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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In the Matter of the Estate	) EQUITY NO. 2048
of	) REPORT OF MASTER REGARDING RETENTION OF NON-STAFF COUNSEL; CERTIFICATE OF SERVICE
BERNICE PAUAHI BISHOP,	)
Deceased.	)

REPORT OF MASTER
REGARDING RETENTION OF NON-STAFF COUNSEL

I. INTRODUCTION

A. SCOPE OF ASSIGNMENT

On November 25, 1998 Trustees Oswald Kofoad Stender and Gerard Aulama Jervis filed Petitions for Instruction with the Court concerning the Board of Trustees decision to retain non staff legal counsel at Trust expense. The Petitions specifically referenced approval on November 17, 1998 by Trustees Wong, Peters and Lindsey, over objections by Stender and Jervis, of resolutions authorizing the retention of non staff legal counsel on two separate matters. However, opposition to the Petitions was not limited to the two specific instances but encompassed the Trustees' general right at all times to retain non staff counsel.

The Petitions were based upon the assertion that such retention was (a) a waste of trust assets, (b) a breach of the Trustees' duties and/or (c) constituted a conflict of interest between the personal interests of the Trustees and the best interests of the Estate.

An Order was entered by the Court on the Petitions on March 3, 1999. Said order appointed this Master and directed that issues and matters related to the retention and payment of non staff legal counsel be addressed. This report is intended to address those issues for the time frame August 1998 to May 1999.

August is selected as the beginning point for two separate, distinct reasons. First, on August 7, 1998 Master Matsumoto filed a report critical of all Trustees' past conduct. The Petitions filed by Stender and Jervis specifically reference that report. Second, later in August the Attorney General exercised its statutorily mandated responsibility to act as parens patriae and sought interim removal, permanent removal and surcharges of the trustees for alleged past misconduct. Said action by the Attorney General was based, in part, upon the criticisms by Master Matsumoto. In other words, as of August issues of Trustee misconduct/breach of duty as well as conflict of interest were clearly before the Court and Trustees were on notice. In some instances in this report charges incurred before August 1998 are included and reviewed. In instances where that is done it is because there is a great similarity between the scope and nature of work done before when compared to after.

May is selected as the ending date because that is when the Court ordered temporary removal of the Trustees. Thereafter expenses for non staff counsel would have been authorized by persons other than those who were subject of the November Petitions.

B. WORK DONE

Upon acceptance of the assignment meetings took place with counsel for the Petitioners and with counsel for the two law firms whose work was specifically at issue in the Petitions. Thereafter request was made to the Estate through staff counsel for (1) all invoices for legal services, whether paid or unpaid, for the time period at issue and (2) all documents authorizing and defining the scope of work to be done by the retained non staff counsel. Said documents were provided, reviewed in great detail, compared and cross referenced. Owing to other proceedings that were ongoing in this matter in the latter half of 1999, which the Master did not wish to complicate or confuse, no other meetings were scheduled either with counsel, trustees or trust employees. Pleadings were reviewed as was certain correspondence of counsel to the Estate, together with the reports of Master Matsumoto.

It is the judgment of this Master that the above described work revealed sufficient facts to support the conclusions reached, particularly when one takes into account the conclusion of this Master that it is the burden of the Trustees under the circumstances that existed in this case to show that their expenditure of Trust assets for attorneys' fees was appropriate, not the burden of the Trust, or of the Master/Court, to show that the expenditure was inappropriate. Further it was and is the intent of this Master to be cost effective in this work, even if it results in criticism for not having sought from every attorney involved an "explanation" for the work that was done. Frankly speaking, too much money has already been spent on attorney's fees.

In accord with the above, both in terms of legal analysis, much if not all of which has been exhaustively briefed for this court in earlier pleading and will not be requested here, and factual history, this report is, by design, as brief as possible.

C. RELEVANT FACTUAL HISTORY

Before the "starting" date of August 1998 there was an ongoing IRS audit of which all the Trustees were aware. It is undisputed from earlier pleadings, documents and the reports of Master Matsumoto that at the heart of that audit were issues of trustee misconduct, including but not limited to intermediate sanctions and excessive compensation to trustees. Master Matsumoto had concluded that conflicts of interest had existed and continued to exist for the trustees with reference to the audit and any action to be taken on behalf of the Trust. This Court, in its February 26, 1999 Order adopted the conclusions and recommendations of the Master that "incumbent Trustees face actual, apparent and material conflicts of interest between their individual interests and the interests of the Trust Estate with respect to the issues raised in the IRS Form 5701s and the IRS Examination." The court specifically referenced the intermediate sanctions and excessive compensation issues.

As will be seen and discussed below the Trustees retained and paid non staff attorneys with Trust assets for legal work done with reference to this Examination.

As stated previously, Master Matsumoto issued a report on August 7, 1998 which was critical of the past conduct of the Trustees. At least as of that date the Trustees were on notice that it was being alleged by an officer of the Court that they had been and continued to be in violation of their duties as Trustees. Neither can it be argued that the allegations were entirely groundless. Master Matsumoto issued additional reports up to November 2, 1998 which criticized the conduct of the Trustees and made recommendations to correct perceived deficiencies in conduct. By Stipulation the Trustees agreed to implement many of those recommendations.

Shortly after Master Matsumoto's August 7 report, based in part upon the findings of that report, the Attorney General filed an action, to include temporary removal, permanent removal and surcharge of the Trustees. With reference to the "legality" of such an action being brought, the Trustees were on notice from at least 1995 that same was proper. In that year they had authorized and paid for non staff counsel Cades, Schutte, Fleming & Wright to prepare a legal opinion which covered the subject. Counsel had concluded that "the attorney general has the power, as parens patrias [sic] of a charitable trust, to bring independent actions against the Trustees" (See Exhibit 1). That same counsel concluded that the trust had a duty to give the Attorney General information related to the administration of the trust and that "the bulk of [legal] authority seems to indicate that the courts prefer full disclosure by the trustees". As will be seen in the detailed discussion that follows, the Trustees did not heed the earlier advice of counsel. They constantly took action to attempt to question and at least limit the authority of the Attorney General and also instituted Herculean efforts to avoid full disclosure of information

As regards the potential accuracy of Master Matsumoto's conclusions of Trustee misconduct, breach of duty and conflict of interest there are relevant facts other than the agreement by the Trustees as evidenced by their entry into the above described Stipulation. On October 16, 1998 Trustee Stender filed a response to the Master's First Supplement Report in which he admitted that individual trustees were in conflict with the interests of the Trust itself with regard to the Attorney General's petition to remove the trustees. Trustee Jervis also filed a response to that Report in which he admitted that the trustees were in conflict with regard to responding to discovery requests propounded by the Attorney General. Based in part upon these admissions Master Matsumoto filed a Third Supplemental Report on November 20, 1998 in which he concluded that a conflict did exist for all trustees with regard to the pending action by the Attorney General, as well as the then pending action to remove Trustee Lindsey. Again, as will be discussed below, Trustees Wong, Peters and Lindsey nonetheless authorized and paid from trust assets for legal expenses incurred by non staff counsel to defend the action by the Attorney General.

With reference to payment of non staff legal expenses from Trust assets the Trustees were on notice for at least one year prior to the above described removal actions that there were real and substantial questions as to which legal expenses could or should be paid from estate assets. They received such a legal opinion from non-staff counsel who they had specifically contacted for the possible purpose of retaining to be "trust counsel" [See Exhibit 2-legal memo from Davis, Wright, Tremaine LLP].

Finally, despite the fact that the law provides a specific statutory mechanism to the trustees of any charitable trust when there are questions as to the propriety of expending trust assets for attorneys' fees, the Trustees never once availed themselves of that legal safeguard. At any time where there was a conflict or a question as to the propriety of retaining non-staff counsel, the Trustees could have petitioned the Court for instructions. With regard to the issues of conflict, they were required to petition. The expense of such a petition could properly have been paid from trust assets. No such petition was ever filed.

II. LEGAL ANALYSIS

At common law trustee remedies were exclusively equitable in nature. Generally, as regards expenses that were incurred, payment was by way of reimbursement, not direct payment in the first instance.

A trustee was reimbursed the cost of reasonable attorneys' fees if they were incurred in the proper administration of the trust and if the legal expense was either necessary to preserve trust assets or to confer a benefit upon the trust estate. In recognition of the fact that questions might exist as the propriety of a given expense, including legal expense under the above quoted standard, it has long been recognized by the law that a trustee has the right to seek instruction of the court beforehand regarding the propriety of a given potential expense. Further, the expenses associated with seeking such instruction, regardless of the ultimate decision of the court, were generally reimbursable.

On the other hand, even if a legal expenses was incurred in the proper administration of the trust and even if it was necessary to preserve trust assets, if that fee was incurred as a consequence (singularly or collectively) of the trustee's fault or breach of fiduciary duty (which are not necessarily duplicative), the expense is for the trustee to bear, <u>not</u> to be charged to the trust estate. This rule was not limited to legal expense but also included other types of expenses, including accountants.

If payment was made from the assets of the trust in the first place and did not meet the above quoted standards, the trustees (again singularly and collectively) ran the risk of surcharge.

As regards actions seeking the removal of a trustee, particularly where the trustee is highly compensated, expenses associated with same, including but not limited to legal expenses, were not chargeable to the trust in the first instance. If the trustee was successful in resisting such removal and if such resistance was later found to be of benefit to the trust, upon instruction to the court, all expenses associated with the removal action could be properly reimbursed. Simply stated a trustee faced with removal had two choices, accept removal or fight it with his own money and, if successful, seek the equitable remedy of reimbursement by showing that his action benefitted the trust.

Finally, even if a legal expense which was incurred met the above quoted standards in purpose, it was properly reimbursable only if reasonable. If a portion were not reasonable, that portion was not reimbursable under any circumstances.

This master would submit that the above quoted tenants of trust law certainly represent the long standing weight of authority and are, in many instances, simply not controverted. See, for example Restatement Trusts, Restatement (Second) Trusts, Scott on Trusts, 4th ed.

In addition, although not all of the above quoted common law has been the subject of reported appellate decisions in Hawaii, no decision was reviewed which contradicted or even questioned any of the quoted material.

Certain aspects of charitable trust administration are now the subject of statute. There is no question, for example, that one of the statutorialy granted powers of trustees is to hire attorneys. HRS 554A-3(c)(23). However, such hiring must be “to advise or assist the trustee in performance of the trustee’s administrative duties.” It must also be consistent with the trustee’s “obligation as a fiduciary”. HRS 554A-3(b). This master interprets the above statute as restating the common law “requirement” that legal fees are properly chargeable to the trust only if incurred in the performance of ordinary or day to day administrative duties, is beneficial to the trust and, regardless of the benefit, only if it was not caused by the error or fault of the trustee. That is not an unreasonable burden to place on a trustee when one recognizes that in instances where there is a question (is it beneficial to the trust?/is it caused, in whole or in part by the fault of the trustee?) the trustees can, in fact should, seek the instruction of the court.

There is one instance in which the statute mandates that the trustees seek the instruction of the court. The trustee may only exercise his power, in this case the hiring of an attorney, with prior authorization of the court “if the duty of the trustee and the trustee’s individual interest ... conflict in the exercise of a trust power.” HRS 554A-5(b). In that instance, court approval is mandatory, not discretionary.

III. SUMMARY OF CONCLUSIONS

As regards the IRS audit, as of 1998, there can be no question that a conflict existed between the interests of all five trustees and that of the Trust. Later that was one of the conclusions of this court in appointing interim trustees to deal with the IRS. As has been previously stated one of the issues which concerned the IRS and which threatened the tax exempt status of the trust was that of trustee compensation. It is inconceivable to this Master that anyone who critically examined that issue and who honestly responded to it would not conclude that a conflict existed on that issue. That was not the only conflict, however. Other concerns expressed by the IRS related to past decisions of the trustees and other trustee conduct, for example certain actual investment decisions and decisions related to accumulated income, also created conflicts. By statute all trustees were required to seek prior court authorization before engaging and paying non staff counsel to perform legal services with regard to the IRS Audit. They did not. Accordingly all such legal expenses discussed below are surchargeable to the trustees, jointly and severally.

The presence of a conflict and the subsequent failure to obtain court approval is not the only basis for surcharging legal expenses paid from trust assets to respond to the IRS audit. At the heart of the IRS inquiry, which clearly had the potential to harm rather than benefit the trust by causing it to lose its tax exempt status, were the actions of the trustees. Even if simple errors or poor judgment rather than misconduct or an intentional variety, that is a sufficient basis for the resulting legal expenses to be paid by the involved trustees rather than from the assets of the trust. Even if the IRS was wrong with regard to its allegations the proper options for the trustees were to incur the expense themselves and to seek reimbursement if and when they prevailed against the IRS or to seek prior approval from the Court. The trustees did not pursue either option. What they chose to do until replaced by the court was to vigorously contest the IRS at Trust expense. Such a course was and is without basis in law or fact. Accordingly, for this, as well as for the reasons stated with regard to conflict, all expenses enumerated below with regard to non staff attorneys' fees incurred in the "IRS Audit" are properly surchargeable to the trustees, jointly and severally.

A similar conclusion is drawn with regard to non staff legal expenses incurred in regards to the Attorney General's investigation which sought, among other remedies, removal.

Clearly, as was concluded by both Master Matsumoto and this Court, a conflict existed there too. No Court authorization was sought to expend trust assets for non staff attorneys. That is a sufficient legal basis to require surcharge. It is not the only basis.

Clearly the Attorney General's complaint seeking removal alleged misconduct of the trustees. The trustees clearly had a right to contest those allegations. They had no right to contest them with trust assets without seeking prior court approval. They did not.

Finally, there is no evidence of benefit to the trust. The work done was clearly on behalf of the trustees individually and has its origins in allegations of trustee misconduct. Therefore, each of these should be surcharged.

The stated purpose of the Trust Estate is to educate Hawaiian children. It takes money to do that. The more money available, the greater the number of children who can be educated. When one reviews the legal invoices one is drawn to the inescapable conclusion that the trustees thought of the assets of the trust as their own. No real thought was given to the advisability of spending money on lawyers. In fact, one can easily conclude, as this Master has, that a strategy was adopted to obstruct the legal process, to delay where ever possible, to object where ever possible, to utilize so many lawyers and so many arguments that the opposition would be overwhelmed and would choose to give up. That did not prove true. In the interim literally millions of dollars of trust funds were wasted. The tragedy is that even if recovered at a future date, in the interim these funds were unavailable to fulfill the purpose of the trust. Accordingly it is the strong and unqualified recommendation of this Master that the involved trustees be surcharged with all amount enumerated below, jointly and severally. Trustees Stender and Jervis should not be surcharged any sum which, by their vote, they did not authorize but in fact objected to.

IV. NON STAFF LEGAL EXPENSES

A. GENERAL CONSIDERATIONS

Billing invoices from various law firms, as well as much of the correspondence to and from involved members of the firms, contain both an assignment title and a billing reference number. Both were generated by KSBE. Either or both of these are useful in cross-referencing the various involved firms, as well as the scope of work.

During the time period in question the legal work done by non staff counsel with reference to the IRS Examination was titled by KSBE "Tax/Audit II". Its reference number was 000088A. Defense of the action by the Attorney General, which began in 1997 after the Governor announced his intention to have the Attorney General investigate the Trustees, was titled either "AG Review" or "Trustee/AG Review". Its reference number was 010414.

In some but not all cases a retention letter was authored by Nathan T. K. Aipa, General Counsel, to the involved firm, describing the scope of retention. In other cases there is an acknowledgment letter from the retained firm describing the scope of the work. In all cases the involved firm received and followed a set of KS/BE billing guidelines, which make comparison and analysis of the billings decidedly easier and more meaningful.

B. VERNER LIIPFERT

Prior to August 1998 Verner Liipfert, a Washington D.C. based law firm which employed former governor John Waihee was retained to do certain legal work. From other pleadings filed in this matter we know that central to that retention was lobbying by the firm on the issues of intermediate sanctions and/or trustee compensation. It is also known from other pleadings that that firm was compensated for work done on investigating the feasibility of changing the domicile of the trust from Hawaii to a Souix [Sioux] River Indian Reservation. This master was not requested to review that legal work. However, Verner Liipfert did additional "follow up" work in 1998.

Minutes of a Special Trustees' Meeting of September 9, 1998 authorized instructing John Waihee to "transfer all files on the matter of Trustees lobbying efforts on Intermediate Sanctions legislation" to Hawaii for review by other lawyers, including "point person" William McCorriston. In addition Verner Liipfert lawyer Sue Temkin was to come to Hawaii "as soon as possible to explain and elaborate on the lobbying efforts". This was in response to Master Matsumoto's request for information on the subject and the right to review the files.

However, it is clear from a review of all of the 1998 invoices that even before August 1998 Verner Liipfert was aware that the Attorney General had subpoenaed its files and was involved in efforts to not produce its files. As time progressed, this firm did everything possible to delay production and, then, to attempt to limit the scope of that production. This Master reviewed the following invoices:

DATE	AMOUNT	
4/28/98	$10,286.00	
5/31/98	49,245.00	
6/19/98	58,138.42	
7/24/98	4,808.05	
8/26/98	3,859.50	
9/30/98	42,551.91	
10/30/98	44,180.72	
11/30/98	68,492.61	
1/28/99	21,440.50	
2/28/99	2,948.35	
4/21/99	38,074.18	
4/29/99	3,537.94	
	347,564.09	TOTAL

This entire amount should be surcharged to the Trustees. Although attempts were made to categorize some of the work under "TRS/Annual accounts 109-111" with reference number 010130, all of the work was properly classified under the assignment "Attorney General Review" with the reference number 010414. Some of the work was actually billed to that topic. Further, the bills do not contain charges for John Waihee, even though he clearly spent time on the file matter. If he was compensated in some other way or at a different time, that sum should be included in the surcharge total. This Master would request that KSBE review invoices a third time to see if any such payments were made, direct or indirect.

It is not overstatement to say that there was nothing of legal substance in the work done in 1998 by this firm. Rather, it simply represents the formulation and implementation of a strategy to delay and obstruct, discussed ad nauseum among a large number of firm personnel, including the central involvement of N. Wong, S. Temkin and J. Waihee.

As one proceeds chronologically through the invoices one finds numerous time entries like the following:

3/30/98	N. Wong	Ph call w/S. Temkin re AG's subpoena:: Discussion w/J. Waihee re same
4/2/98	P Chong	Fax to S. Temkin re Motion for Protective Order
4/3/98	N Wong	Discussion w/J Waihee re meeting w/Trustee Wong on briefing
4/14/98	S Britton	Review subpoena documents and draft Motion for Protective Order, review draft memo re privilege
4/16/98	S Temkin	Conf call w/Gov. Waihee, N Wong, J Hibey and D Dwyer...Consider privilege issues
4/20/98	J Sullivan	Research re: limits on subpoena reach
4/21/98	N Wong	Meeting w/R Wong and W. McCorriston

4/22/98	J Sullivan	Research re: "undue burden" of compliance with subpoena
5/5/98	J Sullivan	Research re attorney work product doctrine
5/8/98	J Lyons	Working on timeline for intermediate sanctions project
8/18/98	S Santa	Researching legislative history of excess benefits provisions
9/8/98	K Ayers	Review intermediate sanctions memo
9/11/98	J Myrdal	Conference w/J Waihee re: response to court master, faxes re trustee removal
10/14/98	Deligatti	Assist in preparation of bills re intermediate sanctions issues for production to trustee counsel
10/15/98	S Temkin	Conf w/W McCorriston and attorneys for individual trustees
8/19/98	J Myrdal	Research authority of AG for subpoena
8/20/98	J Myrdal	Interview prep for Governor Waihee
9/30/98	N Wong	Ph calls to trustees re: intermediate sanctions

Simply stated as one proceeds through the billing records one is left with the inescapable conclusion that legal work being done was of no benefit to the trust. Rather it was designed solely to address allegations of past misconduct or at least errors of judgment made by the individual trustees with regard to the earlier retention of this firm. The goal of the work was to attempt to formulate a strategy to prevent or limit disclosure.

In the event that this court adopts this Master's recommendation and orders surcharge, the possibility exists that one or more of the trustees will not be able to pay. The law permits, upon petition of an interested party and after notice to all interested persons, examination of the propriety of employment of any person, including attorneys, by trustees. Refunds may be ordered from such persons. HRS 560:7-205. In this case it is interesting to note that K Regan of Verner Liipfert researched both the issue of "indemnification of officials" [7/2/98] and "outside attorney fees for AG investigation" [7/6/98].

Absent a satisfactory explanation by Verner Liipfert and assuming an interested party files an appropriate action which gives the appropriate notice to Verner Liipfert, a refund is, in the opinion of this Master, in order. This master finds it inconceivable that a lawyer would hold that this type of work both benefitted the trust, did not encompass allegations of trustee misconduct and/or error and was, therefore, appropriate to be paid from trust assets. However, the statute does not require that Verner Liipfert be given notice and that has not been done. Finally, this Master also concludes that a surcharged trustee who satisfies the surcharge is an interested party who could petition for such a refund.

C. MILLER & CHEVALIER

This is another Washington D.C. law firm that was retained to work on the IRS examination. The retention letter dated November 25, 1998, after the date the Attorney General had filed its action seeking removal. The firm invoiced the following amounts, which were paid:

1/5/99	57,680.88	
1/25/99	66,954.47	
2/26/99	15,299.65	
3/25/99	14,430.97	
3/25/99	126,521.75	
4/21/99	46,122.42	
5/27/99	165,956.51	
5/27/99	98,486.70	
6/24/99	62,158.36	
	653,511.71	TOTAL

These invoices were titled "TAX/Audit II" and had KS/BE reference number 000088A, both consistent with the references used by other firms dealing with the IRS examination. The work of Miller & Chevalier was different in character than that done by Verner Liipfert. It does not appear that this firm had done any previous work for the Estate and was then brought into the Audit for purposes of "explaining" the work to the IRS. Nor does it appear that the purpose of the work was to formulate and/or implement a strategy to thwart the AG's inquiry. Rather the firm assumed the primary role of substantively "defending" the Trust against the IRS action. In so doing they, according to their December 1, 1998 acknowledgment letter, were to "coordinate with [CPA] Mark McConaghy". Michael Hare would serve as "local counsel to assist".

The role of Miller & Chevalier was potentially of great benefit to the Trust because its purpose was to preserve the tax exempt status and/or minimize any tax liability. Nonetheless all of their fees are surchargeable to the trustees because the central focus of the work was clearly the alleged misconduct and/or inappropriate past actions of the trustees. This fact is again evidenced by reviewing entries concerning the nature of work done. Quite literally the first topic, beginning with the first time entry of 10/28/98, dealt with the issue of intermediate sanctions. Thereafter the following entries are relevant and illustrative:

11/9/98	STH	Revising intermediate sanctions outline; Reading AG's petition and preparing a list of alleged trustee violations.
11/11/98	RLM	Meeting in Honolulu with staff, Trustee Peters and outside consultants
12/2/98	EBL	Reviewing 9th Circuit opinion re 5th Amend rights of Trustees
12/7/98	STH	Researching attorneys' fees; preparing outline of alleged trustee violations.

12/8/98	STH	Analysis of potential implications of alleged violations of trust.
2/5/99	LBG	TCs after IRS meeting and trustee removal for conflict of interest.
2/24/99	EBL	Reviewing AG petition and Writ of mandamus filings
5/6/99	EBL	Travel to Hawaii for hearing: Review pleadings to hearing
5/7/99	EBL	Attend hearing; Meet with new Board of Trustees...for IRS meeting

The Special Purpose Trustees appointed by this Court continued the services of Miller & Chevalier to defend with regard to the IRS Audit.

As stated above, it is the recommendation that all fees of Miller & Chevalier be surcharged to the trustees. However, unlike Verner Liipfert, these would not appear to be appropriate for a possible refund action based on either "propriety" or "unreasonableness".

D. SUTHERLAND ASBIL & BRENNAN

This Atlanta firm did certain legal work in 1999. It submitted the following invoices:

4/22/99	7,689.79	[paid]
5/26/99	43,040.89	[not paid?]
	71,494.28	TOTAL

The recommendation of this Master is that if, in fact, the final invoice has not been paid, it should remain unpaid. The paid invoices should be surcharged to Trustees Peters, Wong and

Lindsey. If one or more of these trustees claims that the retention was unauthorized, he or she may seek refund from the trustee who authorized the work and/or payment, or from Stan Mukai, the attorney who may have engaged the services of this Atlanta firm without proper Trustee authority.

There is no resolution of the Board of Trustees authorizing this retention. No letter of retention or even letter of acknowledgment was reviewed. The so-called retention took place late in 1999 when legal developments were occurring at a fast pace. S. Mukai contacted NJ Cohen of the firm, apparently to consult with regard to the IRS Audit and the AG inquiry. It is interesting and probably telling that the Sutherland invoices do not contain either a KS/BE file title or reference number.

NJ Cohen appears to have worked on two specific issues. The first was the disclosure of the IRS Form 5701. He did not, however, appear as counsel of record and there is no justification in the record as to why his involvement was necessary, let alone an indication of how his work benefitted the Trust as opposed to the Trustees. He did have individual conferences with Trustee Peters to discuss various issues. The only one described in detail is the Writ of Mandamus regarding the 5701. Later NJ Cohen and other members of the firm became involved in the issues of "trustee status, lobbying, accumulated income...intermediate sanctions and IRS removal of trustees" in connection with the then pending motion to have interim Special Purpose Trustees appointed.

Such activity in no way benefitted the trust and clearly was related to allegations of trustee misconduct. Trust assets should not have been used to pay any portion of these services and should be surcharged to the three trustees subject of the removal, unless one actually did authorize. If that occurred, then the authorizing trustee alone should be surcharged.

Finally, to the extent these invoices were paid, they do not appear to be the subject of "refund" action on the same basis as is set out above with reference to Verner Liipfert. It appears that this firm was acting as something of an "expert". The propriety of payment from trust assets was not an issue which they were asked to or did research in any detail.

As an aside, in this and certain other instances it is not clear the exact sums that were paid. This master reviewed "paid" invoices but not actual canceled checks. If there is an error, then the amount actually paid is the amount to be surcharged.

E. LEE H. HENKEL III

Lee Henkel had originally been retained in 1991 in connection with controversies respecting the Trust's investment in certain coal bed methane drilling programs. In 1992 he had been involved in the formation of KUKUI INC a Texas corporation that was a profit subsidiary of the Trust. There were issues related not only to the original propriety of the investment, but also conflicts because of trustee co-investments and, of equal importance, the failure to pursue individuals who may have been responsible for losses sustained by the Trust. This was a consideration for the IRS in its ongoing investigation. As noted in Mr. Henkel's time entry for 1/29/99:

> Research of "private inurement" and "private benefit" rules and effective date and general purpose of "intermediate sanctions" rules in connection with IRS position that KSBE failing to pursue fraud claims against SG Methane Company and Lester Smith and Russell Gordy constituted a "private benefit"; discuss same with

Dennis Fern and in particular, effective date provisions of intermediate sanctions laws.

Beginning in 1998 Mr. Henkel was asked to assist in responding to IRS inquiries about the various aspects of the above described past events. This was an involved issue and required substantial work. Invoices were submitted which predate our “starting” date but which are included because a detailed review shows a similarity in the scope and nature of work done.

2/12/98	1,824.88	
5/12/98	1,000.00	
5/15/98	41,948.25	
6/15/98	11,285.97	
7/13/98	17,658.77	
8/11/98	1,358.55	
9/14/98	392.75	
2/09/99	4,633.25	
4/09/99	15,182.77	
6/09/99	3,259.12	
	98,544.31	TOTAL

Obviously, entities subject to governmental inquiries, including those from the IRS may have to utilize the services of third parties to “recreate the past” and/or “explain” transactions. In many instances that is part and parcel of ordinary administrative duties. That is not the case here. This IRS inquiry was anything but routine, in scope or substance. The issue at the heart of the overall inquiry, as well as the inquiry into the methane gas investment history, was that of alleged trustee "misconduct". If it was "misconduct" of prior trustees then it was the duty of the responding trustees to seek reimbursement of the cost from those trustees. Otherwise there is a waste of trust assets. Accordingly, this Master recommends that the trustees be surcharged with the above enumerated amounts.

F. DAVIS WRIGHT TREMAINE LLP

On September 23, 1997 this Seattle law firm was retained "as special counsel in the review being conducted by the Office of the Attorney General ". That review eventually resulted in the action filed by the Attorney General in August of 1998. Although certain of the work predates our "start" date, again, because of the nature of the work performed it is included in the recommendation for surcharge.

Even more so than the "IRS Audit" there can be no question that the investigation by the Attorney General centered on the conduct or, rather, alleged misconduct of the trustees. No credible argument could be made that the Attorney General did not have the statutory authority to act as parens patriae. Further, no credible argument was or could be made that it was not factually justified in filing the action that it did.

This firm, as well as two others researched the issue. Based on the fact that no action to dismiss was ever filed, one can only assume that this firm and the other two all concluded that such an action was legally supportable.

Nonetheless, from the outset the trustees retained counsel at trust expense to investigate every possible "defense", including one which clearly raised the issue of conflict and/or misconduct. This began with Davis Wright Tremaine. It researched the "Hawaii Trustee Powers

Act" and whether it effected the Trustees investment power. It researched whether the AG had authority to conduct investigations. It researched the use of the attorney-client privilege as a shield against disclosure of information. It researched intermediate sanctions. It researched the issue of proposed repayment to trust as evidence. It researched the issue of trustee's duty of loyalty when on a corporate board. It researched the issue of trustee compensation. It researched the issue of confidentiality protection for business activities of a privately created trust, again as a possible shield against disclosure of information. It researched protection of the minutes of trustee meetings from discovery as well as the protection of other trust records. It researched the issue of the liability of the trust for trustee's acts. It researched co-investment issues. It researched the issue of the applicability of the work product doctrine to prevent trust records from being reviewed. It researched the issue of "ownership" of these documents. It researched trust governance issues. It researched the issue of remedies for breach of trust. It analyzed the duty to "share communications with counsel for other trustees". It researched at least some aspects of the issue of trustee conflict of interest. It researched the issue of payment of attorneys' fees out of trust estate for legal services rendered to trustees (yet never petitioned the court pursuant to the statute for the right to do that). It researched the issue of a trustee's duty to prevent or cure breaches of fiduciary duty by a co-trustee.

It also spent time on the issue of whether a single justice of the Supreme Court had power to appoint a new trustee. It researched whether this court had the power to appoint "trustee ad litem". It analyzed agency and management issues related to speeches by the trustees and Dr. Chun. Finally it met repeatedly with members of the McCorriston law firm. It did all of this before the AG filed any action. Yet when the action was filed, none of this was used to argue that the action of the AG was without legal basis, that it was a groundless attack lacking a factual basis or was being done for improper motives. Further, and of equal importance no credible argument was or has been put forward in moving papers that the action of the AG was not in the best interest of the trust.

Reviewing the above, it is clear that what this firm was doing was to anticipatorily defend the trustees. The Trustees have the right to defend themselves and their conduct, but at their own expense.

It is not clear from the records what portion or even whether any of the bills from Davis Wright Tremaine LLP were actually paid. Invoices were originally submitted on 11/26/97, 12/29/97, 1/28/98 and 2/27/98. Correspondence dated in early 1999 indicated that amounts were in dispute and that adjustments would be made. If any sum, in fact, was paid it is to be surcharged to the Trustees, jointly and severally.

G. ACCOUNTANTS

Before examining the non-staff legal fees for firms whose primary if not sole involvement was in matters other than the IRS Audit, it is necessary to discuss the accountants who did work in connection with the IRS audit. Obviously the response to the IRS from the estate was not strictly legal but rather involved issues of law and of accounting. For the same reasons cited above with reference to surcharge of legal fees, there should be a surcharge of these accounting fees. Specifically, the incurring of such fees was not in the ordinary administration of the estate. Further, the need to incur these large fees arose from allegations of trustee misconduct and/or errors in judgment. Simply stated, it was the conduct of the Trustees which made it necessary to incur these extraordinary accounting fees. It was, therefore, their responsibility to pay the costs of the accountants.

1. Price Waterhouse/Price Waterhouse Coopers

This master reviewed accounting invoices for services provided in 1998-1999 for Price Waterhouse, which became Price Waterhouse Coopers beginning in July 1998. It is known that accounting services were provided by this firm before 1998. No opinion is offered with reference to reasonableness or surchargeability of accounting fees incurred during that earlier time. However, based upon review of legal invoices and pleadings, it is clear that in 1998 the graveman [sic] of the IRS audit had clearly become (if it had not always been) breaches of fiduciary duty and/or the misconduct of the trustees. Thus, accounting fees incurred were and are properly surchargeable to the trustees.

In its invoices multiple topics and/or reference numbers were used. It is clear that work was done on a variety of accounting concerns. All that was included in the surcharge amount is that which is clearly identified by topic and reference number as relating to the IRS audit, together with travel expenses, which are set out separately, which were necessitated by the Audit. Specifically <u>excluded</u> from the surcharge amount was that sum related to the school's admissions policy, which was at one time a concern of the IRS.

2/26/98	43,424.97
3/31/98	25,532.02
	2,689.68

4/25/98	35,023.66	
	3,284.83	
5/28/98	19,632.00	
	3,910.00	
	3,122.00	
7/28/98	15,981.87	
	2,162.00	
8/28/98	19,998.00	
	2,878.00	
	2,395.00	
9/28/98	43,044.38	
	1,782.69	
10/30/98	46,422.53	
	3,187.66	
11/10/98	48,701.27	
12/31/98	78,477.60	
	3,789.65	
1/27/99	112,917.09	
	4,296.74	
	2,022.82	
2/26/99	155,598.17	
	12,819.75	
	9,065.48	
	2,679.22	
3/30/99	145,306.56	
5/27/99	147,954.34	
5/28/99	132,281.04	
	1,130,383.02	TOTAL

2. Arthur Anderson

When the Special Purpose Board of Trustees was appointed by this Court to deal with the IRS, that board felt it necessary to engage the services of an accounting firm to assist it. Given the circumstances then existing, i.e. the contested nature of the interim appointment and the continued existence of the other board for non IRS matters, that was a reasonable decision, in fact a necessary one. Further, the selection of an accounting firm other than Price Waterhouse was appropriate as potential conflicts may very well have existed for Price Waterhouse. Nonetheless, fees incurred by Arthur Anderson through the "end" of the period of time at issue, i.e. when the removal order was entered, were the result of the alleged misconduct of the still remaining trustees and should be surcharged.

3/15/99	26,041	
3/15/99	56,944	
4/15/99	95,200	
5/14/99	90,105	
	298,290	TOTAL

H. MANUIA/DUVACHELLE

Obviously, during the time frame 1998-1999 there was a great deal happening with respect to legal issues at KS/BE. Many document requests were made by different entities from the IRS to the AG to the attorneys involved in the Lindsey removal petition. A decision was made to have the reproduction of documents supervised by an "independent" party. Attorneys Manuia/Duvachelle were selected for this task. Their work as largely paralegal in nature but was designed so that an "officer of the court", who had not been involved in any of the prior conduct at issue and who was not representing any entity in any of the disputes that were ongoing, could offer assurance as to what had been reviewed, what had been produced to whom, where original documents had been found, how they were processed and where they were returned to.

This process was put in place only with reference to the IRS Audit, but also the AG Removal petition, the other various removal petitions, and even the Annual Reports for the years at issue. Although this process may have been somewhat "excessive" it was of benefit to all concerned, including this Court and even the trust itself. Accordingly, these charges should not be the subject of surcharge. In addition, this Master reviewed all of these charges and finds that they were done in a cost effective manner. Accordingly, no portion should be reduced as excessive or the result of waste and/or duplication.

I. PITLUCK KIDO SATO & STONE

In the later part of 1997 various events were occurring wherein the conduct of the Trustees was brought into question and subjected to criticism. Chief among these was the Governor's announcement that the Attorney General's office would investigate the conduct of the trustees. As we know that investigation eventually led to the filing of a Petition seeking removal and surcharge.

In 1997, presumably in response to these events, the Trustees assembled a team of lawyers. This "team" included Cades Schutte Fleming and Wright, with lead counsel Michael Hare. The Cades firm had a history of representing the Trust in various matters. The team also included Ashford & Wriston, with lead counsel Bruce Graham. This firm also had a history of representing the Trust in various matters, including the Annual Reports that were filed. The "team" also included Pitluck Kido Sato & Stone, with lead counsel Wayne Pitluck. Finally the "team" included McCorriston Miho Miller & Mukai, with lead counsel Bill McCorriston. This firm, which did not have a history of representing the Trust, was experienced and respected litigation counsel. It assumed the role as "counsel of record" for the Trust when the AG filed its removal action.

There was not a clear statement of the relative responsibilities of each lawyer on the "team", nor was there a clear statement as to why the Trust needed all of their respective services. All of these lawyers worked on the matter with no clear delineation of their individual roles. There was duplication and waste.

What is unmistakable when one reviews the totality of the documents is that the primary purpose of each of these lawyers was to defend the interests of the individual trustees from allegations of misconduct. As has been repeatedly pointed out, that clearly was a right of each and every Trustee. However, it is and always was clear from the law that if such defenses were to be undertaken they should have been at the expense of the trustees, not at the expense of the trust.

What is particularly disturbing to this Master is the fact that not only was it abundantly clear from the outset that trustee misconduct was the real issue, but also that the issue of conflict of interest, in various forms, was known. This issue was examined repeatedly and in depth, yet the trustees would never acknowledge any conflict. In fact, they even fought the Court when the

Court made that finding, based on the earlier recommendation of the Master and the conclusion of the IRS. It appears that the real purpose of all of this research, paid for from trust assets, was to make incredibly fine distinctions in the law, or, more correctly, to create a “fiction” that no conflict existed in this case and/or legally justify it as being something which was actually of benefit to the trust.

The Pitluck firm submitted monthly bills to the trust under title “Trustees/Attorney General’s Review” with reference number 010414, the common title and number that originated with the Trust. Bills began in September of 1997 and continued through January of 1999. Although the bills describe task done, amount of time spent and rate there is no total amount given. The invoices do indicate from time to time that small costs have been paid by the Trust. This would seem to indicate that the trust is the responsible billing agent (otherwise why would bills be sent to them?) but that an advance was made or payment came from another file. Over the span of time 292 hours, almost all for Mr. Pitluck, were billed. This would render a total something in excess of $70,000. If money was paid from trust assets to the Pitluck firm, that entire sum is subject to surcharge.

The gravamen of the Pitluck legal work is evident right from the outset. The first three time entries, dated 8/6 to 8/14/97 relate to the analysis of “trustee’s breach of fiduciary duty” and “trustee liability issues”. Shortly thereafter conferences begin to take place involving various attorneys in what is described as the “Legal Task Force” to discuss, among other topics, “strategy”, “investment issues”, the AG’s power and the AG’s “inquiry issues”.

On 8/29/97, well before the AG filed its petition, Mr. Pitluck had a telephone conversation with both Mr. Graham and Mr. Hare "regarding referral of individual trustees to counsel". That represents a clear recognition that conflicts might very well exist. It should have put all on notice, trustees and attorneys, that a real issue existed as to what, if any, legal expenses should be paid by the trust.

Similarly at this same time extensive research and discussion began on the topics of "privilege" and "attorney-client privilege". Time was spent by other firms on this same topic within this same general time frame. It is admittedly a thorny legal issue. It is, however, made thorny largely because of the differing interests within the trustees individually and as compared to the interests of the Trust. In the opinion of the Master this was yet another "red flag" to the trustees and attorneys that legal expenses being incurred were not properly billable to the Trust <u>and</u> that it was necessary to seek instruction of the Court before retaining non-staff counsel.

In September Mr. Pitluck spent time on the issue of problems created where a trustee was also a director of a corporation which did business with KS/BE. The Task Force continued to meet and discuss strategy. In September of 1997 Mr. Pitluck was communicating with Mr. Hare regarding "Punalu'u issues" [Allegations against Lindsey individually for impropriety regarding work done by KSBE employees on her home] and with Mr. McCorriston regarding "non-bid contract" subpoena. Again these related to allegations of trustee misconduct.

In 1998 Mr. Pitluck continued to attend the counsel meetings. For example, 5 such meetings occurred in April, 6 in May and 2 in June. Strategy was discussed, as well as repeat discussions of the response to subpoenas. Not once was a topic listed which clearly evidenced a benefit to the trust or even a potential benefit to the trust which did not appear to arise from trustee conduct being questioned. Later a "subpoena task force" was set up, which apparently included Mr. Pitluck.

If any sum was in fact paid to the Pitluck firm, other than the cost reimbursements shown, from trust assets, the entire sum should be surcharged to the trustees, jointly and severally.

J. ASHFORD & WRISTON

1. Trustee/AG Review

As stated in opening this firm had a history of working for the trust in a number of different areas. For example, it had for years been responsible for preparing the Annual Report.

The firm, like the Pitluck firm, billed for services provided under a file entitled "Trs/AG's Review" with reference number 010414. For the reasons stated with regard to Pitluck, these fees should be surcharged to the trustees. The following invoices were paid.

8/31/97	23,015.10
9/30/97	28,903.61
10/31/97	12,277.24
11/30/97	2,483.78
12/31/97	10,239.78
2/28/98	3,354.77
4/30/98	898.90

10/23/98	397.10	
1/31/99	374.40	
	81,944.68	TOTAL

2. Removal Petition

Ashford & Wriston also represented the trust in the matter of the Petition filed by trustees Stender and Jervis to remove trustee Lindsey, which petition was opposed by trustees Peters and Wong. Owing to this rather Byzantine alignment of trustees, the firm was in a very difficult position and had to expend significant resources in responding to various information requests made by different parties. Trustees Wong and Peters should have sought payment from Trustee Lindsey, as the need, if there was one, to incur fees was related to allegations of her misconduct. These should, therefore, be surcharged against Trustee Lindsey, who was removed by the Court pursuant to the petition. If she is unable to pay the surcharge, then a surcharge should be made against Trustees Wong and Peters. It should be noted that this case once again served to highlight for all involved the conflict problems that were clearly present.

It is submitted that in this file in particular, the only conclusion that could reasonably have been drawn was that there was hopeless conflicts related to trustee misconduct, that the trust was being harmed and that their "entity" theory was a fiction and that there was no basis to pay for these services out of trust assets. Certain time entries illustrate the problems:

2/9/98	TCW Peters re status, attorney conflict and representation of majority

8/13/98	Remove privilege Van Dyke and Punalu'u documents from trustees' sets
10/26/98	Prepare letter to disciplinary counsel; TCW Peters and Lindsey re Nathan's claim of privilege
11/18/98	Research re appealibility [sic] of order requiring the disclosure of documents relating to the special master's report
12/7/98	Review Cades, Schutte privilege log of master's documents
12/20/98	TCW McCorriston, Hare and Kawachika; Draft petition for Writ of mandamus
12/29/98	Research re joint client exception to attorney -- client privilege.
1/7/99	Research re recovery of attorney's fees from trust estate.
1/11/99	Research re recusals of Hawaii Supreme Court justices & dismissal of appeals of Judge Chang discovery orders.

The firm invoiced and was paid the following amounts by the trust, all of which should be surcharged to Trustee Lindsey:

12/31/97	1,454.59
1/31/98	1,634.79
2/28/98	134.37
3/31/98	716.62
5/31/98	2,615.98
7/31/98	3,872.19
8/31/98	20,662.18
9/30/98	37,333.16
10/23/98	12,776.80
11/30/98	5,732.56
12/31/98	12,938.95
1/31/99	3,017.47
2/28/99	424.41
3/31/99	1,335.58
	104,649,65 TOTAL

3. IRS Audit

In April of 1999 Ashford & Wriston was briefly involved in the tax audit at the request of the Special Purpose Trustees. For the reasons cited earlier with reference to the charges incurred by Mill [sic] & Chevalier after the appointment date these charges should be surcharged to the trustees. There were only two invoices submitted. They were

4/30/99	14,130.12	
5/31/99	23,170.17	
	37,300.29	TOTAL

4. Annual Report 109

As stated above Ashford & Wriston had been the firm who had prepared the annual report. Under most circumstances that would be considered a part of "ordinary trust administration". The need to file such a report was not dependent upon a charge of misconduct or breach of duty by one or more trustee. Further, it is clear that the requirement of a report, despite expenses being incurred in preparation of same, is of benefit to the trust by providing present and future beneficiaries with full disclosure of information. Having said that, this Master is extremely troubled by some (but not all) of the charges paid by the trust to this firm under the file entitled "109th Annual report". It is clear that certain fees incurred were related to the charges of trustee misconduct and/or breaches of duty. The charges by the firm were not, however, to simply report conduct. Rather, charges appear which reflect the apparent strategy by the trustees to defend the anticipated investigation by the AG and to then actually defend it. This firm appears to have actively participated in at least portions of that defense. Those are charges which are not ordinary administrative charges for an annual report and should not have been billed to the trust. Rather they should have been billed to the trustees. Accordingly, they should be surcharged to all trustees, jointly and severally. Attached as Exhibit 3 is a list of the charges. In certain instances comments of the Master are noted in brackets. In certain instances a charge should be surcharged to only one trustee. That is also noted in brackets.

EXHIBIT 3

12/30/97	107.50	TCW Peters re financial statements required by stipulation
1/12/98	344.00	Memo on propriety of appointing a temporary receiver during removal proceedings
4/13/98	215.00	CW Pitluck and Hare [Neither of these attorneys authored the annual report. As we know they were part of the "team" that defended the AG action].
4/14/98	322.50	CW Hare and Pitluck
4/20/98	215.00	CW Pitluck and Hare
4/27/98	275.00	CW Aipa re production privilege issues, att. Conflicts [once again it is troubling that these issues, which existed only because of the charges of trustee misconduct, resulted in charges to the trust. It is not logical that this issue was researched as extensively as it was and and the problem not identified. At the very least the possibility of a conflict should have been identified and the recommendation that, pursuant to the statute, Court approval be obtained to for any defense].
5/24/98	1204.00	Research and prepare opinion letter re minutes [here and elsewhere it is evident that the trustees did not want certain records to be turned over to protect themselves and requested counsel to see if there existed a legal basis to protect those records].

7/1/98	136.50	Work on response to Master re intermediate sanctions
7/7/98	322.50	CW Hare, Pitluck
7/13/98	129.00	TCW Peters re records and confidentiality [charged only to Peters].
7/13-14	1377.50	Research re fiduciary obligations of principal employees [not relevant to annual report-done at time where efforts were made to control potential adverse comments of some employees]
7/30/98	43.00	TCW Waihee re intermediate sanctions memo
7/31/98	64.50	TCW Temkin re intermediate sanctions
8/3/98	1068.50	Research re "prudent investor" standard of trustee conduct
8/10/98	322.50	CW Hare and Pitluck
	172.00	TCW Temkin re intermediate sanctions
8/13/98	86.00	TCW Temkin re intermediate sanctions
8/17/98	602.00	CW Hare and Pitluck
8/18/98	86.00	TCW McCorriston
8/19/98	86.00	TCW Temkin re intermediate sanctions
8/13/98	215.00	CW Hare
9/8/98	301.00	CW Hare and Pitluck

	1505.00	CW trustees and McCorriston
9/9/98	43.00	TCW Temkin
9/10/98	64.50	TCW Waihee re intermediate sanctions
9/11/98	365.50	CW Hare
	430.00	CW McCorriston
	64.40	TCW Waihee, Temkin
9/11-14	2689.00	Analysis of conflict, privilege, attorney-client issues
9/16/98	1145.00	Research re removal
9/17/98	1015.00	Work on removal issues
9/21/98	193.50	Research interim removal
9/24/98	1398.00	Research extent of right of trustee to independent representation of other trustees and how to resolve [see comment to 4/27/98]
10/1/98	516.00	CW trustees and McCorriston
10/5/98	344.00	CW Hare and Pitluck
10/5/98	215.00	CW Trustee Lindsey and her personal counsel Greene {charged only to Lindsey]
10/6/98	516.00	CW Trustee Peters and his personal criminal defense counsel [charged only to Peters]

10/8/98	258.00	CW Trustee Lindsey and her personal counsel [charged only to Lindsey]
10//8/98	408.00	CW Trustee Wong's personal counsel Sakai [charged only to Wong]
10/19/98	258.00	CW Hare and Pitluck
10/19/98	193.50	CW Trustee Wong's personal counsel Malone [charged only to Wong]
10/21/98 10/30 10/31	279.50	Research re "conflicts"-possible handling of interim admin
11/2/98	494.50	TCsW [sic] Trustee Peters re tax audit
11/2/98	322.50	CW Hare re tax audit
11/2/98	236.50	CW Trustee Wong and personal counsel re tax audit
11/4/98	215.00	TWC Trustee Peters, his criminal counsel and counsel for Wong [Charged only to Peters and Wong]
11/5/98	172.00	CW McCorriston and Trustee Lindsey
11/6/98	172.00	TCW Trustee Peters and his criminal attorney re tax audit [Charged only to Peters]
11/8		

11/9/98	408.50	TcsW [sic] Trustee Peters re tax audit [Charged only to Peters]
11/13/98	107.50	CW McCorriston
11/14/98	43.00	TCW Trustee Lindsey and her personal counsel re Estate's retention of counsel [Charged only to Lindsey]
11/16/98	666.50	CW Trustee Wong's private counsel [Charged only to Wong]
11/18/98	831.50	Research re role of Court/Special Master/AG in reviewing trustee discretion [THIS WAS THE ASSIGNMENT THAT WAS OBJECTED TO BY STENDER AND JERVIS AND RESULTED IN THE FILING OF THE PETITION FOR INSTRUCTION. Hereafter, surcharge only to Trustees Wong, Peters and Lindsey].
11/19/98	1926.00	Above continued
11/20/98	787.50	Above continued
11/21/98	1079.50	Above continued
11/22/98	1235.50	Above continued
11/23/98	1145.50	Above continued
11/24/98	808.50	Above continued
11/25/98	1494.50	Above continued
11/26/98	262.50	Above continued

11/27/98	681.50	Above continued
11/21 to 11/30	1685.50	Various matters for Professor McCall, the so called expert who was retained to defend the actions of the trustees and conclude that no conflict existed
11/30/98	1608.50	Research whether indictment of Peters is grounds for his removal. [Charged only to Peters]
12/1/98	852.50	Above continued
12/2/98	333.50	Above continued
12/3/98	72.50	Above continued
12/4/98	232.00	Above continued
12/7/98	322.50	CW Hare
12/7/98	696.00	Above continued
12/8/98	107.50	TCW Professor McCall
12/8/98	652.50	Above continued
12/11/98	279.50	CW McCorriston re various issues, including conflicts
12/16/98	1032.00	Revise opinion letter re trustee indictment issues [Charged only to Peters]

12/16/98	645.00	Above continued
12/16/98	262.50	Attend hearing on motion to exclude proposed expert [Here and on other occasions members of the firm attended court hearings related to claims of trustee misconduct in matters where they were not counsel of record. There is no documentation that their appearance was ordered by the court or was necessary for the trust].
1/8/999	259.00	Attend hearing to continue hearing for disqualification and removal of Master Matsumoto
1/11/99	430.00	CW Hare and LaPorte
1/11/99	215.00	CW Peters re status
1/12/99	301.00	CW Hare and McCorriston re 5701
1/12/99	86.00	TCW Trustee Peters re 5701
1/15/99	1087.00	CW Hare; Work on approach to handling Master's petition to appoint special administrator to handle IRS audit
1/15/99	234.50	Attend hearing on motion to admit Malone pro hac vice
1/16/99	473.00	Analyze IRS report on "unreasonable compensation"
1/19/99	1333.00	CW Trustees and Hare tax audit

1/16 to 1/30

	3968.00	Work on voluntary recusal issue (IRS audit)
1/19/99	322.50	Work on “unreasonable compensation” issue
1/22/99	752.50	Continue above
1/22/99	203.00	Attend hearing on motion to compel depo of Master
1/25/99	332.50	Attend hearing on motion to disqualify AG
1/26/99	413.00	Attend hearing on motion to disqualify AG
1/27/99	2085.50	Research Trustee conflicts of interest, including scope and exceptions [see comment to 4/27/98].
1/27/99	353.50	Attend hearing on motion to disqualify AG
1/28/99	1074.00	Continue above research
1/28/99	416.50	Attend hearing on motion to disqualify AG
1/29/99	213.00	Memo on hearing to disqualify AG
1/31/99	107.50	Review transcripts re BRONSTER’S role as parens patriae
2/1/99	215.00	CW Hare
2/8/99	215.00	CW Hare
2/8/99	537.50	CW Hare and McCorriston

2/11/99	301.00	Prepare memo to Peters re appointment of trustees by Supreme Court [Charged only to Peters].
2/12/99	157.50	Attend hearing on petition to Amend Recommendation 22
2/23/99	322.50	CW McCorriston
2/24/99	297.50	Attend hearing on Stone's motion to dismiss
2/25/99	329.00	Memo on ruling on motion to dismiss
3/12/99	310.50	Attend hearing on motion to disqualify McCorriston
3/15/99	270.00	Memo on ruling on motion to disqualify McCorriston
3/16/99	107.50	TCW Hare re prep of bullet point outlines for IRS
3/21/99	645.00	CW Hare re tax audit-strategic plan
3/24/99	602.00	CW Hare
3/29/99	301.50	Attend hearing on AG motion for interim removal of trustees
3/30/99	319.50	Attend hearing
3/31/99	292.50	Attend hearing
4/5/99	303.75	Attend hearing
4/6/99	337.50	Attend hearing

4/7/99	180.00	Attend hearing
4/8/99	430.00	CW Hare
4/8/99	360.00	Attend hearing
4/12/99	391.50	Attend hearing
4/13/99	342.00	Attend hearing
4/14/99	315.00	Attend hearing
4/15/99	146.25	Attend hearing
4/19/99	373.50	Attend hearing
4/20/99	184.50	Summarize hearing testimony
4/20/99	136.50	Compile chronology of actions taken in response to CEO and conflict of interest policies
4/26/99	279.00	Attend hearing
4/27/99	337.50	Attend hearing
4/28/99	310.50	Attend hearing
4/29/99	265.50	Attend hearing
4/30/99	261.00	Attend hearing

64,800.50 TOTAL

NOTE: There are many time entries of a very short duration, usually less than .7 of an hour, which could also be included in this list but were not.

K. CADES SCHUTTE FLEMING & WRIGHT

In many ways the most "troubling" of all legal expenditures were those incurred by Cades Schutte Fleming & Wright, under the direction of its lead counsel Michael Hare. As previously noted, this firm had an extensive history of legal work for the Trust. With reference to the matters at issue, during the time period covered by the master, it became involved in almost everything, submitted bills on almost everything, yet its responsibility was never clearly defined by retention letter, acknowledgment letter or anything else. In reviewing the billings, its purpose often seems to be that of an "overseer", directing and checking the work of others, often in a duplicative, cost ineffective manner. It was never counsel of record in any of the proceedings and seldom assumed lead status. Nonetheless it submitted very large billings, which were always paid. Further, and of greater importance, as time progressed it appears that its purpose and goal more than any other law firm involved in this review was to represent the interests of the majority of the split board, namely the interests of Trustees Peters, Wong and Lindsey. Except in very limited instances, which will be discussed below, the work of this firm was not only duplicative and wasteful, but also cannot be described in any fashion as benefitting the trust.

1. Annual Report 110

This is an excellent example of what is meant by the above statements. Recall that the Trust has retained Ashford & Wriston to prepare the report. Manuia/Duvachelle were involved in the production of certain documents. Although no Trustee resolution sets forth the scope of retention of the Cades firm and there is no apparent or stated need for it, time entries show that members of the firm reviewed documents, inventoried documents that were to be reviewed by Master Matsumoto or potentially the AG, prepared privilege logs of documents, held discussions with both McCorriston and Graham concerning the withholding documents as privileged, all tasks of questionable relevance with reference to preparation of the Annual Report. This firm reviewed documents requested by individual trustees related to the issue of their compensation, and then billed the trust rather than the individual requesting trustee. Even more troubling, lead counsel Hare billed the trust for 4 hours that he spent meeting with only Trustees Peters and Wong to discuss the following

> Master's letter pertaining to endorsement of Governor in context of the Bishop Estate investigation and reference by the endorsement to the investigation. 10/28/98

This court will recall that this was after the date at which the removal of these two trustees was at issue, pursuant in part to the recommendation of Master Matsumoto. After this conference an unsuccessful effort was made to have that Master disqualified on the basis that he had publicly supported the governor, which governor was responsible for investigation of the trust, or rather the trustees. Not only does this have nothing to do with the preparation of Annual Report 110, not only does this not benefit the trust, but this is an example of the type of far reaching and obstructive efforts put forth by the trustees to thwart any investigation into their conduct. This firm, particularly its lead counsel Hare, were front and center in these efforts.

The firm billed a total of $31,036.25 under reference number 010130. The entire amount should be surcharged to Trustees Peters, Wong and Lindsey.

2. Lindsey Removal Petition

This firm billed and was paid $16,203.75 by the trust under this heading. This billing should never have occurred. If work was necessary in this matter on behalf of the Trust there should have been an attempt either to bill it to petitioning trustees Stender and Jervis or defending Trustee Lindsey. Barring that, court approval to spend trust funds on this matter should have been sought. Since Trustee Lindsey was removed and has been surcharged other fees, these fees should be added to her surcharge. If she is unable to pay, any trustee who authorized this expenditure without obtaining Court approval should be surcharged.

Reviewing the entries supports the conclusions expressed in opening concerning the apparent role of the firm. Almost all of the time spent was spent reviewing documents, trying to prevent certain documents from being produced and/or obtaining confidentiality agreements. One time entry is particularly illustrative.

> Per Trustee Peters' request Pull production files re 98-01
> Kalele Kai; 98-78 RTJ; 98-52 Peters Mid Ocean files; 98-154 Mid Ocean; pull
> privilege documents re same

3. Grand Jury Subpoena

In August-September of 1998 two separate files were opened by this firm under the headings "Grand Jury subpoenas". There is no written indication as to who authorized this, the scope of the authorization or why the trust needed assistance of counsel in this matter. No documentation is provided indicating what benefit is offered the trust by the retention of the firm. The benefit to the trustees targeted by the grand jury proceedings is obvious. Time is spent almost exclusively in reviewing documents, preparing privilege logs [whose privilege?] and redacting documents. When documents are specifically identified they concern matters such as KALELE KAI and MILTON HOLT.

The $13,357.22 and $7,413.75 billed to these files should be surcharged to the two trustees who were subject of the grand jury proceedings, namely Peters and Wong, unless it is shown that other trustees authorized the retention. If that is true, then that Trustee should also be surcharged.

4. Petition for Removal

In February of 1999 this firm opened a file under the above title (KSBE reference number 011228). The initial issue was the response of the trust to document request from trustee Wong and his counsel, who was subject of the removal action. It does not appear from the file that any effort was made to have Trustee Wong pay or, if pay was refused, to seek instruction from the court to require payment.

Later requests were received by the trust from the Master and/or AG. This firm, which was not defending the removal action, expended significant resources to review all that was to be produced to the Master and/or AG, without explanation as to why that was necessary. A comparison shows that a goodly portion of the documents reviewed by this firm were also reviewed by defending counsel McCorriston Miho Miller & Mukai. The “normal” practice in litigation is for the firm actually defending to do the review. Accordingly the $76,830.00 paid in this case should be surcharged to the trustees who were subject of the removal action. Again, if any other trustee authorized the retention, he or she should be included in the surcharge.

5. IRS Audit

In January 1998 Cades Schutte Fleming & Wright began work with reference to the IRS audit. There is no applicable trustee minute authorization or retention letter, but we do know from later correspondence to Miller & Chevalier that, pursuant to the instructions of the trustees, Michael Hare was to act as “local contact/counsel” with reference to the audit. During the pendency of this action the firm billed the following amounts:

1/31/98	39,603.71
2/28/98	9,494.27
3/31/98	6,692.80
4/30/98	1,114.43
6/10/98	12,700.15
6/30/98	50,182.78
7/31/98	67,436.57
8/31/98	36,770.54

9/30/98	14,385.44	
10/31/98	13,966.74	
11/31/98	22,391.98	
12/31/98	20,739.48	
1/31/99	120,207.03	
2/28/99	124,239.35	
3/31/99	143,964.15	
5/28/99	51,715.77	
	735,6054.19	TOTAL

This Master does not recommend surcharging the entire amount. It appears from invoices that three topics were worked on in the first eight months. The first was for the firm to become acquainted with the issues. The second was to address some privilege issues. Although there is some concern as to why that was necessary at that time, the concern is outweighed by the third topic, which appeared paramount. That third topic was the admission policy and the concern that “discrimination” in favor of Hawaiians was an issue for the IRS and could effect the tax exempt status of the Trust. Clearly, a favorable resolution of that was an issue which benefitted the children the Princess intended to benefit and did not arise from any allegation of trustee misconduct. Accordingly the first $223,995.25 billed in the file is not surchargeable. The remaining sum $511,609.94, is, however, surcharged to all trustees, jointly and severally. The reasons for surcharge are those set out with reference to Miller & Chevalier, above, together with the fact that it does not appear that this firm simply acted as “local counsel”. Rather it was central, perhaps the most central firm, in carrying out the defense at trust expense of the alleged misconduct of the trustees.

6. Trustee/AG Review

In many ways this is the most disturbing of all the legal bills reviewed, both in terms of propriety and reasonableness.

As we know late in 1997 certain “non legal” events occurred, including public protests and the publication of a newspaper article, which became known as the “Broken Trust”, which lead to the announcement by the Governor that he was requesting the Attorney General to launch an investigation into the operations of the Trust. In 1998 the Attorney General filed an action against the trustees, seeking removal and surcharge. That was done pursuant to its statutory obligation as parens patriae.

After the announcement, in apparent anticipation of the investigation, the trustees authorized that certain legal work be done by non staff counsel to “defend” the trust. Primary or lead counsel was the firm of McCorriston Miho Miller & Mukai. When the AG actually filed its action this firm answered on behalf of “trustees under the Will and of the Estate of Bernice Pauahi Bishop, Deceased”. The firm was and is a large one with a great deal of experience in almost all types of litigation. It had and has personnel, from paralegals to associates to junior partners to senior partners, who could cost effectively handle all aspects of major litigation.

As we have already seen, other firms, without adequate explanation of need, participated in this defense, without ever being listed as counsel of record. However, their involvement was, to one degree or another, limited in scope. Cades Schutte Fleming & Wright also participated in the defense without ever being listed as counsel of record and without any apparent limitation in scope one is left with the clear impression that the firm, through its senior counsel Michael Hare, acted as “shadow” lead counsel. Mr. Hare, from a review and comparison of task descriptions in invoices, emerges as a critical figure in policy formulation and implementation. There is no documentation as to why this was necessary or even advisable. It certainly constituted a waste of trust assets. The Cades firm was involved in tasks that would normally be done by lead counsel of record, such as document productions. McCorriston also expended considerable effort in this area. Thus a large amount of unnecessary duplication occurred. Further, the Trust already had in place “special” counsel [Manuia/Duvachelle] to deal with documents. In addition, both firms spent substantial time doing legal research which was often duplicative, in whole or in part.

There was no stated reason why Cades had to be so involved in document production. Institutional knowledge or familiarity is not a satisfactory explanation. Further the work which Cades did was not done in a cost effective manner. In most if not all cases, documents were reviewed for content, not just to see if some legitimate claim of privilege applied. Documents were then summarized and other members of the firm reviewed these summaries. To say the least that is unusual for a firm which is not counsel of record.

In addition and of greater importance, this firm carried out work that was wholly inappropriate to any defense of the trust. When reviewing the matter in total one comes to the inescapable conclusion that this firm was representing the interests of the individual trustees and was actively formulating an obstructionist defense to the AG’s investigation designed to discredit that investigation and/or to wear down and win by attrition, if possible. Accordingly, all of the below listed fees should be surcharged to the trustees.

8/31/97	35,102.41
9/30/97	47,359.67
11/30/97	47,970.11
12/31/97	26,984.07
1/31/98	32,345.79
2/28/98	41,438.56
3/31/98	36,145.83
4/30/98	36,133.39
5/31/98	30,688.26
6/30/98	25,403.14
7/31/98	18,721.16
8/31/98	30,480.57
9/30/98	12,417.16
10/31/98	13,119.91
12/31/98	9,363.24
1/31/99	3,818.62

2/28/99	1,949.65	
3/31/99	3,747.61	
	457,020.78	TOTAL

Further, as was stated with reference to the fees of Verner Liipfert, in the event that the trustees cannot satisfy this surcharge, upon petition of an interested party and with opportunity to respond, this Master would suggest that without adequate explanation by the Cades firm, the funds paid to Cades for (1), (3), (5) and (6) above, should be refunded, both for absence of propriety and unreasonableness.

This Master will now review and, in some instances, comment upon certain of the work done by this firm under the "Trustee/AG Review" heading. These are intended only to be illustrative of the type of work done which caused this master to come to the recommendations and conclusions that he has set out above.

Work began in August of 1997. In the first month this firm researched "power parens patriae issues". This was duplicative of work done by others as well as work which Cades had done in 1995. Mr. Hare then discussed the scope of the "AG's power and removal issues". The first thought seems to have been, can we stop the AG by asserting that it does not have the power to act for the beneficiaries. No such action to question the legal right of the AG to investigate and/or file an action was even tried.

Randy Roth was one of the authors of the Broken Trust article which criticized the actions of the trustees. In August his "claims were investigated". Then the claims of employee

Harmon, who also criticized trustee conduct, were investigated.

In an effort to show that KSBE was not different from other similar trusts, the firm "reviewed" other Ali'I [sic] Trust re selection, appointment and commission issues". How was any of this of benefit to the trust as opposed to being simply a defense of the actions of the trustees?

Senior Federal Judge Sam King was also one of the authors of Broken Trust. In what can only be described as chilling and wholly inappropriate legal work, the firm spent 16 hours researching and drafting a memo "limits on freedom of federal judge regarding public statements on social issues and conclusions of law" [8/29-30/97]. This best illustrates the conclusion of this Master that no stone would be left unturned by the trustees in attempting to silence or at least discredit their critics. To charge the trust for such legal work is outrageous!

Time was spent in September researching the issue of "trustees duty to furnish information", followed by research on conflict and "independent counsel". Conferences were held with attorneys Pitluck and Graham, who similarly conducted research on conflicts. Further, apparently as more information became available, further research was done regarding "trustees' duties and trust counsel's duties, duties to investigate suspected wrongdoing" [11/12/97].

This firm researched the issues of remedies in the event Mr. Harmon spoke about the conduct of trustees, in violation of the injunction gotten against him. What was the benefit to the trust? It is clear what the benefit to the trustees was, hope that employees would be silenced by fear of reprisal. If they and their attorneys wish to adopt that as a tactic, that is their right. It is not their right to have the trust pay for!

The firm researched and then discussed quashing an AG subpoena. All too often this was the first step, repeated often when a subpoena was received. It appears that sometimes motions were filed, other times they were not. If documents had to be produced they were reviewed for content and summarized, a step of very questionable value for a firm that was not "of record". The summaries were reviewed. Many times there were meetings of all counsel to discuss. See, for example, time entries for 12/3/97 and 2/2/98. Often times the result of such discussion was to claim privilege and not produce documents or to redact documents. It was often this firm which prepared the privilege logs and then gave them to lead counsel McCorriston, a reversal of what is generally done. All too often the process of document production became lengthy and expensive. By the repetitive nature of this strategy, it appears clear that the trustees were attempting to block productions in whole or in part and to make it so laborious a process that the opposition would "give up". How does that benefit the trust?

Further, many of the documents to be produced must have or at least should have tipped off those who reviewed them that there was a conflict between trustees and the trust. For example beginning 10/1/97 "lobbying documents" were reviewed and summarized. We know from other sources that one of if not the central point of lobbying was maintenance of high trustee commissions/salary. In December Holt documents were reviewed and redacted. In January Mid Ocean documents were reviewed and privilege was claimed. In that same month Kalele Kai documents were reviewed, summarized and those summaries reviewed. Beginning 10/13/97 Punalu'u documents were summarized. We know that those related directly to charges of misconduct by Trustee Lindsey, which actually formed the basis in part for her removal. This raised a clear notice of conflict between her and the trust as well as between trustees. The same is true with the Van Dyke documents, which this firm reviewed and redacted [10/28/97]. Shortly thereafter trustees Stender and Jervis filed their Petition to Remove Lindsey. Nonetheless, despite the "split" that existed within the board after that, as late as 6/9/98 and 6/17/98 this firm was withholding the Van Dyke appraisal as privileged and was redacting same. This firm reviewed the Stender/Jervis petition, addressed the issue of conflicts but then immediately followed with research on the "entity representation" theory (assisted by Graham). That, in this Master's opinion represents an effort to put into place a strategy of attempting to deny that conflicts existed through strained interpretations that fly in the face of logic. Once again, the Court could and should have been consulted to determine the extent of conflict and the appropriate course of conduct.

In another chilling example of the length to which the trustees would go to silence criticism, on 9/12/97 the firm began to research "journalist privilege" in an effort to legally support efforts to obtain sources from a reporter. In the same vein, they researched the issue of whether the AG had conflict which would support disqualification.

Finally, this firm billed the trust to review and organize sets of photographs taken at the 5/15/97 March and Rally at Kawaiahao Plaza. No purpose is stated and, it is respectfully submitted that the one which makes sense is to assist the trustees in identifying those who opposed them. That is chilling conduct. What is equally chilling is that the Cades firm would do the work and then bill the Trust.

One of the question in the action to seek removal of Trustee Lindsey by Stender related to Stender's alleged misconduct in certain Maui Land & Pineapple dealings. The two senior lawyers from their firm met with Lindsey INDIVIDUALLY to discuss that and then prepare a "draft of findings" [4/3/98].

This firm also communicated with State Representative Terrence Tom concerning his response to an AG subpoena [4/6/98]. They then reviewed his response before it was made [4/7/98].

Members of the firm attended Court hearings from time to time, hearings in which the trust was represented by McCorriston. No reason for the duplicative appearances is noted, but the trust was charged for the attendance.

This firm reviewed documents requested in Grand Jury subpoenas before the documents were turned over.

In the trial for removal of Lindsey this firm became actively involved, along with other firms, in an effort to prevent the disclosure by KSBE General Counsel Nathan Aipa of certain trustee meeting minutes, as requested at the trial by two of the five trustees. Further, even after the "split" on the board following filing of the removal petition and the petition for instruction which led to the appointment of this Master, the Cades firm continued to respond to individual requests by "majority" trustees and bill the trust. For example, on 2/19/99 Mr. Hare spent 6.25 hours "complete review and revisions to chart and documents re subpoenas and requests and transmit to Trustee Peters". The majority of the other individual requests also involved Trustee Peters.

L. McCORRISTON MIHO MILLER & MUKAI

This firm was the only one of the non staff counsel whose scope of work was defined in some detail in writing. The firm did not have a history of "regularly" representing KSBE. By retention letter dated September 23, 1997 all trustees "unanimously confirmed retention to serve as lead counsel for the Kamehameha Schools Bishop Estate (KSBE) in the review being conducted by the Office of the Attorney General". That very retention letter acknowledges the potential conflicts of interest and forbids the firm from "providing services for individual trustees". This retention was authorized at a board of trustees meeting of the same date.
More than a year later, November 17, 1998 Trustee Wong submitted 4 resolutions for consideration. They were approved by the majority of trustees (Wong, Peters and Lindsey). They were objected to by Stender and Jervis, which lead to filing of the Petition for Instructions that resulted in appointment of this Master. As regards McCorriston, the resolutions provided:

> KSBE needed protection form improper encroachments on the proper exercise of Trustees' discretionary power [Resolution 2]
>
> Whether the Will and/or law require all income be expended on educational purposes within a certain period of time and whether accounting practices have served legitimate Trust purposes [Resolution 3].
>
> The report of Special Master Matsumoto contains significant factual inaccuracies, misstatements, mischaracterization, unfair and/or unjustified criticisms and improper comments and erroneous legal conclusions which negatively impact the ability of KSBE to fulfill its missions [Resolution 4].

[Page 64 is missing.]

6/30/98	81,845.75
7/31/98	53,484.00
8/31/98	23,193.00
9/30/98	59,743.50
10/31/98	114,909.50
11/30/98	54,364.50
12/31/98	88,935.25
2/28/98	86,955.00
	1,381,291.75

Other materials appeared to indicate the McCorriston [firm] did legal work after 2/28/99 but before the order removing the trustees, which was entered in May 1999. However, staff counsel at KSBE rechecked after this Master requested it and could not find any paid invoices after 2/28/99. If same were misplaced or lost and it is discovered later that payments were made after that date, those should be consider[ered] for surcharge. It is the conclusion of this Master that the entire amount set out above should be surcharged to the trustees, jointly and severally. The amount incurred after November 17, 1998 should be surcharged only to Trustees Wong, Peters and Lindsey.

As has been repeated more than once above, the retention of this law firm was not, absolutely not, in the ordinary course of trust administration. It was, without question, extraordinary. Accordingly the trustees did not have an unfettered statutory right to retain non staff counsel and charge trust assets without court approval. To not be subject to surcharge, having failed to obtain prior court approval, it is their burden to show not only that there was a benefit to the trust but also that, regardless of any benefit, the need to hire counsel did not arise from charges of trustee error and/or misconduct. With reference to the retention of McCorriston these trustees fail completely on all accounts.

A benefit to the trust might very well be shown if there was an unlawful or unjustified encroachment by government. This firm researched that issue endlessly. Despite that research no credible argument was ever put forth that the IRS, the AG or Master Matsumoto did not have a legal basis for their actions. Neither was any credible argument ever put forward that the actions taken were not factually justified. Arguments could be made and were on the interpretation given to some facts, but not that there were no facts to support the position of the IRS, the AG or of Master Matsumoto. This is true despite Herculean efforts by the trustees and this law firm to show otherwise.

Finally, it is beyond question that the initial AG inquiry, which resulted in the AG action to remove, based in part upon the companion Master Matsumoto inquiry and the paralleling IRS inquiry were all premised upon the charges of misconduct of the trustees. That was, without question, the central focus of each inquiry. It matters not that each individual charge was true or that an individual charge represented an “error” as opposed to “misconduct.” What matters was and is that the charges were made and were not summarily dismissed because of the complete absence of support. When that occurred the trustees were simply wrong in defending using trust moneys. Accordingly, they were subject to surcharge. In addition, colorable charges having been made against them which could effect the tax exempt status of the trust and which would require the expenditure of large sums of money to defend, money which would not then be available to carry out the purpose of the trust, there was no question but that conflict existed between the trust and the interest of the individual trustees. The law required that court approval be obtained before money was spent. It was not obtained. Surcharge is appropriate.

In reviewing the scope of work done by McCorriston, one comes to certain inescapable conclusions. The most critical is that this was a defense of the trustees, not of the trust. There were monumental efforts made to keep trustee conduct from coming to light or, if it did come to light, to rationalize it. Second, there was an effort, despite clear realization of problems with conflict, to explain away any conflict. That is best exemplified by reliance upon the so-called “enterprise” theory of representation, even after the 3-2 split occurred on the board and even after the two minority board members admitted that conflicts existed in Court pleadings.

There was the adoption by the Trustees of a strategy of obstruction and delay. The apparent thought was to make every inquiry so difficult that the opposition would either become confused or give up. This is particularly evident in the strategy adopted with respect to document production, which will be discussed in some detail.

Finally there was also apparently the adoption of a “destroy the opposition” strategy. There was a constant effort made to take steps to silence or discredit what was perceived as the “opposition”, whether that was an employee, a reporter, the AG, a Judge or a Master.

This master will discuss examples of the above, based on review of time entry descriptions. Again, these were made for illustrative purposes. They are not intended to be exhaustive.

As stated above, the firm began its legal work in September of 1997. As would be expected of any firm which takes an assignment and does not have a "history" of the case, research was undertaken on a number of topics. These illustrate a number of things, including what was initially thought to be relevant issues. The first topic researched was that of intermediate sanctions [9/23]. This related to trustee conduct. It was not the only time that research was done with reference to trustee conduct. Research was also conducted into "trustee removal [10/10]. Research was conducted on the investigative power of the AG [9/27]. Others had researched this. All appear to have been looking unsuccessfully for a way to thwart any investigation. This was not limited to a simple inquiry. It included looking at constitutional limitations and relevancy [10/2]. The research then went so far as to examine the right to 4th and 14th amendment arguments against unreasonable searches and seizure [10/3]. Later it changed focus to the "authority to investigate and issue subpoenas in connection with public and private civil matters" [1/6/98]. Research also examined the supervisory power of the AG over charitable trusts [10/13] and the reviewability of an agency's determination re "public interest" [10/14]. Then research was conducted on "why attorneys for the trust should be allowed at investigative hearings by the AG" [10/1], despite the potential chilling effect of such an appearance.

Research was conducted on "reimbursement to individual trustees for attorney's fees" [9/26]. It is impossible for one to have researched this topic and not become familiar with the general rules concerning when a trust should not pay for attorney's fees where charges of misconduct are involved. Concerning potential conflicts, as well as trustee misconduct, research was conducted on trustee self dealing and co-investments [10/6]. The firm also reviewed the petition filed by trustees Jervis and Stender, which clearly raised the allegation of conflict amongst trustees themselves [11/4]. The response to that was to research whether "co-trustees were viewed as a collective for purpose of representation" [11/5]. I.e., the "enterprise" theory. In what this Master believes is evidence that, as of that petition date, this firm represented the interests of the majority trustees, the firm researched whether it could intervene in the Stender/Jervis Removal action against Lindsey [1/5/98]. Still later it took the time to analyze "breach of fiduciary duty" [1/22/98] and then, after reviewing the removal petition to "delineate trust v. trustee issues" [9/15/98]. Yet, it never acknowledged a conflict.

In fact, when actions were ongoing to appoint special purpose trustees to deal with the IRS, the issue of "conflicts of interest in dealing with the IRS" was research [11/4/98]. Incredibly, this firm argued on behalf of the trustees accused of misconduct being able to respond, seeing no conflict and arguing that the IRS had a duty to communicate with the trustees accused of misconduct and conflict [11/11/98].

In what had to be the ultimate show of arrogance a Complaint against the IRS was drafted for the refusal to communicate [11/12/98] and then a complaint against the AG and the Master was drafted for interference in that right to communicate [11/12-13/98]. They then finished it all off by researching whether this court, an equity court, even had the authority to appoint special purpose trustees [11/29/98, 11/29/98]. When the court made such an appointment based, in part, on the finding that a conflict existed between the interests of the trust and that of the individual trustees, this firm disagreed and prepared a petition for stay pending appeal [2/3/99]. They then researched the assertion that a trial judge who was subject to a writ of mandamus had a conflict [2/17/99]. At the same time this firm opposed the motion to disqualify it for taking the above described stand in the IRS special purpose trustee dispute [2/18/99].

In an effort to limit disclosure, research was also conducted on "confidentiality of employee information" [10/3]. Then research was conducted on "privileges and defenses that can be asserted against subpoenas of former employees" [10/20]. One of the first motions filed in this matter sought by injunction to silence such a person [10/24].

There also appears to have been efforts to research the possible limitations of the Court [10/8], including its jurisdiction [12/17/97]. Later in the case when grand jury proceedings were ongoing against individual trustees, trust funds were spent to research the "powers and prohibitions" of the grand jury [9/23/98] and then following that up with research as to whether the AG had jurisdiction to conduct criminal prosecutions as opposed to the county prosecutors [12/2/98]. What is the possible benefit to the trust of carrying out that task?

Meetings were held with other attorneys, frequently including Mr. Hare and Mr. Graham [see, for example 9/25/97, 11/24/97]. Meetings were also held, and the trust billed for same, with trustees' personal attorneys [10/27/97, 3/5/98, 6/17/98, 7/21/98], including criminal counsel [11/5/97, 2/27/98, 3/2/98] and with individual trustees and their individual counsel [2/25/98, 9/3/98]. The firm reviewed the personal records of individual trustees [1/5/98, 2/21/98]. It also discussed personal records with individual trustees [2/13/98]. It even went so far as to become embroiled in the issue of which individual trustees' personal documents would not be produced in response to a subpoena [2/25/98, 2/26/98]. The firm reviewed Verner Liipfert documents, which they rigorously asserted were privileged when subpoenaed, and then apparently distributed them to the attorneys for individual trustees [10/9/98].

The effort to block or at least limit production of information is best illustrated by the approach to document requests. These were often objected to on numerous grounds, including relevancy, attorney-client privilege, work product [12/23/97] and even right to privacy [1/15/98] and qualified immunity [2/3/98]. This was not done once, but repeatedly. Other times documents were redacted, as had been done by the Cades Schutte Fleming & Wright firm [2/13/98]. Often a motion to quash a subpoena or a motion for protective order was filed [see for example 10/29/97, 12/10/97, 12/27/97, 1/9/98, 2/10/98, 3/10/998, 3/16/98, 5/11/98, 6/1/98, 6/7/98]. Other times documents were not produced and then opposition was filed to a motion to produce. The order of the probate court was not final. On occasion appeals were filed [3/20/98]. What is more telling is that this strategy of appeal of a discovery order was researched before one was ever at issue. On 10/21/97, before any order was at issue this firm had undertaken research into “appeal of circuit court order enforcing administrative subpoena”. When orders were granted to comply with three of the first AG subpoenas at issue (97-77, 97-78 and 97-83) an appeal was drafted as well as a motion to stay enforcement [10/27, 11/3]. Others followed [1/29/98 re IDRs].

With regard to a specific request, namely the AG effort to review the IRS materials, Herculean efforts were made to prevent that, beginning with the filing of a motion to quash [11/11/97]. That is explainable if one is representing the trustees, but lacks purpose if one represents the trust. After all the AG was the acknowledged parens patraie [sic].

Further, many of the other records which were fought over were important from the trustees conduct point of view, but not nearly so important, even innocuous, from the point of view of the trust itself. Many of these were also subject to significant review by Cades Schutte, Fleming & Wright and were mentioned above. One example is the Holt records [11/25/97]. Others include the Kahala Hilton transaction [11/26/97], the Van Dyke documents [12/18/97], billing records [1/13/98], admissions records [2/10/98] and Verner Liipfert lobbying activity records [3/26-27/98], which it fought hard to bring under the attorney-client privilege [3/30/98]. In fact lead counsel McCorriston flew to Washington, D.C. to meet with Verner Liipfert and review their documents [4/20/98]. It is clear why the trustees, attempting to protect their large salaries and using trust moneys to do it, would want those records protected. It is not so clear why the trust would want them protected. Still others included Terrence Tom billing records [3/30/98], campaign spending candidate disclosure statements [7/23/98], Kalele Kai documents [9/14/98], and trustee minutes in the removal trial between trustees [12/21/98]. When they failed in this later effort, an appeal was drafted to the Supreme Court [1/12/99].

After the initial few months this firm continued its “combative” litigation strategy. It researched the possibility of enjoining the AG from issuing further subpoenas [12/1/97], including going to the Supreme Court with that motion [12/2/97]. It researched the propriety of appointment of trustee ad litem once that issue was proposed by the master [1/12/98]. Obviously this was of great interest to the trustees, but of less concern to the trust. In fact at that time the beneficiaries might very well have argued that such appointment was in their interests. This firm discussed filing an opposition for appointment of any such trustee [1/28/98].

Then, apparently dissatisfied with the rulings of this court, it began an involved process of research to see if the matter could be raised in Federal Court [1/22/98, 1/26/98]. It followed this up by specifically researching whether the Master's recommendation that special purpose trustees be appointed to deal with the IRS could be removed to Federal Court [11/9/98]. Even though the AG was parens patraie [sic] for the trust, it researched filing an injunction to prohibit AG contact with trust employees [3/23/98]. It reviewed Servco Pacific annual report [3/30/98]. That company had nothing to do with the dispute, other than possibly the fact that Attorney General Margery Bronsters' in laws were owners of that company. Next the firm considered filing a petition to enjoin the AG from acting as parens patriae [4/8/98], going so far as to draft a petition to enjoin [4/21/98, 4/27/98] and a disqualification [5/5/98]. Not stopping there, it investigated not only the prospect of civil liability against the AG, but also criminal charges [5/6-7/98]. Trustee Peters discussed the possibility of RICO violations against the AG [5/20/98] and the issue was researched [5/27/98]. Thereafter this firm researched the prospects of disqualifying the AG because it had a conflict of interest in participating in discovery in the removal proceedings related to Trustee Lindsey [6/29/98, 7/2/98].

Master Matsumoto filed a report critical of the trustees. Attorney time was spent developing a "strategy for response" [8/18/98]. This resulted in working on a motion to disqualify him [10/28/98].

Early in 1998 a report on KSBE, which the trustees considered confidential, was disclosed in the press. The "punish your enemies" defense adopted by the trustees and carried out by this firm is best illustrated by what was done in response to this disclosure. First it was investigated [4/6/98]. The subpoena was served on the reporter to identify his source or sources. Time was spent researching the journalist's qualified privilege [5/1/98]. Then time was spent determining whether civil liability could be imposed against the Star Bulletin [5/8/98, 6/19/98]. The Star Bulletin obtained a protective order. The Trustees would not be stopped. They had research done to see if the order could be lifted [5/15/98]. When it could not, rather than leave it alone, this firm researched the issues of conversion and replevin "to seek return of leaked IDR material from the Star Bulletin" [6/17/98]. A motion was drafted [6/19/98]. Research went further, into the possible civil liability of the reporter himself [6/19-22/98]. A motion was filed and lost. An appeal was drafted [7/24/98]

The "punish your enemies" defense was not limited to Rick Daysog and the Star Bulletin. This firm researched the issue of both disqualification of the Watanabe firm and Judge Chang based on the assertion of conflict [9/2/98]. This Master finds it beyond comprehension how conflicts could be seen with everyone involved in the prosecution of the removal action and yet no conflict seen in defense of the trustees. In fact, the trustees went so far as to consider action against Federal Judge Sam King for ethical violations in authoring the Broken Trust article [9/2/98]. The Trustees also drafted a complaint against the Campaign Spending Commission [10/20/98]. How either of these is of benefit to the trust is beyond rational explanation.

A trustee faced with removal can be as vigorous in defense as he or she thinks necessary. He or she can be obstructioned with reference to document requests and can question the authority of the opposition. It can even be argued that attempting to punish and/or discredit the opposition is a legitimate tactic. A trustee cannot, however, when faced with removal and without first obtaining prior court approval, spend the money of the trust to do any of this. He or she owes a fiduciary duty to the beneficiaries, a duty which is breached when trust assets are spent in that manner. Surcharge of the full amount is the remedy.

The final question is whether, assuming an interested party brings action and opportunity to respond is afforded the McCorriston firm, that any refund is in order from the firm. Although it is in the opinion of this Master a "close" question, with arguments on both sides, based on what is known refund would <u>not</u> be recommended. This firm was vigorously defending as lead counsel of record. It was not trying to hide its own past conduct and was not functioning "in the shadows". It appears to have been acting upon directions of the trustees, who were knowing and purposeful people.

DATED: Honolulu, Hawaii, May 18, 2000.

/S/ Robert P. Richards
ROBERT P. RICHARDS

Master