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UNITED STATE COURT OF APPEALS

NINTH CIRCUIT

GEORGE K. YOUNG JR., Plaintiff, vs. STATE OF HAWAII ET. AL.; Defendants.	No. 12-17808 Appeal from a Judgment of the United States District Court For the District of Hawaii Civ. No. 12-00336 HG BMK The Honorable Judge Helen Gillmor United States District Court Judge Reply to Defendant State of Hawaii's Response to Mr. Young's Motion to Strike

Introduction

Mr. Young replies to ***Defendant*** State of Hawaii response which entails a number of novel and legal propositions unsupported by either statutory or case law. State of Hawaii improperly analogizes to case law for intervention by relying on *Yniguez v. Arizona*, 939 F.2d 727, 734 (9th Cir.1991). Even if this Court were to

apply this case law to amicus curiae, State of Hawaii fails to meet the standard for intervention.

This Court's Test For Intervention Is Inapplicable To The Filing Of a Amicus Curiae Brief

As a preliminary matter, State of Hawaii attempt to analogize to *Yniguez* is inappropriate because it is not attempting to intervene. This Court's holding in *Yniguez* deals with intervention under Fed.R.Civ.P. 24(a)(2). It is completely inapplicable to the filing of an amicus curiae brief pursuant to F.R.A.P. Rule 29 especially when State of Hawaii was afforded a Answering Brief and declined to file one. *Yniguez* holds "in [a] motion to intervene at the outset of litigation if four criteria are met: (1) timeliness; (2) an interest in the subject matter of the litigation; (3) absent intervention the party's interest may be practically impaired; (4) other parties inadequately represent the intervenor. *Id* at 731. Even if this Court were to take the novel position that the test for a intervenor should be applied to an amicus curiae, Defendant State of Hawaii fails the following prongs of the aforementioned test.

Defendant State of Hawaii Failed To Act Promptly

Defendant failed to act timely in this action. "The general rule [is] that a post-judgment motion to intervene is timely if filed within the time allowed for the

filing of an appeal." *Id* at 734. Here, Defendant State of Hawaii made no attempt to give this Court notice that it wished to file an amicus curiae brief until its actual filing on May 31st 2013. Per the general rule, Defendant State of Hawaii should have given notice of its intention to file by December 22nd, 2012. However this Court uses the following test to in determining whether a motion to intervene is timely; (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. *See United States v. Oregon,* 745 F.2d 550, 552 (9th Cir.1984).

a. Defendant State of Hawaii Fails This Courts Test For Timeliness

Defendant State of Hawaii filed on May 31st, 2013. This was the last conceivable moment it could have filed its "amicus" brief. Accordingly, it filed its brief at the very final stage of written proceedings. This is highly prejudicial to Mr. Young. He was given no notice of State of Hawaii's intent to intervene which meant he was unable to take into consideration its brief when preparing his reply brief. In fact at the time of State of Hawaii's filing his brief was nearly complete and Mr. Young had already consumed nearly all of the 7,000 words allowed in a reply brief. Accordingly, Mr. Young was unable to reply to any of Defendant State of Hawaii's contentions. No reason was given for this delay. Even if one was given a delay of six months from the general rule cannot be reasonable by any standard of equity. While dealing with the third prong of the intervention test, the

Second Circuits holding in *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 185-94 (1963) is applicable ("The SEC's workload, despite its limited budget and staff, would be substantially increased if such intervention were allowed.") As Mr. Young is represented by one inexperienced attorney pro bono (who himself has a budget of almost nothing) intervention should be denied on these grounds alone. State of Hawaii filing fails all three prongs of this Court's timeliness test.

County of Hawaii Adequately Represents State of Hawaii's Interests

State of Hawaii fail the third and fourth prongs of the *Yniguez* test (absent intervention the party's interest may be practically impaired and other parties inadequately represent the intervenor) as well. This Court promulgated a three part test for adequate representation in *Blake v. Pallan*, 554 F.2d 947, 954-55 (9th Cir. 1977) (" a would-be intervenor is adequately represented if: (1) the interests of a present party to the suit are such that it will undoubtedly make all of the intervenor's arguments; (2) the present party is capable of and willing to make such arguments; and (3) the intervenor would not offer any necessary element to the proceedings that the other parties would neglect".) *Id.*

County of Hawaii is a municipal entity incorporated under the State Constitution of Hawaii. It shares identical interests with Defendant State of Hawaii. As it made nearly the same arguments as State of Hawaii in its "amicus"

brief, it clearly is willing and capable to do so. Moreover, it is unclear what necessary element to this proceeding State of Hawaii brings to this action. The burden would have been upon State of Hawaii to show the necessary element and it failed to do so. Accordingly, State of Hawaii fails both the third and fourth prong of this test as well.

State of Hawaii Could Have Coordinated With County of Hawaii

State of Hawaii claims that it would have difficult for State of Hawaii to avoid "repeating arguments" made by Defendant County of Hawaii. This is an incredulous argument when County of Hawaii is part of the same state apparatus as State of Hawaii. The various Defendants have had six months to coordinate with one another if they wished to file Answering Briefs that attacked different portions of Mr. Young's appeal. This is an utterly untenable argument. State of Hawaii's contention that County of Hawaii's extension was not approved by it is rhetorical tautology of the highest order. It certainly was not harmed by the extension or made any attempt to protest the extension.

Conclusion

There is no absolutely no law or equity to support this belated filing of a Answering Brief disguised as an amicus brief. Even State of Hawaii's attempt to analogize to inapplicable case law supports Mr. Young's motion to strike.

Accordingly, Mr. Young respectfully reiterates his request that State of Hawaii's "amicus" brief be stricken from the record.

Respectfully submitted this 5th day of June, 2013,

s/ Alan Beck
Alan Beck (HI Bar No. 9145)

CERTIFICATE OF SERVICE

I served the foregoing pleading by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 5th day of June, 2013

s/ Alan Beck
Alan Beck (HI Bar No. 9145)