No. 29919

IN THE SUPREME COURT OF THE STATE OF HAWAII

ALBERTA S. DEJETLEY; JOHN R. DELA CRUZ; DEBORAH YOOKO DELA CRUZ; LAURIE ANN DELIMA; ROY Y.H. DELIMA; MICHAEL "PHOENIX" DUPREE; *et al.*, Plaintiffs-Appellants, vs. SOLOMON P. KAHOOHALAHALA, *et al.*, Defendants-Appellees.	CIVIL NO. 08-1-0678(3) (Maui) (Declaratory Judgment) APPEAL FROM FINAL JUDGMENT (entered June 23, 2009) SECOND CIRCUIT COURT Honorable Joseph Cardoza

REPLY BRIEF FOR THE APPELLANTS

SUPPLEMENTAL STATEMENT OF RELATED CASES

APPENDIX "6"

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No. 29919

IN THE SUPREME COURT OF THE STATE OF HAWAII

ALBERTA S. DEJETLEY; JOHN R. DELA CRUZ; DEBORAH YOOKO DELA CRUZ; LAURIE ANN DELIMA; ROY Y.H. DELIMA; MICHAEL "PHOENIX" DUPREE; *et al.*, Plaintiffs-Appellants, vs. SOLOMON P. KAHOOHALAHALA, *et al.*, Defendants-Appellees.	CIVIL NO. 08-1-0678(3) (Maui) (Declaratory Judgment) APPEAL FROM FINAL JUDGMENT (entered June 23, 2009) SECOND CIRCUIT COURT Honorable Joseph Cardoza

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REPLY BRIEF FOR THE APPELLANTS

Maui's continuous residency and non-felon requirements exist for the benefit of the residents of Maui County, not Solomon Kahoohalahala. Section 3-3 of the Maui Charter requires council members continually maintain residence in their respective residency areas:

> If a council member . . . ceases to be a resident of the council member's residency area during the council member's term of office, or if a council member is adjudicated guilty of a felony, the council member *shall immediately forfeit office and the seat shall thereupon become vacant.*

Maui Charter § 3-3 (2003) (emphasis added). This requirement was meant to guarantee that the residents of Maui County have a Lanai voice on the Council, and to insure a Lanai resident occupies the Lanai seat. For nearly a year, however, the public has suffered truly irreparable injury by having a pretender occupy the Lanai seat while he lived in Lahaina. As recently determined by this Court in *Dupree v. Hiraga*, 2009 Haw. LEXIS 253 (Haw., Oct. 20, 2009), a case holding that Kahoohalahala was not a resident of Lanai for voter registration purposes, "there was nothing in the record to establish that Kahoohalahala actually lived [at his brother's home] or anywhere else on Lanai in any commonly-understood meaning of the term." *Id.* at *74.[1]

Because the forfeiture requirement of section 3-3 is self-executing and is not dependent upon Kahoohalahala refusing to resign and then being impeached, a judicial remedy is appropriate to assist the initiation of the vacancy-filling measures set forth in the Charter. *See* Maui Charter § 3-4 (2003) (detailing the procedures for filing a Council vacancy). For example, Kahoohalahala cannot argue that a council member who is adjudicated guilty of a felony while in office could continue to serve on the Council until impeached or recalled. *See Office of Hawaiian Affairs v. Cayetano*, 94 Haw.

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1. Section 3-3 requires continual residence, so Kahoohalahala's post-*Dupree* attempt to "cure" his Lahaina residency by seeking to change his registration to Lanai does not affect this case, regardless of the outcome of the appeal to the Board of Registration filed on November 12, 2009 by a Lanai voter from Kahoohalahala's latest attempt to register. *See Dupree v. Kahoohalahala*, State of Hawaii Board of Registration (Notice of Appeal filed Nov. 12, 2009) (copy attached as Appendix "6"). Kahoohalahala's Statement of Related Cases attached to his Answering Brief notes the County Clerk's October 24, 2009 ruling, but omits this Court's decision in *Dupree* which necessitated his latest registration attempt. Also, the Statement of Related Cases states Dupree did not appeal. As noted above, he did.

In any event, in reviewing a motion for judgment on the pleadings, the Court is required to accept as true the plaintiffs' allegations that Kahoohalahala is not a resident of Lanai. *See* R:CV08-1-0678(3) Doc. 0008. *See Baehr v. Lewin*, 74 Haw. 530, 545-46, 852 P.2d 44, 52-53 (1993) (motion for judgment on the pleadings governed by same standard as motion to dismiss for failure to state a claim) (citing *Marsland v. Pang*, 5 Haw. App. 463, 474, 701 P.2d 175, 186, *cert. denied*, 67 Haw. 686, 744 P.2d 781 (1985)).

1, 8, 6 P.3d 799, 806 (2000); 63c Am. Jur. 2d *Public Officers and Employees* § 120 (2009) ("a change of residence may, of itself, automatically provide grounds for having an office declared vacated, [but] it cannot be said that the office is vacated until such vacation is declared by a court or other authorized official or governing body"). Because the charter additionally provides that "the seat shall thereupon become vacant" and creates the vacancy upon forfeiture, a writ of quo warranto is not necessary, and declaratory relief is the most appropriate means to effectuate the charter. *Office of Hawaiian Affairs*, 94 Haw. at 8, 6 P.3d 7at 806 (U.S. Supreme Court decision, unlike the Charter, did not automatically create a vacancy in office, thus quo warranto could be used to do so).

This Reply Brief addresses three issues.

First, the Charter's plain requirement that a council member "immediately forfeits" office upon felony conviction or nonresidency does not impose upon him a duty to resign. Indeed, it requires no action by the council member because the loss of office is automatic and self-executing.

Second, declaratory relief, and not impeachment or recall, is an appropriate remedy which confirms the charter's plain language of immediate forfeiture and vacancy.

Third, the circuit court did not conclude Kahoohalahala would suffer prejudice if the complaint were amended to change its form from a request for declaratory relief to a petition for a writ of quo warranto – the public's prejudice and not Kahoohalahala's is the proper focus – and the court abused its discretion when it refused to permit amendment.

I. THE CHARTER PROVIDES A COUNCIL MEMBER SHALL IMMEDIATELY "FORFEIT," NOT SHALL IMMEDIATELY "RESIGN"

Kahoohalahala's entire argument is built on a faulty premise: the Answering Brief seeks to effectively rewrite section 3-3 of the Maui Charter by redefining the word "forfeit" to "resign," and to make forfeiture something the council member does, rather than something that happens to him.

Kahoohalahala acknowledges that upon loss of residency or conviction of a felony, he "shall immediately forfeit office and the seat shall thereupon become vacant," but attempts, without citation, to redefine "forfeit" as "resign."

> Mr. Kahoohalahala has a duty to "immediately forfeit" when he is no longer qualified to remain on the Maui County Council. The failure to immediately forfeit would constitute nonfeasance and, therefore, subject him to impeachment proceedings initiated by the voters heard in the circuit court.

Ans. Br. at 13-14. However, forfeiture is not an *action* which Kahoohalahala has a duty to accomplish, but rather is the *consequence* of his being adjudicated guilty of a felony or ceasing to be a resident of his Lanai residency area. To "forfeit" means "[t]o lose, or lose the right to, by some error, fault, offense or crime." *Black's Law Dictionary* 548 (5th ed. 1979). *See Dalton v. City and County of Honolulu*, 51 Haw. 400, 422, 462 P.2d 199, 211 (1969) ("where the meaning of the language is plain, it must be given effect by the courts or they would be assuming legislative authority"). To "lose" office is not merely a requirement to "surrender," "resign," or "quit."

Thus, it is a council member's felony conviction or nonresidency which triggers the forfeiture, not his resignation. Kahoohalahala does not need to resign in order to "immediately forfeit" office, it occurred automatically when he ceased to be a resident, and was not dependent upon any action by him. Kahoohalahala carefully avoids the plain meaning of "forfeiture" as confirmed by this Court in *Pioneer Mill.* It means the office holder loses office upon some event occurring:

> We have concluded that the Land Court judge had become a candidate for public office at the time he rendered the decision below, and that under the Hawaii Constitution, he *had forfeited* his judgeship. The case must be remanded for a new trial.

In re Pioneer Mill Co., Ltd., 53 Haw. 496, 498, 497 P.2d 549, 551 (1972). The Court held the Land Court judge "had forfeited" his judgeship – not "had a duty to resign." In footnote 6 of the Answering Brief, Kahoohalahala argues the slight difference in language in the constitutional provision in *Pioneer Mill* and section 3-3 of the charter compels a different result here. Ans. Br. at 13 n.6. The provision at issue in *Pioneer Mill* provided "[a]ny justice or judge who shall become a candidate for an elective office shall thereby forfeit his office." *See* Haw. Const. art. V, § 3 (amended 1978).[2] The Maui Charter provides that upon felony conviction or nonresidence, the council member "shall immediately forfeit office." Maui Charter § 3-3 (2003). Kahoohalahala argues that there is a critical difference between "thereby" and "immediate," since "thereby" indicates conduct triggers the forfeiture, but "immediate" does not. Ans. Br. at 14 & n.6. This opaque argument was perhaps wisely relegated to a footnote, since it is difficult to see any material

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2. That requirement was subsequently eliminated when article V was amended and redesignated as article VI.

distinction in "conduct" between becoming a candidate and becoming a felon, or ceasing to be a resident.

Kahoohalahala further misstates the Court's conclusion in *Pioneer Mill*, when he asserts "the relief sought in *Pioneer Mill Co.* was to invalidate a judgment, not the removal of the Land Court judge." Ans. Br. at 14 n.6 (citing *Pioneer Mill*, 53 Haw. at 497-98, 497 P.2d at 551). However, as the above quotation plainly reveals, the Court "concluded that the Land Court judge . . . had forfeited his judgeship." Thus, not only was the Land Court's judgment rendered after the forfeiture void, the Court held the judge had lost his office by virtue of his becoming a candidate. *Pioneer Mill*, 53 Haw. at 498, 497 P.2d at 551.

Kahoohalahala's avoidance of the plain language of the Charter and the holding of *Pioneer Mill* are revealing, because he never addresses the actual meaning of "forfeit," nor does he address any of the cases cited in the Opening Brief which confirm that forfeiture is self-executing and automatic, and which render the difference between forfeiture and resignation merely academic. *See Pombo v. Fleming*, 32 Haw. 818, 823 (Terr. 1933) (county supervisor who took another position "gave up that position as effectually as though he had expressly resigned"); *Hollinger v. Kumalae*, 25 Haw. 669, 689 (Terr. 1920) (acceptance of office of supervisor automatically vacated the offices of state senator and state representative). *See also* Op. Br. at 13-15 (cases from other jurisdictions which hold that forfeit is automatic and self-executing).

II. DECLARATORY RELIEF IS AVAILABLE

Kahoohalahala's theory that impeachment for failure to resign constitutes a "special remedy" precluding declaratory relief under Haw. Rev. Stat. § 632-1 (1993) also does not account for the term "immediate" in section 3-3. Kahoohalahala does not explain how the immediate nature of forfeiture and vacancy is consistent with impeachment, which is contingent upon 5% of the electorate filing a petition that a he should be impeached (or 20% for recall). Both impeachment and recall are discretionary actions which may or may not be undertaken by the electorate, and are not mandatory as section 3-3 requires. *See* Maui Charter § 3-3 (2003) ("*shall* immediately forfeit office and the seat *shall* thereupon become vacant"). Thus, neither qualifies as a "special form of remedy for a specific type of case" which precludes declaratory relief. Haw. Rev. Stat. § 632-1 (1993) ("Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed.").

In each of the cases cited by Kahoohalahala where the court held that declaratory judgment was not available, the "special remedy" referred to was a detailed statutory scheme that detailed specific procedural and substantive rights. *See, e.g., Punohu v. Sunn*, 66 Haw. 485, 666 P.2d 1133 (1983) (administrative appeals under Haw. Rev. Stat. ch. 91); *Traveler's Ins. Co. v. Hawaii Roofing, Inc.*, 64 Haw. 380, 641 P.2d 1333 (1982) (worker's compensation). These cases also stand for the proposition that once a party participates in a separate process to determine rights, she cannot opt out of that process and switch tracks to another. In both of these cases, the party seeking a declaratory judgment previously sought relief in alternative processes. Where declaratory relief is specifically authorized in a statute or is not precluded because the statute is merely procedural, declaratory relief under section 632-1 is available. *See Costa v. Sunn*, 64 Haw. 389, 642 P.2d 530 (1983) (administrative procedures act expressly authorized declaratory relief).

Further, a petition for quo warranto is not a "special remedy" that must be utilized to the exclusion of declaratory relief, as Kahoohalahala argues. Ans. Br. at 15.[3] The Declaratory Judgment Statute itself shows that declaratory relief is available:

> Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed; but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, a remedy equitable in nature, or an *extraordinary legal remedy*, whether such remedy is recognized or regulated by statute or not, *shall not debar a party from the privilege of obtaining a declaratory judgment* in any case where the other essentials to such relief are present.

Haw. Rev. Stat. § 632-1 (1993) (emphasis added). Indeed, quo warranto is not always necessary (where a statute creates a vacancy such as the charter does, where forfeiture is automatic). On the other hand, declaratory relief should always be available where there is a factual dispute regarding whether the trigger of the automatic forfeiture has occurred.

Further, Kahoohalahala ignores that portion of the quo warranto chapter which expressly provides that a writ it is not an exclusive special remedy, and does not preempt declaratory relief:

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3. In the circuit court, Kahoohalahala did not claim that quo warranto was a "special remedy" precluding declaratory relief, only that impeachment and recall were. Failure to raise the argument below precludes raising it on appeal. *See, e.g., Hill v. Inouye*, 90 Haw. 76, 82, 976 P.2d 390, 396 (1998) (appellate courts "will not consider an issue not raised below unless justice so requires") (quoting *State Farm Mut. Auto. Ins. Co. v. Dacanay*, 87 Haw. 136, 145 n.14, 952 P.2d 893, 902 n.14 (1998)).

> Nothing in this chapter shall preclude the obtaining of relief available by quo warranto *by other appropriate action.*

Haw. Rev. Stat. § 659-10 (1993) (emphasis added). *See also Office of Hawaiian Affairs*, 94 Haw. at 8, 6 P.3d 7at 806 (quo warranto needed to create vacancy because U.S. Supreme Court decision, unlike the Charter, did not automatically create one). Instead, Kahoohalahala relies on the superceded rule of *Kaleikau v. Hall*, 27 Haw. 420, 431 (Terr. 1923), which provided that quo warranto was the exclusive form of action to challenge an officeholder's qualifications. However, as noted in the Opening Brief at 21 & n.7, the Legislature superceded the rule in that case when it subsequently added section 659-10 to the quo warranto chapter in 1972. The Answering Brief does not address the 1972 addition to the quo warranto chapter, and is thus deemed to have conceded the applicability and purpose of the amendment.

Kahoohalahala also avoids discussing *Hawaii's Thousand Friends v. City and County of Honolulu*, 75 Haw. 237, 858 P.2d 726 (1993), in which the Court held that similar language in the Coastal Zone Management Act (CZMA) "clearly allowed" a plaintiff to elect whether to seek relief under the CZMA or by a "generic" declaratory judgment. *Id.* at 245, 858 P.2d at 731 (CZMA provided "[n]othing in this section shall restrict any right that any person may have to assert any other claim or bring any other action") (citing Haw. Rev. Stat. § 205A-6(e) (1988)).

Instead, the Answering Brief ignores the effect of section 659-10 entirely, and relies upon inapplicable cases from other jurisdictions which are readily distinguished by the fact that the quo warranto statutes in those jurisdictions do not contain a non-exclusivity provision similar to Haw. Rev. Stat. § 659-10 (1993). *See* cases cited in Ans. Br. at 16-17. *See, e.g., Beasley v. City of East Cleveland*, 486 N.E.2d 859 (Ohio Ct. App. 1984) (Ohio Rev. Code chapter 2733 contains no provision similar to section 659-10; *see* http://codes.ohio.gov/orc/2733); *Riley v. Hughes*, 2009 WL 281305 (Ala. 2009) (Ala. Code § 6-6-591 contains no provision similar to section 659-10); *Ex Parte James*, 684 So.2d 1315 (Ala. 1996) (same); *State* ex rel. *Munroe v. City of Poulsbo*, 37 P.3d 319 (Wn. Ct. App. 2002) (chapter 7.56 of Washington's Revised Code does not contain a provision similar to section 659-10; *see* http://apps.leg.wa.gov/rcw/default.aspx?cite=7.56); *Nicolopulos v. City of Lawndale*, 111 Cal. Rptr. 2d 420 (Cal. Ct. App. 2001) (section 803 of California's Code of Civil Procedure does not contain a non-exclusivity provision similar to section 659-10); *Madden v. Houck*, 403 N.E.2d 1133 (Ind. Ct. App. 1980) (section 34-17 of the Indiana Code does not contain

a provision similar to section 659-10); *Giannotta v. Milliken*, 246 N.W.2d 357 (Mich. App. 1976) (section 600-4501, *et seq.* of the Michigan Compiled Laws has no provision like section 659-10; *see* http://legislature.mi.gov/doc.aspx?mcl-236-1961-45).

III. NO PREJUDICE IN THE RECORD

Quo warranto, as noted above, is not an exclusive remedy. Section 3-3 of the charter creates a vacancy in office upon the forfeiture, so a writ is not necessary to do so. *See Office of Hawaiian Affairs v. Cayetano*, 94 Haw. 1, 8, 6 P.3d 799, 806 (2000) (when a court decision or a statute does not automatically create a vacancy in office, quo warranto is available to do so). However, even if quo warranto was the only appropriate form of pleading in circumstances, unlike here, where a portion of the relief is quo warranto-like (the injunctive relief) and a portion is declaratory judgment-like interpretation, the circuit court abused its discretion when it did not allow amend of the complaint to change its format.

The only argument Kahoohalahala advances to support the circuit court's conclusion is that he would suffer prejudice if amendment were permitted. Ans. Br. at 19. Kahoohalahala asserts "the circuit court agreed." *Id.* However, there is nothing in the record to indicate that it did.[4] There is nothing but Kahoohalahala's bare assertion that he would be prejudiced if the complaint were amended to change the *form* of action from declaratory judgment to a writ of quo warranto.

The record is plain that relabeling the complaint as a petition for quo warranto would not have "altered the nature of the lawsuit," as the Answering Brief claims. Ans. Br. at 19-20. In the amendment context, "prejudice" is usually shown by a delayed amendment which adds a new claim, or significantly alters the nature of an existing claim. *See, e.g., Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Haw. 92, 101, 176 P.3d 91, 102 (2008) (plaintiff waited to seek amendment one week before discovery deadline and on the day dispositive motions were due). If the complaint in the case at bar were amended to be put in the form of a petition for a writ of quo warranto, the basis for the

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4. Kahoohalahala's claim the circuit court "agreed" that amendment would result in prejudice is notably lacking a record cite. That is because nothing in the record indicates whether the circuit court agreed or did not; the court did not set forth *any reason* why it denied the motion for leave to amend, which in itself is reversible error. *See* R:CV08-1-0678(3) Doc. 0039; Haw. R. Civ. P. 15(a) (Absent "any apparent or declared reason . . . the leave should, as the rules require, be 'freely given.'"); *Keawe v. Hawaiian Elec. Co.*, 65 Haw. 232, 239, 649 P.2d 1149, 1154 (1982) (failure to articulate any reason for the denial is alone an abuse of discretion).

claim – that Kahoohalahala was not continuously a resident of Lanai and had therefore forfeited the Lanai council seat – would be the same. The plaintiffs would be the same. The defendant would be the same. Kahoohalahala does not assert he was not on notice of the nature of the claim against him.

Nor was there any delay. Kahoohalahala points to nothing in the record to demonstrate "ample and obvious" prejudice. Ans. Br. at 18 (citing *Mayeaux v. Louisiana Health Service and Indem. Co.*, 376 F.3d 420, 426-27 (5th Cir. 2004)). He asserts that "additional discovery, costs, and expenses often constitute 'undue prejudice,'" Ans. Br. at 19, yet does not provide any record evidence that he will be subject to "additional" discovery (the case had not progressed beyond the pleading stages in the circuit court, and Kahoohalahala thwarted all attempts at discovery), or that he would incur "additional expense." He alleges the "Corporation Counsel refused to tender the defense" Ans. Br. at 20, and that as a consequence he retained private counsel, something he would have to do in any event since in a quo warranto case, the plaintiffs would be seeking a writ on behalf of the people and in the public interest. *See* Haw. Rev. Stat. § 659-1 (1993) (quo warranto "is an order issuing in the name of the State by a circuit court").

CONCLUSION

The circuit court's judgment should be vacated and the case remanded to the circuit court for further proceedings.

DATED: Honolulu, Hawaii, November 16, 2009.

Respectfully submitted,

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No. 29919

IN THE SUPREME COURT OF THE STATE OF HAWAII

ALBERTA S. DEJETLEY; JOHN R. DELA CRUZ; DEBORAH YOOKO DELA CRUZ; LAURIE ANN DELIMA; ROY Y.H. DELIMA; MICHAEL "PHOENIX" DUPREE; *et al.*,	CIVIL NO. 08-1-0678(3) (Maui) (Declaratory Judgment)
Plaintiffs-Appellants,	APPEAL FROM FINAL JUDGMENT (entered June 23, 2009)
vs.	SECOND CIRCUIT COURT
SOLOMON P. KAHOOHALAHALA, *et al.*,	Honorable Joseph Cardoza
Defendants-Appellees.	

SUPPLEMENTAL STATEMENT OF RELATED CASES

In addition to the cases referred to in the Statement of Related Cases attached to the Opening Brief (filed Sep. 29, 2009), the following cases may be related to the present appeal:

1. *Dupree v. Hiraga*, 2009 Haw. LEXIS 253 (Haw., Oct. 20, 2009).

2. *Dupree v. Kahoohalahala*, State of Hawaii Board of Registration, Notice of Appeal (filed Nov. 12, 2009)

DATED: Honolulu, Hawaii, November 16, 2009.

Respectfully submitted,

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IN THE BOARD OF REGISTRATION COUNTY OF MAUI

MICHAEL PHOENIX DUPREE,	
Appellant,	**NOTICE OF APPEAL**
vs.	
SOLOMON P. KAHO'OHALAHALA,	
Appellee.	

NOTICE OF APPEAL

Notice is hereby given that Appellant, MICHAEL PHOENIX DUPREE, by and through his attorneys Kenneth R. Kupchak and Robert H. Thomas, appeals to the Board of Registration of the Islands of Maui, Molokai, Lanai, and Kahoolawe the decision of the County Clerk, JEFFREY T. KUWADA regarding the voter registration of SOLOMON P. KAHO'OHALAHALA.

On October 24, 2009, Appellant sent a letter to the County Clerk, challenging the right of Appellee to be registered as a voter on the Island of Lanai under HRS §11-25(a). Appellant stated in his letter that Appellee has not met the residency requirements set out in HRS §11-13, as clarified in the recent decision of the Hawaii Supreme Court affirming the rejection of Mr Kahoohalahala's previous attempt to register as a voter on Lanai in July, 2008, (Dupree v. Hiraga, No. 29464, 2009 Hawaii LEXIS 253 (Haw. Oct. 20, 2009)) and therefore should not be allowed to register to vote on Lanai. On November 2, 2009, the County Clerk rejected Appellant's challenge and sent written notice that Appellee had been registered in the precinct of Lanai.

This appeal is being brought to the Board of Registration under HRS §11-26(b) and HAR §2-51-43. Appellant argues that the decision of the County Clerk is erroneous, and continues to assert that Appellee is not a resident of Lanai and does not have the right to be a registered voter in the Lanai precinct.

DATED: Honolulu, Hawaii, November 12, 2009.

Respectfully submitted,

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APPENDIX "6"