INCLINATIONS

It is Judge Mollway's practice, whenever possible, to notify attorneys and pro se parties scheduled to argue motions before her of her inclinations on the motions and the reasons for the inclinations. This is part of Judge Mollway's normal practice, rather than a procedure unique to a particular case, and is designed to help the advocates prepare for oral argument. It is the judge's hope that the advance notice of her inclination and the accompanying reasons will focus the oral argument and permit the advocates to use the hearing to show the judge why she is mistaken or why she is correct. The judge is not bound by the inclination and sometimes departs from the inclination in light of oral argument.

Judge Mollway attempts to communicate her inclinations no later than one working day before a hearing. If your case is not mentioned on the webpage when you check it, please check again later to see whether the webpage has been updated to include the inclination in your case.

The inclination is intended to be only a summary of the court's thinking before the hearing and not a complete legal discussion. The court will issue a written order with a detailed analysis after the hearing.

The parties are reminded that, under Local Rule 7.4, they may not submit supplemental briefs (such as briefs addressing the inclination) unless authorized by the court. The parties are also reminded that they must comply with Local Rule 7.8.

Occasionally, Judge Mollway does not announce an inclination, especially if materials are submitted to her right before the hearing. Because briefing on criminal motions closes just a few days before the hearing, it is not uncommon for her to be unable to announce an inclination on a criminal motion until the start of the hearing itself. Certainly if an evidentiary hearing is scheduled on matters necessary to a decision on either a civil or criminal motion, no inclination will be announced.

Judge Mollway's inclinations may not be cited as authority for any proposition. However, the inclinations will be included with case-related correspondence in the applicable case files for the convenience of the parties.

Judge Mollway announces the following inclinations:

UNITED STATES OF AMERICA for the Use of BODELL CONSTRUCTION COMPANY v. METCALF CONSTRUCTION COMPANY, INC.; NATIONAL FIRE INSURANCE COMPANY OF HARTFORD; FIRST INSURANCE COMPANY OF HAWAI`I, LTD., Civil No. 05-00570 SOM/KSC; MOTION TO ENFORCE STIPULATION AND COMPEL ARBITRATION

Plaintiff Bodell Construction Company has moved to enforce a stipulation filed on October 28, 2005. Bodell says that, in this stipulation, the parties agreed to stay the present case and to arbitrate (1) all of the claims in Bodell's Complaint filed on September 2, 2005, and (2) all of the claims in the Counterclaim filed on October 13, 2005, by Defendants Metcalf Construction Company, Inc., National Fire Insurance Company of Hartford, and First Insurance Company of Hawai`i, Ltd. Bodell asks this court to compel National Fire Insurance Company of Hartford, and First Insurance Company of Hawai`i, Ltd. (collectively, "Sureties"), to participate in the arbitration between Bodell and Metcalf. Bodell also asks this court to declare that, even if the Sureties do not participate in the arbitration, they will be bound by any arbitration award.

The court is inclined to deny Bodell's motion on the ground that the Sureties did not clearly agree to arbitrate their claims. The court is inclined to read the stipulation only as an agreement to stay this case until any arbitration is completed, not as an agreement to arbitrate.

Because this case is stayed and because the Sureties may still decide to participate in and be bound by the arbitration, the court is not inclined to issue a declaration that the Sureties will be bound by the award issued in the arbitration between Bodell and Metcalf. The Sureties are on notice that, if they choose not to participate in that arbitration, Bodell will seek to bind them to the arbitration award.

The court is inclined to deny Defendant's request for fees and costs.

(posted: January 13, 2006)

Kaapuni v. Helm, et al., Civ. No. 04-00449 SOM/LEK; Defendants' Motion for Summary Judgment.

Defendants Carlton Helm, Stag Sagario, Christina Williams, Jamie Winfrey, Harold Manaois, and Keana Brown (collectively, "the Officers") move for summary judgment on the only remaining claims before this court: (1) Count One, which concerns damage to a sliding door and a carpet during the execution of a search warrant, and (2) Count Five, which seeks punitive damages. The court is inclined to grant in part and deny in part the Officers' motion.

With respect to damage to the Kaapunis' sliding glass door, the Officers contend that they broke the door after complying with Haw. Rev. Stat. § 803-37, which requires that police officers declare their business and demand entrance before breaking a door to execute a search warrant. The Officers point to Officer Kelly Pauole's affidavit as evidence that they properly knocked and announced their presence before breaking the door. Officer Pauole claims to have knocked on the sliding glass door three times and yelled, "Police, search warrant. We demand entry." According to Officer Pauole, the police broke the glass door only after receiving no response. Given Barbara Kaapuni's claim that she would have opened the door had she heard any knock or announcement, the court is inclined to conclude that a genuine issue of fact exists as to whether the police knocked and announced their presence. Taking Barbara's statements in the light most favorable to the Kaapunis and drawing all reasonable inferences in their favor, the court is inclined to conclude that a reasonable jury could find that she heard no knock or announcement because there was none. The court recognizes, of course, that not hearing something does not necessarily mean it did not occur, but the court is inclined to see the parties as raising issues of credibility, which are properly left for trial. See California v. Campbell, 319 F.3d 1161, 1166 (9th Cir. 2003) ("A genuine dispute arises if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."); Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000) ("There must be enough doubt for a 'reasonable trier of fact' to find for plaintiffs in order to defeat the summary judgment motion."). Accordingly, the court is inclined to deny summary judgment regarding this claim.

With respect to damage to the carpet, the Officers argue that any damage was "caused by negligence at best" and was not unreasonably destructive. "[D]estruction of property that is

not reasonably necessary to effectively execute a search warrant may violate the Fourth Amendment." United States v. Becker, 929 F.2d 442, 446 (9th Cir. 1991) (citation omitted). However, "[i]f the damage to the property was caused by the officers' mere negligence, there is no violation of the due process clause of the fourteenth amendment." Bergquist v. County of Cochise, 806 F.2d 1364, 1369 (9th Cir. 1986), disapproved on other grounds by City of Canton v. Harris, 489 U.S. 378, 387 (1989). The only evidence before the court regarding damage to the Kaapunis' carpet is Jon Hans Kaapuni, Sr.'s deposition testimony. He says that, while executing the search warrant, the police caused the carpet to "wrinkle up because they was running around the corner to run to my room." The Kaapunis do not present any evidence showing that the alleged carpet damage was not reasonably necessary or was intentional. Even if the police did wrinkle the carpet, the court is inclined to conclude that there is no genuine dispute of fact that they did so while executing the search warrant in a reasonable manner and that their actions do not, on the record before the court, violate the Fourth or Fourteenth Amendment. See Becker, 929 F.2d at 446 ("destruction of property that is not reasonably necessary to effectively execute a search warrant may violate the Fourth Amendment"); Bergquist, 806 F.2d at 1369 ("If the damage to the property was caused by the officers' mere negligence, there is no violation of the due process clause of the fourteenth amendment."). Accordingly, the court is inclined to grant summary judgment in favor of the Officers on this claim.

The Officers also move for summary judgment on Count Five, which asserts that the Officers' actions "were intentional and malicious and done in total disregard of the [Kaapunis'] rights, and therefore, the [Kaapunis] are entitled to an award of punitive damages." However, the Officers present no argument concerning this claim. Because the court is inclined to deny summary judgment as to the sliding glass door claim, the court is inclined to deny summary judgment as to Count Five as well.

(Posted: January 12, 2006)