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Electronically Filed
FIRST CIRCUIT
1CC191000057
13-OCT-2020
03:03 PM
Dkt. 150 MOT

ATTORNEY FOR AMICI CURIAE
CONSERVATION COUNCIL FOR
HAWAI'I; FRIENDS OF LANA'I;
KAHEA: THE HAWAIIAN-
ENVIRONMENTAL ALLIANCE;
KEEP THE NORTH SHORE
COUNTRY; LIFE OF THE LAND;
MĀLAMA KAKANILUA; MAUI
TOMORROW FOUNDATION;
SIERRA CLUB OF HAWAI'I; WEST
MAUI PRESERVATION
ASSOCIATION; HERMINA MORITA;
and CAROL WILCOX

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SAVE SHARKS COVE ALLIANCE,
MĀLAMA PŪPŪKEA-WAIMEA,
HAWAI'I'S THOUSAND FRIENDS,
LARRY McELHENY, JOHN THIELST,
CORR SANCHEZ, and SURFRIDER
FOUNDATION

Plaintiffs,

v.

CITY AND COUNTY OF HONOLULU;
CITY COUNCIL OF THE CITY AND
COUNTY OF HONOLULU;
DEPARTMENT OF PLANNING AND
PERMITTING OF THE CITY AND
COUNTY OF HONOLULU;
HANAPOHAKU LLC; DOES 1-10,

Defendants.

Civil No. 19-1-0057-01 JHA
(Declaratory and Injunctive Relief)

**AMICI CURIAE CONSERVATION
COUNCIL FOR HAWAI'I; FRIENDS OF
LANA'I; KAHEA: THE HAWAIIAN-
ENVIRONMENTAL ALLIANCE; KEEP
THE NORTH SHORE COUNTRY; LIFE
OF THE LAND; MĀLAMA
KAKANILUA; MAUI TOMORROW
FOUNDATION; SIERRA CLUB OF
HAWAI'I; WEST MAUI
PRESERVATION ASSOCIATION;
HERMINA MORITA; and CAROL
WILCOX'S MOTION FOR LEAVE TO
FILE AMICUS BRIEF IN SUPPORT OF
COUNTERCLAIM DEFENDANTS'
JOINT RENEWED MOTION FOR
JUDGMENT ON THE PLEADINGS;
EXHIBIT A; DECLARATION OF
COUNSEL; and CERTIFICATE OF
SERVICE**

NON-HEARING MOTION

HANAPOHAKU LLC

Counterclaim Plaintiff,

v.

SAVE SHARKS COVE ALLIANCE,
MĀLAMA PŪPŪKEA-WAIMEA,
HAWAI'I'S THOUSAND FRIENDS,
LARRY McELHENY, JOHN THIELST,
and CORA SANCHEZ,

Counterclaim Defendants.

Hearing on Counterclaim Defendants' Motion:

Date: October 28, 2020

Time: 10:15 a.m.

Judge: Honorable James H. Ashford

Trial Date: February 22, 2021

AMICUS CURIAE THE CONSERVATION COUNCIL FOR HAWAI'I; FRIENDS OF LANA'I; KAHEA: THE HAWAIIAN-ENVIRONMENTAL ALLIANCE; KEEP THE NORTH SHORE COUNTRY; LIFE OF THE LAND; MĀLAMA KAKANILUA; MAUI TOMORROW FOUNDATION; SIERRA CLUB OF HAWAI'I; WEST MAUI PRESERVATION ASSOCIATION; HERMINA MORITA; and CAROL WILCOX'S MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF COUNTERCLAIM DEFENDANTS' JOINT RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS

Non-party and proposed Amici Curiae, the Conservation Council for Hawai'i; Friends of Lana'i; KAHEA: The Hawaiian-Environmental Alliance; the Keep North Shore Country; Life of the Land; Mālama Kakanilua; Maui Tomorrow Foundation; Sierra Club of Hawai'i; West Maui Preservation Association; Hermina Morita; and Carol Wilcox (collectively, "Citizen Amici") hereby move this Honorable Court for leave to file an amicus brief in support of Counterclaim Defendants Save Sharks Cove Alliance ("SSCA"), Mālama Pūpūkea-Waimea ("MPW"), Hawai'i's Thousand Friends ("HTF"), Larry McElheny, John Thielst, and Cora Sanchez's (collectively, "Save Sharks Cove") Joint Renewed Motion for Judgment on the Pleadings (the "Motion") on Defendant/Counterclaimant Hanapohaku LLC's ("Developer") Counterclaims.

As set forth in the, proposed Amicus Brief (Exhibit A), and supporting Declaration of Counsel, Citizen Amici is a group of non-profit organizations and individual citizens dedicated to protecting Hawai'i's unique and sensitive environmental and cultural resources. As referenced in the attached Declaration of Counsel, Citizen Amici include the following organizations and individuals who routinely appear in state and federal courts, both as parties and as amicus, on matters of significant public concern:

Conservation Council for Hawai'i ("CCH") is one of Hawai'i's oldest and most effective wildlife protection organizations. Since 1950, CCH has been on the forefront of the environmental movement in Hawai'i and a leader in shaping some of the most important environmental policies and programs in the Islands.

Friends of Lana'i ("FOL") was created in 2010 to give voice to the many residents of Lana'i and others in the State of Hawai'i who strongly opposed the Lana'i Wind Power Plant Project proposed by developer Castle & Cooke and Hawaiian Electric Industries. Since then, FOL has sponsored and acted as spokesperson for educational activities and community conversations about a variety of environmental issues.

KAHEA: The Hawaiian-Environmental Alliance ("KAHEA") is a community-based organization founded in 2000, working to improve the quality of life for Hawai'i's people and future generations through the revitalization and protection of Hawai'i's unique natural and cultural resources. KAHEA advocates for the proper stewardship of our resources and for social responsibility by promoting cultural understanding and environmental justice.

Keep the North Shore Country ("KNSC") is a non-profit organization founded in 2006 working to preserve, protect, and enhance the heritage and rural character of the North Shore of O'ahu, Hawai'i, in partnership with communities from Ka'ena Point to Kahalu'u.

For over fifty years, Life of the Land ("LOL") has been a leading Hawai'i energy, environmental, and community action group advocating for the people and 'āina. Its mission is to preserve and protect the life of the land through sound energy and land use policies, and to promote open government through research, education, advocacy, and when necessary, litigation.

Mālama Kakanilua ("Mālama"), a non-profit is dedicated to advocating for the identification, recognition, preservation, and protection of all significant historical and indigenous cultural sites and features as well as indigenous cultural properties on the island of Maui.

For over thirty years, Maui Tomorrow Foundation ("Maui Tomorrow"), a non-profit community organization, has been protecting Maui's precious natural areas and prime open space for recreational use and aesthetic value, promoting the concept of ecologically sound development, and preserving the rural lifestyle on Maui.

Since 1968, the Sierra Club of Hawai'i ("Sierra Club"), a non-profit organization, has been committed to defending everyone's right to a healthy environment and protecting Hawai'i's unique natural resources. The Sierra Club relies on volunteers to support outdoor education programs, trail and native species restoration projects, public interest litigation, and grassroots advocacy for sound environmental policies at county, state, and federal levels of government.

West Maui Preservation Association ("WMPA") is a non-profit organization founded in 2004 dedicated to preserving, protecting, and restoring the natural and cultural environment of West Maui, including activities that enhance the natural beauty, cultural heritage and public enjoyment of the West Maui region.

Kaua'i residents Hermina Morita ("Morita") and Carol Wilcox ("Wilcox") have each been advocates for their community for decades, participating both in their careers and as citizens through testimony, formal public comment, administrative proceedings, and litigation when necessary to defend their environment and community.

Citizen Amici respectfully submit that good cause exists to permit Citizen Amici to file an amicus brief that will aid the Court in its resolution of the Motion. Citizen Amici's proposed amicus brief includes: (1) a discussion of the vital role that a citizen's constitutionally protected right to petition, including through litigation, plays in protecting the public's rights; (2) a summary of Hawai'i's previous citizen engagement efforts and litigation that have played a key role in ensuring the protection of all citizens' rights; and (3) a description of the threats that "Strategic Litigation Against Public Participation" ("SLAPP") claims pose to citizen-initiated litigation, the rule of law, and Hawai'i's environmental and cultural resources. Citizen Amici's proposed amicus brief is attached as Exhibit A.

This Motion is brought pursuant to Rule 7 of the Hawai'i Rules of Civil Procedure. It is based upon the Proposed Amicus Brief, and the Declaration of Counsel.

Counsel for the Citizen Amici sought the position of counsel for Plaintiffs, for the Developer, and for Defendant the City and County of Honolulu on the Citizen Amici's Motion for Leave to File Amicus Brief. Plaintiffs' counsel does not oppose this Motion. Mr. Tobin, counsel for the Developer, indicated that he opposes this Motion. Mr. Saito, counsel for the City, did not indicate whether he opposes this Motion.

DATED: Honolulu, Hawai‘i, October 13, 2020.

/s/ 

RYAN D. HURLEY
Attorney for Amicus Curiae
CONSERVATION COUNCIL FOR HAWAI‘I;
FRIENDS OF LANA‘I; KAHEA: THE
HAWAIIAN-ENVIRONMENTAL ALLIANCE;
KEEP THE NORTH SHORE COUNTRY; LIFE
OF THE LAND; MĀLAMA KAKANILUA;
MAUI TOMORROW FOUNDATION; SIERRA
CLUB OF HAWAI‘I; WEST MAUI
PRESERVATION ASSOCIATION; HERMINA
MORITA; and CAROL WILCOX

EXHIBIT A

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HANAPOHAKU LLC

Counterclaim Plaintiff,

v.

SAVE SHARKS COVE ALLIANCE,
MĀLAMA PŪPŪKEA-WAIMEA,
HAWAI‘I’S THOUSAND FRIENDS,
LARRY McELHENY, JOHN THIELST,
and CORA SANCHEZ,

Counterclaim Defendants.

AMICUS BRIEF OF THE CONSERVATION COUNCIL FOR HAWAI‘I; FRIENDS OF LANA‘I; KAHEA: THE HAWAIIAN-ENVIRONMENTAL ALLIANCE; KEEP THE NORTH SHORE COUNTRY; LIFE OF THE LAND; MĀLAMA KAKANILUA; MAUI TOMORROW FOUNDATION; SIERRA CLUB OF HAWAI‘I; WEST MAUI PRESERVATION ASSOCIATION; HERMINA MORITA; and CAROL WILCOX

I. INTRODUCTION

The Conservation Council for Hawai‘i ("CCH"); Friends of Lana‘i ("FOL"); KAHEA: The Hawaiian-Environmental Alliance ("KAHEA"); Keep the North Shore Country ("KNSC"); Life of the Land ("LOL"); Mālama Kakanilua ("Mālama"); Maui Tomorrow Foundation ("Maui Tomorrow"); Sierra Club of Hawai‘i ("Sierra Club"); and West Maui Preservation Association ("WMPA"); Hermina Morita ("Morita"); and Carol Wilcox ("Wilcox") (collectively, "Citizen Amici") respectfully submit this brief as *amici curiae* in support of Counterclaim Defendants Save Sharks Cove Alliance ("SSCA"), Mālama Pūpūkea-Waimea ("MPW"), Hawai‘i’s Thousand Friends ("HTF"), Larry McElheny, John Thielst, and Cora Sanchez’s (collectively, "Save Sharks Cove") Joint Renewed Motion for Judgment on the Pleadings (the "Motion") on Defendant/Counterclaimant Hanapohaku LLC’s ("Developer") Counterclaims.

The Developer seeks to chill the rights of community groups and members of the public in Hawai‘i to petition their government—indeed, to seek the *protection* of their government with respect to proper land use and environmental permitting processes. The Counterclaim has already burdened the speech and petition rights of Save Sharks Cove by requiring substantial

additional staff, volunteer, and attorney time; adding to litigation costs; stifling the free speech and educational outreach of the plaintiffs; and distracting the parties and the Court from the central issues in this case. Allowing the Counterclaim to survive any longer only deepens the serious—and *intentional*—detrimental effects on the engagement of our civic community in Hawai‘i as well as increases the threats to environmental and cultural resources. Civic groups must often resort to public interest litigation after exhausting other means of redress and petition. The right of citizens to bring cases against the government, and the private entities seeking government approval, must be protected from reprisal.

This brief provides the Court with: (1) a discussion of the vital role of a citizen’s constitutionally protected right to petition, including through litigation, in protecting the public’s rights; (2) a summary of Hawai‘i’s previous citizen engagement efforts and litigation that have been key to protecting the rights of all citizens; and (3) a description of the threats that allowing such punitive claims poses to citizen engagement, the rule of law, and Hawai‘i’s environmental and cultural resources.

II. ARGUMENT

A. **The Right of Citizens To Petition Their Government, Including Through Litigation, Is Protected by the Federal and State Constitutions and Vital to Protecting Other Rights.**

The right of citizens to petition their government, including through litigation, is protected by our federal and state Constitutions. This fundamental right is a vital cornerstone to protecting other rights, such as civil liberties and the right to a clean and healthful environment. Both the United States Constitution and the Constitution of the State of Hawai‘i explicitly protect “the right of the people ... to petition the government for a redress of grievances.” *See* U.S. Const. amend. I; Haw. Const. art. I, § 4 (together with petition clause of U.S. Const. amend. I, the “Petition Clauses”).

The Petition Clauses directly protect “[l]itigation activities constituting ‘communications to the court,’” including the filing of “complaints.” *Lesane v. Hawaiian Airlines, Inc.*, 2020 WL 954964, *3 (D. Haw., Feb. 27, 2020) (citations omitted). And while the Petition Clauses refer to claims against “the government,” their protections also extend to filing claims against those who seek the government’s imprimatur for their activities, such as through permitting or licensing, ensuring that those processes are not improperly co-opted by private actors. *See, e.g., Oregon Nat. Res. Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991) (noting that “petitioning activity” includes claims against U.S. Forest Service and contractor submitting logging bids).

Civic engagement in “petitioning activity,” including lawsuits against governments and private entities that receive permits or authority to operate from the government, is one of the most important characteristics ensuring the health of our democracy. The “right to petition” is “integral to the democratic process,” *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388 (2011), and is a means by which we make explicit the notion “implicit in the democratic process ... that government should be accountable for its actions.” *Sierra Club v. Superior Court*, 57 Cal.4th 157, 164 (2013) (internal quotation marks and citations omitted).

These kinds of retaliatory claims or lawsuits against citizens seeking administrative or judicial redress are generally called “Strategic Litigation Against Public Participation” or “SLAPP” suits. The term “SLAPP” was first coined by Professors George Pring and Penelope Canan in the late 1980s in a seminal book on the topic. George W. Pring & Penelope Canan, Slapps: Getting Sued for Speaking Out 3 (1996). Development and zoning cases along with environmental and animal rights cases are the context for almost half of all SLAPPs, with civil rights and employment not far behind. *Id.* at 6.

SLAPPs are usually brought in an attempt to gain strategic advantage even though the filer has little chance of prevailing. “While the developer may realize that her SLAPP suit has no chance of winning on the merits, she knows that the average citizen dislikes going to court, cannot afford large attorney's fees, will be inconvenienced by court appearances and discovery, and will be less likely to speak out either during or after the suit.” Dwight Merriam & Jeffrey Benson, Identifying and Beating a Strategic Lawsuit Against Public Participation, 18 Duke Envtl. L & Policy F. 17, 17 (1993).

SLAPPs rarely withstand judicial scrutiny yet they inflict significant damage until dismissed. After reviewing leading case law, the most recent statutes, and other resources on the subject, SLAPP expert Lori Potter concluded "the First Amendment guarantees the right of interested parties to attempt to enlist the government on their side of an issue, and almost all SLAPPS are ultimately dismissed." Lori Potter & Cory Haller, SLAPP 2.0: Second Generation of Issues Related to Strategic Lawsuits Against Public Participation, 45 Envtl. L. Rep. 10136, 10141 (2015); *see also* Lori Potter, Strategic Lawsuits Against Public Participation and Petition Clause Immunity, 31 Envtl. L. Rep. 10852 (July 2001).

The potential negative implications of permitting SLAPP claims in Hawai‘i are further explored below.

B. Robust Citizen Engagement and Litigation Has Been and Continues to Be Essential to the Protection of Environmental and Cultural Rights in Hawai‘i.

Robust citizen engagement gives voice to important environmental and cultural values throughout the United States and in Hawai‘i. Various forms of engagement -- e.g., public testimony, formal comments, administrative proceedings, and litigation -- all play a key role in ensuring the protection of the rights of all citizens. The Hawai‘i State Constitution has numerous provisions that enshrine these rights “for the benefit of the people.” *See* Article XI, Sec. 9 (“Each

person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.); Art. XI, Sec. 1 (“All public natural resources are held in trust by the State for the benefit of the people.”); Article XI, Sec. 7 (“The State has an obligation to protect, control and regulate the use of Hawai‘i’s water resources for the benefit of its people.”); Article XII, Sec. 7 (“The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.”).

Hawai‘i’s Constitution also directly authorizes citizen enforcement of these environmental and cultural rights through legal proceedings. Article XI, Sec. 9 (“Any person may enforce this right [“to a clean and healthful environment”] against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.”). In fact, citizen enforcement of our environmental and cultural protection laws is essential to supplement government enforcement of numerous statutory protections at the federal, state, and county levels. Government agencies do not always have sufficient resources or willpower to enforce and monitor all of the laws they are entrusted with enforcing. Sometimes government itself violates the law. To ensure checks and balances, Congress and the Hawai‘i Legislature have recognized and endorsed citizen lawsuits in many areas of environmental and cultural rights. SLAPPs thus thwart the legislative as well as the constitutional protections for citizen participation in the legal process.

For the past five decades, citizen-initiated litigation has been at the forefront of constitutional, statutory, and common law protections for environmental and cultural rights in

Hawai‘i, through the authorized use of the judicial process in our state and federal courts. Such citizen lawsuits are frequently brought against government agencies that are either failing to uphold the law or simply ignoring it. In some cases, the private entity or permittee involved—a land developer or an industrial facility—is also a defendant. These citizen lawsuits are brought as a last resort. Community members have usually participated faithfully in a lengthy administrative process and provided input, but have nonetheless been ignored by the agencies and entities charged with protecting the public’s interest. Agencies and entities sometimes rush head-long into promoting projects, ignoring meaningful citizen objections, and even side-stepping the intent or letter of the laws that govern public decision-making processes.

Citizen suits are not easy to bring—or win. They involve endless hours of volunteer time from the organizations and their members, the major burden of shouldering the costs of filing and hiring experts, and the expense of legal counsel, often stretching over many years. Citizens groups do not take such steps lightly and do not always succeed. Nonetheless, despite immense challenges, citizen suits in Hawai‘i do often prevail in whole or in part and—with the neutral forum and rules provided by an independent judiciary —often establish significant legal precedent that influences future state policies and jurisprudence. Citizen-initiated litigation reinforces fair and due process, for example, by ensuring development projects that seek to skirt the law are held to the same standards and processes as projects that do comply with the law.

These cases would not likely succeed—much less be initiated—if the judiciary allowed the kind of intentional, tactical interference raised by the Defendant’s highly unusual counterclaims in this case. In fact, as explained in Section 3, in the past fifty years of environmental litigation in Hawai‘i, only two previous SLAPP-like cases by

landowners/developers have been identified: one on Kaua‘i and one on Hawai‘i Island.¹ In both cases, which do not have reported decisions on point and apparently settled for no damages, the developer’s claims ultimately did not prevail.

On the other hand, since the 1970, the remarkable number of successful public interest cases brought by citizen groups in Hawai‘i to protect environmental and cultural values indicates how essential these cases have been to vindicate public rights. The review below of over twenty major decisions by the Hawai‘i Supreme Court² that found in favor of environmental and cultural groups demonstrates that our State judiciary often embraces the claims, theories, and contributions made by such plaintiffs. Often, the Court’s disposition of issues addressed in these cases has set significant precedents.

Notable cases decided from the 1980s through the 1990s include: *Mahuiki v. Planning Comm’n*, 65 Haw. 506, 654 P.2d 874 (1982) (finding for cultural practitioners that Kaua‘i County Planning Commission had violated the Coastal Zone Management Act by issuing invalid Special Management Area Permit for a proposed condominium and residential project); *Pearl Ridge Estates Cmty. Ass’n v. Lear Siegler, Inc.*, 65 Haw. 133, 648 P.2d 702 (1982) (holding for citizens groups that reclassification of conservation lands to other uses requires the submittal of an environmental assessment under H.R.S. Chapter 343); *Alaloa v. Planning Comm’n of County of Maui*, 68 Haw. 135, 705 P.2d 1042 (1985) (holding in favor of cultural group that Maui

¹ Documentation is not available regarding the Hawai‘i case, *Protect Puako v. County of Hawai‘i & Bridge Puako LLC*, Civ. No. 00-1-4279 (Third Circuit), where the developer brought a counterclaim against the citizen groups challenging the coastal development.

² Citizens groups in Hawai‘i have also successfully litigated several major environmental and cultural rights cases in federal court, dating back to the 1970s starting with a case involving the bombing of the Island of Kaho‘olawe, *Alului v. Brown*, 437 F. Supp. 602 (D. Haw. 1977) (granting partial summary judgment to plaintiffs and ordering new environmental impact statement due to the discovery of 92 cultural sites) through the very recent United States Supreme Court decision in *County of Maui v. Maui Wildlife Fund, et al*, 590 U.S. ___, 140 S. Ct. 1462 (2020) (ruling in favor of citizen groups that a County of Maui wastewater treatment plant required a Clean Water Act permit for polluted discharge through groundwater into the ocean).

County Planning Commission improperly granted a Special Management Area Permit required under the Coastal Zone Management Act for developer's beachfront condominium project); *Sandy Beach Def. Fund v. City Council of the City & County of Honolulu*, 70 Haw. 361, 773 P.2d 250 (1989) (denying citizen groups' claims that City and County of Honolulu processes for approving Special Management Area permit were invalid but clarifying the law regarding the City's administrative procedures under the Coastal Zone Management Act); *Public Access Shoreline Hawai'i v. Planning Comm'n*, 79 Haw. 425, 903 P.2d 1246 (1995) (finding that public interest group and an individual had standing to challenge a Special Management Area Permit for a developer's resort complex on Hawai'i Island, establishing seminal case law on agency obligations to affirm traditional and customary rights of Native Hawaiians protected by custom, the Hawai'i Constitution, and state law); *Kahana Sunset Owners Ass'n v. County of Maui*, 86 Haw. 66, 947 P.2d 378 (1997) (finding that the County improperly granted a Special Management Area Permit that lacked proper environmental review under H.R.S. Chapter 343); *Citizens for the Prot. of the North Kohala Coastline v. County of Hawai'i*, 91 Haw. 94, 979 P.2d 1120 (1999) (finding for plaintiffs that the County had improperly granted Special Management Area permit for private resort development along Kohala coastline that required an environmental assessment); *Curtis v. Bd. of Appeals, County of Hawai'i*, 90 Haw. 384, 978 P.2d 822 (1999) (upholding neighbors' claims against County that valuation of a cell tower development in agricultural district should have required a Special Management Area major permit instead of a minor permit); *Ka Pa'akai o Ka 'Aina v. Land Use Comm'n*, 94 Haw. 31, 7 P.3d 1068 (2000) (agreeing with cultural group opposing development permit that all state and county agencies have affirmative obligation to protect traditional and customary rights of Native Hawaiians); *In re Water Use Permit Applications (Waiahole I)*, 94 Haw. 97, 9 P.3d 409 (2000),

and *In re Water Use Permit Applications (Waiahole II)*, 96 Haw. 27, 25 P.3d 802 (2001) (finding in favor of citizen groups and establishing seminal case law that the public trust doctrine controls the management and allocation of freshwater under custom, the Hawai'i Constitution, and the State Water Code); *Sierra Club v. State Office of Planning*, 109 Haw. 411, 126 P.3d 1098 (2006) (finding that a developer seeking a district boundary amendment from the Land Use Commission was required to comply with H.R.S. Ch. 343 at the earliest practicable time); *Sierra Club v. Dep't of Transp. (Superferry I)*, 115 Haw. 299, 343, 167 P.3d 292, 33 (2007) (finding in favor of citizen groups that the State Department of Transportation had illegally exempted from environmental review under H.R.S. Chapter 343 the State's \$42 million harbor improvements project to facilitate the private Superferry); and *Sierra Club v. Dep't of Transp. (Superferry II)*, 120 Haw. 181, 202 P.3d 1226 (2009) (agreeing with plaintiffs that Act 2, which purported to exempt the Superferry from H.R.S. Chapter 343, was unconstitutional).

In the past ten years, additional notable decisions include: *Unite Here! Local 5 v. City & County of Honolulu (Turtle Bay)*, 123 Haw. 150, 181, 231 P.3d 423, 454 (2010) (finding for citizen plaintiffs that the City and County of Honolulu should have required a supplemental environmental impact statement under H.R.S. Chapter 343 for applicant resort's subdivision application); *County of Hawai'i v. Ala Loop Homeowners' Ass'n*, 123 Haw. 391, 235 P.3d 1103 (2010) (finding that article XI, section 9 creates a private right of action for citizens to enforce Chapter 205 in a challenge to a proposed charter school and that the plaintiff homeowners' association had standing to sue); *In re 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Haw. 228, 287 P.3d 129 (2012) (finding for cultural and environmental groups that the State Commission on Water Resource Management had violated its fiduciary duty under the Hawai'i Constitution to take the public trust into account in its

allocation of fresh water resources on Maui); *Kaleikini v. Yoshioka*, 128 Haw. 53, 283 P.3d 60 (2012) (ruling in favor of cultural practitioner that the State and the City and County of Honolulu were required to complete an Archaeological Inventory Study for the entire high-capacity rail project under the Hawai‘i’s Historic Preservation law even if not in the timely and complete manner plaintiff requested); *Kilakila ‘O Haleakalā v. University of Hawai‘i & David Lassner*, 138 Haw. 364, 382 P.3d 176 (2016) (holding against cultural group, finding that the University of Hawai‘i’s Management Plan for the summit of Haleakalā, Maui was sufficient, but ruling in the cultural group’s favor that declaratory actions under H.R.S. Ch. 343 were not confined to the record below); *In re Application of Maui Elec. Co., Ltd.*, 141 Haw. 249, 408 P.3d 1 (2017) (finding in favor of citizen plaintiffs that the Hawai‘i Public Utilities Commission’s decision to deny citizen group’s intervention in a Power Purchase Agreement for a fossil fuel plant violated the process because the group had a protected property right to a clean and healthful environment under Art. XI, Sec. 9 of the Hawai‘i Constitution); *Umberger v. Dep’t of Land and Nat. Res.*, 140 Haw. 500, 403 P.3d 277 (2017) (ruling in favor of citizen groups that the State Department of Land and Natural Resources violated H.R.S. Chapter 343 by continuous issuance of commercial and recreational aquarium fish collection permits without environmental review); *In re HELCO*, 445 P.3d 673 (2019) (ruling in favor of Life of the Land that Public Utilities Commission erred by failing to explicitly consider greenhouse gas emissions in approving a power purchase agreement for biomass-fueled energy production facility); *Ching v. Case*, 145 Haw. 148, 449 P.3d 1146 (2019) (ruling that the State Board of Land and Natural Resources had violated its fiduciary duty under Art. XI, Sec. 1 of the Hawai‘i Constitution by failing to monitor land leased to the United States military); *In re The Gas Co.*, 147 Haw. 186, 465 P.3d 633 (finding for

citizen intervenors that State Public Utilities Commission improperly limited consideration of LNG projects' greenhouse gas impacts and two non-profit groups had standing to appeal.).

Viewed cumulatively, these cases brought by citizen groups made remarkable contributions to the rule of law in Hawai'i. If SLAPP claims had been asserted against the citizen plaintiffs in these cases, major opinions issued by the Hawai'i Supreme Court -- as well as successful intermediate appellate and lower-court litigation -- could have been erased from the legal history of our State.

C. Allowing SLAPP Claims To Threaten Public Interest Litigants Endangers Civic Engagement, The Rule of Law, and Risks Irreparable Harm for Hawai'i.

Allowing SLAPP claims to threaten public interest litigants such as Save Sharks Cove and the Citizen Amici threatens civil engagement, the rule of law, and constitutionally protected rights in Hawai'i. Such claims also eviscerate key tools that civic groups, cultural practitioners, and citizens use to protect their rights. Courts have long recognized dangers posed by SLAPPs:

SLAPP suits function by forcing the target into judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the situation can be stretched out, the more litigation can be churned, the greater the expense that can be inflicted and the closer the SLAPP filer moves to success... The ripple effects of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent.

Gordon v. Marone, No. 185 44/90, slip op. at 26-28 (Sup. Ct. Westchester County N.Y., AAPR. 13, 1992), quoted in Pring & Canan, *supra*, at 11.

SLAPPs are usually not about winning or losing on the merits, but rather about stifling and discouraging debate on questions that are of public importance and critical to our democracy. When SLAPP claims are allowed to linger as a cloud over litigation, it emboldens

and encourages similar tactical litigation, threatening other community/civic groups and individuals who file citizen suits.

Typically, even hard-fought citizen suit litigation in Hawai‘i is carried out with civility. SLAPP suits in Hawaii have been rare. As explained by several Amici, and as further detailed in the attached Declaration of Counsel, the threat of SLAPP litigation, such as the counterclaims filed by the Developer in this case, poses real and potentially irreparable harm.

One of the two known SLAPP-like suits filed in Hawai‘i started in November 1993. Amici Morita and Wilcox were among multiple public officials on Kaua‘i sued in Federal Court for \$36 million *in both their official and individual capacities* for regulatory actions. The plaintiffs brought suit claiming interference in business. All of the defendants were incrementally dismissed, with prejudice, supporting the contention that the suit was without merit and meant solely to intimidate, distract, silence, and harm the public servants involved in the case. Although dismissed, the litigation inflicted considerable harm. Morita noted that "the only reason she had legal representation in her individual capacity was because an attorney agreed to represent her *pro bono*." The final defendants were dismissed almost three years later.

The other Amici are also threatened by allowing SLAPPs to flourish in any similar context. WMPA, which has been involved in significant environmental litigation at both the state and federal level, notes: "Were our opponents permitted to abuse the legal system to intimidate WMPA with frivolous claims intended to drain our scarce resources, we could not continue our public interest work." Similarly, Maui Tomorrow states that if this SLAPP suit were allowed to proceed it "would severely constrain our ability - as an organization, and as individuals - to speak out against unwise development proposals. This would significantly hamper our ability to

achieve our mission, and would very likely have an adverse impact on our ability to successfully protect Maui's environment and quality of life."

KNSC, which has successfully protected the North Shore of O‘ahu, states "The right to seek relief through the courts is undeniably established. Efforts to stifle free speech, intimidate opposition and harass those who would step forward to seek relief must never be condoned."

The Sierra Club of Hawai‘i was a plaintiff along with several other citizen groups that recently prevailed in the U.S. Supreme Court in a case with nationwide implications finding that the County of Maui violated the federal Clean Water Act. The Sierra Club "considers access to the courts as fundamental to the efficacy of Hawai‘i’s laws. When the laws designed to protect Hawai‘i’s amazing natural environment are misapplied or ignored, then concerned citizens can seek remedy from the court system. However, if asking the courts for help comes at the risk of significant financial liability, then citizens will be discouraged from seeking remedy for the harms they suffer or ensuring laws are evenly enforced."

Finally, local cultural groups are especially susceptible to the negative impacts of SLAPP suits. Mālama notes that it "regularly speaks out against misconduct of government employees, developers, archaeologists, historians, non-archaeologist personnel, and other, often powerful entities where their actions threaten the dignity or existence of Maui's iwi kupuna and historical and other indigenous cultural sites and features. Were these opponents permitted to abuse the legal system to intimidate Mālama Kakanilua with frivolous claims intended to drain our scarce resources, we could not continue our public interest work."

The above comments from Amici are representative of the concerns expressed by all Citizen Amici members, as further detailed in the Declaration of Counsel.

III. CONCLUSION

Citizen Amici respectfully request that the Court grant the Motion for Leave to File Amicus Brief in Support of Counterclaim Defendants' Joint Renewed Motion for Judgment on the Pleadings and accept this Amicus Brief as part of the record in this case.

DATED: Honolulu, Hawai'i, _____, ____, 2020.

/s/

RYAN D. HURLEY
Attorney for Amicus Curiae
CONSERVATION COUNCIL FOR HAWAI'I;
FRIENDS OF LANA'I; KAHEA: THE
HAWAIIAN-ENVIRONMENTAL ALLIANCE;
KEEP THE NORTH SHORE COUNTRY; LIFE
OF THE LAND; MĀLAMA KAKANILUA;
MAUI TOMORROW FOUNDATION; SIERRA
CLUB OF HAWAI'I; WEST MAUI
PRESERVATION ASSOCIATION; HERMINA
MORITA; AND CAROL WILCOX

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SAVE SHARKS COVE ALLIANCE,
MĀLAMA PŪPŪKEA-WAIMEA,
HAWAI'I'S THOUSAND FRIENDS,
LARRY McELHENY, JOHN THIELST,
CORA SANCHEZ, and SURFRIDER
FOUNDATION

Plaintiffs,

v.

CITY AND COUNTY OF HONOLULU;
CITY COUNCIL OF THE CITY AND
COUNTY OF HONOLULU;
DEPARTMENT OF PLANNING AND
PERMITTING OF THE CITY AND
COUNTY OF HONOLULU;
HANAPOHAKU LLC; DOES 1-10,

Defendants.

HANAPOHAKU LLC

Counterclaim Plaintiff,

v.

SAVE SHARKS COVE ALLIANCE,
MĀLAMA PŪPŪKEA-WAIMEA,
HAWAI'I'S THOUSAND FRIENDS,
LARRY McELHENY, JOHN THIELST,
and CORA SANCHEZ,

Counterclaim Defendants.

Civil No. 19-1-0057-01 JHA
(Declaratory and Injunctive Relief)

DECLARATION OF COUNSEL

DECLARATION OF COUNSEL

I, RYAN D. HURLEY, hereby declare as follows:

1. Amicus Curiae the Conservation Council for Hawai'i ("CCH"); Friends of Lana'i ("FOL"); KAHEA: The Hawaiian-Environmental Alliance ("KAHEA"); Keep the North Shore Country ("KNSC"); Life of the Land ("LOL"); Mālama Kakanilua ("Mālama"); Maui Tomorrow Foundation ("Maui Tomorrow"); Sierra Club of Hawai'i ("Sierra Club"); West Maui Preservation Association ("WMPA"); Hermina Morita ("Morita");

and Carol Wilcox ("Wilcox") (collectively, "Citizen Amici") are represented by Ryan D. Hurley in the above-entitled case.

2. The present motion is based on the following representations by Citizen Amici to counsel:
 - a. Conservation Council for Hawai'i ("CCH") is one of Hawai'i's oldest and most effective wildlife protection organizations. Since 1950, CCH has been on the forefront of the environmental movement in Hawai'i and a leader in shaping some of the most important environmental policies and programs in the Islands.
 - b. Friends of Lana'i ("FOL") was created in 2010 to give voice to the many residents of Lana'i and others in the State of Hawai'i who strongly opposed the Lana'i Wind Power Plant Project proposed by developer Castle & Cooke and Hawaiian Electric Industries. Since then, FOL has sponsored and acted as spokesperson for educational activities and community conversations about a variety of environmental issues.
 - c. KAHEA: The Hawaiian-Environmental Alliance ("KAHEA") is a community-based organization founded in 2000, working to improve the quality of life for Hawai'i's people and future generations through the revitalization and protection of Hawai'i's unique natural and cultural resources. KAHEA advocates for the proper stewardship of our resources and for social responsibility by promoting cultural understanding and environmental justice.
 - d. Keep the North Shore Country ("KNSC") is a non-profit organization founded in 2006 working to preserve, protect, and enhance the heritage and rural character of the North Shore of O'ahu, Hawai'i, in partnership with communities from Ka'ena Point to Kahalu'u.

- e. KNSC believes the right to seek relief through the courts is undeniably established. Efforts to stifle free speech, intimidate opposition and harass those who would step forward to seek relief must never be condoned.
- f. For over fifty years, Life of the Land ("LOL") has been a leading Hawai'i energy, environmental, and community action group advocating for the people and 'āina. Its mission is to preserve and protect the life of the land through sound energy and land use policies, and to promote open government through research, education, advocacy, and when necessary, litigation.
- g. Mālama Kakanilua ("Mālama"), a non-profit organization is dedicated to advocating for the identification, recognition, preservation, and protection of all significant historical and indigenous cultural sites and features as well as indigenous cultural properties on the island of Maui.
- h. Mālama regularly speaks out against misconduct of government employees, developers, archaeologists, historians, non-archaeologist personnel, and other, often powerful entities where their actions threaten the dignity or existence of Maui's iwi kupuna and historical and other indigenous cultural sites and features. "Were these opponents permitted to abuse the legal system to intimidate Mālama Kakanilua with frivolous claims intended to drain our scarce resources, we could not continue our public interest work."
- i. For over thirty years, Maui Tomorrow Foundation ("Maui Tomorrow"), a non-profit community organization, has been protecting Maui's precious natural areas and prime open space for recreational use and aesthetic value, promoting the concept of ecologically sound development, and preserving the rural lifestyle on Maui.

- j. Maui tomorrow believes that allowing this SLAPP suit "would severely constrain our ability - as an organization, and as individuals - to speak out against unwise development proposals. This would significantly hamper our ability to achieve our mission, and would very likely have an adverse impact on our ability to successfully protect Maui's environment and quality of life."
- k. Since 1968, the Sierra Club of Hawai'i ("Sierra Club"), a non-profit organization, has been committed to defending everyone's right to a healthy environment and protecting Hawai'i's unique natural resources. It relies on volunteers to support outdoor education programs, trail and native species restoration projects, public interest litigation, and grassroots advocacy for sound environmental policies at county, state, and federal levels of government.
- l. The Sierra Club is concerned about this case because it could "erect a new hurdle for groups like ours to access the court system." The Sierra Club considers access to the courts as fundamental to the efficacy of Hawai'i's laws. When the laws designed to protect Hawai'i's amazing natural environment are misapplied or ignored, then concerned citizens can seek remedy from the court system. However, if asking the courts for help comes at the risk of significant financial liability, then citizens will be discouraged from seeking remedy for the harms they suffer or ensuring laws are evenly enforced.
- m. West Maui Preservation Association ("WMPA") is a non-profit organization founded in 2004 dedicated to preserving, protecting, and restoring the natural and cultural environment of West Maui, including activities that enhance the natural beauty, cultural heritage and public enjoyment of the West Maui region.

- n. WMPA states "Were our opponents permitted to abuse the legal system to intimidate WMPA with frivolous claims intended to drain our scarce resources, we could not continue our public interest work."
- o. Kaua'i residents Hermina Morita ("Morita") and Carol Wilcox ("Wilcox") have each been advocates for their community, participating in both their careers and as citizens through testimony, formal public comment, administrative proceedings, and litigation when necessary to defend their environment and community.
- p. Morita and Wilcox were both among the multiple defendants in a SLAPP-like suit filed in Federal Court for \$36,000,000, being sued in both their individual capacities and in their official capacities, as a Planning Commission and County Planner respectively. The lawsuit was filed in Federal Court in November 1993 and was dismissed with prejudice almost three years later.
- q. Morita noted that "the only reason she had legal representation in her individual capacity was because an attorney agreed to represent her pro bono."
- r. Members, supporters, and staff of Citizen Amici routinely appear in state and federal courts, both as parties and as amicus, on matters of significant public concern.
- s. Citizen Amici seeks leave to file an amicus brief in support of Counterclaim Defendants Save Sharks Cove Alliance ("SSCA"), Mālama Pūpūkea-Waimea ("MPW"), Hawai'i's Thousand Friends ("HTF"), Larry McElheny, John Thielst, and Cora Sanchez's (collectively, "Save Sharks Cove") Joint Renewed Motion for Judgment on the Pleadings (the "Motion") on Defendant/Counterclaimant

Hanapohaku LLC's ("Developer") Counterclaims.

- t. The Developer's Counterclaims are matters of crucial public concern to Citizen Amici because the Developer has sued Save Sharks Cove in response to Save Sharks Cove's criticism of, and filing of litigation relating to, the Developer's proposed commercial land development on the North Shore of O'ahu. The Counterclaims thus raise issues of the right to petition protected under the Constitutions of the State of Hawai'i and of the United States.

Under these circumstances, Citizen Amici respectfully submits that good cause exists to permit Citizen Amici to file an amicus brief setting forth the following information, which will aid the Court in its resolution of the Motion: (1) a discussion of the vital role a citizen's constitutionally protected right to petition, including through litigation, plays in protecting the public's rights; (2) a summary of Hawai'i's previous citizen engagement efforts and litigation that have played a key role in ensuring the protection of all citizens' rights; and (3) a description of the threats that "Strategic Litigation Against Public Participation" ("SLAPP") claims pose to citizen-initiated litigation, the rule of law, and Hawai'i's environmental and cultural resources.

3. Based on the foregoing, on behalf of Citizen Amici, I respectfully request that this Honorable Court grant Citizen Amici leave to file the Amicus Brief submitted concurrently herewith.
4. I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

DATED: Honolulu, Hawai‘i, October 13, 2020.

/s/ 

RYAN D. HURLEY
Attorney for Amicus Curiae
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MAUI TOMORROW FOUNDATION; SIERRA
CLUB OF HAWAI‘I; WEST MAUI
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Plaintiffs,

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CITY AND COUNTY OF HONOLULU;
CITY COUNCIL OF THE CITY AND
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LARRY McELHENY, JOHN THIELST,
and CORA SANCHEZ,

Counterclaim Defendants.

Civil No. 19-1-0057-01 JHA
(Declaratory and Injunctive Relief)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served on the following parties listed below by electronic service through the JEFS E-Filing System:

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Case ID: 1CC191000057

Title: SAVE SHARKS COVE ALLIANCE VS C & C OF HONOLULU

Filing Date / Time: TUESDAY, OCTOBER 13, 2020 03:03:52 PM

Filing Parties: CONSERVATION COUNCIL FOR HAWAII

KAHEA: THE HAWAIIAN-ENVIRONMENTAL ALLIANCE

FRIENDS OF LANAI

MLAMA KAKANILUA

MAUI TOMORROW FOUNDATION

WEST MAUI PRESERVATION ASSOCIATION

SIERRA CLUB OF HAWAII

HERMINA MORITA

CAROL WILCOX

LIFE OF THE LAND

KEEP THE NORTH SHORE COUNTRY

Case Type: Circuit Court Civil

Lead Document(s):

Supporting Document(s): 150-Motion for _____

Document Name: 150-CORRECTED AMICI CURIAE CONSERVATION COUNCIL FOR HAWAII, et al. MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF COUNTERCLAIM DEFENDANTS' JOINT RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS; EXHIBIT A; DECLARATION OF COUNSEL; and CERTIFICATE OF SERVICE

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