

PAUL S. AOKI, 1286
Corporation Counsel
BRAD T. SAITO, 8827
(808) 768-5139
bsaito@honolulu.gov
Deputy Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, Hawaii 96813
Facsimile: (808) 768-5105

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Attorney for Defendants
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

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

SAVE SHARKS COVE ALLIANCE,
MALAMA PUPUKEA-WAIMEA,
HAWAII'S THOUSAND FRIENDS, LARRY
McELHENY, JOHN THIELST, AND CORA
SANCHEZ,

Plaintiffs,

vs.

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)

CITY AND COUNTY OF HONOLULU,
CITY COUNCIL OF THE CITY AND
COUNTY OF HONOLULU AND THE
DEPARTMENT OF PLANNING AND
PERMITTING OF THE CITY AND
COUNTY OF HONOLULU'S
MEMORANDUM IN OPPOSITION TO
PROPOSED AMICUS CURIAE THE
AMERICAN CIVIL LIBERTIES UNION OF
HAWAI'I FOUNDATION'S MOTION FOR
LEAVE TO FILE AMICUS BRIEF IN
SUPPORT OF COUNTERCLAIM
DEFENDANTS' JOINT RENEWED
MOTION FOR JUDGMENT ON THE
PLEADINGS FILED HEREIN ON
OCTOBER 13, 2020; CERTIFICATE OF
SERVICE

HANAPOHAKU LLC

Counterclaim Plaintiff,

vs.

SAVE SHARKS COVE ALLIANCE,
MALAMA PUPUKEA-WAIMEA,
HAWAII'S THOUSAND FRIENDS, LARRY
McELHENY, JOHN THIELST, and CORA
SANCHEZ,

Counterclaim Defendants.

CITY AND COUNTY OF HONOLULU, CITY COUNCIL OF THE CITY AND COUNTY OF HONOLULU AND THE DEPARTMENT OF PLANNING AND PERMITTING OF THE CITY AND COUNTY OF HONOLULU'S MEMORANDUM IN OPPOSITION TO PROPOSED AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF HAWAI'I FOUNDATION'S MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF COUNTERCLAIM DEFENDANTS' JOINT RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS FILED HEREIN ON OCTOBER 13, 2020

COMES NOW, Defendants CITY AND COUNTY OF HONOLULU; CITY COUNCIL OF THE CITY AND COUNTY OF HONOLULU; and the DEPARTMENT OF PLANNING AND PERMITTING OF THE CITY AND COUNTY OF HONOLULU (collectively, "City"), by and through its attorneys PAUL S. AOKI, Corporation Counsel, and, BRAD T. SAITO, Deputy Corporation Counsel, and hereby submits this Memorandum in Opposition to proposed *Amicus Curiae* THE AMERICAN CIVIL LIBERTIES UNION OF HAWAI'I FOUNDATION'S ("Petitioner") *Motion for Leave to File Amicus Brief in Support of Counterclaim Defendants' Joint Renewed Motion for Judgment on the Pleadings* ("Petition") filed herein on October 13, 2020 ("Petition").

I. INTRODUCTION

Petitioner is non-party, non-profit organization that is dedicated to protecting the Bill of Rights and Constitutional freedoms. It has asked this court for leave to file an amicus brief to

support Counterclaim Defendants Save Sharks Cove Alliance et al.’s (“SSCA”) *Joint Renewed Motion for Judgment on the Pleadings*, filed on September 28, 2020 (“Motion”). The Motion seeks dismissal of Defendant and Counterclaimant HANAPOHAKU, LLC’s Counterclaim against SSCA, filed on September 27, 2019.

Although Petitioner is well-intentioned, the City respectfully opposes the Petition for three reasons. First, the Petition does not propose briefing on novel or complex legal issues; the importance of the “right to petition,” contributions of citizen suits to Hawaii environmental law, and the threats posed by SLAPP suits are well-known and do not require special briefing. Second, unlike the Hawai‘i Rules of Appellate Procedure, the Hawai‘i Rules of Civil Procedure do not provide for amicus briefing. *C.f.* HRAP R. 28 and HRCP (generally). And third, the proposed amicus brief does not address the dispositive issues raised by SSCA’s Motion (i.e., whether the Noerr-Pennington Doctrine applies to statutory or common law claims; whether SSCA’s Complaint may be construed as “sham litigation,” and whether the Noerr-Pennington Doctrine is a defense or immunity from suit).

II. DISCUSSION

The importance and contributions of citizen suits to Hawai‘i law is undeniable; Hawai‘i case law, and environmental case law in particular, is filled with examples of how individuals and special interest groups have helped to shape our legal landscape. *See, e.g., Unite Here! Local 5 v. City & Cty. of Honolulu*, 123 Hawai‘i 150, 179, 231 P.3d 423, 452 (2010) (*requiring a supplemental EIS absent design changes in the approved project*); *Sierra Club v. DOT*, 120 Hawai‘i 181, 185, 202 P.3d 1226, 1230 (2009) (*holding that Haw. Sess. Laws Act 2, which permitted the super ferry to operate a ferry service under alternative environmental review processes rather than the more rigorous requirements of Haw. Rev. Stat. ch. 343, was an*

unconstitutional “special law”); and, Kaleikini v. Yoshioka, 128 Hawai‘i 53, 78-81, 283 P.3d 60, 85-88 (2012) (*holding that HRS Chapter 6E and its implementing rules do not allow for a phased HRS Chapter 6E archeological review*). The City surely does not dispute the importance of public participation in the legal process when environmental interests or important public rights are at stake. However, the City is opposed to Petitioner’s proposed amicus brief because it is not material to the issues that must be decided by the Court in order to resolve SSCA’s Motion.

SSCA’s Motion and Hanapohaku’s counterclaim against SSCA will ultimately be determined based on the applicability of the *Noerr-Pennington* doctrine and whether SSCA’s claims are “sham litigation.” Petitioner’s proposed brief does not address the first issue and the second issue requires a focused, fact specific examination of the record. Briefing on the “right to petition” and the public policy reasons for Anti-SLAPP legislation will distract the Court from this task and encourage results based decision-making rather than objective legal analysis. As is the case with most modern *amici*, Petitioner’s position and interest in this issue are far removed from that of an objective third party. Petitioner hopes to advocate for legal policy and analyze the consequences of “precedent” that may be established by this court. However, such briefing is clearly more appropriate at the appellate court level, after the development of a complete factual record by the trial court.

While Petitioner’s commitment to its public and environmental interests is laudable, it should trust the trial court to make the right decision and allow the Court to focus on the real parties in interest and the relevant law and facts. If Petitioner disagrees with the trial court’s decision and the opportunity presents itself on appeal, it may then seek amicus status as allowed by Rule 28(g) of the Hawaii Rules of Appellate Procedure. Unlike those rules, the Hawaii Rules

of Civil Procedure simply do not afford non-parties the opportunity to submit briefing on issue before the trial court.

III. CONCLUSION

For all of the foregoing reasons, the City respectfully requests that the Petition be denied in all respects.

DATED: Honolulu, Hawaii, October 14, 2020.

PAUL S. AOKI
Corporation Counsel

By /s/ Brad T. Saito
BRAD T. SAITO
Deputy Corporation Counsel
Attorney for Defendants
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

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CIVIL NO. 19-1-0057-01 JHA
(Declaratory and Injunctive Relief)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was served electronically through the Judiciary Electronic Filing and Service System (JEFS), upon the following at their last known email address, on October 14, 2020:

MARGARET DUNHAM WILLE
mw@mwlawhawaii.com
TIMOTHY VANDEVEER
tim@mwlawhawaii.com
Margaret Wille & Associates LLC
P. O. Box 6398
Kamuela, Hawaii 96743

Attorneys for Plaintiffs
Save Sharks Cove Alliance
John Thielst
Cora Sanchez

WADE J. KATANO
wkatano@staffcounsel808.com
Law Offices of Leslie R. Kop
1100 Ward Avenue, Suite 500
Honolulu, Hawaii 96814

Co-counsel for Counterclaim Defendant
John Thielst

PAMELA W. BUNN
Pam.Bunn@dentons.com
ERIKA L. AMATORE
erika.amatore@dentons.com
Dentons US LLP
1001 Bishop Street, Suite 1800
Honolulu, Hawaii 96813

Attorneys for Plaintiffs
Malama Pupukeya-Waimea

GENE K. LAU
glau@hamlaw.net
Harrison & Matsuoka
1001 Bishop Street, Suite 2828
Honolulu, Hawaii 96813

Attorney for Plaintiff
Hawaii's Thousand Friends

MICHELE-LYNN E. LUKE
mluke@kdubm.com
BRADFORD K. CHUN
bchun@kdubm.com
Kessner Umebayashi Bain & Matsunaga
220 South King Street, Suite 1900
Honolulu, Hawaii 96813

Attorneys for Counterclaim-Defendant
Larry McElheny

BRETT R. TOBIN
tobin@smlhawaii.com
TERRENCE LEE
lee@smlhawaii.com
Sullivan Meheula Lee LLLP
733 Bishop Street, Suite 2900
Honolulu, Hawaii 96813

Attorneys for Hanapohaku LLC

MARK S. DAVIS
mdavis@davislevin.com
THOMAS M. OTAKE
totake@davislevin.com
Davis Levin Livingston
851 Fort Street, Suite 400
Honolulu, Hawaii 96813

Attorneys for Amicus Curiae
American Civil Liberties Union of Hawaii Foundation

JACQUELYNN K. M. LEVIEN
jackie@bnsklaw.com
1115A Uluopihi Loop
Kailua, Hawaii 96734

Attorneys for Amicus Curiae
American Civil Liberties Union of Hawaii Foundation

RYAN D. HURLEY
ryan@rdhlawhi.com
Law Office of Ryan D. Hurley
P. O. Box 19205
Honolulu, Hawaii 96817

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

DATED: Honolulu, Hawaii, October 14, 2020.

/s/ Brad T. Saito

BRAD T. SAITO

Deputy Corporation Counsel

Attorney for Defendants

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

NOTICE OF ELECTRONIC FILING

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This notification is being electronically mailed to:

Ryan D Hurley (*Ryan@RDHlawHI.com*)

Jacquelynn Kendra Mahina Levien (*jackie@bnsklaw.com*)

Thomas Mineo Otake (*thomas@otakelaw.com*)

Mark S. Davis (*mdavis@davislevin.com*)

Wade Jiro Katano (*wkatano@staffcounsel1808.com*)

Bradford K. Chun (*bchun@kdubm.com*)

Michele-Lynn E. Luke (*mluke@kdubm.com*)

Recorded Proceeding 1st Circuit (*CTAVAppeals.1cc@courts.hawaii.gov*)

Timothy Alden Vandever (*tim@mvlawhawaii.com*)

Melenaniikeawak Coleman (*mele.coleman@honolulu.gov*)

Brett Richard Tobin (*tobin@smlhawaii.com*)

Gene K. Lau (*glau@hamlaw.net*)

Pamela W. Bunn (*Pam.Bunn@dentons.com*)

Erika L. Amatore (*erika.amatore@dentons.com*)

Brad Tamio Saito (*bsaito@honolulu.gov*)

First Circuit Court 10th Division (*10thdivision.1cc@courts.hawaii.gov*)

Terrence M. Lee (*lee@smlhawaii.com*)

Margaret Dunham Wille (*mw@mvlawhawaii.com*)

The following parties need to be conventionally served:

ALL PARTIES-RE DOCKET ONLY-NOT PARTY RE SERVICE REQUIREMENT
