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**FIRST CIRCUIT**  
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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 THIS  
MEMORANDUM IN OPPOSITION TO  
PROPOSED AMICI CURIAE  
CONSERVATION COUNCIL OF HAWAI'I  
ET AL.'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 THIS MEMORANDUM IN OPPOSITION TO PROPOSED AMICI CURIAE CONSERVATION COUNCIL OF HAWAI'I ET AL.'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

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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 *Amici Curiae* Conservation Council of Hawai'i et al.'s ("Petitioners") *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 ("Petition").

I. INTRODUCTION

Petitioners are non-party, non-profit organizations and individual citizens that are dedicated to protecting Hawaii's environmental health. They have 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 Petitioners are 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 suit 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. Petitioners hope 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 Petitioners disagree with the trial court's decision and the opportunity presents itself on appeal, they 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  
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City Council of the City and County of  
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Permitting of the City and County of Honolulu

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HANAPOHAKU LLC

Counterclaim Plaintiff,

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SANCHEZ,

Counterclaim Defendants.

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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:

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Sierra Club of Hawai'i; West Maui Preservation Association; Hermina Morita;  
and Carol Wilcox

DATED: Honolulu, Hawaii, October 14, 2020.

*/s/ Brad T. Saito*

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City Council of the City and County of

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# NOTICE OF ELECTRONIC FILING

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

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