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Electronically Filed
FIRST CIRCUIT
1CC191000057
15-OCT-2020
01:42 PM
Dkt. 156 MEO

Attorneys for Defendant/Counterclaim Plaintiff
HANAPOHAKU LLC

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,

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)

DEFENDANT/COUNTERCLAIM
PLAINTIFF HANAPOHAKU LLC'S
OPPOSITION TO 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 OCTOBER 13,
2020; CERTIFICATE OF SERVICE

Non-Hearing Motion

Hearing on Counterclaim Defendants'
Motion:

Date: October 28, 2020

Time: 10:15 a.m.

Judge: Honorable James H. Ashford

Trial Date: February 22, 2021

DEFENDANT/COUNTERCLAIM PLAINTIFF HANAPOHAKU LLC'S OPPOSITION
TO 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 OCTOBER 13, 2020

The proposed amicus brief is both improper and irrelevant and, as such, the Motion for Leave to submit it should be denied in its entirety.

I. DISCUSSION

The sole authority Amicus Curiae the American Civil Liberties Union of Hawai'i Foundation ("ACLU") cites in support of its Motion for Leave to File Amicus Brief is Rule 7 of the Hawai'i Rules of Civil Procedure. But Rule 7, unlike Rule 28(g) of the Hawai'i Rules of Appellate Procedure ("HRAP"), does not contemplate or even mention the filing of amicus briefs in Circuit Court proceedings. And even if one were to attempt to follow the requirements of the HRAP provision, this Motion would be improper as there is insufficient time to set forth a briefing schedule given that Counterclaimant Hanapohaku's opposition brief to the underlying motion is due in less than a week and the hearing is just a week after that. The reason for the distinction between appellate and trial court proceedings is because appellate rulings set legal precedents that could conceivably affect non-parties. There is no such danger in this proceeding that would justify the intervention of a non-party. In other words, there is a reason amicus briefs are contemplated in the appellate rules, but not in the rules before the trial court. If this case ends up on appeal, then the ACLU can seek leave to participate at that stage. Both as a matter of law and as a matter of practicality, there is no justification for allowing its intervention here.

To make matters worse, the proposed amicus brief does not even address the issues raised by Plaintiffs' Renewed Motion for Judgment on the Pleadings. In direct response to comments from this Court, Plaintiffs' Renewed Motion is focused on three questions relating to the *Noerr-*

Pennington Doctrine: (1) whether it applies to statutory claims or also to common law claims; (2) whether Plaintiffs' lawsuit constitutes sham litigation to trigger an exception to the doctrine; and (3) whether the doctrine is a defense to liability or an immunity from suit. Curiously, the proposed amicus brief **does not even mention** the *Noerr-Pennington* Doctrine a single time. Instead, the amicus brief is focused on whether or not Hanapohaku's counterclaims constitute a "SLAPP" lawsuit. But this Court already ruled that the counterclaims were not a SLAPP lawsuit under Hawaii's Anti-SLAPP statute and Plaintiffs do not renew their argument on that issue here. If the purpose of an amicus brief is to help give guidance to the Court on an issue that has been raised, the proposed brief here does not remotely meet that standard and, instead, serves only to confuse matters.

Additionally, it should be noted that there are already six Counterclaim Defendants in this action, being represented by no fewer than eight highly skilled attorneys. Those parties and their counsel are more than capable of raising all the pertinent arguments on the issues at hand without needing to be aided by amicus briefs. Indeed, as the briefing has demonstrated, the Counterclaim Defendants have a far better handle on the facts and law of the present case than the amicus curiae. As such, there is even less justification for taking the unusual, if not unprecedented, action of allowing amicus briefs in this Circuit Court proceeding.

Given that there is no support in the Hawai'i Rules of Civil Procedure for allowing an amicus brief in a Circuit Court case, and in light of the fact that the proposed brief does not even address the issues raised by Plaintiffs' Renewed Motion, the ACLU's request should be denied and the Court should not consider the proposed amicus brief in any respect.

II. CONCLUSION

For the foregoing reasons, Counterclaimant Hanapohaku respectfully requests that the Motion be denied in its entirety.

DATED: Honolulu, Hawai'i, October 15, 2020.

/s/ Brett R. Tobin

TERRENCE M. LEE

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Attorneys for Defendant/Counterclaim Plaintiff
HANAPOHAKU LLC

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Defendants.

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

CERTIFICATE OF SERVICE

Trial Date: Not set

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was duly served upon the following on the date indicated below and by the method indicated:

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DATED: Honolulu, Hawai'i, October 15, 2020.

/s/ Brett R. Tobin

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Save Sharks Cove Alliance, et al. v. City and County of Honolulu, et al.; Civil No. 19-1-0057-01
(JHA); CERTIFICATE OF SERVICE

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01:42 PM
Dkt. 157 NEF

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Case ID: 1CC191000057

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

Filing Date / Time: THURSDAY, OCTOBER 15, 2020 01:42:43 PM

Filing Parties: Brett Tobin

Case Type: Circuit Court Civil

Lead Document(s):

Supporting Document(s): 156-Memorandum in Opposition

Document Name: 156-DEFENDANT/COUNTERCLAIM PLAINTIFF HANAPOHAKU LLC'S OPPOSITION TO AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF HAWAII FOUNDATION'S MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF COUNTERCLAIM DEFENDANTS' JOINT RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS, FILED OCTOBER 13, 2020; CERTIFICATE OF SERVICE

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai'i Electronic Filing and Service Rules.

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