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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

SAVE SHARKS COVE ALLIANCE, MĀLAMA PŪPŪKEA-WAIMEA, HAWAII'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.

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

REPLY TO DEFENDANT CITY AND COUNTY OF HONOLULU'S MEMORANDUM IN RESPONSE TO COUNTERCLAIM DEFENDANTS' JOINT RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS; CERTIFICATE OF SERVICE

Hearing
Date: October 28, 2020
Time: 10:00 a.m.
Judge: Hon. James H. Ashford

Trial Date: February 22, 2021

HANAPOHAKU LLC,

Counterclaim Plaintiff,

v.

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

Counterclaim Defendants.

REPLY TO DEFENDANT CITY AND COUNTY OF HONOLULU'S MEMORANDUM IN RESPONSE TO COUNTERCLAIM DEFENDANTS' JOINT RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS

Counterclaim Defendants Mālama Pūpūkea-Waimea, Save Sharks Cove Alliance, Larry McElheny, John Thielst, Cora Sanchez, and Hawaii's Thousand Friends (collectively, "**Save Sharks Cove**" or "**Plaintiffs**") respectfully submit this Reply to Defendant City and County of Honolulu's (the "**City**") Memorandum in Response (the "**Response**") to Counterclaim Defendants' Joint Renewed Motion for Judgment on the Pleadings (the "**Motion**").

I. INTRODUCTION

Purporting to act as *parens patriae*, the City ostensibly does not take a position on the substantive merits of the Motion, but uses its Response "to aid the Court" by addressing questions that no one has asked, based on claims that have not been pled, and suggesting, without factual support, the applicability of an exception to *Noerr-Pennington* immunity that is reserved for knowing fraud upon, or intentional misrepresentations to, the Court. To further "aid the Court," the City has contrived a novel approach to application of the *Noerr-Pennington* Doctrine based on "the source of liability asserted by the claimant" that is more difficult to apply than the approach mandated by the United States Supreme Court. The only thing in the City's Response that is of assistance to the Court is its acknowledgment that "SSCA's complaint and some of its claims are certainly within the scope of petitioning activities covered by the [Noerr-

Pennington Doctrine]." Response at 5. That, alone, is sufficient to defeat the "sham" exception and require dismissal of Hanapohaku LLC's (the "**Developer**") Counterclaim.[1]

II. THE DEVELOPER HAS NOT ALLEGED A DEFAMATION CLAIM

The City's Response posits that the *Noerr-Pennington* Doctrine does not immunize defamation or libel, and attaches a totally inapposite, unpublished 2004 case from the Southern District of New York in support of that proposition. *See* Response at 5, 11, App'x A. This Court need not delve into that case, or the City's argument, because the Developer ***has not made a claim for defamation or libel***.

The Developer's allegation in Paragraph 27 of its Counterclaim about the "libelous and untrue statements" allegedly made by Counterclaim Defendants on social media was an unsuccessful attempt to satisfy the "willful act in the use of process" element of its Abuse of Process claim, and not an attempt to state a claim for libel or defamation. The Developer conceded in its April 20, 2020 Opposition to the First Motion[2] that "such a publicity campaign standing on its own--conducted not in the context of an ongoing lawsuit--would not be sufficiently tied to legal process to support an abuse of process claim (*though it could give rise to separate claims for defamation or other causes of action*)." *Id.* at 13 (emphasis added).[3]

---

[1] *See Prof. Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993) ("*PRE*") ("If an objective litigant could conclude that the ***suit*** is reasonably calculated to elicit a favorable outcome, the ***suit*** is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail.") (Emphasis added).

[2] The "First Motion" refers to *Counterclaim Defendants' Joint Motion for Judgment on the Pleadings* filed on March 13, 2020.

[3] Moreover, the right to petition protected under *Noerr-Pennington* extends to "conduct intimately related to [] petitioning activities" or "incidental to the prosecution of the suit" such as fundraising and publicity efforts. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 934-35 (9th Cir. 2006).

If the Developer believed it had a cognizable defamation claim, it would have asserted it, which would have required it to identify the false statements that were disseminated and who disseminated them. The Developer did ***not assert*** a claim for "defamation or other causes of action" based on the allegedly false (but never identified) assertions made in connection with the publicity campaign, because it cannot. And the Developer confirmed that "[t]he entire basis for the Counterclaims is that Plaintiffs brought a baseless lawsuit in order to improperly prevent Hanapohaku from pursuing its development project." *Id.* at 14.

III. THE MISREPRESENTATION EXCEPTION TO *NOERR-PENNINGTON* IMMUNITY IS INAPPLICABLE

The City also cavalierly suggests the "misrepresentation" exception to the *Noerr-Pennington* doctrine is applicable here. "Misrepresentation" is a species of sham litigation that no one in this case has charged against Save Sharks Cove. As the Ninth Circuit has explained, "the scope of the sham exception depends on the type of governmental entity involved," and "[w]hen the branch of government involved is a court of law, this circuit recognizes three circumstances in which an antitrust defendant's activities might fall into the sham exception." *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998) (citations omitted).

> First, if the alleged anticompetitive behavior consists of bringing a single sham lawsuit (or a small number of such suits), the antitrust plaintiff must demonstrate that the lawsuit was (1) objectively baseless, and (2) a concealed attempt to interfere with the plaintiff's business relationships….
>
> Second, if the alleged anticompetitive behavior is the filing of a series of lawsuits, "the question is not whether any one of them has merit--some may turn out to, just as a matter of chance--but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival."…
>
> Finally, in the context of a judicial proceeding, ***if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, litigation can be deemed a sham if "a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy***." *Liberty Lake Inv., Inc. v. Magnuson*, 12 F.3d 155, 158 (9th Cir.

1993); *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1260 (9th Cir. 1982).

Id. (some citations omitted).

When the City's response to the First Motion made references to misrepresentation, "inappropriate characterizations" and disingenuousness by Save Sharks Cove, Save Sharks Cove took "emphatic exception to the City's accusations" and assured counsel and the Court that "it has endeavored, and will continue to endeavor, to be honest, candid, forthright, and truthful, in all of its dealings with the City and the Developer--and, it assuredly goes without saying, in all of its representations to the Court."[4]

That has not changed. For the City to casually and gratuitously suggest, with absolutely no substantiating facts (or even allegations), that Save Sharks Cove should lose its petition clause immunity because its counsel has committed knowing fraud upon, or made intentional misrepresentations to, the Court is beyond irresponsible, it is reprehensible, particularly when the City purports to be acting as *parens patriae* (which it is not; the City is a named Defendant in this lawsuit).

IV. THE COURT SHOULD USE THE APPROACH MANDATED BY LAW RATHER THAN THE NOVEL APPROACH ADVANCED BY THE CITY

The City advocates a new "approach" to the *Noerr-Pennington* doctrine that "depends on the source of liability asserted by the claimant." *See* Response at 2, 4, 5, 10. Neither the meaning nor the origin of this "approach" are clear. To the extent the City contends this is the approach required under *Allied Tube & Conduit v. Indian Head*, 486 U.S. 492 (1988), the City

[4] *Reply to Defendant City and County of Honolulu's Memorandum in Response to Counterclaim Defendants' Joint Motion for Judgment on the Pleadings* filed April 23, 2020 at 2.

has misread that case. The *Allied Tube* Court held that *Noerr-Pennington* immunity does not apply to petitioning activity before a private association. *Id*. at 495. The Court indeed stated that the scope of *Noerr-Pennington* protection depends on the "source, context, and nature of the anticompetitive restraint at issue," *id*. at 499, but even the portion of the opinion quoted at length by the City makes clear that the Court was referring to whether the anticompetitive results were from "valid governmental action," as opposed to private action, or a "publicity campaign" as opposed to "less political arenas" such as "administrative or judicial processes." *See* Response at 7 (quoting *Allied Tube*, 486 U.S. at 499-500*; see also Allied Tube* at 500 ("In this case, … [t]he relevant context is thus the standard-setting process of a private association").

Where, as here, the context is judicial petitioning, the "approach" is mandated by *PRE,* and starts from the premise that "[t]hose who petition government for redress are generally immune from antitrust liability." *Id.*, 508 U.S. at 56. When a claim burdens petitioning activities, the claimant must make "specific allegations demonstrating that the *Noerr-Pennington* protections do not apply" because the activity falls within an exception. *Lesane v. Hawaiian Airlines, Inc.*, 2020 WL 954964, *3 (D. Haw., Feb. 27, 2020) (citations omitted). To invoke the "sham" exception for baseless litigation, the claimant must first establish that the lawsuit is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." PRE, 508 U.S. at 60. A court only reaches the second prong of the *PRE* test -- the subjective intent of the litigant -- if it first determines that the lawsuit is objectively baseless. *Id*.

As the City concedes, under the approach mandated by *PRE,* Save Sharks Cove's lawsuit is ***not*** objectively baseless and therefore Save Sharks Cove enjoys *Noerr-Pennington* immunity. Response at 5 ("SSCA's complaint and some of its claims are certainly within the scope of petitioning activities covered by the [*Noerr-Pennington* doctrine]").

DATED: Honolulu, Hawai‘i, October 23, 2020.

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