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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 HANAPOHAKU LLC'S MEMORANDUM IN OPPOSITION TO COUNTERCLAIM DEFENDANTS' JOINT RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS; CERTIFICATE OF SERVICE

Hearing
Date: October 28, 2020
Time: 10:15 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 HANAPOHAKU LLC'S MEMORANDUM IN OPPOSITION TO COUNTERCLAIM DEFENDANTS' JOINT RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS

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

I. INTRODUCTION

The Developer's argument is two-pronged: (1) *Noerr-Pennington* is a federal doctrine limited to statutory claims, and should not be "extended" to state common law claims; and (2) whether Save Sharks Cove's lawsuit constitutes "sham" litigation is a "question of fact" not suitable for dismissal. Both arguments are unavailing.

First, "the *Noerr-Pennington* doctrine" is the name bestowed upon activity that is immunized from suit under the Petition Clause of the First Amendment to the United States Constitution. It is not merely a doctrine of statutory construction. It describes a federal constitutional right, well-defined by the relevant case law, that provides immunity to petitioning conduct, including the filing of Save Sharks Cove's First Amended Complaint (the "**FAC**").

Second, whether a lawsuit is "objectively baseless" under the first prong of the sham litigation exception inquiry, is a question of law. There is no genuine dispute regarding the predicate facts of the FAC, and this Court may determine the question by reviewing the pleadings. The Developer's attempt to generate a question of fact out of whether Save Sharks Cove had commissioned pre-suit scientific studies fails: the FAC does not allege that Save Sharks Cove relied on any data other than that provided by the Developer's own Environmental Impact Statement (the "**EIS**") and Special Management Area ("**SMA**") Major Permit Application.

Third, instead of addressing the legal question of whether the lawsuit was "objectively baseless," the Developer presents excerpts of deposition testimony from the individual plaintiffs -- Mr. Thielst, Mr. McElheny, and Ms. Sanchez -- that purportedly show their "improper desires." *See* Opp. at 11-12. That information is not relevant to the objective or subjective prong of the "sham litigation exception" test, and is wholly gratuitous.

What is more, the Developer's tactical misuse of individual plaintiff depositions (the Developer has not deposed any of the organizational plaintiffs) were clumsy, transparent attempts to ensnare the individual plaintiffs into ridiculous "gotcha" admissions. They do nothing more than demonstrate the Developer's true intent: to use its Counterclaim as an intimidation tactic, in an effort to chill the Plaintiffs' constitutional rights to petition this Court.

For those reasons, and the reasons set forth in the Motion, the Counterclaim should be dismissed with prejudice.

II. LEGAL ANALYSIS

A. Petition Clause Immunity Applies to Common Law Claims

In this Court, United States Supreme Court case law is binding precedent on United States constitutional issues. As such, *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982)

which applied *Noerr* to a state common law claim, governs the analysis. As discussed in the Motion, the U.S. Supreme Court in *NAACP* held that business owners could not prevail on their state law malicious interference claim against protestors who had boycotted their businesses, because the protestors' activities -- "speech, assembly association, and petition" -- were protected under the First Amendment. *See* Mot. at 6-8 (analyzing *NAACP*, 458 U.S. 886).

Following *NAACP*, the federal and state courts that have addressed this issue have concluded that the Petition Clause limits liability for the commission of common law torts. *See* Mot. at 8 (collecting federal cases) & 13-14 (collecting state cases). This includes the United States Court of Appeals for the Ninth Circuit. *See id.* at 9-12; *Oregon Nat. Resources Council v. Mohla*, 944 F.2d 531 (9th Cir. 1991) (dismissing counterclaims against plaintiff for abuse of process and interference with business relations); *Theme Promotions Inc. v. News America Marketing FSI*, 546 F.3d 991, 1007 (9th Cir. 2008) (citing *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988)) ("***There is simply no reasons that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust.***") (emphasis added).

Tellingly, the Developer cites to no case law expressly limiting Petition Clause immunity to statutory claims only. *See* Opp. at 5-6. Instead, the Developer cites only to *Lesane v. Hawaiian Airlines, Inc.* ("***Lesane I***"), 2020 WL 954994 (D. Haw., Feb. 27, 2020) and *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (2006). *Sosa* is a RICO case which does not address immunity to common law claims at all.

And *Lesane I* does not limit Petition Clause immunity to statutory claims. In *Lesane I*, Judge Otake recognized that the magistrate judge, who had relied on a footnote in *Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 711 F.3d 1136, 1141 n.2 (9th Cir. 2013), "found that the *Noerr*-

Pennington doctrine does not bar state common law claims," and dismissed a fraud claim on other grounds. *Lesane I*, 2020 WL 954994, at *4. However, Judge Otake also offered a gentle corrective, explaining that in *Theme Promotions*, "the Ninth Circuit agreed with the Fifth Circuit's reasoning for extending the *Noerr-Pennington* doctrine to tortious interference with contract claims: There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust." *Id.* (citations omitted). Judge Otake upheld the magistrate judge's dismissal of the fraud claim, but added that based on *Theme Promotions*, the *Noerr-Pennington* doctrine would "also arguably extend" to the fraud claim. *See id.*

As discussed in the Motion, the holding in *Theme Promotions*, which Judge Otake quoted, was unquestionably not *dicta*. *See* Mot. at 13. By contrast, the footnote in *Nunag-Tanedo* that the magistrate judge had relied upon was not only *dicta*, but also demonstrably wrong. *See* Mot. at 11-12 (analyzing *Nunag-Tanedo*'s failure to recognize the existence of *Theme Promotions* and incorrectly foot-noting that the question remained "open"). Thus, *Lesane I* does not stand for the proposition that Hawai'i federal courts limit Petition Clause immunity to statutory claims. Instead, it demonstrates that Hawai'i federal courts are well aware of the holding in *Theme Promotions*, and are prepared to apply it when the issue is presented.

The Developer offers no reason that a common law tort claim should more permissibly chill the rights to petition under the First Amendment and Article I § 4 of the Constitution of the State of Hawai'i. That is because there is none.

B. The Sham Litigation Exception Does Not Apply

In its Opposition, the Developer contends that whether a case is "sham" litigation is a question of fact and therefore the Counterclaim should not be dismissed. *See* Opp. at 8-9. The Developer is wrong for several reasons. First, the Developer neglects to address the actual issue:

that it failed to adequately *allege* sham litigation in its Counterclaim. Second, none of the cases cited by the Developer supports its arguments. Third, this Court may determine whether the FAC is "objectively baseless" by reviewing the pleadings: There is no "question of fact" regarding the predicate facts of the FAC, and the Developer's attempt to create one fails. Finally, the Developer's reliance on excerpts of the individual plaintiffs' depositions is both puerile and pointless: nothing the individual plaintiffs say supports either prong of the sham litigation test, and it is painfully obvious that the Developer's citations to the depositions are an attempt to embarrass and intimidate them.

1. The Developer Failed to Allege the FAC Constitutes "Sham Litigation"

The Counterclaim fails to allege that the sham litigation exception applies. As discussed in the Motion, "[a]llegations that the sham litigation exception applies are subject to a heightened pleading standard." *See* Mot. at 5-6 (citing *Lesane I*; *Kottle v. NW Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir. 1998)). The facts alleged must be ***specific***, and must demonstrate that the *Noerr-Pennington* protections do not apply. *See id.* (citing *Mohla*, 944 F.2d at 533; *Lesane I*, 2020 WL 954964, at *3; *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988); *Franchise Realty Interstate Corp. v. S.F. Local Joint Exec. Bd.*, 542 F.2d 1076, 1082 (9th Cir. 1976)). This heightened protection "is necessary to avoid a chilling effect on the exercise of this fundamental First Amendment right," and the ***Developer*** bears the burden to establish the exception. Mot. at 6 (citing *Mohla*; *Franchise Realty*; *Evans Hotels, LLC v. Unite Here Local 30*, 433 F. Supp. 3d 1130, 1144 (S.D. Cal. 2020); *Boone*; *Sosa*, 437 F.3d at 942).

To allege sham litigation, the Developer was required to state specific facts sufficient to support a finding that: (1) the FAC is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits;" and (2) the FAC "conceals an attempt to

interfere" through the "use of the governmental process," as opposed to "the outcome of that process." *See Prof. Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* ("***PRE***"), 508 U.S. 49, 60-61 (1993).

The Developer has alleged no such facts. The Developer has only alleged that Save Sharks Cove filed its FAC "without an adequate legal basis to do so and, in particular, without sufficient data to support an attack on the EIS or the SMA Major Permit Application." Countercl. ¶ 25. But as Save Sharks Cove has repeatedly made clear -- and as clearly set forth in the FAC itself -- Save Sharks Cove's basis for challenging the adequacy of the EIS and SMA Major Permit Application were the very studies the Developer commissioned, attached to, and used to support, its EIS and SMA application. *See* Mot. at 17; FAC ¶¶ 116-131. A conclusory allegation that the FAC lacked "adequate legal basis," without more, is insufficient. *Compare Mohla*, 944 F.2d at 535 (dismissing counterclaim which alleged that "complaint was filed with knowledge that it was baseless, with no expectation of obtaining the requested relief, but for the sole purpose of delaying and impeding [company's] logging operation through the pendency of the suit itself").

The Developer's reliance on *Inline Packaging, LLC v. Graphic Packaging Int'l, Inc.*, 164 F. Supp. 3d 1117 (D. Minn. 2016) is misguided, yet the case is instructive. In *Inline Packaging*, Inline, a food packaging company, alleged specific facts establishing that its competitor, Graphic, engaged in litigation activities that amounted to a sham. *See id.* Providing detailed facts in support, Inline charged that Graphic directly threatened it and its customers with patent infringement litigation, when the patents at issue had expired or were inapplicable. *Id.* at 1130. Graphic had deterred customers from purchasing from Inline by making direct threats, and Inline described two occasions when Graphic had disrupted a business relationship by telling Inline's

potential customers that it was planning to sue Inline for patent infringement. *Id*. Graphic invoked Petition Clause immunity, and Inline contended that the sham litigation exception applied. *Id.* The court recognized that the sham exception is "narrow," and that Inline bore a "heavy burden" to demonstrate that the activities were objectively meritless. *Id.* at 1131. Nonetheless, the court concluded that Inline had "adequately pled facts to establish that Graphic's litigation activities constituted a sham so as to preclude immunity under the *Noerr-Pennington* doctrine." *Id.* at 1132; *see also Catch Curve, Inc. v. Venali, Inc.*, 519 F. Supp. 2d 1028, 1037-38 (S.D. Cal. 2007) (where litigant provided detailed allegations regarding a pattern of vexatious litigation by competitors, it had satisfied the sham litigation pleading standard).

Unlike in *Inline Packaging*, the Developer here failed to specify how Save Sharks Cove's FAC is "objectively baseless." The Developer merely alleged it "lacks adequate legal basis" and repeated the fiction that Save Sharks Cove had no scientific data supporting its claims. Without more, the Counterclaim must be dismissed.

2. This Court May Determine Objective Baselessness as a Matter of Law

The Court may determine whether a lawsuit is "objectively baseless" as a matter of law, by reviewing the pleadings before it. *See PRE*, 508 U.S. at 63. The Developer contends "this misstates the standard," *see* Opp. at 9, and that a court may only rule as a matter of law when "there is no dispute over the predicate facts of the underlying legal proceeding." *Id.* (citing *PRE*, 508 U.S. at 63). There was no misstatement. The question is a matter of law, and there is no genuine dispute over the predicate facts of the FAC.

Despite the Developer's strenuous efforts to conjure a factual dispute, no dispute exists regarding the predicate facts. The Developer prepared an EIS and submitted an SMA Major Permit Application. No one disputes that, and no one disputes the contents of the EIS or the SMA application. There is likewise no dispute that the EIS and SMA application were approved

by the City, on the timeline iterated in the FAC. This case is not akin to *Inline Packaging*, where there was a dispute regarding the existence of a valid patent upon which a litigant threatened suit. *See Inline Packaging*, 164 F. Supp. 3d at 1134. Nor does this case bear any resemblance to *Rock River Communications, Inc. v. Universal Music Group, Inc.*, 745 F.3d 343 (9th Cir. 2014), where a factual dispute existed regarding which party had the licensing rights to music. *Rock River*, 745 F.3d at 352.

Here, the *only* dispute the Developer identifies as a "question of fact" is whether, prior to filing the lawsuit, Save Sharks Cove had commissioned independent scientific studies other than what was provided within the EIS itself. *See* Opp. at 8-9. But that is not, in fact, disputed: the FAC does not allege that Save Sharks Cove relied on studies *other* than those provided in the EIS and SMA application. *See generally* FAC. And there is no factual dispute regarding the contents of the EIS. Thus, this Court may determine whether the FAC is objectively baseless as a matter of law, by reviewing the pleadings.

3. The Individual Plaintiffs' Deposition Excerpts Do Not Create Issues of Fact or Support Application of the Sham Exception

Instead of examining whether a factual dispute as to the predicate facts of the FAC actually exists, the Developer swiftly raises, then brushes aside that question, to focus on excerpts of the lay testimony of the individual plaintiffs. Those excerpts do not support the proposition that the FAC constitutes sham litigation. They merely demonstrate that the individual plaintiffs perhaps did not personally read the entire 1119-page EIS; or that they disfavor food trucks; or that they do not like the Developer's plans; or that they relied on friends, family, or attorneys in deciding to sign on to the lawsuit. *See generally* Opp. at 10-13 & Ex. 1-3.

Absolutely nothing in their testimony supports a finding that (1) the lawsuit is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits,

or (2) that the lawsuit conceals an attempt to interfere through the use of the governmental process, as opposed to the outcome of that process. *PRE*, 508 U.S. at 60-61 (iterating sham litigation exception test). Even the Developer itself admits that the testimony shows merely an "improper desire to hold [the Developer] to standards above and beyond what the law requires." Opp. at 8. "Improper desires" constitute no part of the sham litigation inquiry. *See PRE*, 508 U.S. at 60-63.

The depositions -- and the Developer's petty nitpicking at the individual plaintiffs' recollections and, for example, their home septic systems, *see* Opp., Ex. 1-3 -- show nothing so clearly as the *Developer*'s true intent: To punish and intimidate the Plaintiffs for exercising their rights to petition this Court. Notably, the Developer did not notice depositions for ***any*** of the organizational plaintiffs. The organizational plaintiffs have representatives who are experienced in litigation, insusceptible to bullying, and have ready access to information that should have been of interest to any legitimate defense. Apparently, however, they were of no interest to the Developer.

C. The Counterclaim Should be Dismissed With Prejudice

For all of the reasons set forth above and in the Motion, the Counterclaim should be dismissed with prejudice. It is far too late to allow the Developer an opportunity to regenerate its attack on Save Sharks Cove. Trial is set for February 22, 2021. Expert reports and witness lists were due October 23, 2020. Discovery cut-off is on December 23, 2020.

Moreover, the Developer has already had ample opportunity to amend its Counterclaim. Over one year ago, Save Sharks Cove first warned that the Developer's Counterclaim was a "bad faith effort to silence public participation," that the Plaintiffs have constitutional rights to bring this case, and that the Counterclaim served the dilatory purpose of punishing the plaintiffs for exercising those rights. *See Mem. Opp. Mot. Leave to File Counterclaim*, filed Sept. 3, 2019, at

6. The Developer made no attempt to revise its counterclaims then, or at any time after, because it *cannot* allege facts sufficient to invoke the sham litigation exception.

III. CONCLUSION

For the reasons set forth above, Save Sharks Cove respectfully requests that this Court grant its Motion and dismiss the Developer's Counterclaim with prejudice.

DATED: Honolulu, Hawaiʻi, October 23, 2020.

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CERTIFICATE OF SERVICE

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