MARGARET DUNHAM WILLE, ESQ. 8522
TIMOTHY VANDEVEER, ESQ. 11005
Margaret Wille & Associates LLLC
P.O. Box 6398
Kamuela, Hawai‘i 96743
Telephone: (808) 854-6931
Facsimile: (808) 887-1419
mw@mwlawhawaii.com
tim@mwlawhawaii.com

Attorneys for Counterclaim Defendants
SAVE SHARKS COVE ALLIANCE, LARRY McELHENY, JOHN THIELST, and CORA SANCHEZ

GENE K. LAU, ESQ. 3223
Harrison & Matsuoka
1001 Bishop Street, Suite 2828
Honolulu, HI 96813
Telephone: (808) 376-4864
Facsimile: (808) 533-1248

Attorney for Counterclaim Defendant
HAWAII'S THOUSAND FRIENDS

PAMELA W. BUNN 6460
ERIKA L. AMATORE 8580
Dentons US LLP
1001 Bishop Street, Suite 1800
Honolulu, Hawai‘i 96813-3689
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
pam.bunn@dentons.com
erika.amatore@dentons.com

Attorneys for Counterclaim Defendant
MĀLAMA PŪPŪKEA-WAIMEA

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;

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

COUNTERCLAIM DEFENDANTS' **JOINT MOTION FOR JUDGMENT ON THE PLEADINGS**; MEMORANDUM IN SUPPORT OF MOTION; NOTICE OF HEARING and CERTIFICATE OF SERVICE

Hearing Date: April 28, 2020
Time: 9:00 a.m.
Judge: Hon. James H. Ashford

No Trial Date Set

DEPARTMENT OF PLANNING AND PERMITTING OF THE CITY AND COUNTY OF HONOLULU; HANAPOHAKU LLC; DOES 1-10,

Defendants.

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.

COUNTERCLAIM DEFENDANTS' JOINT MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs/Counterclaim Defendants MĀLAMA PŪPŪKEA-WAIMEA, SAVE SHARKS COVE ALLIANCE, LARRY McELHENY, JOHN THIELST, CORA SANCHEZ, and HAWAII'S THOUSAND FRIENDS move jointly to dismiss Defendant/Counterclaim Plaintiff HANAPOHAKU LLC's Counterclaims Filed September 27, 2019, and for an award of damages and costs incurred in bringing this Motion, including attorneys' fees.

This Motion is brought under Article I § 4 of the Constitution of the State of Hawai'i, the First Amendment of the Constitution of the United States of America, Hawai'i Revised Statutes Chapter 634F, and Rules 7, 12(b)(6) and 12(c) of the Hawai'i Rules of Civil Procedure. It is based upon the attached Memorandum, the files and records in this case, and other matters as may be presented at a hearing on this Motion.

DATED: Honolulu, Hawai‘i, March 13, 2020.

/s/ Timothy Vandeveer
MARGARET DUNHAM WILLE
TIMOTHY VANDEVEER

Attorneys for Plaintiffs/Counterclaim Defendants
SAVE SHARKS COVE ALLIANCE, LARRY McELHENY, JOHN THIELST, and CORA SANCHEZ

/s/ Gene K. Lau
GENE K. LAU

Attorney for Counterclaim Defendant
HAWAII'S THOUSAND FRIENDS

/s/ Pamela W. Bunn
PAMELA W. BUNN
ERIKA L. AMATORE

Attorneys for Plaintiff/Counterclaim Defendant
MĀLAMA PŪPŪKEA-WAIMEA

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) **MEMORANDUM IN SUPPORT OF MOTION**
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.	

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Plaintiffs/Counterclaim Defendants Save Sharks Cove Alliance ("**SSCA**"), Mālama Pūpūkea-Waimea ("**MPW**"), Hawaii's Thousand Friends ("**HTF**"), Larry McElheny, John Thielst, and Cora Sanchez (collectively, "**Save Sharks Cove**") jointly bring this Motion for Judgment on the Pleadings, to dismiss Defendant/Counterclaim Plaintiff Hanapohaku LLC's (the

"**Developer**") Counterclaims Filed September 27, 2019 (the "**Counterclaim**"), and for an award of damages and costs of suit in accordance with Haw. Rev. Stat. § 634F-2(8).

The Counterclaim, which alleges two counts for abuse of process and "tortious interference with prospective business," must be dismissed for at least three reasons. First, the Counterclaim seeks $13 million in alleged damages against two non-profit organizations and three individuals, merely for exercising their constitutional right to petition the government through their lawsuit. Second, the Counterclaim violates Hawai'i's "Anti-SLAPP" statute. Finally, the allegations fail to state a claim upon which relief may be granted.

II. RELEVANT FACTS

Save Sharks Cove filed this lawsuit to ensure that Defendants City and County of Honolulu, its City Council, and its Department of Planning and Permitting ("**DPP**") (collectively, the "**City**") and the Developer comply with constitutional mandates, statutes, and ordinances that protect Hawai'i's coastal zone and public trust resources. *See generally* First Am. Compl. Filed Feb. 2, 2019 (the "**FAC**"). As detailed in the FAC, the Developer owns commercially-zoned property neighboring the environmentally-sensitive Pūpūkea Beach Park (the "**Park**") and Pūpūkea Marine Life Conservation District (the "**MLCD**"). *See* FAC ¶¶ 1-4. SSCA, MPW, and HTF are non-profit organizations dedicated to protecting and preserving the marine environment and shoreline, and advocate for good government practices. *See* FAC ¶¶ 21-23. Mr. McElheny, Mr. Theilst, and Ms. Sanchez are long-time residents of the North Shore of O'ahu, with specific concerns and interests in protecting the Park, MCLD, and coastal resources. *See* FAC ¶¶ 24 -26.

On or around July 20, 2018, the Developer submitted an SMA Major Permit Application, seeking to construct a new shopping center on the existing commercial site (the "**Proposed Development**"). *See* FAC ¶ 88. The SMA Major Permit Application included a "non-Chapter

343" Final Environmental Impact Statement (the "**EIS**").[1] *See* FAC ¶ 132. To the dismay of many community members, the City rushed the approval in the final weeks of 2018, failing to appropriately review and analyze the application. *See generally id.* Save Sharks Cove filed this lawsuit, with ten counts against the City[2] and three counts against the Developer for: (1) violation of the right to a clean and healthful environment under Article XI, section 9 of the Constitution of the State of Hawai'i; (2) water pollution, in violation of several statutes and ordinances; and (3) public nuisance. *See generally* FAC.

The Developer filed its Counterclaim on September 27, 2019, alleging abuse of process and "interference with prospective business." For its abuse of process claim, the Developer alleged that Save Sharks Cove filed its FAC for the "ulterior" purpose of "indefinitely delaying the [Proposed Development] in the hope that [Developer] would eventually run out of funding and/or drop the [Proposed Development] entirely." Countercl. ¶ 26. The Developer further

[1] Because the EIS was not prepared under HRS Chapter 343, there was no opportunity to challenge the EIS under that chapter, and Save Sharks Cove was obliged to challenge it through the SMA Major Permit process.

[2] Save Sharks Cove alleged ten counts against the City: (1) Count I (for failure to exercise public trust responsibilities to protect fresh and marine water resources in violation of Haw. Const. art. XI § 1, art. XI § 7, and common law public trust doctrine); (2) Count II (for violation of right to a clean and healthful environment under Haw. Const. Art. XI § 9; (3) Count III (for failure to follow the North Shore Sustainable Communities Plan in violation of HRS chapter 205A and ROH chapter 25); (4) Count IV (for improper issuance of SMA Minor Permit and failure to enforce permit conditions in violation of HRS chapter 205A and ROH chapter 25); (5) Count V (for unlawful fine policy and practice in violation of Haw. Const. art. I § 5, art. XI § 9, public trust doctrine, HRS chapter 205A and ROH chapter 25); (6) Count VI (for improper approval of SMA Major Permit in violation of ROH chapter 25, HRS § 321-11(18), and HAR Title 11, chapter 50); (7) Count VII (for improper acceptance of EIS in violation of ROH chapter 25, HAR Title 11, chapter 200); (8) Count VIII (for failure to provide fair and impartial review in violation of Haw. Const. art I § 5 and due process); (9) Count IX (for improper recommendation of issuance, and improper issuance, of SMA Major Permit in violation of HRS chapter 205A and ROH chapter 25); and (10) Count X (for water pollution in violation of HRS Chapter 205A, ROH Chapter 25, HRS Chapter 342D, HAR Title 11-54, and HAR Title 11-55). *See generally* FAC.

alleged that Save Sharks Cove "willfully and continuously made libelous and untrue statements" about it "in an effort to try to draw support for its legal defense fund and to poison public sentiment against" the Proposed Development and the Developer. *Id.* ¶ 27. (Notably, the Developer did not actually make a claim for libel or slander against any of the Save Sharks Cove plaintiffs. *See generally id.*) In support of its tortious interference claim, the Developer claimed that Save Sharks Cove is "willfully and intentionally interfering" with the Developer's relationships with current and potential tenants by "seeking to shut down current operations and delay or prevent any future ones." *Id.* ¶¶ 31-33.

Save Sharks Cove filed an answer citing, among other defenses, the *Noerr-Pennington* doctrine, the First Amendment to the U.S. Constitution, Article I Section 4 of the Hawai'i Constitution and Hawai'i Revised Statutes Chapter 634F. *See* Ans. ¶¶ 2-5.

III. STANDARD

A. Motion for Judgment on the Pleadings

A motion for judgment on the pleadings under Rule 12(c) "serves much the same purpose" as a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, "except that it is made after the pleadings are closed." *Haw. Med. Ass'n v. Haw. Med. Servs. Ass'n*, 113 Hawai'i 77, 90, 148 P.3d 1179, 1192 (2006) (citations omitted). The movant must "clearly establish that no material issue of fact remains to be resolved and that he or she is entitled to judgment as a matter of law." *Id.* (citations and alterations omitted). The court is "required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Id.* (citations omitted).

B. Anti-SLAPP Motions

However, the burden shifts when a party moves to dispose of a claim that constitutes a Strategic Lawsuit Against Public Participation (a "**SLAPP**" lawsuit). *See* Haw. Rev. Stat.

§ 634F-2(4)(B). An anti-SLAPP motion is "treated as a motion for judgment on the pleadings," but the ***responding*** party has "the burden of proof and persuasion on the motion." *Id.*; *see also Perry v. Perez-Wendt*, 129 Hawai'i 95, 100, 294 P.3d 1081, 1086 (2013) ("under the anti-SLAPP statute, when a motion to dispose of the claim(s) is filed, the burden of proof and persuasion rests with the responding party, *i.e.,* the *non-moving* party"). The court "shall grant the motion and dismiss the judicial claim, unless the responding party has demonstrated that more likely than not, the respondent's allegations ***do not*** constitute a SLAPP lawsuit." *Id.* § 634F-2(6) (emphasis added)*; see also Perry*, 129 Hawai'i at 100, 294 P.3d at 1086.

IV. LEGAL ANALYSIS

The Counterclaim must be dismissed for three reasons. First, the Counterclaim violates Save Sharks Cove's constitutional rights to petition the government through their lawsuit. Second, the Counterclaim violates Hawai'i's Anti-SLAPP statute. Finally, even viewing the Counterclaim in the light most favorable to the Developer, the Counterclaim fails to state claims upon which relief may be granted.

A. The Counterclaim Violates Save Sharks Cove's Right to Petition the Government

The Counterclaim violates Save Sharks Cove's right to petition the government. Under the First Amendment to the United States Constitution and Article I section 4 of the Constitution of the State of Hawai'i, citizens have a right to petition the government for a redress of grievances. As such, Save Sharks Cove is immune from liability for its efforts to influence public officials through its litigation, lobbying, and publicity activity against the existing and Proposed Development.

Petition clause immunity has its roots in a line of antitrust cases, known as the *Noerr-Pennington* doctrine, which hold that efforts to influence public officials through litigation,

lobbying, publicity, and other contact are protected by the First Amendment right to petition the Government for a redress of grievances, and are not a violation of antitrust law. *See United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). In the antitrust context, the protection applies even when the petitioning activity is undertaken for a disfavored motive, such as eliminating competition. *See generally id*. The doctrine extends to all three branches of government, and thus also exempts parties bringing a lawsuit -- that is, petitioning a court -- from liability. *See, e.g.*, *California Motor Transport co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (right to petition necessarily includes right of access to the courts). Later decisions of the United States Supreme Court and other courts demonstrate that *Noerr-Pennington* immunity applies to claims outside of the antitrust context. *See, e.g.*, *NAACP v. Claiborne Hardware*, 458 U.S. 886, 914-15 (1982) (holding that non-violent, politically motivated boycott was entitled to First Amendment protection, even though petitioners "certainly foresaw -- and directly intended" their activities to cause economic harm to local businesses); *see also, e.g.*, *Computer Assoc. Int'l v. Am. Fundware, Inc.*, 831 F. Supp. 1516, 1522 (D. Colo. 1993) (collecting cases); *accord White v. Lee*, 227 F.3d 1214, 1236 (9th Cir. 2000) (lawsuit challenging permit approval was protected under *Noerr-Pennington*, even if lawsuit was unsuccessful).

For example, in *Protect Our Mountain Environment, Inc. v. District Court of Jefferson County ("**POME**")*, 677 P.2d 1361 (Colo. 1984), an environmental organization and nine individuals filed a lawsuit against a retail developer and a county board, seeking to overturn the approval of the developer's rezoning application. *See POME*, 677 P.2d at 1363. Among other things, the protesters claimed that the board did not adequately consider the impact of the proposed development on the region's air quality, highway use, and wildlife. *Id.* The protestors

lost their lawsuit. *Id.* at 1364. In the meantime, the developer filed a counter-lawsuit against the protestors and their counsel, claiming abuse of process and civil conspiracy. *Id.* The developer contended that the protestors' claims had been without legal justification, and had caused economic injury due to increases in financing and construction costs. *Id.*

POME and the individual protestors moved to dismiss the developer's lawsuit on First Amendment grounds, and the trial court denied the motion. *Id.* On appeal, the Colorado Supreme Court directed the trial court to reconsider the motion. *Id.*, 677 P.2d at 1370. The Court opined, "[i]t cannot be denied that suits filed against citizens for prior administrative or judicial activities can have a significant chilling effect on the exercise of their First Amendment right to petition the courts for redress of grievances." *Id.*, 677 P.2d at 1368 (citation omitted). Noting that damage can also result from "baseless litigation," the Court applied a heightened standard in cases where a party files a motion to dismiss by reason of the constitutional right to petition. *Id.*, 677 P.2d at 1369. In such cases, the non-moving party "must make a sufficient showing to permit the court to reasonably conclude" that the moving party's "petitioning activities ***were not*** immunized from liability under the First Amendment because:" (1) the claims were devoid of reasonable factual support or lacked any cognizable basis in law; ***and*** (2) the primary purpose of the petitioning activity was to harass the non-moving party or effectuate "some other improper objective;" ***and*** (3) the petitioning activity "had the capacity to adversely affect a legal interest of the" non-moving party. *Id.* (emphasis added); *accord Prof. Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60-62 (1993) (petitioning activity is not protected where (1) the lawsuit is objectively baseless, and (2) the lawsuit conceals an attempt to interfere directly with the business relationships of a competitor).

In *POME*, the protestors' action was capable of adversely affecting the developer, but the other two elements had not been satisfied. *See Pome,* 677 P.2d at 1369. Even though the protestors' lawsuit was unsuccessful, it could not be "reasonably concluded on the basis of the pleadings alone" that the lawsuit had been "without a reasonable basis in fact or law." *Id.* And the developer had failed to make any showing that the protestors' lawsuit had been "undertaken primarily to harass" the developer or accomplish some other improper objective.

Similarly here, Save Sharks Cove's legal activities may be capable of adversely affecting the Developer -- but the other two elements cannot be satisfied. Viewing the FAC in the light most favorable to Save Sharks Cove, it cannot be reasonably concluded that the FAC has no basis in law or fact. *See infra* Part IV.C.1.a. And the Developer cannot show that Save Sharks Cove's primary intent is to harass the Developer. *See id.* In fact, the only "improper objective" the Developer claims is the very fact that Save Sharks Cove's activities might harm the Developer -- which, as discussed below, is not an "improper objective," but instead merely the foreseeable result of protected activities.

Both of the Developer's counterclaims -- for abuse of process and "interference with prospective business" -- arise out of Save Sharks Cove's petitioning activities. The Developer's abuse of process counterclaim plainly attacks the FAC itself. The Developer claims Save Sharks Cove filed its FAC for the "ulterior" purpose of "indefinitely delaying the [Proposed Development] in the hope that [Developer] would eventually run out of funding and/or drop the [Proposed Development] entirely." Countercl. ¶ 26. But even if true -- *i.e.,* even if Save Sharks Cove foresaw causing, or even intended to cause, economic harm to the Developer -- its petitioning activity is still protected. *See, e.g., NAACP v. Clairborne Hardware*, 458 U.S. 886,

887 (1982) ("Petitioners are not liable in damages for the consequences of their nonviolent, protected activity.").

The abuse of process claim further alleges that Save Sharks Cove "willfully and continuously made libelous and untrue statements" about it "in an effort to try to draw support for its legal defense fund and to poison public sentiment against" the Proposed Development. *See* Countercl. ¶ 27. But the Developer fails to state what allegedly "libelous" statements were made, or by whom. In other words, the abuse of process counterclaim relies on an underlying, unpled affirmative claim of defamation. *See id.* And if the "willful act" is defamation, the Developer must actually allege the elements of and prove that underlying tort in order for its abuse of process claim to be actionable. *See Young v. Allstate Ins. Co.*, 119 Hawai'i 403, 416, 198 P.3d 666, 679 (2008) ("in order to establish an abuse of process claim, the plaintiff must prove a 'willful act' distinct from the use of process *per se*").

Unfortunately, the Developer fails to allege ***any*** facts in support of its inchoate defamation claim, in violation of the notice pleading requirements of Rule 8 of the Hawai'i Rules of Civil Procedure. The Developer thus deprives the protestors of notice, and of the opportunity to prepare a defense, including a defense based upon a First Amendment right of petition. In order to maintain its "libelous statement" allegation -- and its dependent tort claims -- the Developer must provide more information. *See Au v. Au*, 63 Haw. 210, 221, 626 P.2d 173, 181 (1981) (Rule 8 requires providing fair notice of what the claim is and the grounds upon which the claim rests). Even under Hawai'i's notice pleading standard, the Developer's allegation is impermissibly vague as to who ("Counterclaim Defendants") said what ("libelous and untrue statements"), about whom (the Developer, its principals, and the Proposed Development), and how ("through use of social media or otherwise"). *See* Countercl. ¶ 27. Thus, at best, Save

Sharks Cove can only speculate regarding the grounds upon which the allegation was made. Therefore, Developer's assertion that Save Sharks Cove made libelous and untrue statements is a claim that is insufficiently pled and is must be dismissed.

The Developer's claim for "tortious interference with prospective business" is similarly flawed. The Developer claims that Save Sharks Cove "willfully and intentionally" interfered with its relationships "by seeking to shut down current operation and delay or prevent any future ones." Countercl. ¶ 33. As noted above, however, the United States Supreme Court has long held that damages caused by lawful protest activity are non-compensable. *See NAACP*, 458 U.S. at 917-18) (citing *Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *Construction Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 249 n.6 (1959)).

And again, to the extent that the Developer contends the interference claim is predicated upon unpled "libelous and untrue statements," unless each of the Save Sharks Cove defendants is actually guilty of defamation, the intentional interference claim is not actionable. *See, e.g.*, *Browning v. Clinton*, 292 F.3d 235, 244 (D.C. Cir. 2002) (where defamatory conduct formed sole basis for tortious interference claim, latter was dismissed together with defamation claim)*;* *Redco Corp. v. CBS Inc.*, 758 F.2d 970, 973 (3d Cir. 1985) (where defendant was not liable for defamation, intentional interference claim was not actionable, as there was no basis for finding actions "improper"); *accord Gold v. Harrison*, 88 Hawai'i 94, 103, 962 P.2d 353, 362 (1998) (tort claims failed where they were derivative of defamation claim that had failed).

B. The Counterclaim Must be Dismissed as an Illegal SLAPP Action

The Developer's Counterclaim also violates Hawai'i's Anti-SLAPP statute.[3] *See* Haw. Rev. Stat. §§ 634F-1 *et seq.* Under Hawai'i law, a "SLAPP" lawsuit: (1) "lacks substantial justification or is interposed for delay or harassment;" and (2) "is solely based on the party's public participation before a government body." *See* Haw. Rev. Stat. § 634F-1. A lawsuit "lacks substantial justification" when it is, more likely than not, "substantially frivolous, substantially groundless, or substantially vexatious." *Id.* §§ 634F-1, 634F-6. The party against whom an anti-SLAPP motion is made has the burden of proof and persuasion to show its claims are, more likely than not, ***not*** a SLAPP. *See id.* § 634F-2(4) & (6).

[3] In 2002, Hawai'i's legislature joined a growing number of U.S. jurisdictions to pass anti-SLAPP legislation. In the enabling act for HRS Chapter 634F, Act 187 (2002), the legislature found that:

> (1) The framers of our constitutions, ***recognizing citizen participation in government as an inalienable right essential to the survival of democracy***, secured its protection through the right to petition the government for redress of grievances in the First Amendment to the U.S. Constitution and article I, section 4 of the state constitution;
>
> (2) Communication, testimony, claims, and arguments provided by citizens to their government are essential to wise government decisions and public policy, the public health, safety, and welfare, effective law enforcement, the efficient operation of government programs, the credibility and trust afforded government, and the continuation of America's republican form of government through representative democracy;
>
> (3) Civil lawsuits and counterclaims, often claiming millions of dollars, have been and are being filed against thousands of citizens, businesses, and organizations based on their valid exercise of their right to petition, including seeking relief, influencing action, informing, communicating, and otherwise participating with government bodies, officials, employees, or the electorate[.]

Act 187, "A Bill For An Act Relating to Civil Liability" "SECTION 1" (emphasis added).

The SLAPP statute "shall be construed liberally to effectuate its purposes and intent." *Id.*§ 634F-4. The purposes of the SLAPP statute are to:

> (1) Protect and encourage citizen participation in government to the maximum extent permitted by law;
>
> (2) Create a more equitable balance between the rights of persons to file lawsuits and to trial by jury, and the rights of persons to petition, speak out, associate, and otherwise participate in their governments;
>
> (3) Support the operations of and assure the continuation of representative government in America, including the protection and regulation of public health, safety, and welfare by protecting public participation in government programs, public policy decisions, and other actions;
>
> (4) Establish a balanced, uniform, and comprehensive process for speedy adjudication of SLAPPs as a major contribution to lawsuit reform; and
>
> (5) Provide for attorney fees, costs, and damages for persons whose citizen participation rights have been violated by the filing of a SLAPP against them.

Perry v. Perez-Wendt, 129 Hawai'i 95, 98-99, 294 P.3d 1081, 1084-85 (Haw. Ct. App. 2013) (citing 2002 Haw. Sess. Laws Act 187 § 1 at 822).

Here, the Developer's Counterclaim is based solely on Save Sharks Cove's participation in litigation before this Court, and is a direct attack on citizen participation in government. It was interposed to censor, chill, intimidate, and punish Save Sharks Cove (and particularly the individual counterclaim defendants, Mr. Thielst, Mr. McElheny, and Ms. Sanchez) for challenging the Developer's SMA Major Permit. As discussed above (and *infra* Part IV.C), the Counterclaims not only lack substantial justification, but also complain *merely that* Save Sharks Cove filed this lawsuit. The Developer's abuse of process and interference claims are premised upon the fact that Save Sharks Cove is seeking redress before this Court, and nothing more. For those reasons, the Counterclaim should be dismissed as an impermissible SLAPP.

C. The Counterclaim Lacks Merit Because it Fails to State Claims for Which Relief May be Granted

The Counterclaim is meritless not only because it runs afoul of Save Sharks Cove's constitutional and statutory rights, but also because it fails to state any claims upon which relief may be granted.

1. *The Counterclaim Fails to State a Claim for Abuse of Process*

The Developer does not, and cannot, state a claim for abuse of process because it cannot allege its two essential elements: "(1) an ulterior purpose and (2) a willful act in the use of process which is not proper in the regular conduct of the proceeding." *Young v. Allstate Ins. Co*., 119 Hawai'i 403, 412-13, 198 P.3d 666, 675-76 (2008) (citing *Chung v. McCabe Hamilton & Renny Co*., 109 Hawai'i 520, 529, 128 P.3d 833, 842 (2006); *Wong v. Panis,* 7 Haw. App. 414, 420, 772 P.2d 695, 699-700 (1989), *abrogated in part by Hac v. Univ. of Haw*., 102 Hawai'i 92, 73 P.3d 46 (2002); Restatement (Second) of Torts § 682 (1977)). "For the first element, ulterior purpose, the question is whether the defendant used legal process 'primarily' for a purpose that was not legitimate." *Isobe v. Sakatani*, 127 Hawai'i 368, 381, 279 P.3d 33, 46 (Haw. Ct. App. 2012) (citing *Young*, 119 Hawai'i at 413-14, 198 P.3d at 677). The second element requires "[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process," and "there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Id.* The Counterclaim fails to adequately allege both elements.

a) There is No "Ulterior Purpose"

The Developer does not, and cannot, claim Save Sharks Cove used legal process primarily for an "ulterior purpose." The Developer accuses Save Sharks Cove of the "ulterior" purpose of "indefinitely delaying the [Proposed Development] in the hope that [Developer]

would eventually run out of funding and/or drop the [Proposed Development] entirely." Mot., Ex. A ¶ 26. That allegation is insufficient to support a claim for abuse of process for several reasons.

First, the FAC makes clear that Save Sharks Cove's primary purpose in this litigation is to hold both the City and the Developer accountable for compliance with existing permits and health and environmental laws and regulations. *See generally* FAC. In fact, of the eleven counts in the Complaint, only three (Counts II, X, and XI) are made against the Developer, and only one is made solely against the Developer (Count XI). *See generally id*. Second, the SMA Major Permit was granted by the City in December 2018, over one year ago. This lawsuit cannot have as its purpose (whether primary or incidental) the "indefinite delay" of something that has already happened.

Finally, to the extent that Save Sharks Cove ultimately seeks injunctive relief, *see* Compl. at 72 ¶ B, Save Sharks Cove's "purpose" in halting new development on the property is legitimate (not "ulterior") and may properly be granted by the Court in the regular conduct of the legal proceeding. Thus, even if Save Sharks Cove had "bad intentions," its request for an injunction cannot be sufficient to support an abuse of process claim. *See Isobe*, 127 Hawai'i at 381, 279 P.3d at 46.

b) Process Itself is Not a "Willful Act"

The Developer cannot show any "willful act in the use of process which is not proper in the regular conduct of the proceeding." *Young*, 119 Hawai'i at 412-13, 198 P.3d at 675-76. The use of process itself is not a "willful act," nor is an alleged lack of justification for a lawsuit. *See id.*, 119 Hawai'i at 415-16, 198 P.3d at 678-79 (rejecting lack-of-justification standard for abuse of process cases). Instead, "in order to establish an abuse of process claim, the plaintiff must

prove a 'willful act' distinct from the use of process per se." *Id.*, 119 Hawai'i at 415, 198 P.3d at 678.

Here, the Developer attempts to create a "willful act" by alleging that Save Sharks Cove "willfully and continuously made libelous and untrue statements" about it "in an effort to try to draw support for its legal defense fund and to poison public sentiment against" the Proposed Development and the Developer. Countercl. ¶ 28. But Save Sharks Cove's publicity and fundraising efforts are not a "use of process" at all, let alone "use of process which is not proper in the regular conduct of the proceeding." *Young*, 119 Hawai'i at 412-13, 198 P.3d at 675-76. Moreover, if the "willful act" is defamation -- an unalleged claim -- the Developer must actually allege the elements of and prove that underlying tort in order for its abuse of process claim to be actionable. *See id.*, 119 Hawai`i at 416, 198 P.3d at 679 ("in order to establish an abuse of process claim, the plaintiff must prove a 'willful act' distinct from the use of process *per se*"). As discussed above, that means the Developer must specify, at a minimum, who said what, in order to satisfy Rule 8. The Developer does not, and cannot, make a claim for defamation, and therefore its abuse of process claim is not actionable.

2. *The Counterclaim Fails to State a Tortious Interference Claim*

For similar reasons, the Developer cannot state a claim for tortious interference. The elements of a claim for tortious interference with prospective business advantage are:

> (1) the existence of a valid business relationship or a prospective advantage or expectancy sufficiently definite, specific, and capable of acceptance in the sense that there is a reasonable probability of it maturing into a future economic benefit to the plaintiff; (2) knowledge of the relationship, advantage, or expectancy by the defendant; (3) a purposeful intent to interfere with the relationship, advantage, or expectancy; (4) legal causation between the act of interference and the impairment of the relationship, advantage, or expectancy, and (5) actual damages.

Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, 113 Hawai'i 77, 116, 148 P.3d 1179, 1218 (2006) (citations omitted). The pleading standard for claims of tortious interference is "rudimentary." *Haw. Med. Ass'n*, 113 Hawai'i at 119, 148 P.3d at 1221. Thus, for example, under the first element, a plaintiff need not identify a potential contract or a specific third party by name, but may simply identify a class of prospective third parties and the existence of a relationship that "would have inured to their economic benefit." *Id.* at 118-19, 148 P.3d at 1220-21 (citations and internal alteration omitted).

However, even under this "rudimentary" standard, the Developer cannot state a claim. Under the third element, the Developer must, but cannot, allege a "purposeful intent," which "requires a state of mind or motive more culpable than mere intent." *Id.* at 116, 148 P.3d at 1218 (citing *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1166 (9th Cir. 1997); *Locricchio v. Legal Servs. Corp*, 833 F.2d 1352, 1358 (9th Cir. 1987)). The third element "denotes purposefully improper interference," in which the defendant "pursued an improper objective of harming the plaintiff or used wrongful means that caused injury in fact." *See id*. (emphasis added); *see also Meridian Mortg., Inc. v. First Hawaiian Bank*, 109 Hawai'i 35, 48, 122 P.3d 1133, 1147 (2005).

Here, the Developer alleges that Save Sharks Cove is "willfully and intentionally interfering with these relationships by seeking to shutdown current operations and delay or prevent any future ones." Countercl. ¶ 33. But there is no allegation that the purported "interference" is the result of an improper objective of harming the Developer, or that Save Sharks Cove has employed any wrongful means causing injury. *See id*.; *and* compare Haw. Med. Ass'n, 113 Hawai'i at 118, 148 P.3d at 1220 (plaintiff physicians sufficiently alleged "purposeful" intent by pleading that HMSA "maliciously, intentionally, and without justification

or excuse, engaged in numerous unfair and deceptive acts and oppressive business practices designed to delay, deny, impede, and reduce lawful reimbursement to them"). In fact, the purported "intentional interference" with prospective business advantage appears to be nothing more than Save Sharks Cove's filing of this lawsuit.

D. Save Sharks Cove is Entitled to Damages and Costs Incurred Bringing this Motion

Under the SLAPP statute, Save Sharks Cove is entitled to the costs incurred in bringing this Motion, including attorneys' fees. Haw. Rev. Stat. § 634F-2(8). The "court shall award a moving party who prevails on the motion, without regard to any limits under state law:"

> (A) Actual damages or $5,000, which is greater;
>
> (B) Costs of suit, including reasonable attorneys' and expert witness fees, incurred in connection with the motion; and
>
> (C) Such additional sanctions upon the responding party, its attorneys, or law firms, as the court determines shall be sufficient to deter repetition of the conduct and comparable conduct by others similarly situated.

Therefore, Save Sharks Cove respectfully requests that this Court award: (a) $5,000 in damages to each of the six moving parties -- Mālama Pūpūkea-Waimea, Save Sharks Cove Alliance, Larry McElheny, John Thielst, Cora Sanchez, and Hawaii's Thousand Friends; (b) costs of suit, including attorneys' fees, to be submitted to the Court for approval in due course; and (c) such additional sanctions as this Court deems sufficient.

V. CONCLUSION

For the reasons set forth above, Counterclaim Defendants Mālama Pūpūkea-Waimea, Save Sharks Cove Alliance, Larry McElheny, John Thielst, Cora Sanchez, and Hawaii's Thousand Friends respectfully request that Defendant/Counterclaim Plaintiff Hanapohaku's Counterclaim be dismissed, and that this Court award damages and costs of suit.

DATED: Honolulu, Hawai‘i, March 13, 2020.

/s/ Timothy Vandeveer
MARGARET DUNHAM WILLE
TIMOTHY VANDEVEER

Attorneys for Plaintiffs/Counterclaim Defendants
SAVE SHARKS COVE ALLIANCE, LARRY McELHENY, JOHN THIELST, and CORA SANCHEZ

/s/ Gene K. Lau
GENE K. LAU

Attorney for Counterclaim Defendant
HAWAII'S THOUSAND FRIENDS

/s/ Pamela W. Bunn
PAMELA W. BUNN
ERIKA L. AMATORE

Attorneys for Plaintiff/Counterclaim Defendant
MĀLAMA PŪPŪKEA-WAIMEA

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) **NOTICE OF HEARING MOTION AND CERTIFICATE OF SERVICE**
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.	

NOTICE OF MOTION

TO: PAUL S. AOKI, ESQ.
Acting Corporation Counsel
BRAD T. SAITO, ESQ.
MELE COLEMAN, ESQ.
Deputies Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, HI 96813

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

TERRENCE M. LEE, ESQ.
BRETT R. TOBIN, ESQ.
Sullivan Meheula Lee LLLP
Pacific Guardian Center, Makai Tower
733 Bishop Street, Suite 2900
Honolulu, HI 96813

Attorneys for Defendant/Counterclaim Plaintiff
HANAPOHAKU LLC

NOTICE IS HEREBY GIVEN that the Motion hearing for Plaintiffs' Joint Motion for Judgment on the Pleadings, shall come on for hearing on April 28, 2020 at 9:00 a.m. before the Honorable James H. Ashford, Judge of the above-entitled Court, in his courtroom at 777 Punchbowl Street, Honolulu, Hawai'i 96813, or as soon thereafter as counsel can be heard.

DATED: Honolulu, Hawai'i, March 13, 2020.

/s/ Timothy Vandeveer
MARGARET DUNHAM WILLE
TIMOTHY VANDEVEER

Attorneys for Plaintiffs/Counterclaim Defendants
SAVE SHARKS COVE ALLIANCE, LARRY McELHENY, JOHN THIELST, and CORA SANCHEZ

/s/ Gene K. Lau
GENE K. LAU

Attorney for Counterclaim Defendant
HAWAII'S THOUSAND FRIENDS

/s/ Pamela W. Bunn
PAMELA W. BUNN
ERIKA L. AMATORE

Attorneys for Plaintiff/Counterclaim Defendant
MĀLAMA PŪPŪKEA-WAIMEA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served on the following parties listed below by electronic service through the JEFS E-Filing System:

MARGARET DUNHAM WILLE, ESQ. margaretwille@mac.com
TIMOTHY VANDEVEER, ESQ. tvandeveer76@gmail.com
Margaret Wille & Associates LLLC
P.O. Box 6398
Kamuela, HI 96743

Attorneys for Plaintiffs/Counterclaim Defendants
SAVE SHARKS COVE ALLIANCE, LARRY McELHENY, JOHN THIELST, CORA SANCHEZ and SURFRIDER FOUNDATION

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

Attorney for Counterclaim Defendant
HAWAII'S THOUSAND FRIENDS

PAUL S. AOKI, ESQ. paoki@honolulu.gov
Acting Corporation Counsel
BRAD T. SAITO, ESQ. bsaito@honolulu.gov
MELE COLEMAN, ESQ. mele.coleman@honolulu.gov
Deputies Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, HI 96813

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

TERRENCE M. LEE, ESQ. lee@SMLhawaii.com
BRETT R. TOBIN, ESQ. tobin@smlhawaii.com
Sullivan Meheula Lee LLLP
Pacific Guardian Center, Makai Tower
733 Bishop Street, Suite 2900
Honolulu, HI 96813

Attorneys for Defendant/Counterclaim Plaintiff
HANAPOHAKU LLC

DATED: Honolulu, Hawai‘i, March 13, 2020.

/s/ Timothy Vandeveer
MARGARET DUNHAM WILLE
TIMOTHY VANDEVEER

Attorneys for Plaintiffs/Counterclaim Defendants
SAVE SHARKS COVE ALLIANCE, LARRY McELHENY, JOHN THIELST, and CORA SANCHEZ

/s/ Gene K. Lau
GENE K. LAU

Attorney for Counterclaim Defendant
HAWAII’S THOUSAND FRIENDS

/s/ Pamela W. Bunn
PAMELA W. BUNN
ERIKA L. AMATORE

Attorneys for Plaintiff/Counterclaim Defendant
MĀLAMA PŪPŪKEA-WAIMEA