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1                   \* \* \* P R O C E E D I N G S \* \* \*

2    May 12, 2020

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4                   THE BAILIFF:   Calling Civil No. 19-1-57,  
5    save Sharks Cove Alliance versus City and County of  
6    Honolulu for counterclaim-defendants' joint motion for  
7    judgment on the pleadings.

8                   Appearances, please.

9                   MR. VANDEVEER:   Morning, Your Honor.   Tim  
10   Vandever on behalf of counterclaim-defendant Save  
11   Sharks Cove Alliance, Larry Mc Elheny, John Thielst and  
12   Cora Sanchez.

13                  THE COURT:   Good morning.

14                  MR. LAU:   Morning, Your Honor.   Gene Lau on  
15   behalf of counterclaim-defendant Hawaii's Thousand  
16   Friends.

17                  THE COURT:   Good morning, Mr. Lau.

18                  MS. AMATORE:   Good morning, Your Honor.  
19   Erika Amatore on behalf of counterclaim-defendant Malama  
20   Pupukea-Waimea.   I'll be arguing on behalf of the  
21   counterclaim defendant.

22                  THE COURT:   Okay.   Good morning.

23                  MR. TOBIN:   Good morning, Your Honor.  
24   Brett Tobin on behalf of the counterclaimant Hanapohaku.

25                  THE COURT:   Good morning.

1                   MR. SAITO: Good morning, Your Honor. Brad  
2 Saito, Deputy Corporation Counsel for the City.

3                   THE COURT: Good morning.

4                   MR. VANDEVEER: Your Honor, this is Tim  
5 Vandever. Margaret Wille is also joining us via video,  
6 although she's having some audio issues, but she's  
7 also on behalf of counterclaim-defendants Sharks Cove  
8 Alliance, Larry Mc Elheny, John Thielst and Cora  
9 Sanchez.

10                  THE COURT: Okay. Good morning to both of  
11 you.

12                  Okay. So, counsel, could each of you hear  
13 the other attorneys as they spoke, as well as me when I  
14 speak? If anyone believes they have an audio problem,  
15 please speak up now, and before you answer my question,  
16 Mr. Lau, when you spoke it was very faint, so if you  
17 could either get closer to your microphone or speak  
18 louder, that would help me at least.

19                  But that aside, does anybody believe they  
20 have any audio problems? If I hear nothing, then I'll  
21 assume the answer's no from everyone.

22                  And the record will reflect silence, which  
23 is presumably a good thing at this point. If anybody  
24 believes that they have a problem with the audio at some  
25 point, please interrupt whoever is speaking at that

1 time, including myself.

2           If you folks cannot hear, we have a  
3 problem, and that's far more important to identify and  
4 rectify the problem, than for me to keep speaking  
5 blissfully ignorant of that problem. So thank you for  
6 that.

7           Second preliminary point, when each of you  
8 speak, please start by identifying yourself so that the  
9 record is clearer in the future when this -- if this is  
10 transcribed.

11           Third point, if you -- if someone else is  
12 speaking and you feel an urgent desire to be heard,  
13 before we move on, please raise your hand, sort of like  
14 a student in class telling the teacher, Ooh-ooh, I want  
15 to answer that question, and that will be an indication  
16 to me that you at least desire to be heard promptly,  
17 whether I respond favorably remains to be seen.

18           Along that -- on that point, I have one  
19 last disclosure, so to speak at most. I have a 9:30  
20 hearing on a motion for summary judgment and a motion to  
21 compel, so we have a limited amount of time, I apologize  
22 for that, we're just very busy at this point in time.  
23 So we need to be very cognizant of the limited amount of  
24 time.

25           With that being said, rather than let the

1 attorneys start with whatever their prepared arguments  
2 might be, I'm going to direct the order of argument,  
3 because I'm going to try to make sure that we get  
4 through all three of the big issues that the motion  
5 presents today in the time that we have.

6           If we talk too long on one topic, I may  
7 well just push this into the next topic because I want  
8 to cover all three in varying amounts of time, some I  
9 think take more time than others.

10           So, we're going to start with the slap  
11 portion of the argument, then move on to the  
12 Rule 12(b) argument and then finally address the  
13 Noerr-Pennington Doctrine.

14           So starting with the slap action, as to  
15 whether the counterclaim is a slap action, I'm going to  
16 tell you my inclination and see who cares to respond,  
17 we'll go from there.

18           I'm inclined to find that this is not a  
19 slap action because it is not based solely on any  
20 plaintiffs' public participation before a government  
21 body, i.e., it is not based solely on any plaintiffs'  
22 oral or written testimony submitted or provided to a  
23 government body.

24           Is there anything that anyone would like to  
25 argue or address given my inclination? Ms. Amatore.

1 MS. AMATORE: This is Erika Amatore, thank  
2 you. The only thing that I want to say is that we  
3 believe that the complaint constitutes testimony under  
4 the statute.

5 THE COURT: And I have read the briefs,  
6 which I neglected to state at the outset, this is  
7 Judge Ashford by the way, I'm breaking my own rule.

8 Ms. Amatore, is there anything that you  
9 want to expand upon? At present I'm going to stick with  
10 my inclination, but I want to give everyone the  
11 opportunity to make a record and to argue if they feel  
12 the need to.

13 MS. AMATORE: Yes, Your Honor. This is  
14 Erika Amatore. Only that the term "testimony" is not  
15 defined in the statute.

16 Testimony can mean statements made under  
17 oath, but it also can be a (indiscernible)  
18 communication, and with the [break in audio] liberally  
19 interpret the statute, I think that the complaint can  
20 fall within the definition of testimony under the  
21 statute.

22 THE COURT: Okay. Ms. Amatore, appreciate  
23 your argument, as well as your brevity. Notwithstanding  
24 that, I will stick with my inclination.

25 And with respect to the argument of that

1 the counterclaim is a slap action, the motion is denied  
2 on that particular basis.

3 With that, I'm going to move to the issue  
4 of plaintiffs' arguments concerning Rule 12 of the  
5 Hawaii Rules of Civil Procedure, and whether claims have  
6 been stated on which relief can be granted.

7 Again, I'm going to give you my  
8 inclinations on the two counts, and then turn to the  
9 attorneys to see what they would like to argue, given my  
10 inclinations, as well as given anything that opposing  
11 counsel might argue.

12 In short, before I get to the logic, in  
13 short, I am inclined to deny the motion with respect to  
14 count 2 for tortious interference, and grant the motion  
15 with respect to count 1 for abuse of process.

16 I'll give you my reasoning, and then we can  
17 have an opportunity for you folks to respond as you see  
18 fit, and we'll see where I end up.

19 With respect to count 2 for tortious  
20 interference with prospective business, the issue here  
21 is whether the developer has alleged all of the  
22 essential elements of a tortious interference claim.

23 I find that the developer has done so in  
24 the counterclaim. Plaintiffs argue that the developer  
25 cannot and has not alleged a purposeful intent more

1 culpable than mere intent.

2           When I look at paragraph 33 of the  
3 counterclaim, however, I see that it asserts that the  
4 plaintiffs "are willfully and intentionally interfering"  
5 with the developer's existing and prospective tenants.

6           That allegation clearly satisfies the  
7 pleading requirement in my view, particularly in light  
8 of the Supreme Court's decision in *Bank of America*  
9 *versus Reyes-Toledo*.

10           Whether the developer can prove the intent  
11 element at trial or withstand the motion for summary  
12 judgment those are other matters, but that are not at  
13 issue today.

14           Today addresses only whether, if all of the  
15 factual allegations on the count are deemed true,  
16 whether the developer could prevail, I believe the  
17 answer is yes.

18           Therefore, I'm inclined to deny the motion  
19 with respect to count 2. I'm going to tell you my  
20 inclina -- or give you more thoughts on the abuse of  
21 process inclination, and then I will turn it over to you  
22 folks.

23           So with respect to count 1 for abuse of  
24 process, I'm inclined to find that the counterclaim does  
25 not assert an ulterior purpose -- I'm sorry, please

1 strike that or ignore what I said because I'm going to  
2 correct myself.

3 I'm inclined to find that the counterclaim  
4 does assert an ulterior purpose, that of indefinitely  
5 delaying the project until the developer runs out of  
6 funding or abandons the project entirely.

7 However, with respect to the second  
8 essential element of abuse of process, I'm inclined to  
9 find that the counterclaim does not allege a willful act  
10 distinct from the use of process per se.

11 The only allegation in the counterclaim  
12 that addresses the willful act element is paragraph 27,  
13 as far as I can tell, which alleges that the  
14 plaintiffs willfully and continuously made libelous and  
15 untrue statements about the developer in an effort to  
16 raise support and to poison public sentiment against the  
17 project and the developer.

18 But those alleged acts or efforts are not  
19 abuse of process, instead those acts are outside of the  
20 lawsuit, therefore, even taking all of the factual  
21 allegations of the counterclaim as true, I'm inclined to  
22 find that it does not state a claim for abuse of process  
23 on which relief can be granted.

24 Thank you for bearing with me. Any  
25 response from counsel? Ms. Amatore.

1 MS. AMATORE: On the tortious interference  
2 claim, the third element involved a purposeful intent to  
3 interfere [break in audio]

4 THE COURT: Ms. Amatore, I apologize.  
5 Could you start over again. The audio is breaking up to  
6 some degree, and I want to be sure I hear you. It's  
7 very important. Thank you.

8 MS. AMATORE: Yes. The third element of  
9 the tortious interference claim involved a purposeful  
10 intent to interfere.

11 That purposeful intent under *HMA v. HMSA*  
12 does require an improper objective or wrongful means.

13 Paragraph 33 of the counterclaim alleges  
14 that Save Sharks Cove willfully and intentionally  
15 interfering with the tenants' relationship by speaking  
16 to current operations and delay or prevent future ones,  
17 that in itself isn't improper or wrongful and,  
18 therefore, we don't think that it meets the elements of  
19 the claim.

20 THE COURT: Okay. Thank you. Mr. Tobin  
21 anything?

22 MR. TOBIN: Your Honor, this is Brett  
23 Tobin. I don't think I have anything if your  
24 inclination is still the same. If you're persuaded by  
25 the argument, I think the response received that,

1 obviously, the argument that they can delay the case at  
2 an injunction or something, that's [break in audio]

3           But I think the key to our allegation is  
4 that it's improper, and that you can't just -- just  
5 because the lawsuit seeks an objective that would be  
6 proper if you had the basis for it, doesn't mean that we  
7 can't claim that it's improper because we don't think  
8 they have a basis.

9           THE COURT: Okay. Thank you, Mr. Tobin.

10           Is there anyone else who would like to be  
11 heard on this point? And the record will reflect no  
12 response, and I do have visual contact with all of the  
13 counsel who appeared. No one's raised their hand, so I  
14 assume we don't have an audio problem.

15           Okay. My inclination remains unchanged, so  
16 for the reasons that I've previously stated, the motion  
17 is grand with respect to count 1 for abuse of process.  
18 On the Rule 12 issue, denied with respect to the  
19 intentional inference.

20           MR. TOBIN: Your Honor.

21           THE COURT: Mr. Tobin?

22           MR. TOBIN: Your Honor, I'm sorry, I  
23 thought we were just addressing the tortious  
24 interference part at first 'cause that was all that  
25 Ms. Amatore stated.

1 I'd actually like to address the abuse of  
2 process at this time.

3 THE COURT: Okay, so I understand now. I  
4 was not puzzled by your response, but I perhaps assumed  
5 too much. So why don't you move on, please.

6 MR. TOBIN: You were right to be puzzled if  
7 I had just decided to sit by.

8 Yeah, I think on the abuse of process,  
9 Your Honor, you know we recognize this is a difficult  
10 point to thread the needle on because of the distinction  
11 between abuse of process and malicious prosecution, you  
12 have to have this separate meaningful act, it can't be  
13 just abuse of process by itself, but it also can't be so  
14 far removed from abuse of process that it's now not in  
15 the claim.

16 And our allegation is that the social media  
17 disinformation campaign that was engaged in was  
18 inexplicably linked to the lawsuit itself because the --  
19 they're using that as a fundraising arm for the  
20 litigation and support to the litigation.

21 But at the same time they're stating things  
22 on social media that they know that they can't say in a  
23 court proceedings because they know they don't have the  
24 basis to support the [break in audio]

25 So the two kind of go hand in hand, and

1 that's how we had viewed it, and that's why we attached  
2 that as being willful act within the broader scope of  
3 abuse of process which is the litigation itself.

4 THE COURT: Okay, and I recall reading this  
5 in your memorandum. Is there anyone else who would like  
6 to speak or be heard with respect to abuse of process?

7 Ms. Amatore.

8 MS. AMATORE: Thank you, Your Honor. I  
9 just want to say that I didn't find any case law  
10 supporting the opposition that publicity campaign can be  
11 part of the [break in audio] could be abuse of process.  
12 I did find a lot of case law that said a publicity  
13 campaign is associated with involving use of the same  
14 First Amendment protection, but we haven't -- we haven't  
15 reached the Noerr-Pennington issue yet.

16 THE COURT: Understood. Anyone else who  
17 would like to be heard on this topic? Mr. Tobin?

18 MR. TOBIN: Yes, Your Honor, Brett Tobin  
19 again. I just wanted to draw a distinction in terms of  
20 the publicity, and as we conceded in our pleadings  
21 [break in audio].

22 Your Honor saw it, if you were just to  
23 publicize the facts of the complaint, or something along  
24 those lines, would not cause abuse of process claim, nor  
25 would publicity, separate and apart from an act actual

1 lawsuit

2 reach a claim.

3           But I think in this case, with the fact  
4 with the improper use of these publicity campaigns as a  
5 way of linking it to the litigation that we think it's  
6 adequately alleged.

7           THE COURT: Okay. I'm going to digress  
8 slightly, and I apologize. At times I'm having trouble  
9 hearing both Ms. Amatore and Mr. Tobin, it's just  
10 occasional syllables that are not working.

11           I am getting the thrust of the arguments, I  
12 believe, but I have a question to all of you with that  
13 background.

14           Is anyone having difficulty hearing one  
15 another or me, and part of it is, I'm wondering if  
16 counsel and, therefore, probably myself, might be  
17 speaking too quickly.

18           Is anyone else having any audio issues?  
19 And the record will reflect Mr. Tobin and Mr. Saito  
20 raising their hands.

21           Mr. Tobin first, then to Mr. Saito. Do you  
22 believe you're getting adequate audio, even though it  
23 might not be perfect?

24           MR. TOBIN: Yes, Your Honor, this is Brett  
25 Tobin. I hear you fine, I haven't heard any

1 interruptions from you. I do occasionally have things  
2 cutting in and out with Ms. Amatore.

3 THE COURT: Okay. Thank you. Mr. Saito.

4 MR. SAITO: I think my problems are similar  
5 to those described by the Court. I believe I have  
6 adequate reception, although it's not perfect.

7 THE COURT: Okay.

8 So, I'm taking a shot in the dark here to  
9 be quite honest, but I'm going to suggest that we talk a  
10 little bit slower, that might help with the audio. I  
11 don't know if it will, but I suspect it will, so let's  
12 give that a shot. Apologize for stammering about that,  
13 okay.

14 Just to be clear, last chance, if anyone  
15 has anything further with respect to abuse of process or  
16 tortious interference on the Rule 12 argument, now's the  
17 time.

18 The record will reflect no response.

19 So as I started to do earlier, the Court's  
20 inclination remains unchanged, for the reasons I have  
21 stated, notwithstanding -- and I apologize for speaking  
22 quickly, notwithstanding counsel's arguments, count 1  
23 for abuse of process, motion granted.

24 Count 2, intentional interference, denied.

25 I want to move now to the Noerr-Pennington

1 Doctrine. I do have some -- I have several questions.  
2 I would like to give you folks some time to argue,  
3 however, so I'll try not to speak too quickly, and I  
4 apologize for my ignorance on this.

5 Ms. Amatore, this is a question for you, I  
6 believe, or anyone who can remedy my foolishness.

7 Why is it that the actions of a private  
8 individual, whether it be the developer in the *Protect*  
9 *Our Mountain Environment* case from Colorado, or the  
10 developer here, give rise to claims of interference with  
11 Constitutional rights?

12 What I mean is, usually we go after the  
13 government for that, as opposed to private individuals.

14 Ms. Amatore, I see you nodding, so I think  
15 you understand my question your response.

16 MS. AMATORE: Yes, this is Erika Amatore.

17 Petitioning the Court with a complaint is  
18 the exercise of the right to petition under the First  
19 Amendment to the United States Constitution and Article  
20 1 Section 4 of the Hawaii State Constitution.

21 That means -- that means this. Our  
22 complaint is immune from counterclaims that allege harm  
23 caused by the exercise of the right to petition.

24 So if a harm claimed was caused by our  
25 petitioning the government, that's when Noerr-Pennington

1 immunity arises.

2 THE COURT: I may --

3 MS. AMATORE: Does that answer your  
4 question?

5 THE COURT: Go on, I'm sorry.

6 MS. AMATORE: I was just going to ask if  
7 that answered your question.

8 THE COURT: This is Judge Ashford, I may be  
9 misunderstanding, but I do not think that it does.  
10 So let me try again, and perhaps, this would just have  
11 to fall by the wayside, because I'm sure I'm mistaken,  
12 to be blunt.

13 The action that I believe the plaintiffs  
14 assert is violating their Constitutional right under the  
15 First Amendment is the filing of a counterclaim.

16 That counterclaim is filed by a private  
17 citizen and not by the government, so that's the reason  
18 for my question.

19 MS. AMATORE: Yes. It is the filing of the  
20 counterclaim, and it's not just the filing of the  
21 counterclaim, it is filing the counterclaim and claiming  
22 and seeking damages based on harm caused by the filing  
23 of the complaint.

24 So, for example, in *Kearney*, which both the  
25 developer and we have cited in our papers, they do set

1 forth a test to check whether the conduct is immune,  
2 and it is whether the lawsuit imposes a burden on  
3 petitioning rights.

4 By filing the counterclaim, the developer  
5 is burdening the plaintiffs' petitioning right.

6 Were the activities protected petitioning  
7 activities? Yes, many federal courts have said that  
8 filing a complaint in court is a protected activity.

9 And then you look to see if an exception  
10 applies, and there is an exception to Noerr-Pennington  
11 immunity.

12 THE COURT: Understood. Ms. Amatore, what  
13 was the case that you referred to that both parties  
14 cited?

15 MS. AMATORE: That was *Kearney v. Foley and*  
16 *Lardner*, 590 F3d. 638.

17 THE COURT: Okay, thank you.

18 Ms. Wille, earlier I think you raised your  
19 hand briefly, was that a hand raised seeking to speak?

20 Ms. Wille?

21 MR. VANDEVEER: Your Honor, this is Tim  
22 Vandever, I don't believe she can hear you. She's  
23 watching via Youtube.

24 THE COURT: Okay. Thank you.

25 Mr. Tobin, did you have any response to any

1 question by chance?

2 MR. TOBIN: Uh, I do, Your Honor, this is  
3 Brett Tobin.

4 I think -- I think the Court has touched on  
5 one of the problems that we feel is pretty substantial  
6 with this claim, and that's that, and we touched on the  
7 issue of the statutory context that the Noerr-Pennington  
8 Doctrine is typically tethered to, and I think the  
9 reason why is it gets to your point.

10 The First Amendment, just like anything  
11 else in the Bill of Rights is, at least per se, directed  
12 at government action rather than private action. That's  
13 why predominantly the rule is statutory construction  
14 because the state for the government passes a statute  
15 that then is applied to interfere with someone's First  
16 Amendment Right, then we have a problem, and that's why  
17 you're not allowed to read that statute that the claim  
18 is based on to interfere with that First Amendment  
19 petitioning right.

20 Here we don't have that. Here we just have  
21 four claims that don't raise any statutory issues, and  
22 then that, I think, leads to this problem that you're  
23 getting at, which is it just creates this slippery slope  
24 of, if the only issue is that every -- every complaint  
25 that it automatically triggers First Amendment rights,

1 then every counterclaim for abuse of process or tortious  
2 interference or anything along those lines raises First  
3 Amendment complaints, and I think that is just too broad  
4 a brush to paint this.

5 And I think that gives a lack of clarity,  
6 and it's one of the main reasons why I think it just  
7 doesn't make sense for the Court to grab on to it now  
8 when there's no Hawaii State Court guidance on whether:

9 A. To apply.

10 B. How to apply it, what standards are to  
11 be used.

12 Yes, Your Honor.

13 THE COURT: Sorry to interrupt you,  
14 Mr. Tobin, you've gone beyond my question and into other  
15 topics, and I want to stick to my questions first.

16 Ms. Amatore, briefly, I did see you raise  
17 your hand, but I do want to raise a few other issues for  
18 you folks, and so if you could respond to this topic.

19 MS. AMATORE: Sure. I just want to point  
20 out that the counterclaim is seeking action from the  
21 government. It's seeking an award of damages, so that's  
22 why the common law claim would equally apply.

23 The Ninth Circuit said so in *Theme*  
24 *Promotions*, those were both private parties, and  
25 in *Lasaine*, they're both private parties, and they're

1 asserting state tort law claims in paying productions,  
2 and our District Court agreed with this case.

3           And I know that we're moving on, but these  
4 are Constitutional doctrines. They're not statutory.  
5 They're not -- we don't need Hawaii cases interpreting  
6 Noerr-Pennington because we have Supreme Court cases  
7 interpreting Noerr-Pennington, and those are First  
8 Amendments.

9           THE COURT: So if I understand you, two  
10 primary points I take from your response:

11           No. 1. Other courts have not stumbled on  
12 this issue that I raise, so maybe three points.

13           No. 2. The State action that is there is  
14 the request that the counterclaim-defendants be harmed,  
15 so to speak, via an award of damages, so that's the  
16 request for State action, the request that the State  
17 would come in and do something which would chill --  
18 exercise the First Amendment rights.

19           And third point I believe, which I may  
20 have lost track of, is that to the extent you're arguing  
21 a United States Constitution, First Amendment right, we  
22 all know who the -- where the law of the land comes  
23 from, whether it's in the Constitution, the next step  
24 I'm bound by the U.S. Supreme Court's decisions;  
25 correct?

1 MS. AMATORE: Yes, that's correct.

2 On the last point, um, I would also argue  
3 that if anything, our Article 1, Section 4 would provide  
4 broader protection.

5 On your first point, I didn't hear you.

6 THE COURT: First point was that other  
7 courts, such as the District Court in Hawaii, the  
8 Federal District Court, Colorado Supreme Court, et  
9 cetera, have not stumbled at all over the question that  
10 I raised that got us on this topic.

11 MS. AMATORE: I wouldn't say they haven't  
12 stumbled at all, but they have found that, yes, between  
13 private parties, you can assert the claim, that  
14 Noerr-Pennington immunity attaches when you file a  
15 complaint in court, and is it the act of filing any tort  
16 lawsuit? No, because you can only raise the  
17 Noerr-Pennington defense when the counterclaim alleges  
18 some harm caused by the plaintiff's exercise of the  
19 First Amendment.

20 THE COURT: Okay. Mr. Tobin, before you  
21 speak, I'll give you -- I'm going to recommend to you  
22 that you be very brief, because what I plan to do is to  
23 raise a few more issues as food for thought, and then  
24 give each of you a little bit of time to address them,  
25 and we'll see where we end up. So if you want to be

1 very brief on this topic, you may.

2 MR. TOBIN: Well, Your Honor, it may bleed  
3 into some of the others, so maybe it makes more sense  
4 for you to just list your concerns, and then I can just  
5 address it in that context. If it's not in that context  
6 I'll raise it separately.

7 THE COURT: Understood, wise choice, I  
8 think.

9 Okay. So the other things -- some of the  
10 things that go through my mind as I prepared for this  
11 hearing, is whether the Noerr-Pennington Doctrine is a  
12 defense to liability, or is an immunity from being sued.

13 I see language in the cases that address  
14 this, including in the Nunag Tonado (phonetic) case  
15 cited by the defendants, where the Ninth Circuit, I  
16 believe, pretty clearly said, it's a defense that should  
17 be litigated, but does not equal to an immunity to from  
18 suit.

19 And that seems somewhat consistent with the  
20 Colorado Supreme Court's decision in the Protect Our  
21 Mountain Environment case, in that, the Colorado Supreme  
22 Court stated that the trial court in that case should  
23 treat a motion based on Noerr-Pennington as a motion for  
24 summary judgment.

25 In this case, in our case, if I were to

1 follow Colorado, I would then say, Okay, this is a  
2 motion for summary judgment. We have very different  
3 standards for motion for summary judgment than we do for  
4 motions to dismiss.

5 I mentioned, for example, *Bank of America*  
6 *versus Reyes-Toledo* on Rule 12, I would also mention  
7 *Ralston versus Yim* from the Hawaii Supreme Court in  
8 about 2013 regarding the movant's burden on a motion for  
9 summary judgment on a claim for which the movant will  
10 not have the burden of proof at trial.

11 That hasn't been addressed, and I'm not  
12 being critical here, I'm saying this is complicated and  
13 these are concerns I have that cause me to pause.

14 Another issue that I have in my mind is  
15 whether the doctrine applies only to statutory claims or  
16 also to common law claims.

17 Those are the primary issues that stick in  
18 my mind.

19 Ms. Amatore, I'll give you the first whack  
20 at responding to those, to the extent you care to or  
21 anything else that you sort of came into the hearing  
22 wanting to educate me about.

23 MS. AMATORE: Well the question of whether  
24 Noerr-Pennington is a defense to liability or immunity  
25 to being sued is a question that has arisen, and it's

1 very interesting, and I would be happy to provide  
2 further briefing on that.

3           But I think that what we're saying here is  
4 that in order to invoke the sham exception, you have to  
5 allege, you have to make the correct allegation in your  
6 counterclaim.

7           You have to allege that the complaint is  
8 objectively based in the sense that no reasonable  
9 litigant could realistically expect to succeed on the  
10 merits.

11           The suit is immunized if it's reasonably  
12 calculated to solicit a favorable outcome, that's from  
13 that's from the *Lasaine* case that we cited.

14           The United States Supreme Court says, put  
15 it plainly: The suit had been (indiscernible) if  
16 plaintiff could have believed it had some chance of  
17 winning.

18           I did not see any allegation, even  
19 conclusory allegations, in the counterclaim alleged in  
20 this action, and it certainly wasn't alleged to the  
21 heightened pleading standard that applies to the sham  
22 litigation section.

23           So we do have a notice pleading here. I  
24 know that it's not the (indiscernible) of the federal  
25 pleading, but the reasons for the heightened pleading

1 standard isn't based on Court rules, it is based on  
2 First Amendment consideration, petition clause  
3 considerations that are as applicable here as they are  
4 in the federal court.

5           Indeed, many of the cases discussed in the  
6 heightened pleading standard are pretty [break in audio]

7           In *Kottle v. Northwest Kidney Center*, the  
8 Court said that vague allegations are insufficient to  
9 overcome Noerr-Pennington immunity.

10           So the issue here is, yes, in *Protect Our*  
11 *Mountain Environment* we were looking at a summary  
12 judgment. But I didn't see the developer  
13 (indiscernible) counterclaim or complaint. I didn't see  
14 the allegations in it. Here I see the allegations, and  
15 it doesn't make them.

16           As far as whether they apply to common law  
17 claims, I think the Court in *Lasaine* addressed that, and  
18 in let me find the quotation for you, Your Honor.

19           In *Lasaine*, Judge Otake, citing North  
20 American Marketing said, agreed with the Fifth Circuit  
21 reasoning, but the Ninth Circuit agreed with the Fifth  
22 Circuit reason for extending the Noerr-Pennington  
23 Doctrine for tortious interference with a contract  
24 claim.

25           "There is simply no reason that a common

1 law court doctrine has any more [break in audio]  
2 permissibly abridge or chill the Constitutional right of  
3 petition than can a statutory claim (indiscernible).

4 Then she said, Based on this reasoning, the  
5 Noerr-Pennington Doctrine would also arguably extend to  
6 plaintiff's fraud claim, which had already been  
7 dismissed on Rule 9.

8 THE COURT: You did say "arguably" didn't  
9 you?

10 MS. AMATORE: I did, yes.

11 THE COURT: I'm sorry to chide you, I'm  
12 just teasing, but I hear you, I assure you.

13 I interrupted you, Ms. Amatore, anything  
14 further? I know Mr. Tobin is waiting patiently.

15 MS. AMATORE: No, Your Honor.

16 THE COURT: Thank you very much.

17 Mr. Tobin.

18 MR. TOBIN: Thank you, Your Honor. Brett  
19 Tobin. Yes, I think you touched on the word that  
20 matters very [break in audio] the most in that statement  
21 and that statement is pure dicta, it's absolutely 100  
22 percent dicta, and there's a reason we don't apply  
23 dicta, and it's because she says it arguably could work,  
24 but she hasn't done the analysis and it wasn't briefed  
25 and all of those things, so there's really just no

1 reason to lean on that at all.

2 I think, as to your question about defense  
3 to liability or immunity, I think it's very clearly a  
4 defense to liability that should just be litigated  
5 throughout the process, and I think one of the things  
6 that Mrs. -- I'm sorry, Ms. Amatore said earlier, going  
7 to address it comes into play here, which is, that she's  
8 saying the harm, the government actually would be  
9 awarding us damages on our counterclaim.

10 But if the government were awarding us  
11 damages on our counterclaim, it would mean that we would  
12 have prevailed, which means we would have demonstrated  
13 that their claim was baseless. There's no First  
14 Amendment issue whatsoever.

15 So why this needs to play out further and  
16 why it would need to be on a summary judgment standard,  
17 and why you can't just come in at the outset and say,  
18 Well, if you let them win their case and we don't prove  
19 it, it would infringe on our First Amendment right.

20 Well, fine, but that's not the issue.  
21 And I think the odds to the statutory versus common law,  
22 again, there's disputes, even within the Ninth Circuit,  
23 some courts have said, yes, it does apply to common law  
24 claims, some courts have said no, and that's one of the  
25 reasons we cite it.

1           It just doesn't seem like the kind of  
2 vehicle, talking about claims like Newson (phonetic),  
3 where this Court to go out on limb and try to apply a  
4 doctrine, try and set a standard and move forward along  
5 those lines, I think the problem with that is that it  
6 just, there's just not enough of a basis for doing it.

7           And one of the things that Ms. Amatore said  
8 was, I seem to hear that she was saying that we needed  
9 to allege in our counterclaim that it met the sham  
10 litigation exception, when the Noerr-Pennington Doctrine  
11 hasn't even been applied in a Hawaii state court case,  
12 and that just seems ludicrous to me.

13           I think this notion that we didn't  
14 expressly call it a sham, obviously, we're alleging that  
15 we think it's a baseless claim, that's throughout the  
16 counterclaim. It's the gravamen of the whole argument.

17           So the notion that we needed to  
18 specifically address a doctrine that hasn't been applied  
19 just doesn't make sense to me, and if, on a motion for  
20 summary judgment down the road we need to have this  
21 fight, and why it's baseless, and the City and County  
22 raised some good arguments in their response as to why  
23 some of these claims are objectively baseless, then we  
24 can have that conversation, but it's just not on a  
25 motion for judgment on the pleadings.

1           THE COURT: Okay. So, counsel, hang on,  
2 Ms. Amatore, I'll let you speak in just a moment.  
3 I do want to wrap this up because I have this the next  
4 group of attorneys calling in.

5           I'm going to tell you my inclination and  
6 then give anybody who wants to take it one last shot.

7           I'm inclined to deny the motion on this  
8 particular ground based upon the record before me today  
9 and the briefing before me today.

10           I'm also inclined to ask the attorneys to  
11 put their heads together to discuss further briefing on  
12 what will be some sort of motion, that's up to the  
13 moving party.

14           The short version is, I'm not comfortable,  
15 based on the record and the briefing today, granting  
16 this motion. I'm not saying it doesn't have any legs,  
17 but it doesn't have sufficient legs to cross the goal  
18 line today. I apologize for all my silly metaphors.

19           That's my inclination, and I would, after  
20 counsel put their heads together and reach some common  
21 ground or don't, I would think we probably want to have  
22 a status call with me involved to talk about what I  
23 think needs to be briefed with, of course, your input.

24           So that's my inclination. I think that  
25 probably doesn't disturb Mr. Tobin too much, because the

1 motion looks like it's going to be denied, other than  
2 the abuse of process topic.

3 He, of course, wants to put a knife in this  
4 forever and squash it completely, I don't think that's  
5 going to happen today. It disappoints Ms. Amatore  
6 because she'd like to win across the board today.

7 So I'm going to turn to Ms. Amatore first  
8 and say, is there anything further you want to discuss  
9 right now?

10 MS. AMATORE: Only that I very much  
11 appreciate that you're allowing the opportunity for  
12 further briefing, because this is a very, very important  
13 subject.

14 We're talking about one of the most  
15 precious rights that we have, and it's a First Amendment  
16 issue, and I would be happy to provide the Court with  
17 further briefing, and I'd be happy to speak with  
18 Mr. Tobin and Mr. Saito about establishing a schedule,  
19 and then with you about the topics you'd like us to  
20 address.

21 One just last general thing, I want to  
22 thank the Court and the Court staff for arranging this  
23 hearing. There was a [break in audio] interest in this  
24 case, and we appreciate your effort to accommodate that  
25 interest under these unusual circumstances, so thank

1 you.

2 THE COURT: You're welcome.

3 Mr. Tobin, given what I've said, is there  
4 anything further that you'd like to say at this point in  
5 time?

6 MR. TOBIN: No, Your Honor, I learned a  
7 long time ago not to try to snatch defeat from the jaws  
8 of victory, so I'll just be quiet.

9 THE COURT: You're an intelligent man,  
10 despite what everyone says about you, I'm just teasing.

11 Anyone else?

12 Okay. So thank you all very much. I  
13 appreciate your indulgence. I apologize for my  
14 schedule.

15 The motion is denied, insofar as it asserts  
16 the Noerr-Pennington doctrine for the reason that I've  
17 stated.

18 So the motion is granted in part with  
19 respect to the abuse of process, in all other respects  
20 it's denied.

21 Ms. Amatore, as a prevailing party, will  
22 you please prepare the order.

23 MS. AMATORE: Yes, Your Honor.

24 THE COURT: Okay.

25 With respect to eventual status conference,

1 I will rely on the attorneys to contact my chambers  
2 about that. Please do what you can together.

3 That might not be much, but give it a shot  
4 so we can have a more organized status conference,  
5 eventually we'll set that up at a time once you folks  
6 call us. Anything else while we're on the record,  
7 Mr. Tobin?

8 MR. TOBIN: Your Honor, if I could just  
9 quickly. On the abuse of process is that ruling with or  
10 without prejudice? Would we be given leave to amend or  
11 is that not part of your ruling?

12 THE COURT: You have not asked for leave to  
13 amend.

14 MR. TOBIN: Okay.

15 THE COURT: Mr. Lau.

16 MR. LAU: Your Honor, I'm a bit confused.  
17 Are you going to order the Noerr-Pennington part of the  
18 motion be denied, or are you taking that under  
19 advisement, such that, the parties can provide further  
20 briefing on the issue, and the Court can come to its  
21 final.

22 THE COURT: Thank you for seeking  
23 clarification, Mr. Lau.

24 I am not taking anything under advisement.  
25 The motion is denied in all respects, other than the

1 one.

2                   So but I'm not taking it under advisement.  
3 All rulings short of final judgment are interlocutory,  
4 so you can call that without prejudice if you want.

5                   The point is, as I've said, on this record  
6 and on these briefs, motion is denied.

7                   It might bear further discussion informally  
8 and possibly formally via motion, but that's not --  
9 that's what we have for today.

10                   Anything else from anyone?

11                   Okay. Thank you all.

12                   We'll be in brief recess.

13                   MR. TOBIN: Thank you, Your Honor.

14                   MS. AMATORE: Thank you, Your Honor.

15                   (Proceedings concluded at 9:45 a.m.)

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3 STATE OF HAWAII )

4 CITY AND COUNTY OF HONOLULU )

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8 I, NIKKI BEAVER CHEANG, RPR, CRR, CSR-340, an  
9 Official Court Reporter for the First Circuit Court,  
10 State of Hawaii, hereby certify that the foregoing  
11 comprises a full, true and correct transcription of my  
12 stenographic notes taken in the above-entitled cause.

13

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15 Dated this 14th day of May, 2020.

16

17 OFFICIAL COURT REPORTER

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21

/s/ Nikki Beaver Cheang

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NIKKI BEAVER CHEANG, CRR, CSR-340

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