

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SAVE SHARKS COVE ALLIANCE, MALAMA)	
PUPUKEA-WAIMEA, HAWAII'S THOUSAND)	
FRIENDS, et al.,)	
)	
Plaintiffs,)	
v.)	Civil No.
)	19-1-0057 (JHA)
CITY AND COUNTY OF HONOLULU; CITY)	
COUNCIL OF THE CITY AND COUNTY OF)	
HONOLULU, et al.,)	
)	
Defendants.)	
)	

TRANSCRIPT OF AUDIO PROCEEDINGS

before the HONORABLE JAMES H. ASHFORD Judge,
presiding, on Tuesday, May 12, 2020.

APPEARANCES:

TIMOTHY VANDEVEER, ESQ.
MARGARET WILLE, ESQ.
For Save Sharks cove Alliance, etc.
GENE LAU, ESQ.
For Hawaii's Thousand Friends
ERIKA AMATORE, ESQ.
For Malama Pupukea-Waimea
BRETT TOBIN, ESQ.
For Hanapohaku ,LLC
BRAD SAITO, ESQ.
For the City and County of Honolulu

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OFFICIAL COURT REPORTER
STATE OF HAWAI'I

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

2 May 12, 2020

3

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

18

19

20 /s/ Nikki Beaver Cheang

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NIKKI BEAVER CHEANG, CRR, CSR-340

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