

Anthony Ranken & Associates

ANTHONY L. RANKEN 3348
SAMUEL P. SHNIDER 10098
222 N. Church Street
Wailuku, HI 96793
Phone: (808) 244-7011
Fax: (808) 244-7022

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SECOND CIRCUIT
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Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

ANGUS L.K. MCKELVEY, JOANNE)	CIVIL NO. 2CCV-19-1012(3)
JOHNSON WINER, ARCHIE)	(other civil action)
KALEPA, KE‘EAUMOKU KAPU, and)	
MAUI TOMORROW FOUNDATION,)	FIRST AMENDED COMPLAINT FOR
INC.)	DECLARATORY AND INJUNCTIVE
)	RELIEF; EXHIBIT “A”; SUMMONS
)	
Plaintiffs,)	
)	
v.)	
)	
)	
MICHAEL P. VICTORINO, MAYOR)	
OF THE COUNTY OF MAUI;)	
MOANA M. LUTEY, CORPORATION)	
COUNSEL FOR THE COUNTY OF)	
MAUI; and THE MAUI COUNTY)	
COUNCIL,)	
)	
Defendants.)	

**FIRST AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF**

COME NOW Plaintiffs herein, ANGUS L.K. MCKELVEY, JOANNE
JOHNSON WINER, ARCHIE KALEPA, KE‘EAUMOKU KAPU, and MAUI

TOMORROW FOUNDATION, INC., and for their complaint against the above-named defendants, allege and aver as follows:

PARTIES

1. Plaintiff MAUI TOMORROW FOUNDATION, INC. (Maui Tomorrow) is a 501(c)(3) non-profit environmental advocacy organization dedicated to the protection of the island of Maui's precious natural areas and prime open space for recreational use and aesthetic value. Maui Tomorrow serves as a watchdog for enforcement of Hawaii's environmental and land use laws. Maui Tomorrow supports and the general public access natural areas on and off shore for camping, shore fishing, net fishing, snorkeling, spearfishing, surfing, standup paddle boarding, kayaking, and a range of other water related recreational and cultural activities. Since 1990, Maui Tomorrow has promoted the concept of ecologically sound development and is concerned with land-based activities that affect the health of offshore reef ecosystems. Maui Tomorrow believes these impacts are unnecessary and are inconsistent with ecologically sound development. Maui Tomorrow's ability to serve the Maui community, to carry out its advocacy mission, and to preserve and improve the quality of life for future generations all depend on appropriate environmental review and public processes.

2. Plaintiff ANGUS L.K. MCKELVEY is an individual and life-long resident of West Maui who is deeply involved in the community. Plaintiff has personal knowledge of the Lahaina injection wells issue in its entirety as both a community member, and as the elected representative for state house District 10, where said injection wells are located, for the past sixteen years.

3. Plaintiff JOANNE JOHNSON WINER is a taxpaying citizen of Maui, Hawaii. As a former member of the Maui County Council (hereinafter "Council" or "County Council") she is concerned about protecting the proper role and the authority of the Council in County government decisions. As a resident of the affected area (Lahaina side) of Maui she is directly and personally affected by the

injection wells and the resulting diminution of water quality and damage to the coral reefs in the region.

4. Plaintiff ARCHIE KALEPA is a lifelong resident of the district of Lahaina, Hawai'i. He has lived in West Maui for his entire life, and his family has lived in Lahaina for six generations. He is a Native Hawaiian cultural practitioner, whose traditional and customary practices include navigational voyaging, diving, fishing, surfing, paddling, and other ocean-going and nearshore gathering practices. Mr. Kalepa is a retired lifeguard, fisherman, professional surfer, and all-around waterman. He has regularly accessed surf breaks, nearshore fisheries, and paddling, gathering, and camping areas along the coast of West Maui. He counts among his cultural practices the protection of Maui's nearshore resources, reefs, and beaches, for future generations to come.

5. Plaintiff KE'EAUMOKU KAPU is a resident of Maui who resides in Kaa'u above Lahaina, and is a traditional cultural consultant and community organizer. He states: "Our issue with the Mayor's decision is that the lack of accountability for our resources does not guarantee the ability of my future generations in passing generational knowledge when it comes to the rights to gather our medicinal fauna from the sea. This decision also affects the right to harvest for our kupuna that are not able to harvest for themselves. Finally, the lack of consultation with native Hawaiians that have never been considered should be a separate issue from the broader community."

6. Defendant MICHAEL P. VICTORINO, MAYOR OF THE COUNTY OF MAUI ("the Mayor") is the Mayor of the County of Maui, State of Hawaii and is named as a defendant herein in that capacity.

7. Defendant MOANA M. LUTEY, CORPORATION COUNSEL FOR THE COUNTY OF MAUI ("Corporation Counsel") is Corporation Counsel for the County of Maui and is named as a defendant herein in that capacity.

8. Defendant the MAUI COUNTY COUNCIL is a nine-member legislative body

of elected officials, which is the legislative and policy-making arm of the Maui County government, as provided by Section 2-2 and Article 3 of the Charter of the County of Maui. The MAUI COUNTY COUNCIL is named herein as a Defendant because it may claim an interest relating to the subject of this action and is so situated that the disposition of the action in its absence may as a practical matter impair or impede its ability to protect that interest.

JURISDICTION

9. All of the events, activities and circumstances that give rise to this action took place in the County of Maui, State of Hawaii, within the jurisdiction of this Court.

10. This action is brought under Hawaii Revised Statutes § 632-1 as an action for declaratory relief.

11. Plaintiffs further seek injunctive relief as detailed below.

FACTUAL BACKGROUND

12. On April 16, 2012, the Hawaii Wildlife Fund, et al. filed a lawsuit in the United States District Court for the District of Hawaii ("District Court"), Civil No. 12-198 BMK, against the County of Maui, alleging violations under the Federal Water Pollution Control Act, also known as the Clean Water Act, entitled Hawaii Wildlife Fund et al. v. County of Maui ("LWRF Lawsuit").

13. On January 23, 2015, and June 25, 2015, the District Court granted Plaintiffs' motions for partial summary judgment in the LWRF Lawsuit.

14. To avoid incurring expenses and the uncertainty of a judicial determination of the parties' respective rights and liabilities, the County Council approved a Settlement Agreement by Resolution 15-75 ("2015 Settlement Agreement").

15. The 2015 Settlement Agreement was lodged with the District Court on September 24, 2015, and following federal government review pursuant to

40 C.F.R. §135.5, the District Court entered the Settlement Agreement and Order and entered its Judgment on November 17, 2015.

16. Pursuant to the terms of the 2015 Settlement Agreement and Order, the Parties agreed that the County reserved the right to appeal the rulings of the District Court to the Ninth Circuit Court of Appeals and on to the United States Supreme Court.

17. The County of Maui appealed the District Court's decision to the Ninth Circuit Court of Appeals, Case No. 15-17447, and the Ninth Circuit Court of Appeals denied the appeal on February 1, 2018.

18. The County of Maui filed a Petition for Writ of Certiorari with the U.S. Supreme Court on August 27, 2018, and on February 19, 2019, the U.S. Supreme Court granted the County of Maui's petition. (Supreme Court case no. 18-260)

19. Corporation Counsel received from Plaintiffs' counsel and transmitted to the County Council's Governance, Ethics, and Transparency Committee, "Confidential Settlement Communication - FRE 408," dated April 26, 2019 (with amendments made on May 9, 2019) (hereinafter "2019 Proposed Settlement").

20. On August 16, 2019, the *Maui News* published an opinion piece by Mayor VICTORINO in which he acknowledged the Maui County Council's authority to settle the case, referring to "rhetoric aimed at persuading our lawmakers to withdraw from the Supreme Court."

21. At the County Council meeting of September 20, 2019, five months after deliberations about the 2019 Proposed Settlement commenced, the Corporation Counsel for the first time questioned the County Council's authority to settle the case. The County Council considered the concerns raised by the Corporation Counsel, but did not find them persuasive.

22. On September 25, 2019, the Council passed Resolution No. 19-158, a copy of which is attached hereto as Exhibit "A", adopting the 2019 Proposed Settlement (hereinafter referred to as "the 2019 Settlement"). Resolution No. 19-158 had the

following essential terms:

- a. Approving settlement of the case under the terms set forth in the 2019 Proposed Settlement as amended in open session before the reconvened September 3, 2019 meeting of the Governance, Ethics, and Transparency Committee on September 6, 2019;
- b. Authorizing the Mayor to execute a Release and Settlement Agreement on behalf of the County in the case;
- c. Authorizing the Director of Finance to satisfy said settlement of the case; and
- d. Ordering that certified copies of the resolution be transmitted to the Mayor, the Director of Finance, the Director of Environmental Management, and the Corporation Counsel.

23. After the passage of Resolution 19-158, Council Chair Kelly King sent a memorandum to Corporation Counsel MOANA M. LUTEY directing her as follows:

On behalf of your client, the Maui County Council, may I please request the Department of the Corporation Counsel promptly:

1. Execute a settlement agreement consistent with Resolution 19-158; and
2. Take other necessary action, including filing papers with the United States Supreme Court and, as needed, other actions, to resolve the case consistent with Resolution 19-158.

24. On October 3, 2019, Corporation Counsel LUTEY sent a memorandum to Council Chair Kelly King refusing to execute the settlement until the Mayor and the County Council concurred on acceptance of the settlement terms. The memorandum argued that based on the division of powers in the County Charter, some aspects of the settlement required the Mayor's approval, while others required the Council's approval, and still others required the concurrence of both.

25. Mayor VICTORINO has since stated publicly that he will not give his approval to the settlement terms.

26. Corporation Counsel LUTEY has refused to direct the withdrawal of the pending appeal of the LWRF Lawsuit from the United States Supreme Court (hereinafter “the Supreme Court”).

27. As of the filing of this complaint, the settlement has not been executed.

28. As of the filing of this complaint, the LWRF Lawsuit has not been withdrawn and remains on the docket of the U.S. Supreme Court.

29. Due to their specific interests in the health of the marine environment, the Plaintiffs are directly and immediately affected by the actions of Defendants in refusing to execute the settlement agreement and withdraw the Supreme Court appeal. If that appeal is not withdrawn it will result in a decision by the Supreme Court that is beyond the control of the County and that may adversely affect the interests of the Plaintiffs which are laid out in the opening paragraphs of this Complaint.

30. If the Supreme Court rules in favor of the County then the County may be allowed to continue injecting insufficiently treated wastewater into the Lahaina injection wells without taking any measures to prevent the flow of that wastewater into the ocean, and that would result in continuing pollution of the ocean by the wells and resulting damage to the marine environment.

31. On the other hand, if the Supreme Court rules against the County then the County will lose all the benefits of the 2019 Settlement, including potential cost savings due to a stipulated rather than court-ordered approach to remedying the injection well problem, and will also face the probability of the other side in the LWRF Lawsuit being awarded substantial costs and attorney fees, which would be minimized under the 2019 Settlement. The expense of these items will be borne by the individual Plaintiffs herein along with other Maui taxpayers.

32. In addition, as concerned citizens of Maui County and as an organization

representing those citizens, Plaintiffs are impacted by Defendants' refusal to abide by and acknowledge the authority of Section 3.16.020 of the Maui County Code. In refusing to abide by that provision of the Maui County Code the Mayor is arrogating to himself extraordinary powers far beyond those contemplated by the drafters of the Maui County Charter and the Maui County Code. Under the Defendants' interpretation of the law, the Mayor would have authority to refuse to settle cases, and his decision could not be overruled even by a unanimous vote of the County Council.

COUNT ONE: DECLARATORY JUDGMENT AND INJUNCTION RE
AUTHORITY OF COUNCIL TO ADOPT 2019 SETTLEMENT

33. The foregoing paragraphs are incorporated herein as though fully alleged.

34. Pursuant to Maui County Code, Section 3.16.020 (E), "The decision of the council to accept a settlement offer shall be binding on the County and on legal counsel."

35. Pursuant to Maui County Code, Section 3.16.020 (D), the roles of both the mayor and corporation counsel in responding to settlement offers above \$7,500 are limited to making a "recommendation" to the County Council. The dictionary definition of "recommendation" is "a **suggestion** or **proposal** as to the best course of action". A recommendation, by definition, is not binding; it can either be adopted or rejected by the decision maker, which pursuant to §3.16.020 (E) is the County Council.

36. Pursuant to the Maui County Charter, §7-5 (17), Defendant Mayor VICTORINO has the duty to enforce all provisions of the County Charter and all ordinances of the county. That includes §3.16.020 (E) of the Maui County Code.

37. Plaintiffs are entitled to a declaratory judgment that the County Council had the exclusive authority to accept the 2019 Proposed Settlement and adopt it as a final settlement, pursuant to Maui County Code, Section 3.16.020 (E), and that

Resolution No. 19-158 of the County Council directing settlement of the LWRF Lawsuit is therefore binding on the County and on legal counsel.

38. In the alternative, the Charter of the County of Maui, §2-2, provides as follows:

All powers of the county shall be carried into execution as provided by this charter, or, if the charter makes no provisions, as provided by ordinance or resolution of the county council.

Therefore if the Court finds that no provision of the charter adequately defines which branch of government is entrusted with the authority to settle or compromise the LWRF lawsuit, then pursuant to County Charter §2-2 the Council may make that determination by resolution, as it has done in Resolution No. 19-158.

39. In addition to a declaratory judgment that Resolution No. 19-158 is binding upon the Mayor and Corporation Counsel, Plaintiffs are entitled to an injunction requiring those two parties to act in accordance with the Resolution and to implement the 2019 Settlement Agreement, including by performing the ministerial function of signing any necessary settlement paperwork and by withdrawing or directing the withdrawal of the pending Supreme Court appeal, S.Ct. No. 18-260.

COUNT TWO: DECLARATORY AND INJUNCTIVE RELIEF AS TO
DISQUALIFICATION OF CORPORATION COUNSEL FROM
REPRESENTATION OF CONCURRENT CLIENTS WITH CONFLICTING
INTERESTS

40. The foregoing paragraphs are incorporated herein as if fully alleged.

41. For the Corporation Counsel to represent the mayor or itself in this case would violate the Hawaii Rules of Professional Conduct (HRPC) §§1.7(a)(1) and 1.7(a)(2).

42. Pursuant to the Charter of the County of Maui §8-2.3, Defendant MOANA LUTEY, CORPORATION COUNSEL FOR THE COUNTY OF MAUI, represents the County of Maui in all legal proceedings.

43. The Corporation Counsel serves in a dual role in which her clients include both Defendant MICHAEL VICTORINO, MAYOR OF THE COUNTY OF MAUI, and Defendant MAUI COUNTY COUNCIL.

44. Under HRPC §1.7(a)(1), “A lawyer shall not represent a client...if the representation of one client will be directly adverse to another client.”

45. As the interests and positions of Defendant LUTEY’s two clients the mayor and the County Council are directly adverse to one another regarding both the settlement of the LWRF Lawsuit and the question raised in this Complaint of whether the Council has exclusive authority to settle the LWRF lawsuit, the Corporation Counsel is barred from representing either party in this lawsuit.

46. Pursuant to HRPC §1.7(a)(2), “A lawyer shall not represent a client...if there is a significant risk that the representation...will be materially limited by the lawyer’s responsibilities to another client...or by a personal interest of the lawyer.”

47. Defendant LUTEY as a Defendant herein has a personal interest in this lawsuit that is in conflict with her responsibilities to her client, Defendant MAUI COUNTY COUNCIL. Therefore neither she nor her office can represent Ms. LUTEY as a Defendant in this lawsuit.

48. In addition, for Defendant LUTEY or her office to attempt to represent herself in this lawsuit would pit her interests against those of Defendant MAUI COUNTY COUNCIL, which is another client of Defendant LUTEY, and her responsibilities to that client would materially limit her ability to represent herself, in violation of HRPC §1.7(a)(2).

WHEREFORE, upon a trial of this matter, Plaintiff demands that the Court grant Plaintiffs the following relief against Defendants:

- a. A declaratory judgment of law on the above matters;
- b. An order requiring the Mayor to execute a Release and Settlement Agreement on behalf of the County in the LWRF case, implementing

the terms of the 2019 Settlement as provided by County Council Resolution No. 19-158;

- c. An order that Corporation Counsel immediately direct the withdrawal of the Supreme Court appeal, S.Ct. No. 18-260;
- d. An order that Corporation Counsel be barred from representing any of the three Defendants in this matter;
- e. Attorney's fees and costs; and
- f. Any other relief that the court deems proper.

DATED: Wailuku, Maui, Hawaii, November 1, 2019.

/s/ Anthony L. Ranken
ANTHONY L. RANKEN
Attorney for Plaintiffs

Resolution

No. 19-158

AUTHORIZING SETTLEMENT IN HAWAII
WILDLIFE FUND, ET AL. V. COUNTY OF MAUI,
CIVIL 12-00198 SOM BMK, U.S. SUPREME
COURT CASE 18-260

WHEREAS, Plaintiffs Hawaii Wildlife Fund, et al. filed a lawsuit in the United States District Court ("District Court") on April 16, 2012, Civil 12-00198 SOM BMK, against the County of Maui, alleging violations under the Federal Water Pollution Control Act, also known as the Clean Water Act; and

WHEREAS, on January 23, 2015, and June 25, 2015, District Court granted Plaintiffs' motions for partial summary judgment; and

WHEREAS, to avoid incurring expenses and the uncertainty of a judicial determination of the parties' respective rights and liabilities, the County Council approved a Settlement Agreement by Resolution 15-75 ("2015 Settlement Agreement"); and

WHEREAS, the 2015 Settlement Agreement was lodged with District Court on September 24, 2015, and following Federal government review pursuant to 40 C.F.R. §135.5, District Court entered the Settlement Agreement and Order and entered its Judgment on November 17, 2015; and

WHEREAS, pursuant to the terms of the 2015 Settlement Agreement and Order, the Parties agreed that the County reserved the right to appeal the rulings of the District Court to the Ninth Circuit Court of Appeals and on to the U.S. Supreme Court; and

WHEREAS, the County of Maui appealed District Court's decision to the Ninth Circuit Court of Appeals 15-17447, and the Ninth Circuit Court of Appeals denied the appeal on February 1, 2018; and

WHEREAS, the County of Maui filed a Petition for Writ of Certiorari with the U.S. Supreme Court on August 27, 2018, and on February 19, 2019, the U.S. Supreme Court granted the County of Maui's petition 18-260; and

EXHIBIT "A"

Resolution No. 19-158

WHEREAS, in accordance with Section 3.16.020(F), Maui County Code, the Department of the Corporation Counsel may transmit to Council settlement offers involving claims not specified by the Council pursuant to Section 3.16.020(D), Maui County Code; and

WHEREAS, the Department of the Corporation Counsel has received from Plaintiffs' counsel and transmitted to the Council's Governance, Ethics, and Transparency Committee, "Confidential Settlement Communication - FRE 408," dated April 26, 2019 (with amendments made on May 9, 2019), attached hereto as Exhibits "A" and "B" ("Plaintiffs' 2019 Settlement Proposals"); and

WHEREAS, in open session on September 6, 2019, at the reconvened September 3, 2019, meeting of the Governance, Ethics, and Transparency Committee, the Committee revised the terms of paragraph four of Exhibit "B" to read as follows:

"As long as the County makes good faith efforts to reduce its reliance on the LWRF injection wells to dispose of treated wastewater, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit—which could be 'an equivalent control document' (see Hawaii Administrative Rules §11-55-01)—for the LWRF injection wells, the Community Groups will not bring litigation seeking additional penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells."; and

WHEREAS, having reviewed the facts, circumstances, ramifications, and consequences regarding the case and pending appeal before the U.S. Supreme Court, and being advised in the premises, the County Council wishes to authorize the settlement; now, therefore,


BE IT RESOLVED by the Council of the County of Maui:

1. That it hereby approves settlement of the case under the terms set forth in the Plaintiffs' 2019 Settlement Proposals, as amended in open session before the reconvened September 3, 2019 meeting of the Governance, Ethics, and Transparency Committee on September 6, 2019;

Resolution No. 19-158

2. That it hereby authorizes the Mayor to execute a Release and Settlement Agreement on behalf of the County in the case;
3. That it hereby authorizes the Director of Finance to satisfy said settlement of the case; and
4. That certified copies of the resolution be transmitted to the Mayor, the Director of Finance, the Director of Environmental Management, and the Corporation Counsel.

APPROVED AS TO FORM AND LEGALITY



Department of the Corporation Counsel
County of Maui

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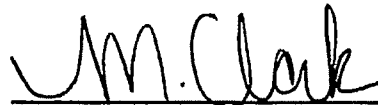
COUNCIL OF THE COUNTY OF MAUI

WAILUKU, HAWAII 96793

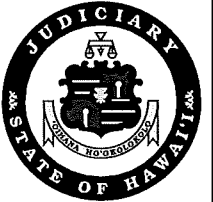

CERTIFICATION OF ADOPTION

It is **HEREBY CERTIFIED** that **RESOLUTION NO. 19-158** was adopted by the Council of the County of Maui, State of Hawaii, on the 20th day of September, 2019, by the following vote:

MEMBERS	Kelly T. KING Chair	Keani N. W. RAWLINS-FERNANDEZ Vice-Chair	G. Riki HOKAMA	Natalie A. KAMA	Alice L. LEE	Michael J. MOLINA	Tamara A. M. PALTIN	Shane M. SINENCI	Yuki Lei K. SUGIMURA
ROLL CALL	Aye	Aye	No	No	No	Aye	Aye	Aye	No



DEPUTY COUNTY CLERK

STATE OF HAWAI'I CIRCUIT COURT OF THE SECOND CIRCUIT	SUMMONS TO ANSWER CIVIL COMPLAINT		
CASE NUMBER 2CCV-19-0001012(3)	PLAINTIFF'S NAME & ADDRESS, TEL. NO. ANTHONY L. RANKEN 3348 SAMUEL P. SHNIDER 10098 222 N. Church Street Wailuku, HI 96793 Phone: (808) 244-7011 Fax: (808) 244-7022		
PLAINTIFF ANGUS L.K. MCKELVEY, JOANNE JOHNSON WINER, ARCHIE KALEPA, KE'EAUMOKU KAPU, and MAUI TOMORROW FOUNDATION, INC			
DEFENDANT(S) MICHAEL P. VICTORINO, MAYOR OF THE COUNTY OF MAUI & MOANA M. LUTEY, CORPORATION COUNSEL FOR THE COUNTY OF MAUI, and THE MAUI COUNTY COUNCIL			
TO THE ABOVE-NAMED DEFENDANT(S)			
<p>You are hereby summoned and required to filed with the court and serve upon Anthony Ranken & Associates 222 N. Church Street Wailuku, HI 96793</p>			
<p>_____ , plaintiff's attorney, whose address is stated above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.</p>			
<p>THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS.</p>			
<p>A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.</p>			
DATE ISSUED November 1, 2019 _____	<div style="border: 1px solid black; padding: 5px;"> Effective Date of 07-Oct-2019 Signed by: /s/ D. Pellazar Clerk, 2nd Circuit, State of Hawai'i </div> 		
	In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the Second Circuit Court Administration Office at PHONE NO. 244-2800, FAX 244-2849, at least ten (10) working days prior to your hearing or appointment date		