

FIRST CIRCUIT COURT
STATE OF HAWAII
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Attorneys for Defendants
ALEXANDER & BALDWIN, INC. ,
EAST MAUI IRRIGATION CO., LTD. and
HAWAIIAN COMMERCIAL AND SUGAR CO.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

HEALOHA CARMICHAEL, LEZLEY
JACINTHO, and NĀ MOKU AUPUNI O
KO'OLAU HUI,

Plaintiffs,

v.

BOARD OF LAND AND NATURAL
RESOURCES, CARTY CHANG, in his
official capacity as Interim Chairperson of the
Board of Land and Natural Resources, the
DEPARTMENT OF LAND AND NATURAL
RESOURCES, ALEXANDER & BALDWIN,
INC., EAST MAUI IRRIGATION CO., LTD.,
HAWAIIAN COMMERCIAL AND SUGAR,
CO., and COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY,

Defendants.

CIVIL NO. 15-1-0650-04 VLC
(Environment; Declaratory Judgment)

DEFENDANTS ALEXANDER &
BALDWIN, INC., EAST MAUI
IRRIGATION CO., LTD. AND HAWAIIAN
COMMERCIAL AND SUGAR, CO.'S
ANSWER TO FIRST AMENDED
COMPLAINT; CERTIFICATE OF
SERVICE

**DEFENDANTS ALEXANDER & BALDWIN, INC.,
EAST MAUI IRRIGATION CO., LTD. AND HAWAIIAN COMMERCIAL
AND SUGAR, CO.'S ANSWER TO FIRST AMENDED COMPLAINT**

Defendants ALEXANDER & BALDWIN, INC. ("**A&B**"), EAST MAUI IRRIGATION
CO., LTD. ("**EMI**") and HAWAIIAN COMMERCIAL AND SUGAR, CO. ("**HC&S**");

collectively, the “*A&B Defendants*”), by and through their attorneys, Cades Schutte LLP, and for their answer to the Complaint (“*Complaint*”) filed herein by Plaintiffs HEALOHA CARMICHAEL, LEZLEY JACINTHO, AND NĀ MOKU AUPUNI O KO‘OLAU HUI (collectively, “*Plaintiffs*”) on April 10, 2015, allege and aver as follows:

1. The A&B Defendants admit the allegations in paragraphs 8, 9, 10, 11, 21, 26, and 45 of the Complaint.

2. The A&B Defendants deny the allegations in paragraphs 1, 6, 14, 16, 23(a), 31, 32, 33, 35, 41, 46, 47, 49, 52, 53, 54, 55, 59, and 61 of the Complaint.

3. As to paragraphs 2, 3, 4, 5, 18, 20, 23, 23(b)-(d), 37, and 38 of the Complaint, the A&B Defendants are without knowledge or information sufficient to form a belief regarding the truth or falsity of the allegations contained therein and therefore deny the same.

4. As to paragraph 7 of the Complaint, the A&B Defendants admit that that A&B is a for-profit corporation engaged in various business enterprises, including real estate development in Hawai‘i and sugar cultivation in Central Maui. A&B/EMI deny the remainder of the allegations in paragraph 7 of the Complaint.

5. As to paragraph 12 of the Complaint, the A&B Defendants admit that the Department of Land and Natural Resources (“*DLNR*”) is statutorily assigned the duty to manage and administer the public lands of the State of Hawai‘i, including the approximately 33,000 acres of lands that are the subject of A&B/EMI’s application dated May 14, 2001 for a long-term lease of public lands in the Nahiku, Keanae, Huelo and Honomanu license areas (collectively, the “*License Areas*”), which application is the subject of BLNR Case No. 01-05-MA. The A&B Defendants deny the remainder of the allegations in paragraph 12 of the Complaint.

6. As to paragraph 13 of the Complaint, the A&B Defendants state that the DLNR's website speaks for itself.

7. As to paragraph 15 of the Complaint, the A&B Defendants admit that the County of Maui, Department of Water Supply ("*MDWS*") supplies domestic and agricultural customers in Upcountry Maui with surface water diverted from certain East Maui streams and transported to MDWS via EMI's ditch system. The A&B Defendants are without knowledge or information sufficient to form a belief regarding the truth or falsity of the remainder of the allegations in paragraph 15 of the Complaint and therefore deny the same.

8. As to paragraph 17 of the Complaint, the A&B Defendants state that the report entitled Wai O Ke Ola: He Wahi Mo'oeolo No Maui Hikina authored by Kepa Maly speaks for itself.

9. As to paragraph 19 of the Complaint, the A&B Defendants state that the allegations therein appear to be based on quotations from an unidentified source. Without knowing the source of the quotations, the A&B Defendants lack sufficient knowledge or information to form a belief regarding the truth or falsity of the allegations based on said quotations and therefore deny the same.

10. As to paragraph 22 of the Complaint, the A&B Defendants admit that the BLNR designated the four License Areas comprising approximately 33,000 acres of ceded lands, from which EMI diverts water to support the operations of Hawaiian Commercial and Sugar Company's ("*HC&S*") sugarcane plantation, that the long-term average delivery by EMI to HC&S has been approximately 165 million gallons per day ("*mgd*"), and that in the ten-year period from 2004 through 2013, water deliveries to HC&S averaged 126 mgd. The A&B Defendants deny the remainder of the allegations in paragraph 22 of the Complaint.

11. As to paragraph 24 of the Complaint, the A&B Defendants admit that, pending the issuance of a long-term water license of the License Areas to A&B/EMI, the BLNR issued one-year revocable permits to A&B and EMI, alternating between A&B and EMI as the permittee each year. The A&B Defendants deny the remainder of the allegations in paragraph 24 of the Complaint.

12. As to paragraph 25 of the Complaint, the A&B Defendants admit that the BLNR, at its regular meeting on May 26, 2000, approved, as amended, the issuance of Water Permits to A&B and EMI, by adding a condition that the Department of the Attorney General issue an opinion regarding compliance with Chapter 343, Hawai'i Revised Statutes, as it relates to these water leases. The A&B Defendants deny the remainder of the allegations in paragraph 25 of the Complaint.

13. As to paragraphs 25(a) to 25(d) of the Complaint, the A&B Defendants admit that the paragraphs accurately quote a portion of Revocable Permit No. S-2763, Revocable Permit No. S-2764, Revocable Permit No. S-2765, and Revocable Permit No. S-2766 (collectively, the "***Revocable Permits***"), respectively.

14. As to paragraph 27 of the Complaint, the A&B Defendants admit that because a contested case as to A&B/EMI's application for a long-term lease of the License Areas, the BLNR deferred action on the application and authorized the holdover of the Revocable Permits on a month-to-month basis pending the results of the contested case.

15. As to paragraph 28 of the Complaint, the A&B Defendants admit that on January 24, 2003, the BLNR issued an order stating, *inter alia*: "Upon determination that it would be in the best interest of the State, BLNR may enter into a lease of water emanating from State lands for transfer outside of the watershed of origin provided that such lease is issued in accordance

with the procedures set forth in HRS Chapter 171 and provided that all diversions of stream water shall remain subject to the Interim Instream Standards set by CWRM, and to any judgment of a court of competent jurisdiction establishing appurtenant or riparian rights in favor of downstream users.” The A&B Defendants deny the remainder of the allegations in paragraph 28 of the Complaint.

16. With respect to paragraph 29 of the Complaint, the A&B Defendants state that Order Affirming in Part and Reversing in Part State of Hawaii Board of Land and Natural Resources’ Findings of Fact and Conclusions of Law and Order, Dated January 10, 2003; Amended January 24, 2003 Regarding Petition Contesting Application For Long Term Disposition of Water Licenses and Issuance of Interim Revocable Permits at Honomanu, Keanae, Nahiku, and Huelo, Maui filed the Circuit Court of the First Circuit, State of Hawai‘i, on October 10, 2003 in *Maui Tomorrow v. State, et al.*, Civil No. 03-1-0289-02, speaks for itself.

17. With respect to paragraph 30 of the Complaint, Plaintiffs fail to identify the source of the representations that the BLNR allegedly made in 2009 and 2014. Accordingly, the A&B Defendants are without sufficient knowledge or information to form a belief regarding the allegations in paragraph 30 of the Complaint.

18. As to paragraph 34 of the Complaint, the A&B Defendants state that the allegations therein appear to be based on quotations from an unidentified source. Without knowing the source of the quotations, the A&B Defendants lack sufficient knowledge or information to form a belief regarding the truth or falsity of the allegations based on said quotations and therefore deny the same.

19. As to paragraph 36 of the Complaint, the A&B Defendants admit that no environmental assessment (“*EA*”) has been completed in connection with the diversions of East

Maui streams undertaken pursuant to the revocable permits issued to A&B/EMI. The A&B Defendants deny the remainder of the allegations in paragraph 36 of the Complaint.

20. As to paragraph 39 of the Complaint, the A&B Defendants reallege and incorporate by reference the responses contained in paragraphs 1 through 19 above.

21. As to paragraph 40 of the Complaint, the A&B Defendants admit that it accurately recites the language of Hawai'i Revised Statutes ("**HRS**") § 343-1.

22. As to paragraph 42 of the Complaint, the A&B Defendants admit that, pursuant to HRS chapter 343-5(a)(1), an "action" (as that term is defined by HRS chapter 343) that "[p]ropose[s] the use of state or county lands" triggers the requirement of an EA absent the applicability of an exemption to the EA requirement.

23. As to paragraph 43 of the Complaint, the A&B Defendants admit that it accurately restates the definitions of the terms "action," "agency," and "applicant" stated in HRS § 343-2.

24. As to paragraph 44 of the Complaint, the A&B Defendants admit that it accurately quotes language stated in Hawai'i Administrative Rules § 11-200-5(c). The A&B Defendants deny the remainder of the allegations in paragraph 44 of the Complaint.

25. As to paragraph 48 of the Complaint, the A&B Defendants admit that it accurately quotes a portion of the language stated in HRS § 343-5(e). The A&B Defendants deny the remainder of the allegations in paragraph 48 of the Complaint.

26. As to paragraph 50 of the Complaint, the A&B Defendants admit that the BLNR did not prepare an EA in connection with the issuance of the Revocable Permits or any previous revocable permits authorizing use of License Areas. The A&B Defendants deny the remainder of the allegations in paragraph 50 of the Complaint.

27. As to paragraph 51 of the Complaint, the A&B Defendants incorporate their answer to paragraph 38 of the Complaint hereinabove.

28. As to paragraph 56 of the Complaint, the A&B Defendants reallege and incorporate by reference the responses contained in paragraphs 1 through 27 above.

29. As to paragraph 57 of the Complaint, the A&B Defendants admit that A&B/EMI submitted an application to the BLNR dated May 14, 2001 for a long-term lease of public lands in the License Areas, in which A&B/EMI also requested a continuation of the Revocable Permits pending issuance of a long-term lease. The A&B Defendants deny the remainder of the allegations in paragraph 57 of the Complaint.

30. As to paragraph 58 of the Complaint, the A&B Defendants incorporate their answer to paragraph 46 of the Complaint hereinabove.

31. As to paragraph 60 of the Complaint, the A&B Defendants admit that A&B/EMI did not prepare an EA in connection with the issuance of the Revocable Permits or any previous revocable permits authorizing use of License Areas. The A&B Defendants deny the remainder of the allegations in paragraph 59 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim against the A&B Defendants upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the applicable statutes of limitation and/or the doctrine of laches.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrines of exhaustion and/or primary jurisdiction.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the defenses of estoppel and/or waiver.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrines of res judicata and/or collateral estoppel.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs lack standing to assert the claims for relief stated in the Complaint.

SEVENTH AFFIRMATIVE DEFENSE

The A&B Defendants plead the defense of abatement.

EIGHTH AFFIRMATIVE DEFENSE

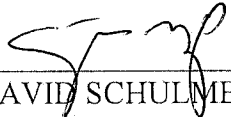
The A&B Defendants intend to rely on any and all other affirmative defenses, the applicability of which may be disclosed through investigation and/or discovery. The A&B Defendants reserve the right to amend this answer to allege such defenses.

WHEREFORE, the A&B Defendants pray as follows:

- A. That the Complaint be dismissed with prejudice.
- B. That the A&B Defendants be awarded their attorneys' fees and costs.
- D. For any such and other relief as the Court deems just and proper.

DATED: Honolulu, Hawaii, May 4, 2015.

CADES SCHUTTE LLP



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ALEXANDER & BALDWIN, INC., EAST
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CERTIFICATE OF SERVICE

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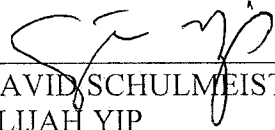
I hereby certify that a copy of the foregoing document was served by hand delivery, on
the following parties at their last known address:

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DATED: Honolulu, Hawaii, May 4, 2015.

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