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A Limited Liability Law Company

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HITOSHI YOSHIKAWA

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ASSOCIATION OF OWNERS OF KALELE KAI,)	Civil No. 15-1-0102-01 KTN
)	
Plaintiff,)	DEFENDANT/COUNTERCLAIMANT/ CROSS-CLAIMANT HITOSHI YOSHIKAWA'S FIRST AMENDED COUNTERCLAIM; CROSS-CLAIM
vs.)	
HITOSHI YOSHIKAWA; DOE DEFENDANTS 1-10,)	Judge: The Honorable Karen T. Nakasone
)	
Defendants.)	No Trial Date
)	
<hr/>		
HITOSHI YOSHIKAWA,)	
)	
Counterclaimant/Cross- Claimant,)	
vs.)	
ASSOCIATION OF OWNERS OF KALELE KAI; BRADFORD OAKES; DARLA SABRY; DOE DEFENDANTS 1- 10,)	
)	
Counterclaim/Cross-Claim Defendants.)	

EXHIBIT
2

ANNOTATED

EXHIBIT C

DEFENDANT/COUNTERCLAIMANT/ CROSS-CLAIMANT HITOSHI
YOSHIKAWA'S FIRST AMENDED COUNTERCLAIM; CROSS-CLAIM

Comes now, Defendant/Counterclaimant/Cross-Claimant Hitoshi Yoshikawa ("Yoshikawa"), by and through his attorneys, Revere & Associates, LLLC, a limited liability law company, and hereby alleges his amended counterclaims against Plaintiff/Counterclaim Defendant Association of Owners of Kalele Kai ("Association") and his amended cross-claims against Cross-claim Defendants Bradford Oakes ("Oakes") and Darla Sabry ("Sabry") (jointly "the Counterclaim and Cross-claim Defendants") and alleges and avers as follows:

COUNTERCLAIM/CROSS-CLAIM PARTIES

1. Yoshikawa is a member of the Association and owns Apartment No. 106, also known as TH1006, and Boat Moorings Nos. 28-33 appurtenant thereto, at the residential condominium project known as Kalele Kai, located at Keahole Place, Honolulu, Hawaii 96825 ("the Project"), by virtue, of the Apartment Deed (With Boat Moorings), recorded in the State of Hawaii Bureau of Conveyances as Document No. 2010-165562 on November 1, 2010.

2. The Association is a Hawaii nonprofit condominium association existing pursuant to Hawaii Revised Statutes Chapter 5148, formed in accordance with and governed by the Declaration of Condominium Property Regime recorded in the State of Hawaii Bureau of Conveyances as Document No. 93-089469 on June 7, 1993, as amended ("Declaration") and the Bylaws of the Association of Owners of Kalele Kai in the State of Hawaii Bureau of Conveyances as Document No. 93-87470 recorded on June 1, 1993, as amended ("Bylaws").

3. Bradford Oaks Oakes was a member of the Association at all relevant time, served as a member of the Association's Board of Directors starting in July 2007, and served as both Vice President and President of the Board thereafter.

4. Darla Sabry is a member of the Association and served as a member of the Association's Board of Directors after purchasing a home in the Project in 2012.

5. DOE Defendants 1-10 are persons, corporations, entities or governmental units which in some manner presently unknown to Yoshikawa, are liable to Yoshikawa, have engaged or involved in the activities alleged herein and/or were in some manner responsible for the injuries or damage to Yoshikawa, and whose true names, identities and capacities are presently unknown to Yoshikawa or his attorneys. Yoshikawa will substitute the true names, identities, capacities, activities and/or responsibilities when the same are ascertained.

6. The acts and omissions alleged herein occurred in the City and County of Honolulu, State of Hawaii. The amount of damages suffered by Yoshikawa as a result thereof is in excess of the jurisdictional requirements of this Court.

FACTUAL ALLEGATIONS

7. The Project exists alongside the Hawaii Kai Marina and contains a Marina Area consisting of boat docks and boat moorings.

8. The Hawaii Kai Marina Association governs and owns the waters in the Hawaii Kai Marina.

9. The Hawaii Kai Marina Association does not limit the size of the boats that use the Hawaii Kai Marina.

10. The Project, as grantee, has a 30' easement appurtenant to the land from

the edge of its property line along the waters edge, which extends out into the waters of the Hawaii Kai Marina.

11. The Project's Marina Area, as originally constructed, contains a main dock walkway, fifty-four 23' perpendicular moorings, and one common 69' side-tie mooring.

12. The Project's main dock walkway protrudes out into the Hawaii Kai Marina water by approximately 7'.

13. Connected to the main dock walkway are 23' long perpendicular finger piers which also protrude out into the Hawaii Kai Marina water and which end at the 30' easement line.

14. The Association's Declaration at §5(b) states that "[t]he boat mooring shall be restricted to use by boats no larger than twenty-three (23) feet in length."

15. The Declaration language refers to a singular mooring, which at the time of the drafting of the Declaration, were the 23' perpendicular moorings.

16. The purpose of the 23' limitation is to keep boats moored perpendicularly along the 23' finger-piers in the original boat moorings from protruding out into the Hawaii Kai Marina past the Project's 30' easement.

17. In 2001, Richard Rosic ("Rosic") purchased TH1006 and perpendicular boat moorings nos. 28 and 29.

18. On October 18, 2001 Rosic attended the Association's Board Meeting and requested to reconfigure multiple boat moorings to create a larger side-tie mooring in which to moor a 40' boat.

19. On October 19, 2001, then Resident Manger Diane Langley verbally informed Rosic that the Board had approved his request.
20. Directly thereafter, Rosic purchased Boat Moorings Nos. 30, 31, 32, and 33 from the Project's developer.
21. Rosic then ordered his new boat, the Ariel.
22. In December 2001, Rosic removed the first finger pier.
23. Board Member James Propotnick witnessed the removal, commented that everything looked good, and inquired as to when Rosic's new boat would arrive.
24. In early 2002, Rosic removed the second finger pier.
25. In approximately January 2002, Rosic flew to New Zealand to observe the Ariel being custom built.
26. The Ariel is a twin-engine power catamaran Quantum 38' and is 40' long due to the slim step and bow pulpit.
27. The Ariel cost approximately \$550,000.
28. The Ariel was shipped from New Zealand and arrived at the Project in April of 2002.
29. Rosic registered the Ariel with the Hawaii Kai Marina Association on April 17, 2002.
30. Rosic registered the Ariel with the Association.
31. The Ariel became a well-known boat at the Association and in the Hawaii Kai Marina.
32. In July or August 2002, Rosic took the Association's Board Members and their families and then Resident Manager Diane Langley out on the Ariel for a cruise.

33. Beginning in approximately May 2002, the Association's Newsletter began regularly featuring photos of the Ariel.

34. Boat and Dock socials were held at the Project's Marina Area allowing all owners to enjoy the Marina Area, learn about and ride on the boats, including the Ariel.

35. Rosic would often go fishing on the Ariel and upon returning to the docks would fly flags which indicated to owners that they could come down and retrieve fish.

36. For a period of five to six years, Rosic entered the Ariel in the Hawaii Kai Christmas Boat Parade. In 2003, the Ariel won first place in the category for boats over 20'.

37. At the January 21, 2003 Association Board Meeting, Project homeowners Ned and Sharon Peterson and Ike and Angela Hung requested to modify boat moorings as Rosic had done.

38. On January 22, 2003, then Resident Manger Diane Langley verbally informed the Petersons and the Hungs that the Board had approved their requests.

39. The Petersons and Hungs then purchased additional Boat Moorings and reconfigured them to create side-tie slips.

40. The Hungs purchased a 26' boat which arrived at the Project in the summer of 2003 and was moored in their modified side-tie slip.

41. The Petersons purchased a 26' boat, which was moored in their modified side-tie slip.

42. The Association's April 2006 Newsletter contained an article advising homeowners how to buy and modify boat docks to accommodate boats longer than 23':

Information on the boat docks

- When Kalele Kai first sold the condominium units to the general public, all but two of the 60 boat docks were retained by the developer
- Two of the boat docks (#7 and #8) are common elements and can be used by association owners and their tenants with advance notice to the management office on site.
- The remaining 58 boat docks have been purchased by the owners of Kalele Kai from the developer.
- Only owners of Kalele Kai are allowed to own the boat docks as limited common elements.
- Users of the Hawaii Kai Marina must comply with Marina Rules and vessels must be registered at the Marina Office.
- **The Kalele Kai boat docks are 23 feet long.**
- **If an owner has a boat that is too long to fit into a single slip, the piers can be moved to accommodate a larger boat parallel to the shore.**
- **Currently there are 17 boat docks available to owners of Kalele Kai to purchase. Some docks are for single slips and some groups of docks can accommodate larger vessels.**
- For further information please feel free to contact the Management Office, located next to the pool in person or by calling Eric or Anne at 395-0431.

43. In 2007, Project homeowner Takaki Nakanishi purchased several Boat Moorings and modified them to create a larger side-tie slip.

44. In 2007 Waldemar and Eva Rojek were interested in purchasing at the Project and were informed by the Association's Manager's office that boat moorings could be purchased and modified to create larger side-tie slips to allow for the mooring of a larger boat.

45. The Association's Manager's office referred the Rojeks to the Association's April 2006 Newsletter.

46. The Rojeks then purchased Unit 3210 and Boat Moorings Nos. 14, 15, 16, and 17.

47. The Rojeks modified the moorings to create a side-tie slip and purchased a custom 37' boat which they moored therein.

48. Over the course of a period lasting over eleven years, a total of six boats longer than 23' were moored in modified side-tie slips at the project.

49. In July 2007, Oakes was first appointed to the Association's Board of Directors.

50. On March 15, 2008, Oakes was formally elected to the Association's Board of Directors.

51. Oakes served as Vice President of the Board of Directors starting in 2008 and President starting in 2009.

52. In February 2008, Rosic listed TH1006, the 69' modified side-tie mooring, and the Ariel for sale.

53. Thereafter, the Association asserted, for the first time, that it did not have the authority to approve the modification of the Boat Moorings.

54. In June of 2009, a Settlement Agreement was reached between the Association and Rosic. The Settlement Agreement permitted Rosic to sell his boat mooring in its modified condition and for any subsequent owner to moor a boat therein including the Ariel, so long as they did so within a certain period of time.

55. The Association knew that the Ariel was longer than 23'.

56. The Association knew that the purpose of the modified boat mooring was to accommodate the Ariel or another boat larger than 23'.

57. Pursuant to the Settlement Agreement, the Board of Directors assisted in passing and recorded the Tenth Amendment of the Declaration.

58. The Tenth Amendment included "Dock and Boat Rules, which were incorporated into the Kalele Kai House Rules. The Dock and Boat Rules expressly

allowed the sale of boat moorings in their modified conditions:

D-6 (a) When a modified boat mooring has one or more finger piers attached in a parallel orientation to the common walkway, *upon sale of the modified boat mooring*, the new owner will have up to twelve (12) months from the transfer date **to dock a boat in the mooring**. Extensions to this deadline may be sought in accordance with the procedures set forth in Section D-5 above.

59. Pursuant to the Settlement Agreement, in November 2010, Rosic sold the townhouse, modified 69' boat mooring, and the Ariel to Yoshikawa.

60. Yoshikawa made the purchase with the intent of eventually purchasing a new boat to replace the Ariel in the side-tie mooring.

61. On August 25, 2011, the Association, "grandfathered" the Ariel and other boats and attempted to take away the ability of boat mooring owners to sell their docks in a modified condition. The Board Meeting Minutes State:

"The board unanimously approved to grandfather the existing 4 boats which do not meet the 23' rule. Should the owner sell his/her boat or home, the dock will need to go back to its original configuration at the expense of the owner."

62. On September 9, 2011, the Hungs, who were in the process of selling their townhome and modified mooring, demanded mediation and then arbitration. On February 1, 2012, the Arbitrator ruled on the Hung's Motion for Summary Judgment holding:

"...to the extent the Board minutes seek to restrict the ability of existing boat-mooring owners from the sale of their modified boat moorings, **the Arbitrator agrees that the Board minutes contradict almost ten years of AOAO policy allowing the Hungs and other boat-mooring buyers/owners to modify their moorings and sell their moorings in a modified condition. The Board cannot now negate Boat mooring owners' reliance on the AOAO's longstanding policy by a Board vote that purportedly claims to "grandfather" existing owners while**

simultaneously restricting their ability to sell their modified boat moorings. Accordingly, the Hung's motion for a declaratory order disallowing the Board's retraction of the sale of modified boat moorings is granted."

63. After moving into the Association, Yoshikawa spent several months researching the type of boat to buy. Yoshikawa took into consideration the size of the mooring and the height of the Hawaii Kai Marina bridge.

64. In September 2012, Darla and Daniel Sabry (jointly "the Sabrys") purchased Townhouse No. 1010.

65. The Sabrys also purchased one single perpendicular 23' boat mooring.

66. Thereafter, Darla Sabry joined the Board of Directors.

67. On or about April 8, 2013, Yoshikawa ordered his new boat, the Rola from the Australian company, Riviera.

68. The Rola is 45'6" in total length.

69. The Rola cost \$1,170,000.

70. In June 2013, Oakes contacted Bellingham Marine, the company which the Board of Directors had granted a no-bid contract to repair the marina, and requested that the company draft an opinion supporting his personal desire to exclude large boats from the Project. Oakes misrepresented the position of owners to Bellingham.

71. On August 23, 2013, before the Rola arrived or was at issue, the Yoshikawas received a letter from the Association's management company claiming that the Ariel was in violation of the 23' rule.

72. On August 23, 2013, the Rojeks received a letter from the Association's management company claiming that their boat was in violation of the 23' rule.

73. On August 26, 2013, the Yoshikawas sold the Ariel in order to prepare for the arrival of the Rola.

74. On approximately October 28, 2013 the Rola arrived and was moored in the Yoshikawa's side-tie slip.

75. On November 4, 2013, the Yoshikawas registered the Rola with the Hawaii Kai Marina Association.

76. On November 6, 2013, the Yoshikawas registered the Rola with Kalele Kai.

77. The Sabrys became upset because the Association informed them that in their single, perpendicular mooring, they couldn't moor a boat longer than 23'.

78. The Sabrys claimed that the Rola blocked their view and caused the reflection of an Association light into their bedroom at night.

79. The light at issue only shined on the Rola due to actions taken by Oakes and the then Resident Manager.

80. Views at the Project are not guaranteed or protected and the Declaration states:

(g) View and View Planes. [...] Developer its employees, agents, real estate broker and agents, condominium documents and written, audio, or video advertisements, make no representations or warranties as to the views and/or view planes which the Project currently has or will have in the future.

81. Sabry used her position on the Board, and the Association's funds to further the Sabry's personal goal of removing the Rola from the property.

82. Sabry participated in secretive executive sessions to further her agenda of

attacking Yoshikawa and the Rola without recusing herself and despite her conflict of interest.

83. Throughout the history of the Project, the marina walkways and all of its components were treated as common elements.

84. Less than a year after Yoshikawa purchased at the Project, the Association improperly assessed the boat owners, including Yoshikawa, in order to pay for the repairs of the common element piers.

85. The Declaration states that the Marina is a common element and only the boat moorings themselves (spaces in the water) are limited common elements:

5. Common Elements. One freehold estate is hereby designated in all of the remaining portions and appurtenances of the Project (hereinafter referred to as the "common elements"), including specifically, but not limited to:

[...]

(c) All walkways, including the boat mooring walkways, and interior roadways located upon the Land;

...

Limited Common Elements:

The following common elements, (hereinafter referred to and designated as "limited common elements"), are hereby set aside and reserved for the exclusive use of certain condominium units, and such condominium units shall have appurtenant thereto exclusive easements for use of such limited common elements. The limited common elements so set aside and reserved are as follows:

[...]

(b) All boat moorings shall be identified by the letter "B" and a number.

86. The Bylaws state that "...the Board shall establish and maintain an adequate reserve for periodic maintenance and repair and replacement of common and limited common elements."

87. Hawaii Revised Statute 514(b) 39 entitled "Limited common elements"

states that:

If the declaration designates any portion of the common elements as limited common elements, those limited common elements shall be subject to the exclusive use of the owner or owners of the unit or units to which they are appurtenant, subject to the provisions of the declaration and bylaws. No amendment of the declaration affecting any of the limited common elements shall be effective without the consent of the owner or owners of the unit or units to which the limited common elements are appurtenant.

88. For over a decade the Association paid for all maintenance on the Marina including the docks and finger piers with funds designated for such repairs in the reserve studies. The maintenance paid for by the Association included electrical work, replacing tie rods, triangles and other components, and sealing of the docks. The sealing of the docks included all of the finger piers.

89. The Project's condominium map indicates the Boat Moorings as open spaces on the water between the finger piers on that part of the Hawaii Kai Marina that borders the Project's property within the 30' easement.

90. In a August 26, 2011 letter to the Yoshikawas, the Association claimed that they own "boat docks 28, 29, 30, 31, 32, and 33" and stated that their "...assessment of \$2,000 per mooring is due by October 30, 2011." The finger piers within the Yoshikawa's mooring space had been removed by Rosic back in 2001 and 2002.

91. Prior to voting to move forward with the renovation, the Board did not demonstrate, as it was required to do under the governing documents, that there was anything wrong with the "piers."

92. The Counterclaim/Cross-Claim Defendants failed to follow the requirements for condominium reserves contained in HRS 514B, the regulations

regarding same and the Association's requirements regarding same.

COUNT 1

(Breach of Contract)

93. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

94. The Counterclaim and Cross-claim Defendants have breached the covenants, conditions and restrictions as set forth in the Project's Declaration & Bylaws.

95. The Counterclaim and Cross-claim Defendants have violated Hawaii common and statutory law with regard to the Project's Declaration & Bylaws.

96. The Association has breached the Rosic Settlement Agreement.

97. As a direct, proximate, and foreseeable result of one or more of the breaches, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.

COUNT 2

(Breach of Fiduciary Duty)

98. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

99. The Counterclaim and Cross-claim Defendants have breached the fiduciary duty owed to Yoshikawa pursuant to the Project's Declaration & Bylaws and Hawaii common and statutory law and the Restatement, 3d of Servitudes.

100. As a direct, proximate, and foreseeable result of one or more of the breaches, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.

COUNT 3

(Bad Faith Pursuant to Haw. Rev. Stat §514B-9 and Common Law)

101. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

102. The Counterclaim and Cross-claim Defendants have acted in bad faith under Haw. Rev. Stat §514B-9 and common law.

103. As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.

COUNT 4

(Intentional Infliction of Emotional Distress)

104. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

105. [The Counterclaim and Cross-claim Defendants actions constitute intentional infliction of emotional distress.]

106. [As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.]

107. The Counterclaim and Cross-claim Defendants engaged in a series of actions as set forth above in paragraphs one through ninety-three inclusive which caused physical and emotional harm to Yoshikawa.

108. The actions of the Counterclaim and Cross-Claim Defendants were intentional or done recklessly.

109. The intentional or reckless acts and actions of the Counterclaims and Cross-Claim Defendants were outrageous substantially exceeding the legitimate

boundaries of the administration of the business affairs of the Association and were contrary to the expectations, the fiduciary and other duties, and scope of their authority.

110. The intentional or reckless acts and actions of the Counterclaim and Cross-Claim Defendants caused extreme emotional distress to Yoshikawa, including but not limited to destroying the quiet enjoyment of his unit within the Project and his boat, destroying interpersonal relationships between Yoshikawa and other owners within the Project, and subjecting Yoshikawa to severe internal and personal emotional distress which has substantially impacted his health and welfare.

111. As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.

COUNT 5

(Violation of §6.13 and §6.14 of the Restatement, 3d of Servitudes)

112. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

113. The Counterclaim and Cross-claim Defendants' actions constitute a violation of the duties set forth in §6.13 and §6.14 of the Restatement, 3d of Servitudes.

114. As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.

COUNT 6

(Prima Facia Tort)

115. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

116. The Counterclaim and Cross-claim Defendants' actions constitute a prima facia tort.

117. As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.

COUNT 7

(Abuse of Process – Individual Defendants)

118. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

119. [~~The Counterclaim and Cross-claim Defendants' actions constitute abuse of process.~~]

120. [~~As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.~~]

121. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

122. Individual Defendants Oakes and Sabry, as set forth in paragraphs one through ninety three above, engaged in a course of conduct with the ulterior motive of protecting their personal interests, contrary to the dictates of the rights and duties of the members of the Association as a whole and Yoshikawa as an owner of limited common space.

123. By so doing, Defendants Oakes and Sabry manipulated the process to effectuate a result which was contrary to the course of conduct at the Project for over a decade.

124. Defendants Oakes and Sabry's ulterior motive was executed intentionally

or with a reckless disregard for the known rights of Yoshikawa.

125. Defendants Oakes and Sabry caused a series of acts and actions by the Board of Directors and the Association which was not done in the normal course of the proceedings in the administration and operation of the Project and was contrary to a course and pattern of conduct which had existed for over a decade.

126. Defendants Oakes and Sabry caused a series of acts and actions by the Board of Directors and the Association which was intended to deprive Yoshikawa of property rights and to inflict extreme emotional distress upon Yoshikawa.

127. As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.

128. As a direct and proximate result of the intentional and/or reckless conduct, Yoshikawa is entitled to punitive damages in an amount to be proven at trial.

COUNT 8

(Misrepresentation)

129. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

130. ~~[The Counterclaim and Cross-claim Defendants' actions constitute misrepresentation.]~~

131. ~~[As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.]~~

132. The Counterclaim and Cross-claim Defendants' in the course of their duties with respect to the Property and the Association, had a pecuniary interest in first in granting the right to permit boats larger than 23' feet to be moored within the easement in

order to maximize the value of the units within the Project and promote the Project, thereby enhancing the value of all of the units within the project and Cross-Claim Defendants had a pecuniary interest in precluding Yoshikawa from mooring his boat within the easement because they believed that by so doing Yoshikawa would block their view despite the fact that they had no vested right to a view in the governing documents.

133. As a result of these pecuniary interests, the Association first granted permission to moor boats larger than 23' feet within the easement, entered into a settlement agreement to "grandfather" boats longer than 23' feet to moor within the easement, and then unilaterally breached the settlement and terminated the same, thereby precluding Yoshikawa from mooring his boat in excess of 23' within the easement.

134. By so doing, the Counterclaim and Cross-Claim Defendants disseminated false information to Yoshikawa during the course of his investigation into the Project and his purchase of his unit, multiple slips and vessel within the project.

135. The Counterclaim and Cross-Claim Defendants knew or should have known that Yoshikawa would rely on their false representations in his valuation of whether the Project was the right property within which to purchase a unit, moorings and vessel.

136. Yoshikawa did in fact rely on these false representations by purchasing the unit, the slips and the vessel.

137. Yoshikawa reasonably relied on the representations without any knowledge of their falsity.

138. As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.

COUNT 9

(Bad Faith)

139. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

140. The Counterclaim and Cross-claim Defendants' actions constitute bad faith.

141. As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.

COUNT 10

(Violation of Haw. Rev. Stat. 514B-9, 514B-10, 514B-33, and 514B-38)

142. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

143. [~~The Counterclaim and Cross-claim Defendants' actions constitute violations of Haw. Rev. Stat. §§ 514B, including 514B-9, 514B-10, 514B-33, and 514B-38.~~]

144. The AOA and Oakes and Sabry as members of the Board of Directors of the AOA had a duty to perform their obligations with the utmost integrity and good faith to protect not their own interests but rather to protect the interests of the members of the AOA.

145. Pursuant to HRS 518B-9, implied in every contractual agreement relating to condominium projects and the operation of an associations is an obligation of good

faith.

146. The AOA, Oakes and Sabry violated their obligations of good faith by

failing to administer the operation of the AOA without bias or conflict of interest.

147. Oakes and Sabry violated their obligations of good faith by failing to recuse themselves from all deliberations and voting when they had a conflict of interest.

148. The AOA breached the duty of good faith by entering into a settlement agreement with Rosic which allowed for a boat longer than 23' to be moored at the marina, but then unilaterally breaching the settlement agreement to which Yoshikawa or any purchaser of Rosic's interest was a third party beneficiary.

149. The AOA breached the duty of good faith by compelling Yoshikawa to restore the docks to their original configuration.

150. The AOA breached the duty of good faith by imposing an assessment against Yoshikawa to repair the boat docks and finger piers, including those finger piers which had been removed years prior.

151. Pursuant to HRS 514B-33 the AOA and its Board Members have a duty to record a condominium map along with the declaration that sufficiently identifies and describes the Project's limited common elements.

152. The AOA and its Board Members breached its duty under HRS 514B-33 by failing to sufficiently identify and describe the boat mooring spaces in the water as limited common elements on the recorded condominium map.

153. Pursuant to HRS 514B-38, the AOA and its Board Members have a duty to protect the owners rights to use the common elements and exclusive rights to use limited common elements.

154. The AOA, Oakes and Sabry breached that duty when they forced Yoshikawa to pay for repairs to the common element boat docks and finger piers that

surround his limited common element boat mooring space in the water.

155. Under HRS 514B-10, the remedies provided under HRS 514B are to be liberally administered to the end that Yoshikawa as the aggrieved party is put in as good a position as if the AOA, Oakes and Sabry had fully performed their duties and obligations as explained above.

COUNT 11

(Violation of Haw. Rev. Stat. §514B-148)

156. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

~~157. The Counterclaim and Cross-claim Defendant's actions constitute violations of Haw. Rev. Stat. §§ 514B-148.~~

158. Pursuant to HRS 514B-148, the AOA and its Board of Directors has a duty to maintain a budget and reserves to provide for the maintenance of the property.

159. The AOA and its Board of Directors breached that duty when it failed to provide for the repair of the common area boat docks and finger piers and instead specially assessed Yoshikawa for the repairs.

160. As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.

COUNT 12

(Violation of Haw. Rev. Stat. §514B-138)

161. The Board has a duty to make an inspection of the property pursuant to HRS 514B-138.

162. As part of that inspection, the Board has a duty to establish standards

when maintenance, repair, or replacement will be required for safety reasons.

163. At no time did the Board adopt any standards concerning when certain common area and/or limited common area property shall required maintenance, repair or replacement.

164. Despite the absence of such standards, the Board nonetheless imposed an assessment against Yoshikawa to make repairs, maintenance or replacement of the common element boat docks and finger piers, which was contrary to a course of practice which had been in place for over a decade.

165. As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.

COUNT 13

(Declaratory Judgment)

166. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

167. Over the course of more than a decade, the Association has engaged in a pattern of conduct which by its words and conduct willfully caused Yoshikawa and his predecessors in interest to believe that it was entirely permissible to moor a boat greater in length than 23' feet at the Project, thereby inducing Yoshikawa to act, including but not limited to purchasing the unit, the moorings, and a vessel which had been side-tied within the mooring despite it being longer than 23' feet, and it would be wholly inequitable to permit the Association to now take a position that a boat longer than 23' feet cannot be moored at the Project.

168. Further, over the course of more than a decade, the Association has

engaged in a pattern of conduct which demonstrates an acquiescence in the substantial and general violations of the restrictive covenant which limited boats to a length of 23' feet.

169. In addition, the imposition of the restriction on the length of the boat at this time, when the Association has permitted longer boats to be moored at the Project for such a long and substantial period of time, constitutes an unconstitutional restriction on the freedom of alienation of property, precluding owners of multiple modified moorings from selling their property as presently constituted and devaluing the value of said property, and compelling owners of multiple moorings to only be able to sell such moorings to owners within the Project.

170. The 23' foot restriction contained within the Association's declaration is contrary to the Hawaii Kai Marina policies, rules and regulations which preempt any restriction imposed by the Association.

171. Because of the course of conduct of the Association over the past decade and longer, there has been a change of circumstances which precludes the right to enforce the restrictions contained in the Association's declaration as it relates to boat length restrictions.

172. Pursuant to HRS 632-1 an actual controversy exists between the parties.

173. The claims between the parties are antagonistic and have resulted in imminent and inevitable litigation.

174. A declaratory judgment will most likely result in a termination of this litigation and a resolution of the actual controversy between the parties.

175. Therefore, this Court should enter a declaratory judgment declaring that:

- a. The Project as a grantee of an easement had no legal right to impose restrictions on the use of the easement by fractional owners of the easement;
- b. To the extent Association had the right to impose restrictions on the length of the boats which may be moored at the Project, that it abandoned said restrictions by its acts and actions over the course of over a decade thereby precluding any and all enforcement of the restrictions imposed;
- c. To the extent the Association had the right to impose restrictions on the length of the boats which may be moored at the Project, the Association has engaged in a pattern of selective enforcement which is a violation of its obligations to Yoshikawa;
- d. To the extent the Association had the right to impose restrictions on the size of the boats which could be moored at the Project, that it is estopped as a matter of law from enforcing said restrictions against Yoshikawa;
- e. The restrictions imposed on the length of the boats which may be moored at the Project is an unconstitutional restriction on the freedom of alienation of property because (a) it precludes current owners of multiple slips from selling their property has currently constituted, and (b) mandates the sale of said slips only to owners within the Project;
- f. The restriction contained within the Association's declaration is contrary to the express language of the Hawaii Kai Marina policies, rules and regulations which preempt any restriction imposed by the Association;
- g. Because of the course of conduct of the Association over the past decade and longer, there has been a change of circumstances which precludes the right to enforce

the restrictions contained in the Association's declaration as it relates to boat length restrictions;

h. Yoshikawa has not violated the Declaration or any of the Governing

Documents;

i. A declaration that Yoshikawa, or any subsequent owner of the modified 69' boat mooring which includes moorings Nos. 28-33, shall have the right to moor therein any length boat that will reasonably fit within the 69' slip;

j. A declaration that the Kalele Kai boat docks and finger piers are common elements;

k. A declaration that the Kalele Kai limited common element boat moorings consist only of the mooring spaces in the water;

l. A declaration that the special assessment for repair costs imposed on Yoshikawa was improper;

m. A declaration that the Association and its members have waived the right to assert that the Board lacked the authority to grant permission to modify the slips to provide for parallel parking of boats larger than 23' feet within the easement;

n. A declaration that the Association and its members have ratified the acts and authority of the Board of Directors to grant and authorize the purchase and removal of finger slips in order to create a larger parallel slip which permitted the parking of a boat larger than 23' within the easement.

COUNT 14

(Violation of HRS 514B-39)

176. Yoshikawa hereby realleges and incorporates the allegations set forth in

the preceding paragraphs.

177. Yoshikawa is the owner of various moorings which are designated as limited common areas by the Declaration.

178. HRS 514B-39 provides that "If the declaration designates any portion of the common elements as limited common elements, those limited common elements shall be subject to the exclusive use of the owner or owners of the unit or units to which they are appurtenant, subject to the provisions of the declaration and bylaws. No amendment of the declaration affecting any of the limited common elements shall be effective without the consent of the owner or owners of the unit or units to which the limited common elements are appurtenant."

179. Yoshikawa's predecessor in interest purchased the moorings at issue from the Project Developer.

180. Upon said transfer and consent by the Board to park a boat larger than 23' feet within the area comprise of the moorings owned by Yoshikawa's predecessor, said moorings and usage became appurtenant to the unit owned by Rosic.

181. Thereafter, neither the Association nor the Board had any right to impose any use restrictions contrary to the approval which previously had been granted without the express permission of Yoshikawa or his predecessor in interest.

182. At no time has either Yoshikawa nor his predecessor in interest agreed to the imposition of the length restriction which the Association now seeks to enforce.

183. Any enforcement of the restriction previously waived is a violation of the vested property rights owned exclusively by Yoshikawa.

184. In addition, by compelling the restoration of the original configuration of

the marina, the Association is effectively requiring Yoshikawa to either own multiple boats in lengths of 23' or shorter to place within the slips or limiting Yoshikawa's right to transfer to said moorings to anyone other than a unit owner within the Project.

185. As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.

COUNT 15

(Violation of HRS 514B-40)

186. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

187. Yoshikawa is the owner of limited common areas.

188. HRS 514B-40 provides, "Except as provided in the declaration, any unit owner may transfer or exchange a limited common element that is assigned to the owner's unit to another unit. Any transfer shall be executed and recorded as an amendment to the declaration. The amendment need only be executed by the owner of the unit whose limited common element is being transferred and the owner of the unit receiving the limited common element; provided that unit mortgages and leases may also require the consent of mortgagees or lessors, respectively, of the units involved. A copy of the amendment shall be promptly delivered to the association."

189. By unilaterally rescinding the rights which were attendant to the property at the time of purchase by Yoshikawa, the Association is effectively compelling both a transfer of the limited common areas by Yoshikawa and mandating an Amendment of the declaration, without the consent of Yoshikawa which he is not freely or voluntarily giving.

190. As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.

COUNT 16

(Violation of HRS 514B-148)

191. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

192. The Counterclaim and Cross-claim Defendants' actions constitute violations of Haw. Rev. Stat. §§ 514B-148.

193. The Association has a duty to maintain appropriate budgets and reserves as mandated by the provisions of HRS 514B-148.

194. Over the course of the operation of the Projects, the Association has fully and completely maintained the common and limited common areas within the easement.

195. By imposing an assessment upon Yoshikawa for the maintenance and repair of the limited common areas owned by Yoshikawa, contrary to the historical practices of the Association, the Association has violated its duty to maintain a proper budget and reserves in order to preserve, maintain and repair the Projects common and limited common areas.

196. As a direct, proximate, and foreseeable result of the actions, Yoshikawa has suffered and continues to suffer damages in an amount to be shown at trial.

COUNT 17

(Private Condemnation)

197. Yoshikawa hereby realleges and incorporates the allegations set forth in the preceding paragraphs.

198. Yoshikawa is the owner of unit to which is appurtenant a fractional interest in the easement granted by the Hawaii Kai Marina, which easement does not include any restriction on the length of boat which may be moored within the easement.

199. At the time of the purchase of the unit, appurtenant to the unit were several moorings which afforded by permission the right to parallel park or side-tie a boat of more than 23' feet in length.

200. At the time of the purchase of the unit, included in the purchase price of the unit was a boat in the length of 46'.

201. Yoshikawa's purchase at fair market value was the fair market value of the unit with the moorings which permitted the mooring of a vessel greater than 23' in length.

202. The Association, by unilaterally breaching its previous grant of permission to moor a boat of a length greater than 23' feet and its settlement agreement has substantially diminished the value of Yoshikawa's unit and his moorings.

203. The Association, as a quasi-governmental agency, has engaged in the private condemnation of the property rights owned by Yoshikawa without paying just compensation for said property rights.

204. As a direct and proximate result of this private condemnation, Yoshikawa has been damaged in an amount to be proven at trial.

PRAYERS FOR RELIEF

Yoshikawa respectfully prays that the Court GRANT the following relief:

A. A declaration that:

1. The Project as a grantee of an easement had no legal right to impose restrictions on the use of the easement by fractional owners of the easement;
2. To the extent Association had the right to impose restrictions on the length of the boats which may be moored at the Project, that it abandoned said restrictions by its acts and actions over the course of over a decade thereby precluding any and all enforcement of the restrictions imposed;
3. To the extent the Association had the right to impose restrictions on the length of the boats which may be moored at the Project, the Association has engaged in a pattern of selective enforcement which is a violation of its obligations to Yoshikawa;
4. To the extent the Association had the right to impose restrictions on the size of the boats which could be moored at the Project that it is estopped as a matter of law from enforcing said restrictions against Yoshikawa;
5. The restrictions imposed on the length of the boats which may be moored within the easement is an unconstitutional restriction on the freedom of alienation of property because (a) it precludes current owners of multiple slips from selling their property has currently constituted, and (b) mandates the sale of said moorings only to owners within the Project;
6. The restriction contained within the Association's declaration is contrary to the express language of the grant of the easement by the Hawaii Kai Marina as well as the Hawaii Kai Marina policies, rules and regulations which preempt any restriction imposed by the Association;
7. Because of the course of conduct of the Association over the past decade and longer, there has been a change of circumstances which precludes the right to enforce

the restrictions contained in the Association's declaration as it relates to boat length restrictions;

8. Yoshikawa has not violated the Declaration or any of the Governing Documents;

9. A declaration that Yoshikawa, or any subsequent owner of the modified 69' boat mooring which includes moorings Nos. 28-33, shall have the right to moor therein any length boat that will reasonably fit within the 69' slip;

10. A declaration that the Kalele Kai boat dock area is a common element;

11. A declaration that the Kalele Kai limited common element boat moorings consist only of the mooring spaces in the water;

12. A declaration that the special assessment for repair costs imposed on Yoshikawa was improper;

13. A declaration that the Association and its members have waived the right to assert that the Board lacked the authority to grant permission to modify the moorings to provide for parallel parking of boats larger than 23' feet within the easement;

14. A declaration that the Association and its members have ratified the acts and authority of the Board of Directors to grant and authorize the purchase and removal of finger piers in order to create a larger parallel mooring which permitted the parking of a boat larger than 23' within the easement;

15. Yoshikawa has not violated the Declaration or any of the Governing Documents;

16. A declaration that Yoshikawa, or any subsequent owner of the modified 69' boat mooring which includes moorings Nos. 28-33, shall have the right to moor therein any length boat that will reasonably fit within the 69' slip;

17. A declaration that the Kalele Kai boat dock area is a common element;

18. A declaration that the Kalele Kai limited common element boat moorings consist only of the mooring spaces in the water;

19. A declaration that the special assessment for repair costs imposed on Yoshikawa was improper.

B. A ruling that Yoshikawa is the prevailing party in this matter;

C. A ruling that the Counterclaim/Cross-Claim Defendants are liable to Yoshikawa for damages, including but not limited to, general, compensatory, special, and punitive damages, in an amount to be proven at trial;

D. An award in favor of Yoshikawa for his reasonable attorneys' fees and cost to be paid by the Counterclaim/Cross-Claim Defendants;

E. Such other relief which this Court finds is just and equitable.

DATED: Kailua, Hawaii, _____ 2015.

TERRANCE M. REVERE
LAUREN C. McDOWELL

Attorneys for Defendant
HITOSHI YOSHIKAWA

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ASSOCIATION OF OWNERS
OF KALELE KAI,

Plaintiff,

vs.

HITOSHI YOSHIKAWA;
DOE DEFENDANTS 1-10,

Defendants.

CIVIL NO. 15-1-0102-01 KTN
(Declaratory Judgment)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

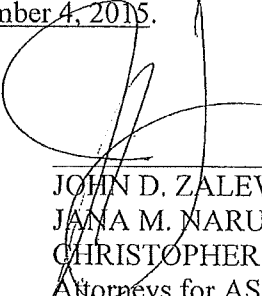
I certify that the foregoing was served on the following persons by the following means
on the following date:

TERRANCE M. REVERE, ESQ.
LAUREN C. McDOWELL, ESQ.
Pali Palms Plaza
970 North Kalaheo Ave., Suite A301
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Email Attachment and
First Class United States Mail

Attorneys for Defendant HITOSHI YOSHIKAWA

DATED: Honolulu, Hawaii, September 4, 2015.



JOHN D. ZALEWSKI
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Attorneys for ASSOCIATION OF
OWNERS OF KALELE KAI