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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
)
) DEFENDANT HITOSHI YOSHIKAWA'S
) MOTION FOR AN ORDER CONFIRMING
) THE AWARD OF ATTORNEYS' FEES
) AND COSTS CONTAINED IN THE FINAL
) AWARD OF THE ARBITRATOR, DATED
) FEBRUARY 12, 2015, INCORPORATING
) THE ARBITRATOR'S PARTIAL FINAL
) AWARD, DATED DECEMBER 12, 2014, IN
) DPR NO. 13-0496-A AND FOR JUDGMENT
) IN CONFORMITY THEREWITH;
) MEMORANDUM IN SUPPORT OF
) MOTION; DECLARATION OF COUNSEL;
) EXHIBITS 1-2; NOTICE OF HEARING
) MOTION & CERTIFICATE OF SERVICE
)
) HEARING:
)
) DATE: 4/21/15
) TIME: 9:00 AM
) JUDGE: The Honorable Karen T. Nakasone
)
)
)

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

2015 MAR 11 PM 3:41

J. KUBO
CLERK

DEFENDANT HITOSHI YOSHIKAWA'S MOTION FOR AN ORDER CONFIRMING
THE AWARD OF ATTORNEYS' FEES AND COSTS CONTAINED IN THE FINAL
AWARD OF THE ARBITRATOR, DATED FEBRUARY 12, 2015, INCORPORATING THE
ARBITRATOR'S PARTIAL FINAL AWARD, DATED DECEMBER 12, 2014, IN DPR NO.
13-0496-A AND FOR JUDGMENT IN CONFORMITY THEREWITH

Defendant HITOSHI YOSHIKAWA ("Yoshikawa") by and through his undersigned counsel, Revere & Associates, LLLC, respectfully moves this Court pursuant to Hawaii Revised Statutes ("HRS") §§ 514B-162(e) and 658A-22, for an order confirming the award of attorneys' fees and costs contained in the Final Award of the Arbitrator, dated February 11, 2015, incorporating the Arbitrator's Partial Final Award, dated December 12, 2014, in DPR No. 13-0496-A, attached hereto as Exhibit 1 ("Award"). Yoshikawa further requests that this Court enter a judgment in favor of Yoshikawa in the amount of \$157,834.13 pursuant to HRS §§ 514B-162(e) and 658A-25. Yoshikawa respectfully requests that the judgment include the 10% per annum interest that has accrued on the Award since its issuance on February 11, 2015, plus the attorneys' fees and costs incurred by Yoshikawa in pursuing this motion.

This motion is brought pursuant to HRS §§ 514B-162(e), 658A-22, 658A-25, Rule 7 of the Hawaii Rules of Civil Procedure, and Rule 7 of the Hawaii Rules of Circuit Courts and is based upon the memorandum in support, declaration of counsel, and exhibit, appended hereto and the files and records herein, as well as such further and additional matters that may be presented to and at this hearing on this motion, all of which are incorporated herein by reference.

DATED: Kailua, Hawaii, March 10, 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	)	Civil No. 15-1-0102-01 KTN
OF KALELE KAI,)	
)	
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
	)	MOTION
vs.)	
)	
HITOSHI YOSHIKAWA)	
DOE DEFENDANTS 1-10,)	
)	
Defendants.)	
_____)	

MEMORANDUM IN SUPPORT OF MOTION

Defendant HITOSHI YOSHIKAWA (“Yoshikawa”) has moved this Court pursuant to Hawaii Revised Statutes (“HRS”) §§ 514B-162(e), 658A-22, and 658A-25, for an order confirming the award of attorneys’ fees and costs contained in the Final Award of the Arbitrator, dated February 11, 2015, incorporating the Arbitrator’s Partial Final Award, dated December 12, 2014, in DPR No. 13-0496-A, attached hereto as Exhibit 1. The AOA further requests this Court enter a judgment in favor of Yoshikawa in the amount of \$157,834.13 pursuant to HRS §§ 514B-162(e) and 658A-25(a).

I. BACKGROUND & FACTS

Plaintiff Association of Owners of Kalele Kai (“AOAO”) is a condominium association existing pursuant to HRS § 514B. Yoshikawa is an AOA homeowner. In July 2014, the parties executed an Agreement to Participate in Arbitration, attached hereto as Exhibit 2. The Agreement specifically stated that the arbitration would be conducted pursuant to Haw. Rev. Stat. §§ 514B-162 and 658A. The Arbitrator’s Partial Final Award, dated December 12, 2014, found that Yoshikawa was the prevailing party. Exhibit 1, page 26. The Final Award of the

Arbitrator, dated February 12, 2015, awarded \$157,834.13 in attorneys' fees and costs to Yoshikawa as the prevailing party. Exhibit 1, page 2.

II. ARGUMENT

Pursuant to HRS 514B-162(e), an award of attorneys' fees and costs following arbitration is binding on all parties and non-appealable. Haw. Rev. Stat. 514B-162(e) states the following:

“Notwithstanding any provision in this chapter to the contrary, the declaration, or the bylaws, the award of any costs, expenses, and legal fees by the arbitrator shall be in the sole discretion of the arbitrator and the determination of costs, expenses, and legal fees shall be binding upon all parties.”

(emphasis added). The Final Award of the Arbitrator, dated February 11, 2015, incorporating the Arbitrator's Partial Final Award, dated December 12, 2014, in DPR No. 13-0496-A awarded \$157,834.13 in attorneys' fees and costs to Yoshikawa as the prevailing party. Exhibit 1, page 2. This award of fees and costs is binding upon all parties and, as such, the Court should enter an order confirming the award of fees and costs and a judgment in conformity therewith.

The AOA's January 21, 2015 Complaint For Trial De Novo has no bearing on this matter. The right to trial de novo on the merits under HRS § 514B-163 which is separate and apart from the binding nature of the original award of attorneys' fees and costs under HRS § 514B-162(e).

The binding nature of an arbitrator's fee and cost award pursuant to HRS § 514B-162(e) is mandated by the statutory scheme, common sense, and public policy. If losing parties were not required to pay fees for losing arbitrations as awarded by the arbitrator, there would be no point whatsoever to the arbitration process set forth in HRS § 514B. There certainly would be no incentive for any party to participate in such a process or to try in good faith to put their best argument forward if the losing party could simply appeal without consequence. The Hawaii Supreme Court has noted a concern that both the Court and the Legislature have with mediation:

namely, that condominium boards treat the mediation provision in the former condominium statute, HRS 514A, like a joke and were simply going through the motions:

The 2004 legislature referred to the Hawai'i Real Estate Commission's December 31, 2003 Final Report to the Legislature as an "aid in understanding and interpreting" the Act that became Chapter 514B. 2004 Haw. Sess. Laws Act 164, at 755. **That report, in turn, stressed the need for improved alternative dispute resolution in condominium communities, because "the 'mandatory' mediation provisions [of Chapter 514A] are essentially voluntary (with boards refusing to mediate or going through the motions to avoid the appearance of non-cooperation). . . ."** Hawaii Real Estate Commission, "Final Report to the Legislature, Recodification of Chapter 514A, Hawaii Revised Statutes (Condominium Property Regimes), in Response to Act 213, Section 4 (SLH 2000)," at 34.

Discovery Bay v. Mitchell, 134 Haw. 251, 339 P.3d 1052, 2014 Haw. LEXIS 329 (2014) (at fn 2)¹. An "improved alternative dispute resolution" mechanisms is the fact that under HRS 514B-162(e) an arbitrator's fee award "**shall be binding upon all parties**" "**notwithstanding any provision in this chapter to the contrary.**"

V. CONCLUSION

Based on the foregoing, Yoshikawa respectfully requests that the Court:

1. Enter an order confirming the award of attorneys' fees and costs contained in the Final Award of the Arbitrator, dated February 11, 2015, incorporating the Arbitrator's Partial Final Award, dated December 12, 2014, in DPR No. 13-0496-A;

¹ "In recent years, with the increase of civil litigation, escalating costs to the parties, and the strain on already scarce judicial resources, there is a dire need for prompt, equitable, and cost-efficient resolution of civil disputes before trial. A recent study entitled 'Assessment of Civil Legal Needs of Low-and Moderate-Income People in Hawaii,' prepared for the Hawai'i Commission on Access to Justice by The Spangenberg Group of West Newton, Massachusetts, has determined that there has been and is a serious level of unmet legal needs among such families in Hawai'i because they simply cannot afford market-rate legal services. It is well-established that, in most instances, the longer a case is in litigation, the more expensive it is for the parties. Thus, we have recognized time and again that the proclaimed public policy of our legislature is to encourage arbitration as a means of settling differences and thereby avoid litigation. Further, courts have realized that, by expediting the adversary process, arbitration promotes quicker settlement of cases thereby speeding up access to the courts. Richardson v. Sport Shinko, 76 Haw. 494, 510, 880 P.2d 169, 185 (Haw. 1994) (citations, quotations and brackets omitted).

2. Enter a judgment in favor of Yoshikawa in the amount of \$157,834.13, plus the 10% per annum interest that has accrued on the Award since its issuance on February 11, 2015, plus the attorneys' fees and costs incurred by Yoshikawa in pursuing this motion.

DATED: Honolulu, Hawaii, March 10, 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	)	Civil No. 15-1-0102-01 KTN
OF KALELE KAI,)	
)	
Plaintiff,	)	DECLARATION OF TERRANCE M.
	)	REVERE
vs.)	
)	
HITOSHI YOSHIKAWA)	
DOE DEFENDANTS 1-10,)	
)	
Defendants.)	
_____)	

DECLARATION OF TERRANCE M. REVERE

I, TERRANCE M. REVERE, declare under penalty of law that the following is true and correct:

1. I am competent to make this declaration, and do so based upon personal knowledge, except as otherwise stated.
2. I am the principle of Revere and Associates, LLC, the law firm representing Defendant Hitoshi Yoshikawa.
3. I am executing this Declaration in support of the attached *DEFENDANT HITOSHI YOSHIKAWA'S MOTION FOR AN ORDER CONFIRMING THE AWARD OF ATTORNEYS' FEES AND COSTS CONTAINED IN THE FINAL AWARD OF THE ARBITRATOR, DATED FEBRUARY 12, 2015, INCORPORATING THE ARBITRATOR'S PARTIAL FINAL AWARD, DATED DECEMBER 12, 2014, IN DPR NO. 13-0496-A AND FOR JUDGMENT IN CONFORMITY THEREWITH.*
4. Attached hereto as "Exhibit 1" is a true and correct copy of the February 11, 2015 incorporating the Arbitrator's Partial Final Award, dated December 12, 2014, in DPR No. 13-0496-A;
5. Attached hereto as "Exhibit 2" is a true and correct copy of fully executed

Agreement to Participate in Arbitration filed in DPR No. 13-0496-A.

DATED: Honolulu, Hawaii, March 10, 2015.

A handwritten signature in black ink, appearing to be 'TMR', written over a horizontal line.

TERRANCE M. REVERE

Keith W. Hunter, Arbitrator
Dispute Prevention & Resolution, Inc.
1003 Bishop Street, Suite 1155
Honolulu, Hawaii 96813

IN THE TRIBUNALS OF
DISPUTE PREVENTION & RESOLUTION
STATE OF HAWAII

IN THE MATTER OF:	) DPR NO. 13-0496-A
)
HITOSHI YOSHIKAWA,	) FINAL AWARD OF
	) ARBITRATOR
Claimant,)
)
vs.)
)
ASSOCIATION OF APARTMENT)
OWNERS OF KALELE KAI,)
)
Respondent.)
)

FINAL AWARD OF ARBITRATOR

I. INTRODUCTION.

The undersigned Arbitrator issued his Arbitrator's Partial Final Award in this matter on December 12, 2014. Pursuant to the Arbitrator's Partial Final Award, the Arbitrator retained jurisdiction over the parties to review and address claims for attorneys' fees and costs. This Final Award of Arbitrator addresses the claims for attorneys' fees and costs.



II. FINAL AWARD.

A. Incorporated herein and made a complete part of this Final Award of Arbitrator is the Arbitrator's Partial Final Award dated December 12, 2014.

B. As the prevailing party herein, Hitoshi Yoshikawa is awarded the sum of \$136,074.22 as and for attorneys' fees.

C. As the prevailing party herein, Hitoshi Yoshikawa is awarded the sum of \$14,159.91 in recoverable costs and \$100.00 as reimbursement for the mediation fee.

D. Hitoshi Yoshikawa's request for award of his share of the Arbitrator's fee is denied as the Arbitrator fee has already been determined, that fee is to be incurred by the parties on a 50/50 basis.

E. As the prevailing party herein, Hitoshi Yoshikawa is awarded the sum of \$7,500.00 as reimbursement for the interpreter's fee.

F. This Final Award of Arbitrator is in full and final determination of all claims, matters and issues submitted in this arbitration proceeding.

G. Effective after the issuance of this Final Award of Arbitrator, the undersigned Arbitrator is *functus officio*.

DATED: Honolulu, Hawaii 2-11-15.



KEITH W. HUNTER
Arbitrator

Keith W. Hunter, Arbitrator
Dispute Prevention & Resolution, Inc.
1003 Bishop Street, Suite 1155
Honolulu, Hawaii 96813

IN THE TRIBUNALS OF
DISPUTE PREVENTION & RESOLUTION
STATE OF HAWAII

IN THE MATTER OF:	) DPR ARB. NO.: 13-0496-A
)
)
Hitoshi Yoshikawa	) ARBITRATOR'S PARTIAL
	) FINAL AWARD
Claimant,)
)
vs.	) Hearing: August 25-26,
	) September 6, September 18
ASSOCIATION OF APARTMENT	) and October 3, 2014
OWNERS OF KALELE KAI,)
)
Respondent.)
)
)
)
)
)

I. INTRODUCTION

The issues before the Arbitrator in this proceeding involve a dispute as to whether Hitoshi Yoshikawa's ("Yoshikawa") new boat, the Rola, violates

the Association of Owners of Kalele Kai's ("Association") Declaration, which restricts boat lengths to twenty-three (23) feet within the Kalele Kai Marina.

Yoshikawa requests that the Arbitrator:

1. Allow the Rola to remain moored at Kalele Kai;
2. Find that the Declaration's 23-foot limit does not apply to the Rola or Yoshikawa's side-tie moorings;
3. Allow that Yoshikawa or any future owner of the Yoshikawa's property to have the right to moor any boat that fits within the 69' side-tie mooring;
4. Award special damages in the amount of \$12,741.09, which is the total Yoshikawa paid under protest to the Association for dock repair and maintenance assessments, along with 10% prejudgment interest.
5. Award general damages in the amount of \$250,000 for the extreme aggravation this situation has caused, along with \$250,000 in punitive damages.

The Association asks the Arbitrator to dismiss all claims with prejudice and issue a mandatory injunction ordering Yoshikawa to remove the Rola from the Kalele Kai Marina by a date certain and henceforth comply strictly with the Declaration.

The undersigned Arbitrator, having conducted arbitration hearings on August 25-26, September 6, September 18 and October 3, 2014, wherein the parties were afforded a full and complete opportunity to present evidence and examine witnesses under oath, and having carefully considered the pre-hearing and post-hearing briefs, the numerous exhibits submitted by the parties, and having considered the totality of credible evidence, testimony,

and arguments in light of the claims by each of the parties, and being duly sworn, hereby FINDS, CONCLUDES AND AWARDS, AS FOLLOWS:

II. FACTUAL SUMMARY

Boat-Mooring Restrictions

The Kalele Kai condominium project and marina were built in the 1990s.¹ The Kalele Kai Marina was originally constructed with numerous 23' perpendicular moorings and one 69' side-tie mooring.²

The Kalele Kai Declaration ("Declaration") was recorded on June 1, 1992.³ The Declaration restricts the lengths of boats moored in the marina to 23 feet.⁴

The Marina Association does not limit the size of the boats that use its waters.⁵ The Marina Association does regulate the mooring of vessels according to mooring zones that restrict the length that boats can extend from the dock.⁶ The Mooring Restrictions Legend states that "[t]he mooring zone is measured from the marina wall to the outboard side of the vessel

¹ See February 2, 1993, Full Size Condo Map, Yoshikawa Exhibit 13.

² See *Id.*; See also, Photo of Hawaii Kai Marina, Yoshikawa Exhibit 157.

³ See June 1, 1993, Declaration of Condominium Property, Yoshikawa Exhibit 15.

⁴ See *Id.* at KK002093.

⁵ *Id.* at 5.

⁶ *Id.* at 6.

moored at the dock.”⁷ This mooring limitation permits boats to extend perpendicular from the dock for 30 feet, the same distance of the Kalele Kai easement within the surrounding Hawaii Kai Marina.⁸

In February 2008, Richard Rosic (“Rosic”), a homeowner and boat-mooring owner in Kalele Kai since 2001, listed his town house for sale. Rosic’s property included a 69-foot boat mooring, which had housed his boat, the Ariel, since 2002. The Ariel is in excess of 38 feet and exceeds the Declaration’s 23-foot restriction.

A dispute ensued between Rosic and the Association wherein the Association claimed it did not have authority under its governing documents to approve Rosic’s disposal, modification, or reconfiguration of individual pier walkways to accommodate larger boats.

In June 2009, a Settlement Agreement (“Rosic Agreement”) was reached between Rosic and the Association wherein the parties agreed that Rosic could sell his boat mooring in its modified condition and for any subsequent owner to moor a boat therein.⁹ Pursuant to the Rosic Agreement, the Association Board passed and recorded the Tenth Amendment of the

⁷ *Id.* at Exhibit C.

⁸ See May 30, 1991, Bellingham Marine Industries, Inc. Map, Yoshikawa Exhibit 7.

⁹ See June 9, 2009, Rosic Agreement, Yoshikawa Exhibit 71.

Declaration.¹⁰ The Tenth Amendment includes "Dock and Boat Rules," which contemplate the sale of boat moorings in their modified conditions.¹¹ The Tenth Amendment, including the Dock and Boat Rules, are incorporated into the Kalele Kai House Rules,¹² which means that they thereafter apply to all Kalele Kai owners.

After the Rosic Agreement, Rosic sold the property, the Ariel, and the boat mooring in its modified condition to Yoshikawa in November 2010.¹³

On August 25, 2011, the Association "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"¹⁴ (the "2011 Board Vote").

On September 9, 2011, Ike and Angela Hung ("Hungs"), who were in the process of selling their townhome and modified boat moorings, demanded mediation and arbitration asking for a declaratory order disallowing the Association's retraction of the sale of modified boat moorings

¹⁰ See August 28, 2009, Tenth Amendment of the Declaration, Yoshikawa Exhibit 74.

¹¹ *Id.* ("(D-6 (a) When a modified boat mooring has one of more finger piers attached in a parallel orientation to the common walkway, upon the 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.")(emphasis added)

¹² See August 27, 2009, Dock and Boat Rules, Yoshikawa Exhibit 73.

¹³ See November 1, 2010, Apartment Deed (with Boat Moorings), Yoshikawa Exhibit 83.

¹⁴ See August 25, 2011, Regular Meeting Minutes, Yoshikawa Exhibit 91.

and challenging the Association's authority to assess boat-mooring owners for repairs to boat docks and walkways.¹⁵

On February 1, 2012, this Arbitrator granted the Hung's motion for a declaratory order, which prohibited the Association's restriction of selling modified boat moorings and deferred ruling on the fairness of the Association's assessments to boat docks and walkways until a full evidentiary hearing clarifying what portions of the marina constitutes common elements versus limited common elements.¹⁶

On August 23, 2013, Yoshikawa received a letter from the Association's management company claiming that the Ariel was in violation of the Declarations' 23-foot rule.¹⁷

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

On November 4, 2013, Yoshikawa registered the Rola with the Hawaii Kai Marina Association.¹⁸

¹⁵ See September 9, 2011, Letter to the Board of Directors and Alan Takumi, Account Executive for Certified Management Hawaii from Hungs, Yoshikawa Exhibit 96.

¹⁶ See February 2, 2012, Hung Order, Yoshikawa Exhibit 109.

¹⁷ See August 23, 2013, Takumi Letter to Yoshikawa, Yoshikawa Exhibit 129.

¹⁸ See November 4, 2013 Hawaii Kai Marina Vessel Registration, Yoshikawa Exhibit 136.

On November 6, 2013, Yoshikawa registered the Rola with Kalele Kai.¹⁹

Boat-Mooring Assessments

Also at issue in this proceeding is the Association's decision to renovate the docks in order to apply for Liability Insurance for the Kalele Kai Marina's docks.²⁰

In early 2011, the Board contacted the original designer and manufacturer of Kalele Kai's boat docks, Bellingham Marine ("Bellingham"), regarding the maintenance and the current condition of the Association's marina. Thereafter, Bellingham conducted a site inspection of the boat docks to assess needed repairs.

On April 8, 2011, Bellingham Marine provided a "Maintenance and Rehabilitation" report along with an estimate to perform the renovation work.²¹

The Board also retained Glenn E. Miyasato ("Miyasato") of MKE Associates to review Bellingham's proposal. Miyasato concurred with Bellingham with respect to the marina's severely deteriorated condition,

¹⁹ See November 6, 2013 Yoshikawa's Boat Registration, Yoshikawa Exhibit 137.

²⁰ See June 25, 2011 Email from Tracy Wong to Bryan Liu, Association Exhibit 525.

²¹ See April 8, 2011 Kalele Kai Marina Maintenance and Rehabilitation, Association Exhibit 523.

need for a comprehensive renovation rather than piecemeal repairs, and utilization of Bellingham for the work.²²

On August 12, 2011, Certified sent Kalele Kai owners a letter titled "Boat Dock Update" and enclosed Miyasato's report for review.²³ The letter further notified the owners that the enclosed report would be discussed at the August 25, 2011, Board Meeting.²⁴

On August 25, 2011, the Board unanimously voted to proceed with the renovations proposed by Bellingham (the "Boat Dock Resolution"), which were to be paid by the boat-mooring owners according to the number of boat docks owned.²⁵

Yoshikawa, however, now questions the Board's authority and reasoning in passing the Boat Dock Resolution, as well as the proportion of assessments charged to boat-mooring owners, which they contend are common-area elements that should be paid for by all owners equally.

²² See April 12, 2011 Letter from Certified Hawaii to Kalele Kai Owners, Association Exhibit 528.

²³ Id.

²⁴ Id.

²⁵ See August 25, 2011, Board Meeting Minutes and Boat Dock Resolution, Association Exhibit 531.

III. DECISION & AWARD

The 23' Foot Boat Length Restriction

Yoshikawa asks the Arbitrator to issue an award permitting the Rola to remain moored at Kalele Kai and to find that the 23-foot limitation does not apply to the Rola or to Yoshikawa's side-tie mooring for Yoshikawa or any subsequent purchaser.

To begin, Yoshikawa argues that the purpose behind the 23-foot limitation is to keep boats moored at Kalele Kai from protruding past the Association's 30-foot easement into the Hawaii Kai Marina. This contention, though not explicit within the Kalele Kai Declaration or other documents, was supported by witness testimony throughout the arbitration proceeding.

For example, current Board President Brad Oakes ("Oakes"), who is seeking to enforce the Declaration's restriction on behalf of the Board, testified that he believed the purpose of the 23-foot limitation "is obviously you can only put 23 feet with the easement and stick out 30 feet."²⁶ Yoshikawa therefore asserts that since his boat is side-tied within a 69-foot mooring area, and does not extend out more than 30 feet, he upholds the original intent behind this limitation.

²⁶ See Arbitration Transcript at 164-165.

The Association argues that despite the original intent, the Declaration provides, unambiguously, that, "[t]he boat mooring shall be restricted to use by boats no larger than twenty-three (23) feet in length."²⁷

Hawaii Law and the Declaration each impose a "comply strictly" obligation on condominium owners, or risk being subject to civil obligations including injunctive relief.²⁸ In this case, it is undisputed that Yoshikawa's 69-foot side-tie mooring does not strictly comply with plain language of the Declaration.

The Association also argues the Hawaii Supreme Court has adopted the "take a chance" doctrine," recognized within *Sandstrom v. Larson*, which acknowledges that a mandatory injunction is appropriate where a party violates a restrictive covenant of which he is aware, irrespective of whether the owner mistakenly relies on incorrect advice from a professional.²⁹ Under this doctrine, it is also unnecessary to consider the relative hardship between the parties, which lowers the typical burden for a mandatory injunction.

In *Sandstrom*, Cyril and Marjorie Larsen lived in the Kaneohe Heights subdivision in Kaneohe, City and County of Honolulu. Each of the original

²⁷ See June 1, 1993, Declaration of CPR of Kalele Kai, Association Exhibit 503 at KK002093.

²⁸ Id. at KK 002105; See Haw. Rev. Stat. §514B-112 (c);

²⁹ See *Sandstrom v. Larsen*, 59 Haw. 491, (Haw. 1978)

thirty lots in this subdivision, including the Larsens, was subject to the Declaration of Restrictive Conditions.³⁰

The Declaration expressly restricted the heights of homes to less than two stories:

1. No lot shall be used except for residential purposes. No building (other than the existing dwelling on Lot 26) shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling not to exceed one and one-half stories in height and a private garage for not more than two cars."³¹

Additional lots were later subdivided and sold by the Souzas, the original owners of the land encompassing the subdivision, and were not subjected to the one and one-half story height restriction.

After a fire partially destroyed their home, the Larsens hired an architect and proceeded to have their home rebuilt as a two-story structure, in violation of the Declaration for their neighborhood.³² The Larsens argued that the restrictive height covenant had been abandoned as evidenced by other two and three story structures in the subdivision.³³

³⁰ *Id.* at 492.

³¹ *Id.* at 492-494.

³² *Id.* at 493.

³³ *Id.* at 496.

The Hawaii Supreme Court held, however, that, “[i]n order to support a finding of abandonment, it must be shown that the lot owners of the subdivision acquiesced in substantial and general violations of the covenant within the restricted area.”³⁴ The Court explained that other two and three story homes did not defeat the purpose of the covenant, which is to protect the view and privacy of other homeowners in Kaneohe Heights.³⁵ The Court further stated, “ the presence of these few multi-story homes does not, in our opinion, constitute such a ‘substantial and general’ acquiescence on the part of the lot owners in the subdivision as to support a finding of abandonment.”³⁶ The Court went on to hold that the Larsens had actual and constructive knowledge of the restrictive covenant at the time they purchased their home, and proceeded to construct a two-story structure in violation of the covenant “at their own risk.”³⁷

The Court was not persuaded by the Larsen’s argument that they “relied on the advice of their architect”³⁸ stating that such reliance does not

³⁴ Id. at 497.

³⁵ Id. at 497.

³⁶ Id. at 497-498.

³⁷ Id. at 500.

³⁸ Id. at 500.

confer immunity from the rights of homeowners to seek an equitable remedy such as an injunction.³⁹

The *Sandstrom* case, however, is distinguishable from this case for several reasons and the Association's reliance is misplaced.

First, unlike *Sandstrom*, where no approval for two-story homes was ever granted and the Declaration expressly prohibited two-story homes, the Kalele Kai Association allowed owners to keep boats in excess of 23 feet for at least a decade and also entered the Rosic Agreement and the Dock and Boat Rules, which contemplated boats in excess of 23 feet by allowing owners to modify their moorings.

Second, unlike the Larsens in *Sandstrom*, Yoshikawa was not in violation of the purpose behind the boat-length restriction found in the Declaration. Instead, Yoshikawa's boat was always side-tied within their 69-foot slip and never extended past Kalele Kai's 30-foot easement. And while some argument during Arbitration was made that the Yoshikawa's boat impacted views for other homeowners, views are expressly disclaimed as a protected right in the Declaration.⁴⁰

³⁹ Id. at 500.

⁴⁰ See Declaration of Condominium Property, Yoshikawa Exhibit 15; Arbitration Testimony at 229-230; June 13, Kalele Kurrents, Association Exhibit 562.

Third, at the time Yoshikawa purchased their property, the Association had allowed repeated “violations” of the Declaration's 23-foot limit by allowing larger boats to be kept at Kalele Kai Marina.

While the Association argues it never expressly approved owners to keep boats larger than 23 feet, this argument is disingenuous given the Association's approval of moorings to accommodate larger boats. Over a period of at least ten years, the Association did not object once to any boat over 23 feet, which were being continuously moored in the Kalele Kai marina.

Arbitration testimony also reveals that these boats took Board Members and other homeowners on cruises,⁴¹ participated in dock social events and parades,⁴² and were featured within the Kalele Kurrents newsletters.⁴³ For example, the April 2006 Kalele Kurrents newsletter explains how homeowners can buy and modify boat docks:⁴⁴

The Kalele Kai boat docks are 23 feet long.

⁴¹Arbitration Transcript at 38.

⁴²Arbitration Transcript at 44; September 2002, Kalele Kurrents, Yoshikawa Exhibit 44; October 2002, Kalele Kurrents, Yoshikawa Exhibit 45; November 2002, Kalele Kurrents, Yoshikawa Exhibit 46; Honolulu Star-Bulletin Hawaii News, Yoshikawa Exhibit 47

⁴³ May 2002, Kalele Kurrents, Yoshikawa Exhibit 38; September 2002, Kalele Kurrents, Yoshikawa Exhibit 44; October 2002, Kalele Kurrents, Yoshikawa Exhibit 45; July 2003, Kalele Kurrents, Yoshikawa Exhibit 49; September 2003, Kalele Kurrents, Yoshikawa Exhibit 50; June 2004, Kalele Kurrents, Yoshikawa Exhibit 54;

⁴⁴ See April 2006, Kalele Kurrents, Yoshikawa Exhibit 59.

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.

Thus, the Kalele Kai's own newsletter acknowledges boats larger than 23 feet are allowed and even explains how to modify piers to accommodate larger boats.

While the Association argues there are no board minutes supporting the approval of modifications of the piers and that the Declaration is the controlling document for owners to abide, this argument ignores the Association's acquiescence in "substantial and general violations" of the Declaration's 23-foot limit. For example, while it is apparently true the Board never altered the Declaration, the Board's express and implied approval of larger boats is readily apparent by the Board's execution of the Rosic Agreement, the 2009 Dock and Boat Rules within the Tenth Amendment, and the long-standing and well-documented history of the Association not enforcing the Declaration.

Unlike the Larsens in *Sandstrom*, Yoshikawa relied on much more than the advice of one agent because Yoshikawa purchased his property, the Ariel, and modified moorings knowing that he had approval under the Rosic

Agreement, which recognized Rosic's ability to transfer the property to a subsequent purchaser with rights to a larger boat and permitted the subsequent owner to "harbor a boat in the boat dock or else the Board may require the area to be reconfigured."⁴⁵

Further, for seven years leading up to the Rosic Agreement, Rosic's boat, the Ariel, had been moored at Kalele Kai and had never been cited for violating the Declaration's 23-foot boat restriction.⁴⁶ The first time the Ariel received a violation was on August 23, 2013, by which point the boat had been moored in its side-tie slip for over eleven years.⁴⁷

2011 Board Vote

The Board's attempt to negate Yoshikawa's rights through the 2011 Board Vote is also unavailing.⁴⁸

While the 2011 Board Vote purports to "grandfather" four boats while requiring moorings to be returned to their original position upon sale of the

⁴⁵ See June 9, 2009, Rosic Agreement, Yoshikawa Exhibit 71.

⁴⁶ See April 17, 2002, Registration of the Ariel with Hawaii Kai Marina, Yoshikawa Exhibit 37; June 9, 2009, Rosic Agreement, Yoshikawa Exhibit 71.

⁴⁷ See August 23, 2013, Takumi Letter to Yoshikawa re: Notice of Violation, Yoshikawa Exhibit 129.

⁴⁸ See August 25, 2011, Board Minutes, Yoshikawa Exhibit 91 ("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.")

boats, this argument has already been rejected in *Hung* for existing owners who purchased and relied upon the Association's history of allowing larger boats in contradiction to the Declaration.

This result is particularly justified here because Yoshikawa's rights were conferred to him under the Rosic agreement, which expressly allowed Rosic to transfer the property to a subsequent purchaser and authorized the subsequent owner to moor a boat in excess of 23 feet. Importantly, under the Rosic Agreement, the subsequent purchaser was not limited to mooring the Ariel, but was instead allowed to moor any boat so long as the mooring was utilized within a 12-month period.

Thus, the Arbitrator finds that the Board has no authority to alter its commitments found within the Rosic Agreement as they relate to Yoshikawa's property.

Further, as in *Hung*, the Arbitrator notes that the 2011 Board Vote to grandfather only existing boats would be a significant change in the Association's policy and contradicts the Dock and Boat Rules incorporated by the Board's Tenth Amendment for existing owners.

Thus, the Arbitrator finds that the 2011 Board vote cannot restrict Yoshikawa's right to sell his boat moorings in a modified condition since he

was a pre-existing home and boat mooring owner and purchased his property and rights before the 2011 Board vote.

As such, the Arbitrator denies the Association's request for a mandatory injunction and thereby permits the Rola to remain moored at Kalele Kai.

The Arbitrator notes, however, that the 2011 Board Vote may be applied to homeowners who purchase a property with modified boat moorings after the 2011 Board Vote. For example, the subsequent purchaser of Yoshikawa's property may purchase the existing boat moorings in a modified condition, however, he does so with the understanding that should this subsequent purchaser sell his boat or home, the docks would have to go back to their original configuration unless he or she obtains Board approval.

Boat Dock Renovations and Assessments

Decision to Renovate

Yoshikawa also questions the Association's decision to renovate the Kalele Kai Marina docks. Specifically, Yoshikawa argues that the Association entered into a no-bid contract with Bellingham Marine to repair limited common elements that are already in safe condition. Yoshikawa contends the Declaration only confers authority to arrange for maintenance and repair

when an "owner fails to maintain and/or repair the boat mooring in good, safe and clean condition."⁴⁹

Yoshikawa asserts that the definition of a boat mooring is the space in the water where the boat is kept, which is admittedly a limited common element.⁵⁰ To the contrary, the boat docks, including the finger piers, the part of the marina that was renovated and for which Yoshikawa was assessed, are common elements.

The Declaration defines common elements as follows:

1. 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;⁵¹

Yoshikawa argues that the common element boat docks and finger piers did not require repair and, therefore, his assessment was improper.

The Association argues that the proposed Dock and Boat Rules, which are incorporated by the Tenth Amendment defines the Finger Piers and

⁴⁹ See June 1, 1993 Declaration of Condominium Property, Yoshikawa Exhibit 15.

⁵⁰ See Yoshikawa Closing Brief at 18; Arbitration Transcript at 38-39.

⁵¹ See June 1, 1993 Declaration of Condominium Property, Yoshikawa Exhibit 15.

triangles as limited common elements and solely the responsibility of the boat-mooring owners.

Specifically, the Proposed Dock and Boat Rules state:

D-8 Finger Piers & Support Triangles – maintenance and replacement of finger piers and support triangles is the responsibility of boat mooring owners. If proper maintenance is not performed by the owner, the Association has the right to perform the maintenance and assess the owner for all costs incurred to perform such maintenance.

The Association claims that the marina had not been renovated since it had been constructed 20 years prior.⁵² Oakes testified that owners had been asking, “[w]ho is going to fix this, what’s the cost, how do we go about it and get it done. That is what started the whole process.”⁵³

Bellingham Marine is a reputable contractor and made specific renovation recommendations, consistent with its findings, report and annotated photos.⁵⁴

The Board also requested a second opinion from Glenn Miyasato of MKE Associates who concurred with Bellingham with respect to the

⁵² Arbitration Transcript at 726-727.

⁵³ *Id.* 730.

⁵⁴ See April 8, 2011, Kalele Kai Marina Maintenance & Rehabilitation Report, Association Exhibit 523.

renovations and recommended the Bellingham Marine to carry out the repairs.⁵⁵ Miyasato also recommended that the Board avoid a piecemeal approach to repairs and maintenance because “the piers and walkways are connected together to act as one integral floating element and will require a more extensive survey of all components to determine their current integrity and need for replacement.”⁵⁶

The Association states that it thereafter reasonably relied on Bellingham’s itemized computation of the renovation cost for the boat moorings (limited common elements) in the amount of the \$95, 400, and the marina common elements, in the amount of \$169, 300. The Board then provided notice to the owners about the plan to renovate.⁵⁷

The Arbitrator finds that Board acted within its discretion to hire Bellingham Marine to perform maintenance and repairs to the docks and finger piers.

⁵⁵ See August 10, 2011, Letter from Glenn Miyasato, Association Exhibit 528.

⁵⁶ *Id.* at KK000092.

⁵⁷ See June 23, 2011, Flyer re: Board Meeting to discuss renovation project, Association Exhibit 524; June 2011, Kalele Kurrents, Association Exhibit 524; June 18, 2011, Owners’ Forum Flyer, Association Exhibit 527; August 12, 2011, Memo to Owners and attached letter from Glenn Miyasato, Association Exhibit 528.

Yoshikawa was given notice and seven days to either comply or challenge the assessments.⁵⁸ Yoshikawa failed to respond within that time period and therefore is responsible for the assessments for the work to the finger piers that are currently in the marina.

The Arbitrator finds, however, that Yoshikawa was unfairly assessed for repairs to the two finger piers that were removed by Rosic in 2001 and 2002. Since Yoshikawa is the owner of these piers, he is responsible for their repair and maintenance and all costs associated to reconfiguring the piers if ever executed.

Yoshikawa further contends that the Association acted maliciously and should not only should he not be liable for the assessments, but also an award of punitive damages.

The Arbitrator finds that Yoshikawa has not presented evidence that rises to the level of malicious intent and warranting a finding of punitive damages.

IT IS THEREFORE ORDERED:

1. Based on the totality of the record before the Arbitrator, the Arbitrator denies the Associations request for a Mandatory Injunction.

⁵⁸ See August 26, 2011, Memo from Certified to Owners re: Boat Dock Update, Association Exhibit 530.

2. The 23-foot limitation does not apply to the Rola due to the rights granted Yoshikawa as a subsequent purchaser in the Rosic Agreement. Therefore, the Rola is permitted to remain moored at Kalele Kai.
3. The Board may apply the 2011 Board Vote to subsequent homeowners who purchased after the 2011 Board Vote, but not to pre-existing homeowners such as Yoshikawa.
4. The Board acted within its discretion to hire Bellingham Marine to perform maintenance and repairs to the docks and finger piers.
5. The Board properly assessed boat-mooring owners for maintenance and repairs to the finger piers, but Yoshikawa was unfairly assessed for two piers that have been removed from the Marina.
6. The Board shall refund Yoshikawa in the amount of \$4,000 (\$2,000 per pier) for this assessment.
7. Since Yoshikawa is the owner of these piers, he is responsible for their repair and maintenance and all costs associated in reconfiguring the piers if and when the piers are returned;
8. The Arbitrator finds that Yoshikawa has not presented evidence to support his claim for general damages nor has he presented evidence

that rises to the level of malicious intent and warranting a finding of punitive damages.

9. Yoshikawa is determined to be the prevailing party. Yoshikawa's counsel shall submit a petition for an award of fees and costs to opposing counsel and the Arbitrator together with all supporting documentation and evidence of payment on or before December 22, 2014. Billing Invoices may be redacted as necessary. Counsel for the AOA shall submit any response on or before January 5, 2015. Thereafter, the Arbitrator shall issue the Final Award of Arbitrator.

10. The fees for the remuneration of the Arbitrator shall be borne equally by the parties.

11. The Arbitrator retains jurisdiction over the parties, pursuant to Haw. Rev. Stat. §658A-21, to review and address the claim for attorneys' fees and costs. In all other respects this Arbitrator's Partial Final Award is in full and final determination of the issues submitted for determination in this arbitration proceeding.

DATED: Honolulu, Hawaii 12-12-14



KEITH W. HUNTER
Arbitrator

STATE OF HAWAII)
 : SS
CITY AND COUNTY OF HONOLULU)

On this 12th day of December, 2014, before me personally appeared KEITH HUNTER to me known to be the person described in and who executed the foregoing instrument and acknowledged to me that he executed the same as his free act and deed.

WITNESS my hand and official seal.

Wamen Fabio

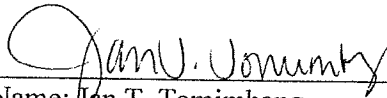
Printed: Wamen Fabio
Notary Public, State of Hawaii
My Commission Expires: 2/2/18

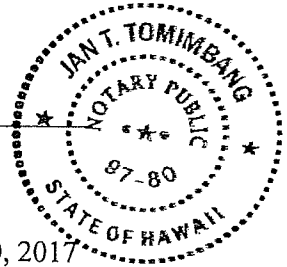
Doc. Date: 12/12/14 # Pages: 24
Notary Name: Wamen Fabio 1st District
Doc. Description: Arbitrator's Partial Final Award
Wamen Fabio 12/12/14
Notary Signature Date

NOTARY CERTIFICATION

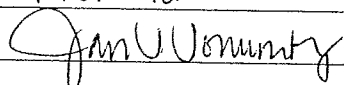
STATE OF HAWAII)
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CITY AND COUNTY OF HONOLULU)

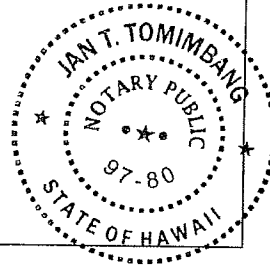
On this 11th day of February, 2015, before me personally appeared Keith W. Hunter, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.


Name: Jan T. Tomimbang
Notary Public, State of Hawaii



My Commission Expires: March 10, 2017

Doc. Date:	<u>2/11/15</u>	#Pages:	<u>27</u>
Name:	<u>Jan T. Tomimbang</u>	<u>First</u>	Circuit
Doc. Description	<u>Final Award of Arbitration</u>		
Signature	<u></u>	Date	<u>2/11/15</u>
NOTARY CERTIFICATION			



AGREEMENT TO PARTICIPATE IN ARBITRATION

RE: 13-0496-A: Arbitration of:
Hitoshi Yoshikawa v. Association of Owners of Kalele Kai

By agreement of the parties set forth below, Dispute Prevention & Resolution, Inc. (DPR)/ Keith Hunter have agreed to conduct an arbitration proceeding pursuant to HRS §514B-162 of the matters in controversy between the parties. Keith Hunter has agreed to serve in the capacity of a neutral and unbiased Arbitrator and will provide arbitration services to the parties on an impartial basis. It is understood as a neutral the Arbitrator will not act as attorney or advocate for any party. The parties, DPR, and Keith Hunter agree to follow and abide by the DPR Arbitration Rules, Procedures & Protocols, as established by DPR and by HRS §658A.

Unless the parties' agreement provides otherwise, the Arbitrator shall determine all issues submitted to arbitration by the parties and may grant any and all remedies that the Arbitrator determines to be just and appropriate under the law. In the Award of Arbitrator, the Arbitrator shall issue a determination on the issue of all arbitration-related fees and costs, including: Arbitrator's compensation and expenses; DPR's fees and expenses; and, if provided for in the parties' agreement, the Submission to Arbitration, or applicable laws or statutes, attorney's fees and costs.

The DPR/Arbitrator fee is \$350.00/hour, plus GET, plus any out of pocket expenses. Initially the parties are responsible for the DPR/Arbitrator's fees and out of pocket expenses on an equal basis. DPR shall collect initial deposits from the parties in advance for the estimated fees and expenses to be incurred in this matter. DPR may also a) collect additional deposits from the parties as necessary throughout the proceeding, and/or b) issue a final invoice at the conclusion of the matter for any outstanding balance owed to DPR. DPR will issue a refund to the parties at the conclusion of the matter for any deposits not expended during the course of the proceeding.

This document may be signed in counterparts.

Hitoshi Yoshikawa
Hitoshi Yoshikawa
Date: 7/8/2014

Dispute Prevention & Resolution, Inc.

By: Coleen Sasaka
Its: Case Manager
Date: 7/11/2014

Association of Owners of Kalele Kai

By: _____
Its: _____
Date: _____

Keith W. Hunter
Keith W. Hunter, Arbitrator
Date: 7/11/2014



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This document may be signed in counterparts.

Association of Owners of Kalele Kai

Hitoshi Yoshikawa
Date: _____

By: Bradford R. Oakes / President
 AOAK
Its: _____
Date: 7/7/2014

Dispute Prevention & Resolution, Inc.

By: _____
Its: _____
Date: _____

Keith W. Hunter, Arbitrator
Date: _____

DATED DECEMBER 12, 2014, IN DPR NO. 13-0496-A AND FOR JUDGMENT IN CONFORMITY THEREWITH shall come on for hearing before the Honorable Judge Karen T. Nakasone of the above-entitled Court, in her courtroom at the First Circuit Court, 1111 Alakea St., Honolulu, Hawaii at 9:00 A.m., on April, 21, 2015, or as soon thereafter as the motion may be heard.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *DEFENDANT HITOSHI YOSHIKAWA'S MOTION FOR AN ORDER CONFIRMING THE AWARD OF ATTORNEYS' FEES AND COSTS CONTAINED IN THE FINAL AWARD OF THE ARBITRATOR, DATED FEBRUARY 12, 2015, INCORPORATING THE ARBITRATOR'S PARTIAL FINAL AWARD, DATED DECEMBER 12, 2014, IN DPR NO. 13-0496-A AND FOR JUDGMENT IN CONFORMITY THEREWITH* was duly served on the above-listed parties on the date shown below at their respective addresses by hand delivery.

DATED: Kailua, Hawaii, March 10, 2015.



TERRANCE M. REVERE
LAUREN C. McDOWELL

Attorneys for Defendant
HITOSHI YOSHIKAWA