



July 20, 2023

VIA EXPRESS MAIL

Board of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

Re: Statement of Position – The Albert Trust
Hearing: July 28, 2023
Proposed DLNR Enforcement Action

Dear Sir/Madam:

Please be advised that this law firm represents Kevin S. Albert and Kimberley L. Albert (the “Alberts”), Trustees of the Albert Revocable Trust (the “Trust”) with respect to a proposed enforcement action being brought before the Board of Land and Natural Resources (“BLNR”) by the Hawaii Department of Land and Natural Resources, Division of Aquatic Resources (“DAR”).

In preparation for the Public Hearing which has been scheduled in this action for July 28, 2023, the following information is submitted in response and rebuttal to the Draft Submittal which was attached to the DAR’s letter to the Alberts and the Trust dated July 7, 2023. It is our position that: (1) there is no basis to impose liability against either the Alberts or the Trust here because the grounding took place following the theft of the vessel and neither the Alberts nor the Trust violated any provisions of the Hawaii Administrative Rules (“HAR”); (2) the damage related to the initial grounding must be separated from the damage related to the damage caused by the salvage; and (3) DLNR and its chosen salvor were the cause of the much greater salvage damage and they should be responsible for the damage caused by their choices and conduct.

Summary of Key Facts

The basic facts at issue here are well documented in the Complaint filed in federal court by the Trust on March 13, 2023 (“Lawsuit”). A copy is attached hereto for ease of reference (Enclosure 1). It is undisputed that the Trust was the Owner of the 94-foot luxury yacht *Nakoa* (the “Vessel”). While Jim Jones and Noelani Yacht Charters (“Yacht Charters”) had executed a Vessel Installment Purchase and Management Agreement in December 2022 (“Purchase Agreement”) with the Trust, that contract required timely installment payments over a period of fifteen (15) years ending in December 2037. Pursuant to the Purchase Agreement, during the installment period, the Vessel was supposed to be used exclusively for luxury charters. No other use of the Vessel by Jones or Yacht Charters was authorized.

On the morning of Saturday, February 18, 2023, Jim and Isabelle Jones had breakfast with the Alberts in Lahaina on the Island of Maui. At no time during that meeting or at any time thereafter did either Jim or Isabelle Jones (or anyone on behalf of Yacht Charters) notify or otherwise ask permission from the Alberts to use the Vessel that weekend for a family vacation. If they had asked, that request would have been denied. As detailed in the Lawsuit, despite not having sought or received permission to do so, the Jones family along with some friends and crew spent the next two days on a personal cruise up the Kapalua coast of Maui and in Honolua Bay. Importantly, the Captain of the Vessel on this personal trip was Kimberley Kalalani Higa (“Capt. Kim”) who holds a 100 T U.S. Coast Guard captain’s license but who is **not** an approved captain under the Vessel’s insurance policy which also required the presence of a first mate and a crew member along with an approved captain for any operational period.

The Vessel moored overnight on both Saturday, February 18th and Sunday, February 19th in Honolua Bay on a mooring ball (believed to have been M1). Neither Jones nor Capt. Kim took the standard precaution of setting a manned mooring or anchor watch while in Honolua Bay but instead relied solely on a digital anchor alarm set by Jones.

Around 5:20 a.m. on Monday, February 20, 2023, Jones heard a notification from the anchor alarm on the Vessel. At or around the same time, Capt. Kim, who was on the bridge of the Vessel, noticed that the Nakoa was no longer moored but adrift. At this point in time, the Vessel was not under power. After getting the engines started and the propulsion and steering engaged, Capt. Kim, Jones and the Vessel’s crew undertook a series of maneuvers but ultimately ran aground in Honolua Bay with the Vessel resting on the shoreline.

Over the next several days, Yacht Charters, Jones, the State of Hawaii Department of Land and Natural Resources (“DLNR”) and the U.S. Coast Guard undertook various steps to defuel the Vessel, remove its batteries, and move the Vessel off the shoreline. DLNR “federalized” the Vessel on Friday, 24, 2023 and from there on, DLNR was in charge of the decision-making process relating to the salvage of the Vessel and its removal from the shoreline.

At no time following the Vessel being federalized by DLNR were the Trust or the Alberts allowed access to the Vessel to remove valuable equipment, machinery, or effects including but not limited to the engines, the transmission, the propellers, the electronic radar and navigation equipment, any of the galley equipment or any of the furniture or effects associated with a luxury yacht.

The salvage company which undertook the removal of the Vessel from the shoreline of Honolua Bay did not undertake any substantive vessel hull repairs and when the Vessel was towed out to sea, it sank in approximately 800 feet of water off the coast of Maui on Sunday, March 5, 2023 (the “Sinking”).

DLNR conducted a Total Damage Assessment which detailed its investigation into the damage caused by both the first contacts caused by Jones and Higa (“First Contacts”) and the second contacts caused by the salvage efforts (“Salvage Contacts”)(“DLNR Damage Report”) a copy of which is attached hereto (Enclosure 2). In addition, attached to a DLNR Notice of

Public Hearing dated July 7, 2023 (“Notice Letter”) is a BLNR proposal for environmental assessment related to the Grounding and salvage efforts (“Assessment”). Similar to the DLNR Damage Report, the Assessment also clearly delineates the environmental damage caused during the First Contact and the Salvage Contacts. As detailed in its report, the BLNR found that the damage caused during salvage operations was the major contributor to the damage to the environment for which DLNR is now seeking compensation.

The Alberts and the Trust Are Not Liable

While DAR may be able to state a case against Jones or Yacht Charters, it cannot establish any liability on the part of the Alberts or the Trust for a number of reasons.

As an initial matter, the Alberts themselves are legally distinct from the Trust and nothing in the Draft Submittal provides a basis for any personal liability on the part of the Alberts. As such, they should be removed from the Draft Submittal entirely.

Next, even as to the Trust in its capacity as the owner of the Vessel, there can be no liability for actions taken following the theft of the Vessel by Jones. According to Section 708-830 of the Hawaii Revised Statutes (“HRS”), a person commits theft if that person “[o]btains or exerts unauthorized control over property”. Jones quite clearly was not authorized to use the Vessel for a personal trip, nor was Capt. Kim authorized to pilot the Vessel. Had permission to take the trip been sought, it would have been denied. Thus, Jones obtained unauthorized control over the Vessel—and act of theft under Hawaii law. Anything subsequent to that theft cannot be deemed to be the responsibility of the Trust, let alone the Alberts, in their individual capacity.

Relatedly, neither the Alberts nor the Trust violated the statutory provisions cited by DAR. The Draft Submittal alleges that the Alberts and the Trust violated Sections 13-95-70 and 71 of the HAR. Those provisions make it unlawful for “any person to take, break, or damage” any stony coral (13-95-70) or live rock (13-95-71). The terms “break”, “damage”, and “take” are defined in HAR § 13-95-1 in very clear and active language. For example:

“Break” means to hit with, or to apply sufficient force to reduce to smaller pieces or to crack without actually separating into pieces.

....

“Damage” means to scrape, smother, poison, or otherwise cause any physical or physiological harm to the living portion of a stony coral or live rock.

HAR § 13-95-1.

Quite clearly, the Alberts and the Trust did not “hit” or “apply force” to anything. Holding them responsible for the damage to the coral would be no different than blaming the owner of a baseball bat that someone stole and used to cause damage to marine life. As there is

no allegation even hinting that the Alberts or the Trust caused any breakage or damage, there can be no liability under the cited sections of the HAR. This, combined with the clear theft of the Vessel, should result in the Alberts and the Trust being removed from the Draft Submittal.

Damage Caused by the Second, Salvage Related Contacts

In addition to the discussion above, any handling of the damage caused during the salvage operation should be dealt with separately as it is even further removed from the Alberts and the Trust.

As detailed in the BLNR Assessment, the clear majority of the damage to the environment in Honolua Bay occurred during the salvage operations. However, DLNR—not the Alberts or the Trust—selected the salvage company, Visionary Marine, and approved its Towing Plan, a copy of which is attached hereto as Enclosure 3. The plan was to pull the Vessel off a lee shore during heavy winds and seas. The originally scheduled tug and rigging were insufficient to complete the task which then required a more substantive rigging arrangement and a larger tractor tug. These brute physical efforts caused the Salvage Contacts and the entities involved in that decision-making process and its execution are the ones responsible for the damage caused. This election of a method to salvage the Nakoa were especially ill-advised since the vessel had been defueled, was not causing environmental damage while on the shoreline, and salvaging the vessel in place (an option proposed by Phoenix International) would have avoided all of the damage caused by the Salvage Contact.

To the extent harm was caused due to decisions made by DLNR or its chosen salvor, that damage cannot be ascribed to the Alberts or the Trust. Just as the Alberts and the Trust played no part in putting the Vessel on the rocks in the first place, they similarly had no ability to control how it was removed. On that basis, the Alberts and the Trust cannot be found to have violated the HAR with respect to the salvage operation either.

Summary and Conclusion

For the foregoing reasons, the Alberts and the Trust should not be held responsible for any damage associated with the grounding or salvage of the Nakoa. They should therefore be removed from the Draft Submittal.

July 20, 2023

Page 5

Sincerely,

McCORRISTON MILLER MUKAI MacKINNON LLP

A handwritten signature in black ink that reads "Randall K. Schmitt". The signature is written in a cursive style with a large, prominent 'R' and 'S'.

Randall K. Schmitt

RKS

Enclosures

Cc: Client (via email only with enclosures)

442435.1

7/14/23

McCORRISTON MILLER MUKAI MacKINNON LLP

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KEVIN S. ALBERT AND
KIMBERLY LEBLANC ALBERT,
TRUSTEES OF THE ALBERT
REVOCABLE TRUST UAD 6/3/1997
AND RESTATED 1/7/2020,

Plaintiffs,

vs.

NOELANI YACHT CHARTERS,
LLC, a Hawaii limited liability
company; JIM JONES; KIMBERLEY
KALALANI HIGA; JOHN DOES 1-
50; JANE DOES 1-50; DOE
PARTNERSHIPS 1-50; DOE
CORPORATIONS 1-50; DOE
GOVERNMENTAL AGENCIES 1-
50; and DOE ENTITIES 1-50,

Defendants.

CASE NO.

COMPLAINT; DEMAND FOR JURY
TRIAL; SUMMONS

COMPLAINT

COMES NOW, Plaintiffs KEVIN S. ALBERT AND KIMBERLY LEBLANC ALBERT, TRUSTEES OF THE ALBERT REVOCABLE TRUST UAD 6/3/1997 AND RESTATED 1/7/2020 (“Trust” or “Plaintiffs”), by and through their attorneys, McCorriston Miller Mukai MacKinnon LLP, and allege as follows:

PARTIES

1. The Trust is a duly registered revocable trust with residence in the State of New Mexico.
2. Defendant NOELANI YACHT CHARTERS, LLC (“Yacht Charters”) is a limited liability company registered in and with its principal offices in the State of Hawai‘i.
3. Defendant JIM JONES (“Jones”) is a resident of the State of Hawai‘i.
4. Defendant KIMBERLEY KALALANI HIGA (“Capt. Kim”) is a resident of the State of Hawai‘i.
5. Defendants JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE GOVERNMENTAL AGENCIES 1-50; and DOE ENTITIES 1-50 (“Doe Defendants”) are persons or entities who in some manner are liable to the Trust for the relief claimed and/or

cause of action herein alleged and described and whose true names, identities and capabilities are presently unknown to the Trust or its attorneys.

JURISDICTION

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 because there is complete diversity between the parties and the amount in controversy exceeds \$75,000.00 exclusive of interest, fees and costs.

7. Venue is appropriate in this Court under 28 U.S.C. § 1391 because a substantial portion of the events giving rise to Plaintiffs' claims occurred in this judicial district.

STATEMENT OF GENERAL FACTS

A. Purchase Agreement

8. The Trust owns a 94-foot luxury yacht named the Nakoia (hereinafter "Nakoia" or "Vessel").

9. Defendants Yacht Charters and Jones purchased the Vessel from the Trust by way of a Vessel Installment Purchase and Management Agreement dated December 29, 2022 ("Purchase Agreement").

10. Defendants Yacht Charters and Jones are in the business of luxury yacht charters in the Hawaiian Islands.

11. The purchase price for the Vessel was \$1.45 million with this amount to be paid over a time period of fifteen (15) years as secured by various related agreements.

12. To ensure that the Trust's interests were secured and protected, the Purchase Agreement contained several important duties upon Yacht Charters and Jones (collectively referred to in the contract as the "Buyer") including the following:

ARTICLE III VESSEL MANAGEMENT

Section 3.01 Management and Operation of the Vessel in the Business. From the Closing Date until the expiration or earlier termination of this Agreement (the "Term"), Buyer shall manage and operate the Vessel in the Business and use its best efforts to manage and operate the Vessel in accordance with best yacht management practices and promote the interests of Seller in all matters relating thereto. Without limiting the generality of the foregoing, at all times during the Term, Buyer shall provide the management services set forth on Exhibit G attached hereto (the "Services").

Section 3.02 Operation in Compliance with Law. At all times during the Term, Buyer shall operate, man, and maintain Vessel in accordance with all applicable statutes, laws, ordinances, regulations, rules, codes, constitutions, treaties, common law, governmental orders, other requirements, or rule of law of any governmental authority (collectively, "Laws").

Section 3.05 Manning Requirements. Buyer shall at all times man the Vessel with a sufficient number of competent and properly licensed crew and/or deckhands trained and experienced in the operation of the Vessel in the waters in which the Vessel is to operate under this Agreement. Buyer shall cause the crew of the Vessel to carry out their duties with due care and workmanship and the utmost dispatch and diligence. Buyer warrants that the crew to be

provided by Buyer shall meet legal manning requirements in accordance with applicable Law for uses and purposes of the Vessel required under this Agreement. The Vessel's crew shall be Buyer's employees at all times. Buyer shall pay all wages, fringe benefits, applicable taxes, expenses, and applicable fees and taxes required for the Vessel's crew.

Section 3.10 Restrictions on Buyer's Use of Vessel. Prior to the Transfer of Title, Buyer shall not take, or permit to be taken, any of the following actions with respect to the Vessel:

- (a) use the Vessel for any purpose other than as expressly provided for in this Agreement;
 - (b) operate the Vessel in violation of applicable Law;
 - (c) modify the Vessel in any way without the prior written consent of Seller;
 - (d) relocate the Vessel to any location other than the Hailing Port;
 - (e) lease, sell, transfer, or assign the Vessel or any component thereof to any person or entity;
- or
- (f) subject the Vessel to any Encumbrance.

Section 3.11 Risk of Loss. During the Term, Buyer shall bear all risk of loss, damage, destruction, theft, taking, confiscation, or requisition, partial or complete, of or to the Vessel or its use, however caused or occasioned. Buyer shall notify Seller in writing within five days of learning of any such loss.

* * *

ARTICLE V DEFAULT

Section 5.01 Events of Default. Each of the following events is an "Event of Default" under this Agreement:

(b) if Buyer defaults in the observance or performance of any other term, covenant, or condition of this Agreement, on Buyer's part to be observed or performed, and Buyer fails to remedy such default within 30 days after notice by Seller to Buyer of such default, or if such default is of a nature that it cannot be remedied within said period of 30 days, if Buyer does not commence within said period of 30 days, or does not thereafter diligently prosecute to completion, the steps necessary to remedy such default;

(c) if Buyer fails to observe or perform any term, covenant, or condition on Buyer's part to be observed or performed under any agreement with Seller other than this Agreement, including the Installment Note, the DP Note, or the Seller Note, and such default continues beyond any grace period set forth in such other agreement for the remedying of such default;

* * *

ARTICLE VI INDEMNIFICATION

Buyer and Jones, jointly and severally, shall indemnify, defend, and hold harmless Seller, its affiliates, and their respective successors and assigns and representatives (collectively, "**Indemnitees**") against any and all losses, injury, death, damages, liabilities, claims, deficiencies, actions, judgments, interest, awards, penalties, fines, costs, or expenses of whatsoever kind and nature, including reasonable attorneys' fees and the cost of enforcing any right to indemnification hereunder and the cost of pursuing any insurance providers, incurred by Indemnitees relating to, arising out of, or in connection with the transactions contemplated by this Agreement, including:

(a) the possession, maintenance, use, condition, repair, return, disposition, operation, storage, or transportation of the Vessel, any parts or components thereof, or any modifications thereto (including latent and other defects, whether or not discoverable by Seller or Buyer), including any related pollution, contamination, environmental impairment, or similar condition;

(b) any inaccuracy in or breach of any of the representations of Buyer or Jones contained in this Agreement or any document to be delivered by Buyer or Jones hereunder; or

(c) any breach or non-fulfillment of any covenant, agreement, or obligation to be performed by Buyer or Jones pursuant to this Agreement or any document to be delivered by Buyer or Jones hereunder.

The obligations of Buyer under this **ARTICLE VI** shall survive and continue in full force and effect notwithstanding the expiration or earlier termination of this Agreement.

* * *

ARTICLE VIII RETURN OF VESSEL

Section 8.01 Obligation to Return Vessel. In the event Buyer is required to return the Vessel to Seller for any reason hereunder, including upon the occurrence of an Event of Default or the termination of this Agreement, Buyer shall, at its sole expense and risk, return and/or deliver the Vessel to Seller at the Hailing Port or such other location as the parties mutually agree.

Section 8.02 Condition of Vessel on Return. Upon the return of the Vessel, Buyer shall cause the Vessel to be in: (a) as good condition as when delivered to Buyer and complete with all parts and components, ordinary wear and tear excepted, and (b) in compliance with applicable Law.

B. General Information

13. Upon information and belief, Yacht Charters operates a luxury charter operation based on the Island of Oahu with charters in and around the Hawaiian Islands.

14. Upon information and belief, Yacht Charters operates another vessel, a 75-foot yacht, the “Noelani”, USCG Official Document No. 1171213, berthed on the Island of Oahu.

15. Upon information and belief, the principals in Yacht Charters are Jim and Isabelle Jones, husband and wife.

16. Upon information and belief, neither Jim nor Isabelle Jones are licensed vessel captains.

17. Capt. Kim holds a 100 T U.S. Coast Guard captain’s license.

18. Upon information and belief, prior to February 17, 2023, the Friday before the vessel grounded on February 20, 2023 (“Grounding”), Capt. Kim had captained the MV Noelani but not the MV Nakoia.

19. On the Vessel’s insurance policy, the listed and approved captain was Joe Bardouche (“Capt. Joey”) who holds a 100 T U.S. Coast Guard license.

20. Under the terms of the Vessel’s insurance policy, the Nakoia is supposed to be crewed by an approved, licensed captain, a first mate and a crew member.

C. Events leading up to the Grounding.

21. On Friday, February 17, 2023, Jim and Isabella Jones, 4 juvenile family members or friends, Capt. Kim, a first mate and a crew member arrived at the Vessel which was moored in Lahaina Roads.

22. At the time of their arrival, Capt. Joey was onboard and in operational control of the Vessel but was relieved of those duties by Capt. Kim at the direction of Jones.

23. After being relieved of his duties, Capt. Joey departed the Vessel for the weekend in preparation for the next vessel charter scheduled for February 20, 2023, a charter which was to begin on the Island of Lanai (“Lanai Charter”).

24. Beginning on February 17th and continuing through the Grounding, Jones was using the Vessel for personal use, not a commercial charter (“Personal Trip”).

25. In the course of the Personal Trip, Jones directed the Vessel to various locations along the coast of Maui including Black Rock, Kapalua Bay and Honolua Bay.

26. The Vessel moored overnight on both Saturday, February 18th and Sunday, February 19th in Honolua Bay on a mooring ball (believed to have been M1).

27. Upon information and belief, mooring in Honolua Bay is limited to two and one half (2 1/2) hours per vessel per day with no overnight mooring allowed.

28. Upon information and belief, neither Capt. Kim nor Jones took the standard precaution of setting a manned mooring or anchor watch while in Honolulu Bay but instead relied solely on a digital anchor alarm set by Jones.

29. Upon information and belief, Capt. Kim had never operated at the helm of the MV Nakoia in Honolulu Bay prior to the Personal Trip.

30. Neither Yacht Charters nor Jones notified the Trust about the Personal Trip.

31. Neither Yacht Charters nor Jones sought the approval of the Trust for the Personal Trip.

32. Neither Yacht Charters nor Jones sought to have Capt. Kim approved as a vessel captain for the Nakoia prior to the Grounding.

D. Grounding and Salvage

33. Upon information and belief, around 5:20 a.m. on Monday, February 20, 2023, Jones heard a notification from the anchor alarm on the Vessel.

34. Upon information and belief, at or around the same time that Capt. Kim, who was on the bridge of the Vessel, noticed that the Nakoia was no longer moored but adrift.

35. At this point in time, the Vessel was not under power.

36. Upon information and belief, after getting the engines started and the propulsion and steering engaged, Capt. Kim, Jones and the Vessel's crew

undertook a series of maneuvers but ultimately ran aground in Honolua Bay ultimately resting on the shoreline.

37. Upon information and belief, over the next several days, Yacht Charters, Jones, the State of Hawaii Department of Land and Natural Resources (“DLNR”) and the U.S. Coast Guard undertook various steps to defuel the Vessel, remove its batteries and move the Vessel off the shoreline.

38. DLNR “federalized” the Vessel on Friday, 24, 2023 and from there on, DLNR was in charge of the decision-making process relating to the salvage of the Vessel and its removal from the shoreline.

39. At no time following the Vessel being federalized by DLNR were the Trust or the Defendants allowed access to the Vessel to remove valuable equipment, machinery, or effects including but not limited to the engines, the transmission, the propellers, the electronic radar and navigation equipment, any of the galley equipment or any of the furniture or effects associated with a luxury yacht.

40. Upon information and belief, the salvage company which undertook the removal of the Vessel from the shoreline of Honolua Bay did not undertake any substantive vessel hull repairs and when the Vessel was towed out to sea, it sank in approximately 800 feet of water off the coast of Maui on Sunday, February 26, 2023 (“Sinking”).

41. DLNR has asserted that the Grounding resulted in some damage to Honolua-Mokulei‘ia Marine Life Conservation District on the northwest coast of the Island of Maui (“Conservation District”) and that it intends to seek compensation for the cost of the salvage operations and compensation for any environmental damage to the Conservation District.

E. Default

42. Following the Grounding, Jones notified the Trust that he had used the Vessel for personal use over the weekend leading up to and including the Grounding.

43. Based on these admissions and other violations of the Purchase Agreement, the Trust issued a Notice of Default letter to Jones and Yacht Charters on March 3, 2023.

**COUNT I – BREACH OF CONTRACT
(Yacht Charters and Jones)**

44. Plaintiffs reallege and incorporate by reference paragraphs 1 through 43 above with the same force and effect as if fully set out in specific detail here.

45. As detailed herein, both Jones and Yacht Charter had duties and obligations to the Trust in accordance with the terms of the Purchase Agreement.

46. Jones and Yacht Charters breached those duties resulting in direct and proximate damage to the Trust in amounts which will be proven at trial including,

but not limited to, the loss of the Vessel, DLNR claims and fines, the cost of salvage and environmental damages claims, if any.

**COUNT II – MISREPRESENTATION
(Yacht Charters and Jones)**

47. Plaintiffs reallege and incorporate by reference paragraphs 1 through 46 above with the same force and effect as if fully set out in specific detail here.

48. During the term of the Purchase Agreements, Jones and Yacht Charters have made misrepresentations to, or by omission failed to be truthful with, the Trust with respect to various aspect of the operation of the Vessel.

49. These misrepresentations or omissions include failing to notify the Trust about personal use of the Vessel, failing to obtain permission to use the Vessel for personal use, substituting an unapproved and unqualified captain to operate the Vessel and failing to adequately secure the financial interests of the yacht charter operations to adequately protect the interest of the Trust.

**COUNT III – UNFAIR AND DECEPTIVE ACTS AND PRACTICES
(Yacht Charters and Jones)**

50. Plaintiffs reallege and incorporate by reference paragraphs 1 through 49 above with the same force and effect as if fully set out in specific detail here.

51. As detailed herein, Yacht Charters' and Jones's conduct constitutes unfair and deceptive acts and practices as they were using secured, commercial

assets for purely personal purposes without notice to the Trust and in a grossly negligent manner.

52. Yacht Charters' and Jones's decisions prior to the Grounding also demonstrate a violation of their individual and collective obligations to act in the best interest of the Trust to fulfill the requirements of the Lanai Charter and there was no way that the Vessel could have been returned to Lahaina, cleaned, reprovisioned and readied for that charter if the Vessel were moored overnight in Honolua Bay for the Personal Trip.

**COUNT IV – EXEMPLARY DAMAGES
(Yacht Charter and Jones)**

53. Plaintiffs reallege and incorporate by reference paragraphs 1 through 52 above with the same force and effect as if fully set out in specific detail here.

54. Yacht Charters' and Jones's conduct with respect to the Grounding was grossly negligent, willful, and demonstrated a wanton disregard for the consequences of their actions in that there was no preparation for the weather conditions which were expected and none of the standard maritime practices for the safe operation of the Vessel were followed including properly setting the mooring and regularly checking the mooring.

55. Further evidence of this misconduct was the decision by Yacht Charters and Jones to violate the mooring restrictions in Honolua Bay.

56. This grossly negligent and willful and wanton misconduct occurred in a marine life conservation sanctuary with a captain who was not trained or equipped to handle the situations which could have been expected might occur.

**COUNT V – NEGLIGENCE
(Jones and Capt. Kim)**

57. Plaintiffs reallege and incorporate by reference paragraphs 1 through 56 above with the same force and effect as if fully set out in specific detail here.

58. Both Jones and Capt. Kim owed the Trust a duty of care in the planning, preparation, and operation of the Vessel during the Personal Trip.

59. Capt. Kim, as a licensed U.S. Coast Guard captain, had a duty to the Trust to ensure that he was properly trained and acquainted with the maneuvering and operation of the Vessel before taking on the responsibility for operating and maneuvering the Vessel.

60. Capt. Kim and Jones both owed the trust the duty to ensure that they and the Vessel observed and obeyed all laws, regulations, and restrictions with respect to the operation of the Vessel during the Personal Trip.

61. Jones and Capt. Kim, individually and collectively, failed in these duties.

62. As a direct and proximate result of their individual and collective negligence, the Trust has suffered damages in an amount which will be proven at

trial but include the loss of the Vessel, the funds due and owing under the Purchase Agreement, and all environment and salvage damage.

**COUNT VI – MARITIME LIEN
(Yacht Charters)**

63. Plaintiffs reallege and incorporate by reference paragraphs 1 through 62 above with the same force and effect as if fully set out in specific detail here.

64. In accordance with the terms of the Purchase Agreement, Yacht Charters warrants and secures the amounts due and owing and the obligations of the Buyer with its own assets including but not limited to the MV Noelani and its other assets.

65. Therefore, a maritime lien exists on those assets including specifically the MV Noelani.

PRAYER FOR RELIEF

WHEREFORE, the Trust asks that this Court grant it the following relief:

1. Judgment in its favor on all counts.
2. Damages for the loss of the Vessel in an amount to be proven at trial but not less than \$1.45 million.
3. Damages for the cost of salvage in an amount to be proven at trial but not less than \$500,000.

4. Damages for environmental damages and other assessments by the State of Hawai‘i and the U.S. Coast Guard in an amount to be proven at trial but not less than \$500,000.
5. Damages awarded in accordance with HRS Ch. 480 (treble damages).
6. Exemplary damages in the event that HRS Ch. 480 damages are not awarded.
7. Attorneys’ fees and costs in accordance with the Purchase Agreement and HRS Ch. 480.
8. The recognition of a maritime lien on the MV Noelani.
9. Such other and further relief as this Court may deem just and proper.

DATED: Honolulu, Hawaii, March 13, 2023.

/s/ Randall K. Schmitt
RANDALL K. SCHMITT
BRETT R. TOBIN
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KEVIN S. ALBERT AND
KIMBERLY LEBLANC ALBERT,
TRUSTEES OF THE ALBERT
REVOCABLE TRUST UAD 6/3/1997
AND RESTATED 1/7/2020,

Plaintiffs,

vs.

NOELANI YACHT CHARTERS,
LLC, a Hawaii limited liability
company; JIM JONES; KIMBERLEY
KALALANI HIGA; JOHN DOES 1-
50; JANE DOES 1-50; DOE
PARTNERSHIPS 1-50; DOE
CORPORATIONS 1-50; DOE
GOVERNMENTAL AGENCIES 1-
50; and DOE ENTITIES 1-50,

Defendants.

CASE NO.

DEMAND FOR JURY TRIAL

DEMAND FOR JURY TRIAL

Plaintiffs KEVIN S. ALBERT AND KIMBERLY LEBLANC ALBERT,
TRUSTEES OF THE ALBERT REVOCABLE TRUST UAD 6/3/1997 AND
RESTATED 1/7/2020, by and through their undersigned counsel, demand a jury
trial of all issues triable of right to a jury in the above-captioned matter. This

Demand for Jury Trial is made pursuant to Rule 38 of the Federal Rules of Civil Procedure.

DATED: Honolulu, Hawaii, March 13, 2023.

/s/ Randall K. Schmitt
RANDALL K. SCHMITT
BRETT R. TOBIN
Attorneys for Plaintiffs

HID 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Hawaii

Kevin S. Albert and Kimberly Leblanc Albert, Trustees of the
Albert Revocable Trust UAD 6/3/1997 and Restated
1/7/2020

Plaintiff

Noelani Yacht Charters, LLC, a Hawaii limited liability company;
Jim Jones; Kimberley Kalalani Higa, et al.

Defendant

Civil Action No. CV 23-00132 RT

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

Noelani Yacht Charters, LLC
1125 Ala Moana Blvd.
Honolulu, HI 96814

Jim Jones
7226 Hawaii Kai Dr. Unit B
Honolulu, HI 96825

Kimberley Kalalani Higa
41-850 Ala Koa St.
Waimanalo, HI 96795

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you
are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ.
P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of
the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney,
whose name and address are:

Randall K. Schmitt, Esq.
Brett R. Tobin, Esq.
McCorriston Miller Mukai MacKinnon LLP
500 Ala Moana Boulevard
Five Waterfront Plaza, 4th Floor
Honolulu, HI 96813

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint.
You also must file your answer or motion with the court.

Date: March 13, 2023



CLERK OF COURT

/s/ Lucy Carrillo, Clerk by EA, Deputy Clerk

Signature of Clerk or Deputy Clerk

Civil Action No. CV 23-00132 RT

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify):* _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00

I declare under penalty of perjury that this information is true.

Date:

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Nakoa Vessel Grounding, Lipoa Point, Maui

Damage Assessment

Field Investigation Report
Initial Field Assessment 2/21/2023
Final Assessment 3/7/2023
Final Report Completed 4/20/2023

Report By: Russell Sparks, Kristy Stone
Field Work By: Russell Sparks, Kristy Stone, Tatiana Martinez, and Cole Peralto
Division of Aquatic Resources, Maui Office



The Vessel “Nakoa” shown grounded on the rocky shoreline and leaking diesel fuel.



Examples of damage to live rock habitat and corals from the grounding and salvage operations.

Overview

On Monday, February 20, 2023, the Maui Division of Aquatic Resources (DAR) received information regarding a large vessel that had run aground just outside of the Honolua/Mokuleia Bay Marine Life Conservation District. Based on initial reports, the vessel named “Nakoa” was moored overnight within Honolua Bay and upon waking up in the early morning, the captain realized that the vessel had come loose from its mooring but was unable to prevent it from being pushed into shallow water and grounding near Lipoa point just outside of Honolua Bay. The grounding and subsequent salvage operation resulted in significant damage to important hardbottom habitat in the area. This report will document and discuss the findings of two separate site inspections conducted by Maui DAR staff.

Case History

The initial site inspection was conducted on February 21, 2023. At that time, the Nakoa was still stuck on the shallow rocky coastline, and the inspection focused on documenting and measuring the extent of the damage that occurred during the grounding incident. This assessment was conducted by the Maui DAR Aquatic Biologist Russell Sparks with the assistance of Tatiana Martinez (Marine Monitoring Technician). Images along with careful measurements and notes on the extent of damage were collected at both the initial grounding scar and at the area surrounding where the vessel was grounded. The location and condition of the vessel was also noted. The vessel was also observed to be leaking small amounts of diesel fuel into the nearshore waters at this time.

Following this initial site inspection, salvage companies were contracted to remove all the fuel, batteries, and other potential pollutants from the vessel. A successful effort to pull the vessel offshore was completed on March 5, 2023. After removal, the salvage company was unable to keep the Nakoa afloat and it sank between Maui and Molokai in approximately 800ft of water.

A second assessment was conducted on March 7, 2023, which was shortly after the removal of the vessel. This assessment focused on the impact to hard bottom habitat where the vessel was grounded and along the scar created when the Nakoa was pulled back out into deeper water. This assessment was conducted by Maui DAR Aquatic Biologists Russell Sparks and Kristy Wong-Stone, along with assistance from Tatiana Martinez and Cole Peralto (Marine Monitoring Technicians). Significant amounts of coral and live rock were damaged from the vessel grounding and subsequent salvage. This damage was documented, and detailed photographs were taken of all damaged corals and of areas with significant impact to live rock habitat.

Coral and Habitat Damage Assessment

Measurements of Damaged Area

All impacted areas were initially identified by the dive teams and then marked and measured by laying down plastic 50-meter-long measuring tapes from the start to the end of the impact scars where they could be clearly identified with evidence of damage to the substrate. These measuring tapes would then serve as transect tapes for detailed damage assessments. The entire area was then mapped out with a diagram showing the initial impact scar, the secondary impact scar (location where the vessel remained grounded), and the salvage scar (Figure 6). To assess specific damage within these areas, divers swam along the transect tape and identified all coral colonies to species level, measuring colony size, and photographing the evidence. A 50 cm archaeological black and white pole was used to measure coral colony size and to serve as a consistent scale in the photographs.

The initial grounding incident resulted in a patchy impact scar extending 85 meters by 2 meters from a northwestern direction (170 square meters). Of this total 170 square meters of disturbed habitat, 35.5 square meters of clearly damaged high rugosity live rock habitat was specifically documented and photographed (Figures 1 & 2). In addition, there were 18 coral colonies directly damaged or destroyed during this grounding. All damaged coral colonies were individually documented during the initial grounding inspection and consisted of 8 colonies of *Pocillopora meandrina* (“cauliflower coral”) and 10 colonies of *Porites lobata* (“lobe coral”).



Figure 1: Photograph of an underwater shelf habitat broken off from impacts during the grounding of the vessel “Nakoa”.

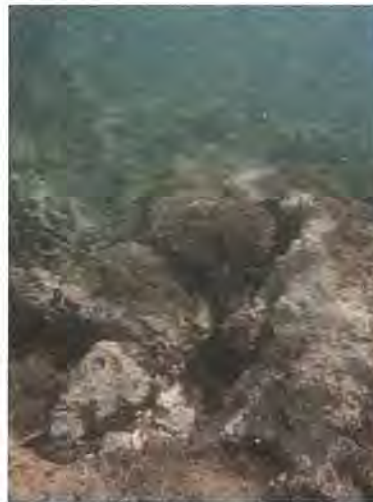


Figure 2: Photograph showing a section of structured habitat Smashed by the grounding event.

The vessel then remained grounded in extremely shallow water along a basalt boulder shoreline for 14 days while salvage efforts were planned and the pollutants were removed. This area where the vessel remained stranded was composed of flat carbonate pavement and basalt boulder habitat in a high wave energy environment. In this area, a total of 1,575 square meters of live rock habitat was scarred, smashed and/or disturbed (45m long by 35 m wide) (Figure 3). There were very few live coral colonies found in this area and the substrate was covered mostly by turf algae.

The final salvage removal operation that was conducted on Sunday, March 5, 2023, resulted in a scar to the substrate that extended an additional 75 meters in a westerly direction from where the vessel was stranded. The initial 15 meters of this salvage scar consisted of two deep trench-like scars that were about 5 meters apart and were each 1 meter wide (Figures 4 & 5). This was followed by a smaller impacted area for the next 60 meters that was limited to about 2 meters of width and extended out to a final depth of 10 feet. Within the deeper habitat, the damage was patchy and mostly composed of damage to individual coral colonies. The combined hard bottom live rock substrate impacted by this salvage scar was 195 square meters. There were significant impacts to living coral colonies all along this total salvage scar area, but the most significant impact to the live rock habitat was along the two scars that each extended 15 m x 1 m (30 square meters). Coral colonies impacted included 77 colonies of *Pocillopora meandrina* ("cauliflower coral") and 24 colonies of *Porites lobata* ("lobe coral") for a total of 101 impacted coral colonies within the salvage scar.

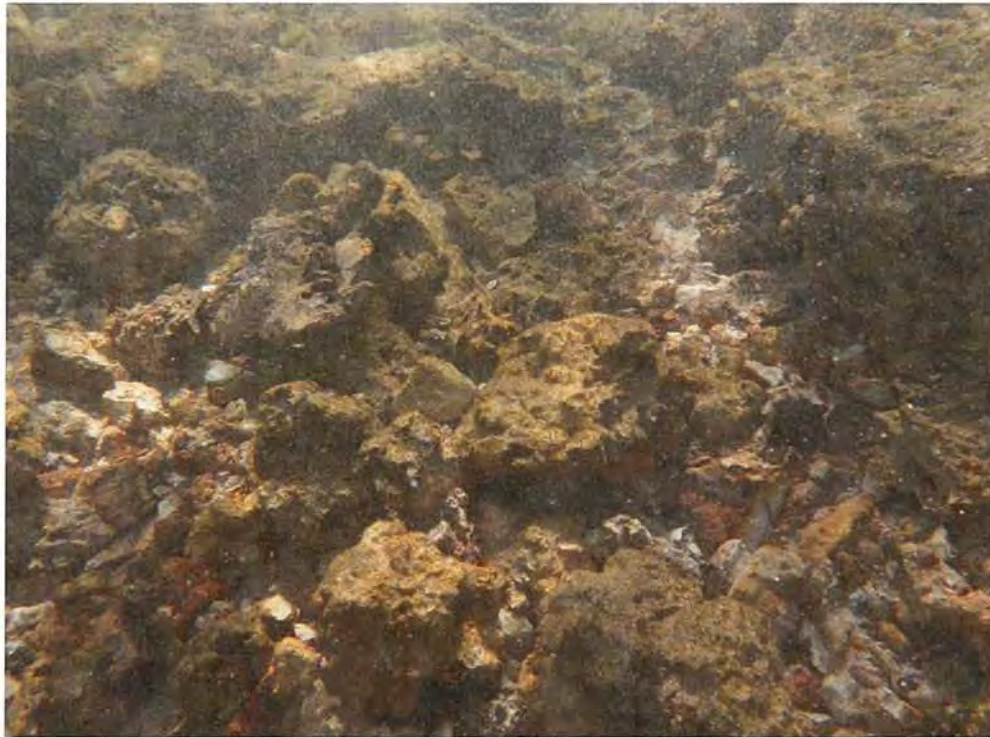


Figure 3: Underwater photograph showing the damage to hard bottom substrate at the location where the *Nakoa* was grounded for 6 days.



Figure 4: Aerial Photograph showing the two parallel salvage scars leading offshore from grounding site. (photo by: Mark Deakos)



Figure 5: Underwater photograph showing coral damage along the salvage scar.

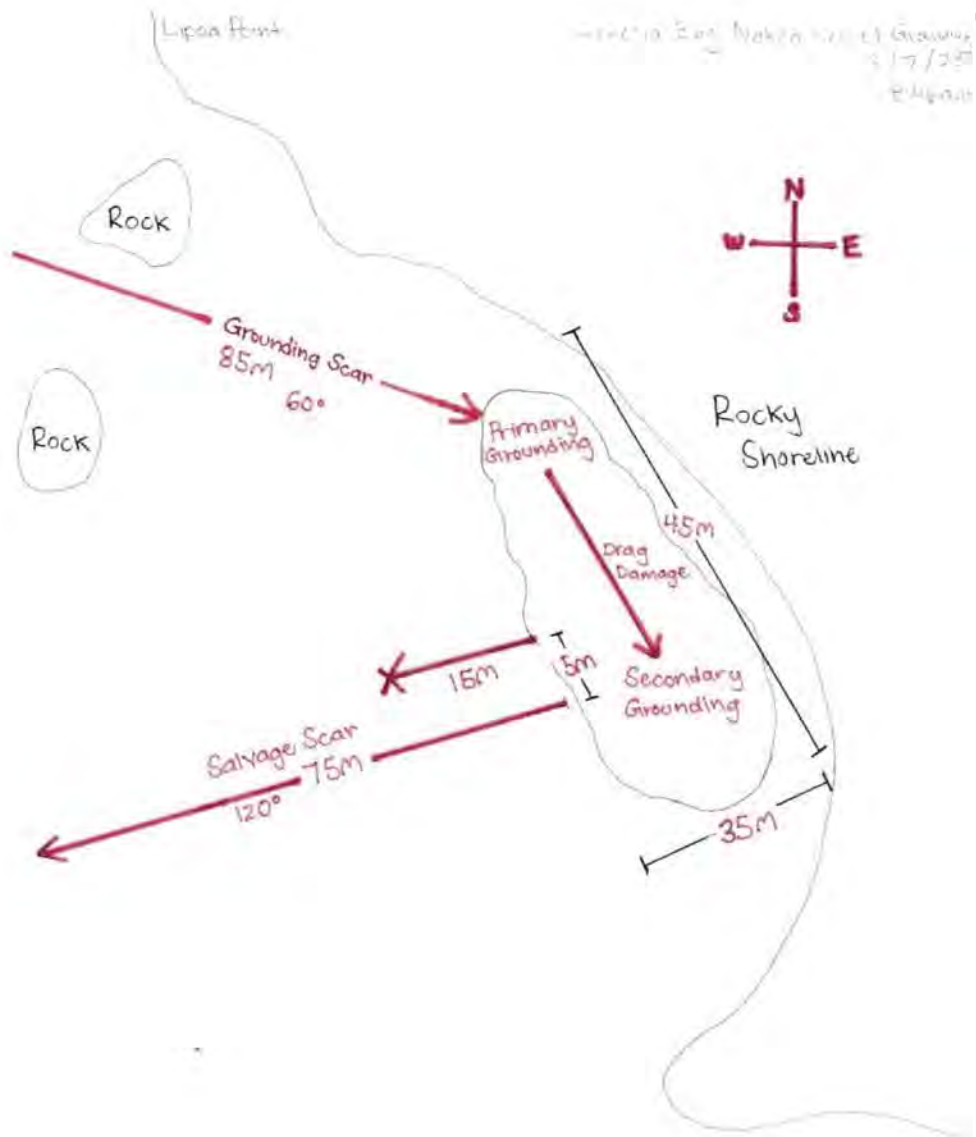


Figure 6: Detailed map of the impact area. The map shows the Initial Grounding Scar, the salvage scar, and the secondary grounding scar (where the vessel sat for 14 days along the shoreline).

Summary

The entire grounding and salvage incident resulted in impacts to 1,940 square meters of hard bottom nearshore habitat. Of that total impacted area, we focused our assessment on important habitats with significant and highly visible damage to live rock and on all damage to individual colonies of live corals. Key areas of damaged live rock included: 35.5 square meters of damage to high rugosity live rock habitat that occurred on the initial grounding scar; 1,575 square meters of smashed and damaged shallow hard bottom pavement and basalt boulder habitat where the vessel grounded and moved around in the waves; and 30 square meters of damage where the vessel was dragged out to deeper water resulting in deep scars into the shallow flat pavement habitat in the area. This entire impacted area is covered with highly cropped turf algae and patchy coral cover. There was a total of 119 live coral colonies that were documented as heavily damaged or destroyed (see Appendix 1 for a full listing). The corals impacted were composed of two common species of corals found in shallow high wave energy environments and consisted of 34 colonies of *Porites lobata* (“lobe coral”) and 85 colonies of *Pocillopora meandrina* (“cauliflower coral”). The overall area was categorized as having low coral area value given that it was shallow and flat with low rugosity with total coral cover below 20%. All 34 colonies of *Porites lobata* were growing in a crustose morphology. The damaged *Pocillopora meandrina* colonies were all composed of the typical robust branching morphology found with this species.

In addition to the significant damage to live rock substrate and living corals, there were unidentified impacts to the ecosystem that likely resulted from diesel fuel that leaked from the vessel into the nearshore waters. This report is not intended to assign a specific value to the ecosystem damage sustained by this event, but rather should serve as a complete documentation and accounting of the damages sustained, which can assist in the process of determining what monetary compensation is appropriate.

Appendix 1

Table 1: *Pocillopora meandrina* Corals Damaged by the Nakoia grounding. Table shows the estimated coral colony size, the picture number that documented that specific damage, and the observer who took the photo.

<i>Pocillopora meandrina</i> Colonies			
	Size (cm)	Pic #	Observer
1	30	2735	R. Sparks
2	30	2736	R. Sparks
3	40	2743	R. Sparks
4	40	2746	R. Sparks
5	40	2747	R. Sparks
6	40	2751	R. Sparks
7	40	2753	R. Sparks
8	40	2755	R. Sparks
9	30	2206-2208	K. Stone
10	10	2209	K. Stone
11	30	2210	K. Stone
12	30	2211	K. Stone
13	20	2214	K. Stone
14	20	2214	K. Stone
15	40	2215	K. Stone
16	40	2217	K. Stone
17	30	2219	K. Stone
18	40	2218	K. Stone
19	30	2220-21	K. Stone
20	20	2222	K. Stone
21	25	2224	K. Stone
22	40	2225	K. Stone
23	20	2229	K. Stone
24	25	2231	K. Stone
25	40	2232-partial	K. Stone
26	20	2233	K. Stone
27	30	2234	K. Stone
28	30	2235	K. Stone
29	20	2237	K. Stone
30	20	2238	K. Stone
31	40	2240	K. Stone
32	30	2240	K. Stone
33	30	2241	K. Stone

34	30	2241	K. Stone
35	40	2242	K. Stone
36	20	2244	K. Stone
37	45	2245	K. Stone
38	20	2246	K. Stone
39	30	2246	K. Stone
40	40	2247	K. Stone
41	40	2248-49	K. Stone
42	30	2250	K. Stone
43	20	2251	K. Stone
44	25	2252-53	K. Stone
45	30	2256-57	K. Stone
46	30	2256-57	K. Stone
47	20	2258	K. Stone
48	35	2259	K. Stone
49	35	2260	K. Stone
50	50	2261-62	K. Stone
51	40	2263	K. Stone
52	30	2266-67	K. Stone
53	30	2268	K. Stone
54	30	2269	K. Stone
55	30	2270	K. Stone
56	50	2270	K. Stone
57	30	2272	K. Stone
58	40	2277-78	K. Stone
59	50	2279-82	K. Stone
60	30	2283	K. Stone
61	40	2284-85	K. Stone
62	30	2286	K. Stone
63	20	2289	K. Stone
64	30	2287	K. Stone
65	35	2292	K. Stone
66	35	2294	K. Stone
67	25	2296	K. Stone
68	30	2298	K. Stone
69	25	2299	K. Stone
70	15	2301	K. Stone
71	40	2214-2219	T. Martinez
72	30	2218-2222	T. Martinez
73	15	2246-2248	T. Martinez
74	12	2249-2252	T. Martinez
75	25	2271-2273	T. Martinez

76	10	2277-2278	T. Martinez
77	10	2283-2284	T. Martinez
78	40	2294-2296	T. Martinez
79	35	2298-2302	T. Martinez
80	30	2305-2307	T. Martinez
81	20	2308-2309	T. Martinez
82	30	2310-2312	T. Martinez
83	20	2315	T. Martinez
84	20	2318	T. Martinez
85	30	2319	T. Martinez

Table 2. *Porites lobata* Corals Damaged by the Nakoa grounding. Table shows the estimated coral colony size, the picture number that documented that specific damage and the observer who took the photo.

<i>Porites lobata</i> Colonies			
	Size (cm)	Pic #	Observer
1	50	2737	R. Sparks
2	50	2739	R. Sparks
3	60	2742	R. Sparks
4	50	2745	R. Sparks
5	50	2745	R. Sparks
6	100	2748	R. Sparks
7	60	2749	R. Sparks
8	80	2750	R. Sparks
9	60	2751	R. Sparks
10	30	2751	R. Sparks
11	20	2209	K. Stone
12	50	2212	K. Stone
13	30	2213	K. Stone
14	40	2214	K. Stone
15	40	2216	K. Stone
16	50	2223	K. Stone
17	20	2226	K. Stone
18	25	2227	K. Stone
19	20	2228	K. Stone
20	30	2230	K. Stone
21	20	2232	K. Stone
22	40	2236	K. Stone
23	25	2239	K. Stone

24	40	2243	K. Stone
25	25	2252-53	K. Stone
26	40	2254-55	K. Stone
27	30	2264-65	K. Stone
28	20	2271	K. Stone
29	35	2275	K. Stone
30	12	2269-2270	T. Martinez
31	15	2281-2282	T. Martinez
32	35	2284-2285	T. Martinez
33	20	2313-2314	T. Martinez
34	30	2316	T. Martinez

Visionary Marine
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Ph. 808 841-4956
March 25, 2023

Tow Plan for the Vessel "Nakoa"

On February 23, 2023 DLNR Boating Division has requested for the removal of the vessel "Nakoa" which is located on the shoreline of Maui, Honolua Bay. Reports from both Boating Division and Sea Engineering is that the vessel is no longer Sea Worthy, also concern is that a large North swell is predicted in the next few days. Based on the urgency and fact that several large holes are already in the vessel as well as boulders within the hull area, below is our tow plan for the removal of the vessel and tow back to Oahu.

Tow plan: Once the USCG releases the vessel from its defueling and Marine pollution operations, Visionary Marine will go over to assess, rig and tow vessel from shoreline. Our intentions are to leave Oahu on Saturday February 25th if weather permits as it is still very rough.

Once we arrive our intentions are to rig the vessel with our large 8" plasma line and go around the entire vessel, if the swell is too large then we will utilize our lighter rig which we are able to swim in, this rig is utilizing 4" straps, triple rig with shackles on each connecting point, this rig we have utilized in the past with long line vessels with success though our preference is the larger rig. From the grounded vessel to the tow vessel we will have 8" plasma line (800,000) breaking

strength line for the tow. Since the vessel appears to be unseaworthy we will install airbags on the inside of the vessel as best as possible to assist us out to Sea.

High tide - high tide unfortunately is at night which adds another safety issue, we will spend some time to plot out the area with our gps to ensure we can operate in darkness in a safe manner.

Extraction – if weather/surf permits, we will attempt to cut off running gear below the vessel that might hang up on the reef area, this will be done only if we determine the vessel not sea worthy and a total loss as reported. Please note that we will need calm water to ensure it is safe to conduct this operation, there will be no cables used and only floating lines to protect corals in the area.

Once the vessel is towed off the shallow area, we will go to the deepest and closest part of the channel area, our hopes are to get the vessel free from shore and to this area, once we arrive, we will then assess if it is safe to add additional airbags to make the voyage to Oahu. We must make sure that while attaching additional airbags the vessel is stable enough to ensure diver safety, also at no time will we allow any divers to inside the vessel while in deep water, safety is our number one priority during this operation. If the vessel is rigged with additional airbags, then we must determine that it is safe to continue onto Oahu.

If we are able to tow the vessel to Oahu, prior to entering any navigational channel we will contact the USCG and get permission to enter, please note in the past USCG has denied entry due to safety concerns. Our intentions are to tow the vessel to Keehi Lagoon for the open area by the ramp for disposal if deemed a total loss.

Vessel deemed unsafe – once we reach the determined site for determination of tow and we determine the vessel unsafe to rig, then our focus will shift to

conduct a safe disposal at Sea operation. There are two safety issues that we will do our best to accomplish, first is to shorten the tow line for cut, this is to ensure safety and prevent issues in future for whales getting entangled in a long line to the surface, second is to ensure safety for Sub operations that may get entangled in a submarine.

If the vessel does in fact sink, then we will remain onsite for a minimum of two hours to look for floating debris, this is a requirement by the EPA. All debris that is visible will be either picked up, or towed to calmer waters to be removed from the area. Please note that our Salvage Vessel does in fact have two cranes onboard for such operations. We will then notify the DLNR Boating Division of the gps marks for the site of sinking.

Grounded site - Once tow operations are complete, we will then return to the grounded site to look for any other debris that may be apart of the vessel, it is our understanding that at least one stabilizer has come off of the vessel so far. Once complete will inform DLNR DAR of our completion and go back if needed for further cleanup efforts.

Randy Cates

Visionary Marine