

From: [Cheryl B](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Keep the fine !!!!
Date: Thursday, May 23, 2024 2:04:16 PM

This is my testimony to say that the fine should remain for the yacht at Honolua Bay.
Do not back down.
C. Burghardt

From: [Cheryl Hendrickson](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Nakoia Grounding Fine
Date: Thursday, May 23, 2024 2:30:11 PM

Aloha-

The fine levied for the Nakoia grounding in Honolua Bay must stand. The fine should be more.

It must stand as a warning to other negligent boat owners and captains.

Our fragile marine eco system needs to be respected.

Many Mahalos,
Cheryl Hendrickson
38 year Maui Resident

From: [Save Honolua](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] testimony for Honolua Nakoia Yacht Fine
Date: Thursday, May 23, 2024 9:41:03 AM

The community demands justice and the maximum fine has already been deemed appropriate. Honolua is sacred and it needs to be honored. Don't let the boat owners try to weasel out of their responsibility. Set an example so all boat owners are encouraged to be more careful. Mahalo, John Carty - Save Honolua Coalition.

From: [Leonard Nakoa](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Nakoa boat at honolua
Date: Thursday, May 23, 2024 1:57:23 PM

Please do right by our HONOLUA BAY. Make this boat owner pay the whole 1.8 million dollars and use that money to enforcement to stop all the boats from ground on our reefs.

From: [David Leonhardt](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Honolulu appeal
Date: Thursday, May 23, 2024 1:25:36 PM

Aloha everyone, please deny the appeal that the yacht owners are trying to force to do away with their fine of 1.8 million. Just because they rich doesn't mean they can get away with whatever they want. If it doesn't start here with this fine, things like this will keep happening and more and more people will get away with it because they know they can. Use that money to redo and make better moorings in honolua. It's such a beautiful place and after that yacht was pulled out I personally saw the horrible changes in the reef, really the entire ecosystem. That bay used to have mantas in it and doesn't any more because to many boat go. Everything will leave that bay eventually if this kind of thing keeps happening. So please deny the appeal and charge them the fine they deserve.

Mahalo nui,

Dave

Sent from my iPhone

From: [Nancy Mcdonough](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Honolulu Bay
Date: Thursday, May 23, 2024 2:22:01 PM

The grounding of the vessel

In Honolulu Bay was not just heartbreaking, it was an elitist, we can do what we want disregard for the land, ocean and people of Hawaii.

They are adults who chose to take their boat to a fragile environment and now don't think they should be financially responsible. That attitude is absolutely atrocious and disrespectful.

I visit Maui often and when I am there I respect the people and the environment. I am a native Californian and the destruction of our land and oceans everywhere cannot be tolerated.

Please enforce the judgment against the owners of the boat.

Nancy McDonough

3123 Middlefield Ave, Fremont, CA 94539

From: [Lorraine Michelle](#)
To: [DLNR.BLNR.Testimony](#)
Subject: [EXTERNAL] Please Read: Honolua Bay
Date: Thursday, May 23, 2024 11:18:02 AM

Greetings,

I would like to share a brief letter to express my urging to deny the appeal of the Yacht Company for their negligence/damage to Honolua Bay.
It is my understanding that they are appealing the fine of \$1.8million.

I had the honor of being at Honolua Bay in 2022. I spoke to the land owner there, who described to me story after story of people coming to Honolua Bay and being careless, reckless, not respectful to the land.
As I spent the afternoon there, I witnessed him educating tourists multiple times on how to behave with respect to the land. What a thankless and tiring job to have to hold people accountable day after day like that.
When I saw the yacht incident and followed the unfolding situation, I kept thinking of this Native man, his land, his duty to protect it.

I know that the State of Hawai'i has deep respect for the land, the mana, the people, the animals.
With regard to this yacht situation, I have the deepest faith that the Hawai'i Board of Land and Natural Resources will continue to protect the land, people, animals, by holding this company accountable for their actions, financially and otherwise.

Please deny their appeal and give them the opportunity to have financial accountability for their negligence.

With Gratitude,
Lorraine Michelle



May 22, 2024

VIA EMAIL ONLY

Board of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809
blnr.testimony@hawaii.gov

Re: Statement of Position – The Albert Trust
Hearing: May 24, 2024 Item F-1
Proposed DLNR Enforcement Action

Dear Sir/Madam:

As you know, this law firm represents Kevin S. Albert and Kimberley L. Albert (the “*Alberts*”), Trustees of the Albert Revocable Trust (the “*Trust*”) (collectively, “*Petitioners*”) with respect to a proposed Enforcement Action¹ being brought before the Board of Land and Natural Resources (“*Board*”) by the Hawai‘i Department of Land and Natural Resources (“*DLNR*”), Division of Aquatic Resources (“*DAR*”).

On May 24, 2024, the Board will consider DAR’s Item F-1 Recommendation that the Board of Land and Natural Resources Deny the Written Contested Case Hearing Request by Kevin S. Albert and Kimberley L. Albert, Trustees of the Albert Revocable Trust (“*DAR Recommendation*”) to which Petitioners are submitting this written testimony pursuant to the Board’s procedural requirements posted on the DLNR website. It is our position that: (1) Petitioners conformed to HAR § 13-1-29 because the issue of liability has not yet been scheduled for Board disposition; and (2) In the alternative, good cause exists such that a waiver of the “oral or written request” requirement under HAR § 13-1-29(a) is warranted.

II. PERTINENT PROCEDURAL HISTORY²

On April 26, 2024, the Board approved an administrative penalty of \$1,818,851.97 to purportedly compensate the State of Hawai‘i for stony coral and live rock damage allegedly resulting from the February 20, 2023 *Nakoa* grounding incident that occurred outside of the

¹ “Enforcement Action against Jim Jones, Noelani Yacht Charters, LLC, Kevin S. Albert, Kimberley L. Albert, and the Albert Revocable Trust for Stony Coral and Live Rock Damage resulting from the *Nakoa* grounding incident on February 20, 2023, outside of the Honolua-Mokulē‘ia Bay Marine Life Conservation District, island of Maui” was brought before the Board on July 28, 2023 [Agenda Item F-1], on January 26, 2024 [Agenda Item F-1], and on April 26 2024 [Agenda Item F-5].

² For brevity, this section is limited to the procedural history of Petitioners’ CCH request and petition. For a more comprehensive recitation of the procedural history in the Enforcement Action thus far, please see the DAR Recommendation and Petitioners’ written testimony submitted to the Board on or around July 20, 2023, attached hereto as **Attachment “A”**.

Honolua-Mokule‘ia Bay Marine Life Conservation District, Island of Maui.³ On July 28, 2023, Petitioners and the Board reached a tentative agreement in which Petitioners would agree to pay a settlement amount of \$117,471.97 for the alleged damage to natural resources, the restoration of such natural resources, and the cost of the DLNR investigation. This settlement did not materialize.

Now, based on the Board’s decision to increase the proposed administrative penalty by more than ten times, Petitioners requested a contested case hearing (“**CCH**”) on the issue of liability in their letter to the Board, dated April 30, 2024. *See Attachment “B”*. Subsequently, Petitioners submitted a CCH petition and supplemental document to the Board, delivered on May 6, 2024. *See Attachments “C” – “E”*. On May 17, 2024, Petitioners were informed that DAR will be recommending that Petitioners’ CCH request be denied for reasons stated in the DAR Recommendation.

Accordingly, it is our position the DAR Recommendation is improper for several reasons discussed herein. In short, the Board may not deny Petitioners’ right to due process when (1) Petitioners conformed to HAR § 13-1-29 because the issue of liability has not yet been scheduled for Board disposition; and (2) In the alternative, good cause exists such that a waiver of the “oral or written request” requirement under HAR § 13-1-29(a) is warranted.

II. DISCUSSION

A. Due Process

“A contested case hearing is **required if** the statute or rule governing the activity in question mandates a hearing prior to the administrative agency’s decision-making, **or if a hearing is mandated by due process.**” DAR Recommendation at 3 (citing *Bush v. Hawaiian Homes Com’n*, 76 Hawai‘i 128, 134, 870 P.2d 1272, 1278 (1994)); *see Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376, 390, 363 P.3d 224, 238 (2015) (“A contested case is an agency hearing that 1) is required by law and 2) determines the rights, duties, or privileges of specific parties. An agency hearing that is required by law may be required by (1) agency rule, (2) statute, **or** (3) constitutional due process.”) (emphasis added) (internal citations and quotation marks omitted).

Based on Discussion Section B in the DAR Recommendation, there is no dispute that Petitioners are entitled to a CCH because their “**potential liability** creates a sufficient property interest to trigger due process.” DAR Recommendation at 3 (emphasis added). Petitioners are

³ Three days before the grounding incident, Jim and Isabella Jones, 4 juvenile family members or friends, Captain Kim Higa—a captain not approved to operate the vessel by Petitioners—a first mate, and a crew member took the *Nakoa* on a personal trip. In accordance with the plain terms of the Purchase Agreement between Mr. Jones and the Trust, the *Nakoa* was supposed to be used exclusively for commercial charters. On the weekend of the grounding, Mr. Jones admitted that his use of the *Nakoa* was for a personal family weekend voyage. This use was not approved nor authorized by Petitioners. In fact, neither Mr. nor Ms. Albert knew anything about this personal use until they were notified of the grounding incident. DLNR can and should pursue Mr. Jones, a Hawai‘i resident, for his misconduct and the damage he caused.

therefore entitled to a CCH prior to the Board determining whether Petitioners are liable for the \$1,818,851.97 fine in the Enforcement Action.⁴

B. Procedural Requirements

The HARs “require that a person requesting a CCH by the Board must make an oral or written request for a CCH by the close of the Board meeting at which the subject matter of the request is scheduled for Board disposition.” HAR §13-1-29(a); DAR Recommendation at 4. “For good cause, the time for making the oral or written request or submitting a written petition, or both, may be waived.” HAR §13-1-29(a); DAR Recommendation at 4.

1. Petitioners conformed to HAR § 13-1-29 because the issue of liability has not yet been scheduled for Board disposition.

Petitioners have complied with HAR § 13-1-29(a) which requires “a person requesting a CCH by the Board must make an oral or written request for a CCH by the close of the Board meeting **at which the subject matter of the request is scheduled for Board disposition.**” HAR § 13-1-29(a) (emphasis added). Contrary to DAR’s allegations that Petitioners did not conform to HAR § 13-1-29(a) in requesting a CCH on the issue of liability, DAR itself has acknowledged that the subject matter of Petitioners’ request has **not been scheduled for disposition yet**, nor has there been any indication as to when this issue of liability will be scheduled for disposition. See DAR Recommendation at 3 (“Petitioners are subject to a monetary fine **if** found liable by the Board. Petitioners’ **potential liability** creates a sufficient property interest to trigger due process.”) (emphasis added).

Put simply, Petitioners are entitled to an opportunity to be heard prior to the Board’s determination of liability pursuant to their due process rights under the Hawai‘i State Constitution and the United States Constitution. See *Sandy Beach Def. Fund v. City Council of City & Cnty. of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)); *Sierra Club v. Bd. of Land & Nat. Res.*, No. CAAP-22-

⁴ Although not specifically argued at this time, it is Petitioners’ position that current procedures in the Enforcement Action deny them their Constitutional rights to due process. To deny Petitioners’ CCH request on the issue of liability for the reasons discussed in the DAR Recommendation therefore constitutes improper Board action:

“Determination of the specific procedures required to satisfy due process requires a balancing of several factors: (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.”

Mathews v. Eldridge, 424 U.S. at 335, 96 S.Ct. at 903, 47 L.Ed.2d at 33; *Silver v. Castle Memorial Hospital*, 53 Haw. at 484, 497 P.2d at 571. Here, Petitioners’ property interest in \$1,818,851.97 is very significant, the risk of an erroneous deprivation is high, as Petitioners themselves have not violated any provisions of the HARs, and the burden of a CCH is relatively low considering Petitioners’ active participation in the Enforcement Action proceedings thus far.

0000516, 2024 WL 1596193 at *13 (Haw. Ct. App. Apr. 12, 2024). At this point, no determination of liability has been made. *See* DAR Recommendation at 3. As such, Petitioners are not in violation of the CCH procedural requirements outlined in HAR § 13-1-29(a) because Petitioners requested a CCH prior to any Board meeting at which the issue of liability is scheduled for disposition. *See* HAR § 13-1-29(a). Petitioners should therefore not be denied their Constitutional rights to due process under the guise of failing to meet procedural requirements as proposed in the DAR Recommendation.

2. **Good cause exists such that a waiver of the “oral or written request” requirement under HAR § 13-1-29(a) is warranted.**

If the Board considers whether Petitioners satisfied the CCH procedural requirements, Petitioners submit good cause exists to waive the “oral or written request” requirement as warranted under HAR § 13-1-29(a). Here, good cause is present for two main reasons. First, Petitioners have been participating in the BLNR proceedings on this issue in good faith and did not anticipate needing to orally request a CCH prior to the Board’s decision on April 26, 2024 because Petitioners have indicated their intent to request a CCH on several prior occasions. Second, upon voting and rendering its decision on April 26, 2024, the Board stated that they were not taking any more testimony and immediately closed the agenda item, leaving Petitioners’ counsel **no viable opportunity** to request a CCH of the Board’s action.

Lastly, Petitioners do not believe they violated the procedural requirements under HAR Rule 13-1-29(a) to warrant the deprivation of their Constitutional rights to due process. As stated previously, the Board has never indicated to Petitioners the issue of liability has been determined, nor has the Board indicated that a formal consideration of liability is forthcoming. The DAR Recommendation makes clear the issue of liability is outstanding. Other than Petitioners’ continuous submissions denying liability for the grounding and salvage damage, the Enforcement Action proceedings have not addressed whether Petitioners are liable for the fine assessed in the April 26, 2024 meeting. Nor has the Board awarded Petitioners an “opportunity to be heard at a meaningful time and in a meaningful manner **before governmental deprivation of a significant property interest**” on the issue of liability. *Sandy Beach Def. Fund*, 70 Haw. at 378, 773 P.2d at 261 (citing *Matthews*, 424 U.S. at 333); *Sierra Club*, 2024 WL 1596193 at *13.

At this stage, it is unclear whether Petitioners must pay the \$1,818,851.97 fine within sixty (60) days of the April 26, 2024 Board meeting, whether another “responsible party” must pay the fine, or whether a combination of parties must pay the fine. These issues must be resolved before any fine is collected.

Because the BLNR has not made a determination on the issue of liability, Petitioners are left with no alternative but to request a CCH prior to the Board’s scheduling a meeting to consider this particular issue.

As mentioned in the DAR Recommendation, Petitioners have participated in good faith and have been patient with the proceedings thus far: (1) Petitioners’ counsel appeared and actively participated in three meetings to discuss the matter with the Board; (2) counsel has engaged in settlement negotiations with the Department of the Attorney General; (3) Petitioners

have unceasingly, adamantly, and vehemently denied liability at every stage of the proceedings, and (4) Petitioners have repeatedly requested the Board to consider their position regarding liability under the Enforcement Action. Despite the continuous requests for a determination of liability and an opportunity to be heard in a meaningful manner, the Board still has not scheduled a disposition meeting regarding the issue of liability, nor has the Board indicated when, if any, consideration is to be given to Petitioners' position that they have not violated any provisions of the HARs to warrant the imposed fine.

Based on the admission by DLNR that Petitioners only have "potential liability" in the Enforcement Action, the Board has failed to clarify the implications of the April 26, 2024 meeting where it increased the fine tenfold from \$117,471.97 to \$1,818,851.97. *See* DAR Recommendation at 3. At this stage, whether Petitioners are required to furnish the \$1,818,851.97 within sixty (60) days is unclear and further Board action is required at this time.

Based on the foregoing, if the Board finds that the DAR Recommendation is persuasive and determines a CCH request was required prior to the close of the April 26, 2024 meeting, Petitioners submit that good cause exists and requests a waiver of the "oral or written request" requirement as warranted under HAR § 13-1-29(a).

IV. CONCLUSION

Petitioners are entitled to the Board's formal consideration of their liability prior to holding them responsible for paying the \$1,818,851.97 fine. *See* DAR Recommendation at 3 (citing *Bush*, 76 Hawai'i at 134, 870 P.2d at 1278 ("A contested case hearing is required if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency's decision-making, **or if a hearing is mandated by due process.**")).

Additionally, Petitioners are entitled to a CCH as required by the HARs, and their CCH request may not be denied based on a failure to adhere to the procedural requirements of HAR § 13-1-29(a). As stated previously, Petitioners conformed to HAR § 13-1-29(a) because the issue of liability—which is the subject matter of the CCH request—has not been scheduled for Board disposition.⁵ Additionally, for the reasons discussed herein, good cause exists such that a waiver of the "oral or written request" requirement under HAR § 13-1-29(a) is warranted.⁶

Petitioners therefore request the Board grant Petitioners' CCH request and allow Petitioners an "opportunity to be heard at a meaningful time and in a meaningful manner **before governmental deprivation of a significant property interest.**" *Sandy Beach Def. Fund*, 70

⁵ It is Petitioners' position that the effect of their CCH request is simple: If Board action on the issue of liability is forthcoming, Petitioners have asserted their right to a CCH as required under HAR § 13-1-29(a), and the "Board will consider the request first – before considering the merits of the item before it." DAR Recommendation at fn 3. If the Board fails to formally consider the issue of liability but also requires Petitioners to pay the Enforcement Action's fine, Petitioners have preserved their right to a CCH pursuant to HAR § 13-1-29(a) by filing with the Board their CCH request and petition.

⁶ *See* Section II. B. 2. *Infra*.

Board of Land and Natural Resources

May 22, 2024

Page 6

Haw. at 378, 773 P.2d at 261 (citing *Matthews*, 424 U.S. at 333); *Sierra Club.*, 2024 WL 1596193 at *13.

Sincerely,

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

Laurel L. Loo
Randall K. Schmitt
James M. K. Stone
Sabrina N. Gouveia

LL|JMKS|SG

Cc: Clients (via email only)

Attachment “A”



RANDALL K. SCHMITT
ATTORNEY

DIRECT #S:
PHONE - (808) 529-7422
FAX - (808) 535-8018

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 Nakoia 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, February 26, 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 Nakoia 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 Nakoia. They should therefore be removed from the Draft Submittal.

Sincerely,

McCORRISTON MILLER MUKAI MacKINNON LLP

A handwritten signature in blue 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

RANDALL K. SCHMITT 3752-0
BRETT R. TOBIN 9490-0
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawai‘i 96813
Telephone: (808) 529-7300
Facsimile: (808) 524-8293
Email: schmitt@m4law.com; btobin@m4law.com

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, McCorrison 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 Honolua 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 Honolua 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 Honolulu 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 Honolulu 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 Honolulu 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 Honolulu 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.
McCorrison 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.



CLERK OF COURT

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

Signature of Clerk or Deputy Clerk

Date: March 13, 2023

AO 440 (Rev. 12/09) Summons in a Civil Action (Page 2)

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.

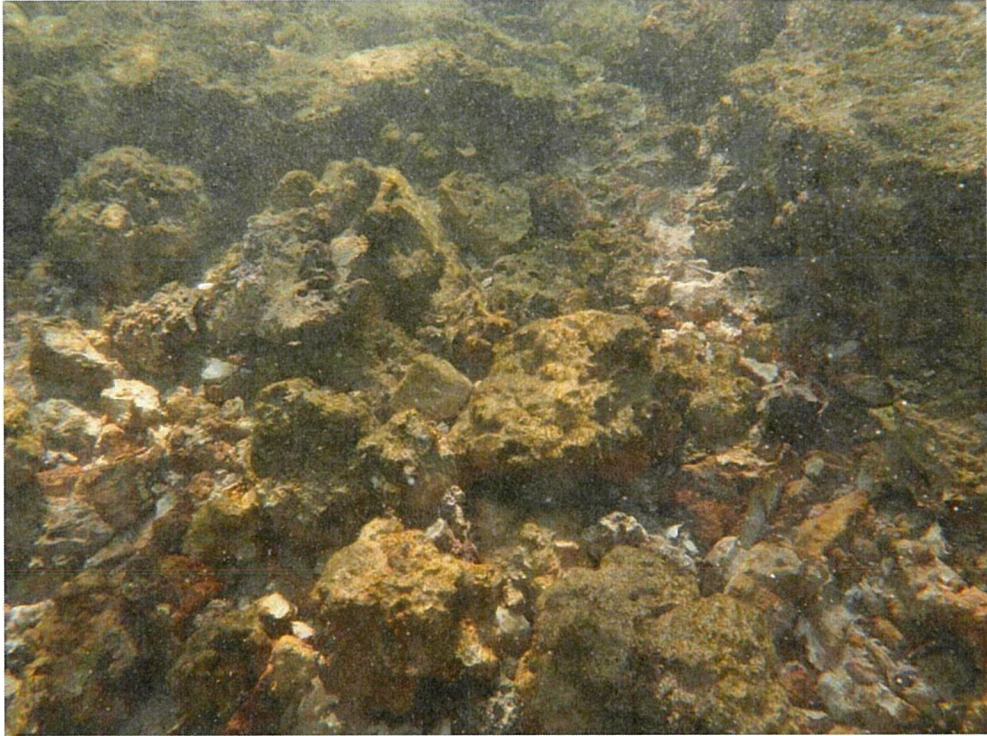


Figure 3: Underwater photograph showing the damage to hard bottom substrate at the location where the Nakoa was grounded for 6 days.



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.

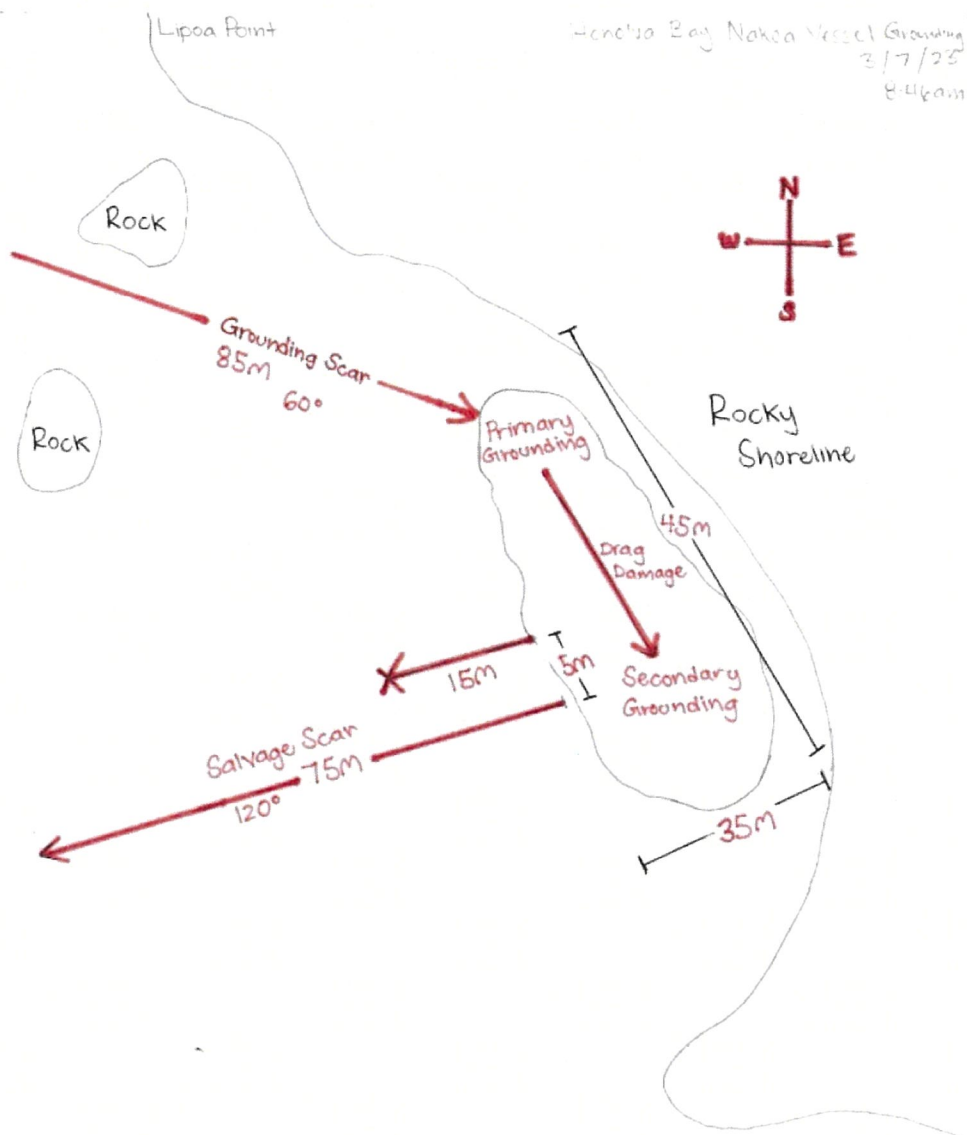


Figure 6: Detailed map of the impact area. The map shows the Initial Grounding Scar, the salvage scar, and the secondary grounding scar (where the vessel sat for 14 days along the shoreline).

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 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>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
24 Sand Island Access Road
Box 27
Honolulu, Hi 96819
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

Attachment “B”



April 30, 2024

VIA EMAIL ONLY

Board of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809
blnr.testimony@hawaii.gov

Re: Contested Case Hearing Request – The Albert Trust
April 26, 2024 Hearing Item F-5
Proposed DLNR Enforcement Action

Dear Sir/Madam:

As you know, 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 (“*Board*”) by the Hawaii Department of Land and Natural Resources (“*DLNR*”), Division of Aquatic Resources (“*DAR*”).

On April 26, 2024, the Board approved an administrative penalty of \$1,818,851.97 to purportedly compensate the State of Hawaii for damage to natural resources on public lands, restoration of such natural resources, and the cost of the investigation. Based on the Board’s decision to increase the proposed administrative penalty by more than ten times, the Alberts hereby request a contested case hearing on the above referenced matter. *See* Hawaii Administrative Rules (“*HAR*”) § 13-1-29(a) (“On its own motion, the board may hold a contested case hearing. Others must both request a contested case and petition the board to hold a contested case hearing.”). A petition will be submitted on or before May 6, 2024, within the “ten calendar days after the close of the board meeting at which the matter was scheduled for disposition.” *Id.*

To be clear, the Alberts maintain that: (1) there is no basis to impose liability against either the Alberts or the Trust 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; (2) the damage related to the initial grounding must be separated from the damage related to salvage; and (3) DLNR and its chosen salvor were the cause of the much greater damage and they should be responsible for the damage caused by their choices and conduct. The Alberts intend to present these positions in greater detail in their petition to the Board for a contested case hearing pursuant to HAR § 13-1-29.

Board of Land and Natural Resources

April 30, 2024

Page 2

Please do not hesitate to contact me if you have any questions.

Sincerely,

McCORRISTON MILLER MUKAI MacKINNON LLP



Randall K. Schmitt

cc: Client (via email only)

Attachment “C”



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

- File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:
 Department of Land and Natural Resources
 Administrative Proceedings Office
 1151 Punchbowl Street, Room 130
 Honolulu, Hawaii 96813
 Phone: (808) 587-1496, Fax: (808) 587-0390
- DLNR’s contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://dlnr.hawaii.gov/forms/contested-case-form/>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to “DLNR”) or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner’s financial hardship.
- All materials, including this form, shall be submitted in **three (3)** photocopies.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Kevin S. Albert and Kimberly L. Albert, Trustees of the Albert Revocable Trust UAD 06/03/1997 and Restated 01/07/2020	2. Contact Person Randall K. Schmitt, Esq.	
3. Address Five Waterfront Plaza, Building Five, 4th Floor 500 Ala Moana Boulevard	4. City Honolulu	5. State and ZIP HI 96813
6. Email c/o McCorrison Miller Mukai MacKinnon	7. Phone (808) 529-7422	8. Fax (808) 535-8018

B. ATTORNEY (if represented)	
9. Attorney Name Randall K. Schmitt, Esq.	10. Firm Name McCorrison, Miller, Mukai, MacKinnon, LLP

11. Address Five Waterfront Plaza, Building Five, 4th Floor 500 Ala Moana Boulevard	12. City Honolulu	13. State and ZIP HI 96813
14. Email Schmitt@m4law.com	15. Phone (808) 529-7422	16. Fax (808) 535-8018

C. SUBJECT MATTER

17. Board Action Being Contested April 26, 2024 Hearing Item F-5 - Grant of the Motion to Accept Staff's Recommendation with the Amendment to Increase the Fine brought by Member Canto in the Enforcement Action against Jim Jones, Noelani Yacht Charters, LLC, Kevin S. Albert, Kimberly L. Albert, and the Albert Revocable Trust for Stony Coral and Live Rock Damage resulting from the Nakoia grounding incident on February 20, 2023 outside of the Honolua-Mokulē'ia Bay Marine Life Conservation District, island of Maui.		
18. Board Action Date April 26, 2024	19. Item No. F-5	
20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case Under Hawaii Administrative Rules ("HAR") Section 13-1-31, all persons "who otherwise can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application." Petitioner is directly and immediately affected by the \$1,818,851.97 valuation presented by Board member Cantos in the April 26, 2024 Meeting and is therefore entitled to a contested case hearing.		
21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection Personal property in the amount of \$1,818,851.97.		
22. Any Disagreement Petitioner May Have with an Application before the Board N/A		
23. Any Relief Petitioner Seeks or Deems Itself Entitled to <ol style="list-style-type: none"> 1. A finding by the Board of Land and Natural Resources that there is no basis to impose liability against either the Alberts or the Trust because the grounding took place following the theft of the Vessel, and neither the Alberts nor the Trust violated any provisions of the HAR; 2. A finding that the damage related to the initial grounding must be separated from the damage related to the damage caused by the salvage; 3. A finding that 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; 4. Any other relief as set forth in our supporting and supplemental documents; and 5. Any other relief requested at the contested case hearing deemed just and equitable. 		
24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest N/A		

25. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

N/A

- Check this box if Petitioner is submitting supporting documents with this form.
- Check this box if Petitioner will submit additional supporting documents after filing this form.

Randall K. Schmitt, Esq.

Petitioner or Representative (Print Name)

Randall K. Schmitt

Signature

May 6, 2024

Date

Attachment “D”

McCORRISTON MILLER MUKAI MacKINNON LLP
A Limited Liability Law Partnership

RANDALL K. SCHMITT 3752-0
BRETT R. TOBIN 9490-0
500 Ala Moana Boulevard
5 Waterfront Plaza, Suite 400
Honolulu, Hawai'i 96813
Telephone No. (808) 529-7300
Email: schmitt@m4law.com; btobin@m4law.com

Attorneys for Petitioners
KEVIN S. ALBERT and KIMBERLY L. ALBERT,
Individually and as Trustees of the
ALBERT REVOCABLE TRUST AUD

BOARD OF LAND AND NATURAL RESOURCES
FOR THE STATE OF HAWAII

IN THE MATTER OF

A Contested Case Hearing Re Enforcement
Action against Jim Jones, Noelani Yacht
Charters, LLC, Kevin S. Albert, Kimberly
L. Albert, and the Albert Revocable Trust
for Stony Coral and Live Rock Damage
resulting from the Nakoā grounding
incident on February 20, 2023 outside of the
Honolua-Mokulē'ia Bay Marine Life
Conservation District, island of Maui

KEVIN S. ALBERT and KIMBERLY L.
ALBERT, Individually and as Trustees of the
ALBERT REVOCABLE TRUST AUD

From Action of the Board of Land and
Natural Resources dated April 26, 2024

Case No.

PETITION APPEALING FROM ACTION
OF THE BOARD OF LAND AND
NATURAL RESOURCES; EXHIBIT "A"

PETITION APPEALING FROM ACTION OF BOARD

ATTACHMENT "D"

1. Petitioners in this appeal are KEVIN S. ALBERT and KIMBERLY L. ALBERT, Individually and as Trustees of the ALBERT REVOCABLE TRUST AUD (the “*Trust*”) (collectively, “*Petitioners*”).

2. This petition arises from the “Enforcement Action against JIM JONES, NOELANI YACHT CHARTERS, and Petitioners for Stony Coral and Live Rock Damage resulting from the *Nakoa* grounding incident on February 20, 2023 outside of the Honolua-Mokulē‘ia Bay Marine Life Conservation District, Island of Maui” (“*Enforcement Action*”). Exhibit A at 1.

3. “In December 2022, Yacht Charters purchased its second vessel, the *Nakoa* from Kevin and Kimberly Albert, trustees of the Albert Revocable Trust, by way of a Vessel Installment Purchase and Management Agreement dated December 29, 2022.” *Id.* at 5-6.

4. “The purchase price of the vessel was \$1.45 million dollars, to be paid over fifteen years. The *Nakoa* is listed as 94-foot long and weighing 120 tons.” *Id.* at 6.

5. On July 28, 2023, the State of Hawai‘i’s Department of Land and Natural Resources (“*DLNR*”) brought an Enforcement Action against Petitioners and others for alleged violations of Hawai‘i Administrative Rules (“*HAR*”) Sections 13-95-70 and 13-95-71. *Id.* at 3.

6. Specifically, the Enforcement Action alleges that Petitioners violated HAR §§ 13-95-70 and 13-95-71 when “Jim Jones’s vessel, the *Nakoa*, grounded outside of the Honolua-Mokulē‘ia Bay Marine Life Conservation District, island of Maui on February 20, 2023, breaking and damaging 119 specimens of stony coral and 1640.5 square meters of live rock.” *Id.* at 1, 3.

7. This petition arises from the action of the Board of Land and Natural Resources (the “**Board**”), Division of Aquatic Resources on April 26, 2024, raising the administrative penalty in the Enforcement Action from \$117,471.97 to \$1,818,852.97.

8. Under HAR § 13-1-31, all persons “who otherwise can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.”

9. Petitioners are directly and immediately affected by the \$1,818,851.97 valuation presented by Board member Cantos in the April 26, 2024 Meeting, and are therefore entitled to a contested case hearing.

10. The grounds for this petition are:

a. The Board alleges that Petitioners violated HAR § 13-95-70, which applies to stony corals, and HAR § 13-95-71, which applies to live rocks. *See generally* Exhibit A. Under HAR § 13-95-70(a)(1)-(2), “it is unlawful for any person to take, break, or damage any stony coral,” and “it is unlawful for any person to damage any stony coral by any intentional or negligent activity causing the introduction of sediment, biological contaminants, or pollution into state waters[.]” Similarly, “it is unlawful for any person to take, break or damage any live rock[.]” and “it is unlawful for any person to damage any live rock by any intentional or negligent activity causing the introduction of sediment, biological contaminants, or pollution into state waters[.]” HAR § 13-95-71(a)(1)-(2). Petitioners have not violated HAR §§ 13-95-70 and 13-95-71 because they did **not** act intentionally or negligently. Additionally, Petitioners were **not** involved in any activity causing damage to stony corals and live rocks, nor were they involved in any activity causing the introduction of sediment, biological contaminants, or

pollution into state waters. As such, there is no basis to impose liability against Petitioners because the grounding took place following the theft¹ of the Vessel and Petitioners have not violated any provisions of the HAR.

b. Even though Petitioners were not involved in the initial grounding of the *Nakoa*, or the salvage, Petitioners still request that the Board separate the fines for the grounding damage from the fines resulting from the salvage. DLNR and its chosen salvor were the cause of extensive damage to stony coral and live rocks during the *Nakoa's* salvage, and they should be responsible for such damage caused by their choices and conduct. The salvage company is in violation of HAR § 13-95-70 and § 13-95-71 by breaking and damaging stony coral, breaking and damaging live rocks, and negligently causing the introduction of sediment, biological contaminants, or pollution into state waters. *See* HAR §§ 13-95-70 and 13-95-71. The salvage company, however, is not listed as a named party in the Enforcement Action along with Petitioners. *See* Exhibit A at 1. Although there are exceptions to HAR §§ 13-95-70 and 13-95-71, none of the exceptions apply to the salvage company in this case. The salvage company must therefore be held liable for its violations of HAR §§ 13-95-70 and 13-95-71 cited against Petitioners, and its significant contribution to the overall damages caused by the salvage itself.

11. Petitioners seek the following relief in this action:

a. A finding by the Board that there is no basis to impose liability against either the Alberts or the Trust because the grounding took place following the theft of the Vessel, and neither the Alberts nor the Trust violated any provisions of the HAR;

¹ On or around July 27, 2023, Special Agent Stacey R. Yamashita with the State of Hawai'i Department of the Attorney General Investigations Division initiated an investigation into the theft of the *Nakoa* by Jim Jones. To date, the investigation is ongoing and is anticipated to be completed shortly.

- b. A finding that the damage related to the initial grounding must be separated from the damage related to the damage caused by the salvage;
- c. A finding that 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;
- d. Any other relief as set forth in our supporting and supplemental documents; and
- e. Any other relief requested at the contested case hearing deemed just and equitable.

DATED: Honolulu, Hawai'i, May 6, 2024.

/s/ Randall K. Schmitt

RANDALL K. SCHMITT

BRETT R. TOBIN

Attorneys for KEVIN S. ALBERT and
KIMBERLY L. ALBERT, Individually and as
Trustees of the ALBERT REVOCABLE TRUST
AUD

Attachment “E”

McCORRISTON MILLER MUKAI MACKINNON LLP

ATTORNEYS AT LAW

ERRAND DELIVERY

DATE: 5/3/24 ATTY/SECTY: JKI/SNG/gena COMPLETE BY: Today, please

PHONE: 529-7 441 CLIENT: NAKOA (66237)

DESCRIPTION: PETITION FOR A CONTESTED CASE HEARING

DELIVERY TO: Department of Land and Natural Resources
Administrative Proceedings Office
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

PICK UP FROM:

GET SIGNATURE OF:

OTHER INSTRUCTIONS: 3 copies attached

MESSENGER COMMENTS:

- NEED NEW ADDRESS PLEASE.
OFFICE WAS CLOSED; COULDN'T SLIP UNDER DOOR.
SLIPPED UNDER DOOR.
NO ONE WAS IN TO SIGN.
REFUSED TO SIGN.
LEFT DOCUMENTS. THEY WILL CALL WHEN READY.
ITEM FOR PICKUP NOT READY YET.
HAS MOVED TO
OTHER:

RECEIVED
2021 MAY -6 PM 3:27
DEPT. OF LAND & NATURAL RESOURCES
STATE OF HAWAII