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Attorney for the Sierra Club

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LAND/TRANS DIV
DEPARTMENT OF
ATTORNEY GENERAL

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

SIERRA CLUB,	)	CIVIL NO. 19-1-0019-01 JPC
	)	(Environmental Court)
Plaintiff,)	
vs.	)	PLAINTIFF'S NOTICE OF TAKING
	)	DEPOSITION UPON ORAL
BOARD OF LAND AND NATURAL	)	EXAMINATION OF
RESOURCES, DEPARTMENT OF LAND	)	REPRESENTATIVE(S) OF THE
AND NATURAL RESOURCES,	)	DEFENDANT DEPARTMENT OF LAND
SUZANNE CASE in her official capacity as	)	AND NATURAL RESOURCES and
Chairperson of the Board of Land and	)	BOARD OF LAND AND NATURAL
Natural Resources, ALEXANDER AND	)	RESOURCES PURSUANT TO HRCP
BALDWIN, INC., EAST MAUI	)	30(B)(6); CERTIFICATE OF SERVICE
IRRIGATION, LLC, and COUNTY OF)	
MAUI	)	Date: September 6, 2019
	)	Time: 8:30 a.m.
Defendants.	)	Judge: Honorable Jeffrey Crabtree
)	
	)	No Trial Date Set

PLAINTIFF'S NOTICE OF TAKING DEPOSITION UPON ORAL EXAMINATION OF REPRESENTATIVE(S) OF THE DEFENDANT DEPARTMENT OF LAND AND NATURAL RESOURCES and BOARD OF LAND AND NATURAL RESOURCES PURSUANT TO HRCP 30(B)(6)

TO: Amanda Weston
Deputy Attorney General
Department of the Attorney General
465 South King Street, 3rd Floor
Honolulu, Hawai'i 96813

Please take notice that the Sierra Club, by and through the undersigned counsel, will take the deposition of the representative(s) designated by Board of Land and Natural Resources and

the Department of Land and Natural Resources pursuant to Rule 30(b)(6) of the Hawai'i Rules of Civil Procedure on September 6, 2019 at 8:30 a.m. at the offices of Ralph Rosenberg Court Reporters, Inc., 1001 Bishop Street, Conference Room 798, Honolulu, Hawai'i 96813.

HRCP 30(b)(6) requires the deponent to designate one or more officers, directors, managing agents, or other authorized representative with knowledge of facts and information to testify on behalf of the Defendant Department of Land and Natural Resources and the Board of Land and Natural Resources regarding:

(1) the **information** that DLNR or BLNR had as of November 10, 2018 regarding:

- a. stream life, including (i) which diversion structures (within the area encompassed by the revocable permits at issue in this case) cause the greatest threat of entrainment of native aquatic species; (ii) which diversion structures (within the area encompassed by the revocable permits at issue in this case) pose the greatest impediment to migration of native aquatic species; (iii) whether enough water was flowing in each stream to ensure that the populations of native aquatic organisms within each stream had not been adversely affected; (iv) whether freshets upon which native species depend flow below each stream diversion;
- b. the twelve streams not regulated by the June 2018 CWRM order within the area covered by the revocable permits: Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanahana Stream¹ (Ohanui tributary), Hoalua Stream, Waipio Stream, Mokupapa Stream, and Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries) including (i) how much water was flowing in these twelve streams as of June 15, 1988; (ii) the instream flow standard for these twelve streams; (iii) how much water was taken daily from each of these streams within the past two year; (iv) how much water was taken on average from each of these streams for the past two years; (v) how much water A&B

¹ Please note that in Findings of Fact 58 and 60 of the June 2018 CWRM decision, CWRM refers to the stream as "Hanahana Stream." The Hawai'i Board on Geographic Names, however, refers to the stream as Hanawana. <http://files.hawaii.gov/dbedt/op/gis/bgn/placenames/HBGN%20-%20Maui%20-%20Official%20May%202018.pdf>.

and EMI were proposing to take on average, or daily, or at a maximum from each stream; (vi) what percentage of each of these stream's flow was taken over the previous two years or was being proposed to be taken; and (vii) what the base flows of these twelve streams are; (viii) whether native aquatic species would benefit if more water were to be restored to them, or whether they are harmed by the diversions taking place in 2018;

- c. Ho'olawa Stream, including whether A&B and/or EMI are dumping any water (and how much) from other streams into Ho'olawa Stream and its impact;
- d. Hanehoi and Honopou streams, including their restoration status, whether the diversions remain, how much water was still being diverted from these streams, and what the impact is from diversions to the species that live (or would live) in these streams;
- e. the restoration status of all of the streams ordered to be restored and free-flowing by CWRM in June 2018;
- f. the amount of water would flow within each stream without diversions how much A&B and EMI were taking from each stream on average daily, and how much they proposed to take from each stream in 2019;
- g. invasive species, including the extent to which invasive species are spreading (within the area encompassed by the revocable permits at issue in this case) and the threat posed by invasive species growing in this area;
- h. garbage and debris, including (i) how much trash, including discarded pipes, remains littering the revocable permit parcels; and (ii) A&B's compliance with the terms of its permits to clean up debris;
- i. whether A&B was making "reasonable and beneficial" use of the water in 2018, including specific information as to the uses to which A&B was making of the water taken from east Maui on average daily, by whom, broken down into separate categories that include: water taken from the east Maui RP area, water used by Maui County for domestic uses, Maui County's agricultural park, diversified agriculture (identifying the location, crop/commodity and user), reservoirs, and seepage/leakage;

- j. how much water A&B was proposing to divert in 2019; from which streams this water was proposed to come from; and from which streams the increase in diversions would come from;
- (2) to the extent that DLNR had any of the information described above, the method and means by which this information was **conveyed to all members of the BLNR** and when this information was conveyed;
 - (3) **all the efforts** (with specificity and all examples) DLNR and BLNR made **to obtain any of the information** described above prior to November 10, 2018;
 - (4) **all the efforts** (with specificity and all examples) that BLNR and DLNR made prior to November 10, 2018 to:
 - a. protect native stream life, including (i) on those twelve streams unaffected by the 2018 CWRM Order); (ii) requiring the removal or alteration of any stream modification structure within a clear timeframe; (iii) ensuring that the freshets upon which native species depend will flow below stream diversions; (iv) studying or evaluating which diversion structures cause the greatest impediment to the migration of native aquatic species and which cause the greatest threat of entrainment of native aquatic species;
 - b. protect the twelve streams unaffected by the 2018 CWRM Order: Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanahana Stream (Ohanui tributary), Hoalua Stream, Waipio Stream, Mukupapa Stream, and Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries), including (i) protection for any of the amphidromous species that live in those streams, (ii) protection of the public use and enjoyment of these twelve streams, (iii) limiting the amount of water that A&B and EMI can take out of these streams; (iv) determining how much water flows in these streams and how much is diverted;
 - c. protect Ho'olawa Stream from the dumping of water that has been taken out of other streams;
 - d. ensure that (i) the diversion of water from Hanehoi and Honopou streams end within any specific timeframe; (ii) the structures that impede the migration of

- aquatic species (or entrain them) within Hanehoi and Honopou streams be removed or altered within any specific timeframe;
- e. ensure that the streams that CWRM ordered to be restored are restored and free-flowing within a specific timeframe, with the removal and alteration of those stream modification structures within a clear timeframe;
 - f. learn how much water would flow within each stream without diversions, how much A&B and EMI take from each stream on average daily, and how much water they were proposing to take;
 - g. require that A&B and EMI manage the public lands (within the area encompassed by the revocable permits at issue in this case) to reduce the spread of invasive species;
 - h. ensure that A&B and EMI are complying with condition imposed on the revocable permits in November 2017 that they clean up their debris starting with the more accessible area and along streams;
 - i. monitor and assess as to whether the water diverted from east Maui is actually being used in a "reasonable and beneficial" manner;
 - j. require that EMI and A&B routinely report precisely how the water is being used;
 - k. inspect the area encompassed by the revocable permits at issue in this case to check on (i) stream alteration and diversion structures (ii) invasive species, (iii) debris;
- (5) The efforts that BLNR and DLNR have taken in 2019 to ensure that the water that A&B has been taking is actually put to reasonable and beneficial use;
- (6) The efforts that BLNR and DLNR have taken since November 2018 to follow up on photographs and testimony regarding debris littering the area;
- (7) For all of the categories above, an explanation as to why more effort was not made and why more information was not sought from A&B and EMI.

The deponent may designate those matters to which each designee will testify prior to the date and time for which the deposition regarding those matters is scheduled. The designee(s) shall testify as to all information known to or reasonably ascertainable by the Department of Land and Natural Resources and the Board of Land and Natural Resources, including

information in the possession, custody or control of its directors, officers, employees, agents, attorneys and other representatives in their capacity as such.

Please note that the responding party has a duty "to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unequivocally answer questions about the designated subject matter." *Starlight Int'l Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999). "Not only must the organization designate a witness, but it is responsible also to prepare the witness to answer questions on the topics identified and present the organization's knowledge on those topics." Wright, Miller & Marcus, 8A Fed. Practice & Procedure Civ. 2d § 2103. The State must "must designate and adequately prepare witnesses." *United States v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996). "The corporation then must not only produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation." *Id.* at 360-61. "If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation." *Id.* at 361 The 30(b)(6) deponent must not only testify about facts within the organization's knowledge, "but also its subjective beliefs and opinions. . . . [to] provide its interpretation of documents and events." *Id.* at 361." [I]t is not uncommon to have a situation, as in the instant case, where a corporation indicates that it no longer employs individuals who have memory of a distant event or that such individuals are deceased. *See Dravo Corp.*, 164 F.R.D. 70, 75; *U.S. v. Massachusetts Indus. Finance Agency*, 162 F.R.D. at 412. These problems do not relieve a corporation from preparing its Rule 30(b)(6) designee to the extent matters are reasonably available, whether from documents, past employees, or other sources." *Id.* An unprepared Rule 30(b)(6) witness is tantamount to a failure to appear at a deposition and is sanctionable conduct. *See Starlight Int'l Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999). "The party responding to a 30(b)(6) deposition notice 'must prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition exhibits.'" *Calzaturificio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 37 (D. Mass. 2001). "The burden upon the responding party, to prepare a knowledgeable Rule 30(b)(6) witness, may be an onerous one, but we are not aware of any less onerous means of assuring that the position of a corporation that is involved in litigation, can be fully and fairly explored." *Id.* at

638. The corporation and its counsel have a duty to prepare the witness so that he or she is able to give "complete, knowledgeable and binding answers on behalf of the corporation." *Continental Cas. Co. v. Compass Bank*, 2006 U.S. Dist. LEXIS 12288, 2006 WL 533510 * 18 (S.D. Ala. March 3, 2006). The person being deposed is required to testify about the knowledge of the entity and not his or her own knowledge. *Id.* An individual identified as a Rule 30(b)(6) witness may be called on to answer questions known to the corporation but not to himself personally. The duty to prepare the Rule 30(b)(6) witness properly attaches to the deponent corporation. *Calzaturificio, Inc.*, 201 F.R.D. at 37; *Provide Commerce, Inc. v. Preferred Commerce, Inc.*, 2008 U.S. Dist. LEXIS 9563, 6-7 (S.D. Fla. Feb. 7, 2008). "Producing an unprepared witness is tantamount to a failure to appear at a deposition." *Starlight Int'l Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999). In response to Rule 30(b)(6) deposition notices, parties are required "to have persons testify on its behalf as to all matters known or reasonably available to it and, therefore implicitly require such persons to review all matters known or reasonably available to it in preparation for the Rule 30 (b)(6) deposition." *Taylor*, 166 F.R.D. at 362. Rule 30(b)(6) explicitly requires the BLNR and DLNR "to have persons testify on its behalf as to all matters known or reasonably available to it, and, therefore, implicitly requires such persons to review all matters known or reasonably available to it in preparation for the Rule 30(b)(6) deposition. This interpretation is necessary in order to make the deposition a meaningful one and to prevent the 'sandbagging' of an opponent by conducting a halfhearted inquiry before the deposition but a thorough and vigorous one before the trial. This would totally defeat the purpose of the discovery process." *Id.* at 362. See also *Black Horse Lane Assocs., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 303-304 (3d Cir. 2000) and *Resolution Trust Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993).

Furthermore, the DLNR's obligation to provide complete answers to questions asked in a 30(b)(6) deposition is compounded by its duties as a trustee. "[T]he beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust." Restatement 2d of Trusts, § 173 (comment c). In *Miller v. First Hawaiian Bank*, 61 Haw. 346, 350, 604 P.2d 39, 42 (1979), the Hawai'i Supreme Court noted that a trustee has a "duty to keep a beneficiary informed of facts concerning the administration and management of the trust estate." "If the cestui is to be able to hold the trustee to proper standards of care and honesty and procure for himself the benefits to which the trust

instrument and the doctrines of equity entitle him, he must know of what the trust property consists and how it is being managed.” *Id. See also, Office of Hawaiian Affairs v. State*, 110 Hawai`i 338, 355, 133 P.3d 767, 784 (2006) (“duty to give beneficiaries upon request complete and accurate information as to the nature and amount of trust property”).

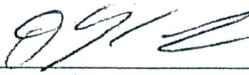
If any of the topics or terms used in this notice are unclear, counsel for the BLNR Defendants should seek clarification prior to the deposition so that the witness(es) are well prepared.

Pursuant to HRCF Rule 30(b)(5), the deponent shall also bring all documents requested in Plaintiffs’ Fourth Request For Production of Documents to BLNR, DLNR and Case. That request asks the deponent to bring copies of any and all documents that BLNR and DLNR rely upon or refer to in answering the questions posed above.

This deposition will be taken upon oral examination pursuant to HRCF Rule 30(b)(6) before a certified shorthand Reporter duly authorized by law to administer oaths pursuant to Rule 30 of the Hawai`i Rules of Civil Procedure. The deposition will be recorded by stenographic means. The deposition shall continue from day to day until completed. You are invited to attend and cross-examine.

Pursuant to Rule 30(b)(8) you are hereby notified that you may request a review of the completed transcript or recording of your deposition. You must make this request before the completion of your deposition. If you make such a request, after being notified by the court reporter or other officer taking the deposition that the transcript or recording is available, you will have thirty (30) days to: (1) review the transcript or recording; and (2) if there are changes in form or substance, to sign a statement reciting such changes and the reasons for making them.

DATED: Honolulu, Hawaii, August 2, 2019.



David Kimo Frankel
Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SIERRA CLUB,	)	CIVIL NO. 19-1-0019-01 JPC
	)	(Environmental Court)
Plaintiff,)	
vs.	)	CERTIFICATE OF SERVICE
)	
BOARD OF LAND AND NATURAL)	
RESOURCES, DEPARTMENT OF LAND)	
AND NATURAL RESOURCES,)	
SUZANNE CASE in her official capacity as)	
Chairperson of the Board of Land and)	
Natural Resources, ALEXANDER AND)	
BALDWIN, INC., and EAST MAUI)	
IRRIGATION, LLC)	
)	
Defendants.)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served today by hand delivery upon:

Linda Chow and Amanda Weston
Deputy Attorneys General
Department of the Attorney General
465 South King Street, 3rd Floor
Honolulu, Hawai'i 96813
Attorneys for BLNR, DLNR and Case Defendants

and

David Schulmeister and Trisha Akagi
1000 Bishop St. #1200
Honolulu, HI 96813
Attorneys for Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC

I also certify that a copy of the foregoing was mailed today to:

Caleb Rowe
Department of the Corporation Counsel
200 South High St.
Wailuku, HI 96793

I also certify that on July 11, 2019, I served Plaintiff's Fourth Request for Production of Documents to Defendants Suzanne Case, in her official capacity as Chairperson of the Board of

Land and Natural Resources, Board of Land and Natural Resources, Department of Land and Natural Resources – which is related to this deposition notice -- in the same manner as above.

Dated: Honolulu, Hawai'i, August 2, 2019.



David Kimo Frankel
Attorney for Plaintiff