CONDOMINIUM PROPERTY REGIME TASK FORCE
Department of Commerce and Consumer Affairs
State of Hawaii
https://cca.hawaii.gov/

AGENDA

Date:	November 30, 2023
Time:	1:30pm
In-Person Meeting Location:	Queen Liliuokalani Conference Room King Kalakaua Building 335 Merchant Street, 1st Floor Honolulu, Hawaii 96813
Agenda:	The agenda was posted to the State electronic calendar as required by Hawaii Revised Statutes ("HRS") section 92-7(b).
Virtual Participation:	Virtual Videoconference Meeting – Zoom Webinar (use link below) https://dcca-hawaii-gov.zoom.us/j/83298129616
Phone: Meeting ID:	+1 669 444 9171 US 832 9812 9616

If you wish to submit written testimony on any agenda item, please email your testimony to kladao@dcca.hawaii.gov or submit by hard copy mail to: Attn: Condominium Property Regime Task Force, 335 Merchant Street, Room 310, Honolulu, Hawaii 96813. We request submission of testimony at least 24 hours prior to the meeting to ensure that it can be distributed to the task force members.

INTERNET ACCESS:

To view the meeting and provide live oral testimony during the meeting, please use the above link. You will be asked to enter your name in order to access the meeting as an attendee. The Task Force requests that you enter your full name, but you may use a pseudonym or other identifier if you wish to remain anonymous. You will also be asked for an email address. You may fill in this field with any entry in an email format, e.g., *****@***mail.com.

Your microphone will be automatically muted. When the Chairperson asks for public testimony, you may click the Raise Hand button found on your Zoom

screen to indicate that you wish to testify about that agenda item. The Chairperson will individually enable each testifier to unmute their microphone. When recognized by the Chairperson, please unmute your microphone before speaking and mute your microphone after you finish speaking.

PHONE ACCESS:

If you cannot get internet access, you may get audio-only access by calling the Zoom Phone Number listed at the top on the agenda.

Upon dialing the number, you will be prompted to enter the Meeting ID which is also listed at the top of the agenda. After entering the Meeting ID, you will be asked to either enter your panelist number or wait to be admitted into the meeting. You will not have a panelist number. So, please wait until you are admitted into the meeting.

When the Chairperson asks for public testimony, you may indicate you want to testify by entering "*" and then "9" on your phone's keypad. After entering "*" and then "9", a voice prompt will let you know that the host of the meeting has been notified. When recognized by the Chairperson, you may unmute yourself by pressing "*" and then "6" on your phone. A voice prompt will let you know that you are unmuted. Once you are finished speaking, please enter "*" and then "6" again to mute yourself.

For both internet and phone access, when testifying, you will be asked to identify yourself and the organization, if any, that you represent. Each testifier will be limited to five minutes of testimony per agenda item

If connection to the meeting is lost for more than 30 minutes, the meeting will be continued on a specified date and time.

Instructions to attend State of Hawaii virtual board meetings may be found online at https://cca.hawaii.gov/pvl/files/2020/08/State-of-Hawaii-Virtual-Board-Attendee-Instructions.pdf

The Task Force may move into Executive Session to consult with the Task Force's attorney on questions and issues pertaining to the Task Force's powers, duties, privileges, immunities, and liabilities in accordance with Section 92-5(a)(4), HRS.

1. Call to Order

2. Approval of Minutes
    a. September 11, 2023
    b. October 27, 2023

3. Old Business

    a. None

4. New Business

    a. Proposed discussion draft of Interim Report; and
    b. Proposed discussion draft of bill to amend alternative dispute resolution procedures.

5. Next Meeting: TBD

    Virtual Videoconference Meeting – Zoom Webinar

    And

    In-Person Meeting Location: Queen Liliuokalani Conference Room, King Kalakaua Building 335 Merchant Street, 1st Floor Honolulu, Hawaii 96813

6. Adjournment

If you need an auxiliary aid/service or other accommodation due to a disability, contact Kyle Ladao, Administrative Assistant, at (808) 586-3025 or at kladao@dcca.hawaii.gov, as soon as possible, preferably by November 28, 2023. Requests made as early as possible have a greater likelihood of being fulfilled. Upon request, this notice is available in alternate/accessible formats.

Gmail Lila Mower <lila.mower@gmail.com>

number of registered condo units

Kyle-Lee N. Ladao <kladao@dcca.hawaii.gov> Fri, Nov 3, 2023 at 8:36 AM
To: Lila Mower <lila.mower@gmail.com>

Hello Ms. Mower,

I apologize for not forwarding this to you sooner. Here is Dathan's (DCCA) response. Please let me know if you have any other questions. Thank you!

Mahalo,

Kyle Ladao

From: Dathan L Choy <dchoy@dcca.hawaii.gov>
Sent: Thursday, November 2, 2023 3:21 PM
To: Kyle-Lee N. Ladao <kladao@dcca.hawaii.gov>; Kedin C. Kleinhans <kkleinha@dcca.hawaii.gov>
Subject: RE: [EXTERNAL] number of registered condo units

Hi Kyle,

Per our records as of today, there are 230,729 units in 3,411 condominium registrations with six units or more which would *generally* be required to register their AOUO. These are rough numbers as some of the five or fewer may have merged their AOUOs and would register that AOUO and some condominium registrations have not triggered the 365 day requirement after first sale or held their first association meeting that would then require them to register their AOUO. Also, some developers register in phases and then merge all of the phases into a single AOUO. For example, the Honua Kai project was developed in 15 phases representing 1,401 units and the Hu'elani project was developed in 20 phases (some with five or fewer) representing a total of 101 units. Both merged their units into their respective AOUOs. So again, rough numbers in that condominium registrations will not match up to AOUO registrations.

There are 13,154 units in 5,512 condominium registrations where each condominium registrations is five or fewer units and individually, are exempted from AOUO registration. However, as stated before, some of these will have merged associations and registered their AOUO.

We also have no formal data on unregistered projects that never came into our office for a Developer's Public Report to engage in legal sales much less an AOUO registration. We do get questions time to time on those, so we know they exist, but they're largely a black hole in terms of numbers.

Hopefully this assists Lila on her data collection.

- Dathan

HI Condo Bulletin	AOAO/BOD	OWNER V	OWNER V	OWNER V	TOTAL	mediated	mediated;	assn did not	owner didnt	elevated	other	mentions allegation(s)* of violations of			water leak,
ISSUE MONTH	V OWNER	AOAO/BOD	OWNER	CAM	CASES	to agreemt	no agreemt	mediate*	mediate**	to arbitratn	***	514B	retaliation	gov docs	intrusion,etc
September-23	0	8			8	3	4			1				8	
June-23	4	10			14	4	5	0	2		3	1		13	1
March-23	3	15			18	1.5	14.5		2		0			18	1
December-22	3	8			11	1	7	0	2		1	1	0.5	9.5	
September-22	2	4			6	3	1	0	0		2	2		4	1
June-22	5	14			19	4.5	10.5				4	1	1	17	
March-22	2	15			17	8	4			1	4	1		16	5
December-21	1	8			9	3	4				2		0.5	8.5	2
September-21	3	13			16	8	5				3			16	3
June-21	5	12			17	8	5	2			2	1		16	1
March-21	1	9			10	4	3		2		1	1		9	
December-20	5	15			20	7	12		1				1	19	1
September-20	2	4			6	2	3				1			6	
June-20	1	2			3	3	0		.					3	
March-20	3	13			16	5	9		1		1			16	1
December-19	2	13		1	16	5	6		2		3	1		15	
September-19	3	8			11	6	4				1	1		10	2
June-19	0	10			10	5	3		1		1	1		9	1
March-19	2	13			15	7	4	1	1		2	1		14	2
December-18	1	2			3	0	3							3	1
September-18	3	7			10	4	2	1	1		2	1		9	1
June-18	1	4.5	0.5		6	2	3	1						6	1
March-18	5	5	1		11	3	3		2		3		1	10	
December-17	3	13			16	5	6	3	2					16	5
September-17	1	10			11	3	5	2	1			1		10	1
June-17	0	6			6	3	3					1		5	2
March-17	2	4			6	4	2							6	
December-16	2	6			8	2	4	2						8	3
September-16	2	8			10	2	5	1	2			2		8	1
June-16	1	3	1		5	3	0	0	1		1			5	1
March-16	2	10			12	3	2	1	4		2	1		11	
December-15	2	7			9	3	2	3	1			1		8	
September-15	0	2	1		3	1	1	1						3	1
June-15	1	7	1		9	0	2	3	2		2			9	
March-15	1	13			14	7	4	2	1					14	
December-14	1	5			6	2	1	0	0		3	1.5		4.5	
September-14	1	8			9	2	2	3	1		1			9	1
June-14	0	8			8	2	2	1	3					8	1
March-14	0	3			3	2			1					3	
December-13	1	6			7	3	3	1						7	
September-13	0	8			8	1	2	2	3					8	2
June-13	1	6			7	0	4	2	1			3		4	1
March-13	1	5			6	2	3	0	0		1			6	1
December-12	2	9			11	2	6				3	1		10	
September-12	0	2	2		4	0	0	1			3			4	
June-12	0	4.5		0.5	5	1	0	1	2		1			5	1
March-12	1	3			4	1	1		2					4	1

December-11	1	6.5		0.5	8	0	1	3	2		2			8	
September-11	1	4			5	2	2	1						5	
May-11	2	8			10	2	2	3	1		2			10	1
February-11	2	4			6	1	2	3				1		5	
November-10	3	11			14	5	4	1	1		3	2		12	1
August-10	2	14.5	1	2.5	20	1	2		1		16	5		14	1
March-10	2	5	1	2	10	2	2				6			10	
November-09	1	4	1		6	3	0	1			2	2		4	1
June, July -09	0	19			19	8	1				10	2		17	1
February-09															
October-08	4	9	1		14	1	1	4			8	1		13	1
total cases	100	454	10.5	6.5	571	176	192	50	49	2	102	37.5	4	528.5	52
total by %	17.51%	79.51%	1.84%	1.14%	100.00%	30.82%	33.63%	8.76%	8.58%	0.35%	17.86%	6.57%	0.70%	92.56%	9.11%
June-08	1	10	1		12	3	1	2	2		4			12	
February-08		10.5	1	0.5	12	3	1	5			3			12	
Oct., Nov. - 07	2	9	2		13	2	5				6	1		12	1
July-07	4	6	1		11		1	3	2		5	1		10	
Jan., Febr. - 07	1	14			16	2	5	5	2		2	2		14	
September-06															
January-06															
September-05	4	11			15	2	5	2	3		3			15	
June-05															
March-05	2	9			12		2	6	1		3				1
October-04															
June-04	1	10			11		4	1	3		3	2		9	1
February-04															
October-03	0	7			7						7			7	
June-03															
February-03	1	6		1	8				1		7			8	
October-02	1	22	0.5	5.5	29		3	2	3		21			29	
July-02															
March-02	0	2			10	4					5			4	
December-01	0	1			11	1					10			1	
September-01	0	2			15	1					13			2	1
June-01	3	1	4		8	5	1				2			8	
February-01	0	2			2		1				1			2	
October-00	0	1.5		0.5	2						2			2	1
June-00	0	6	1	3	10	1	1	3	1		4			4	
February-00															
November-99	0	4			4			2	1		1				
September-99															
Spring 1999															
Fall 1998															
Summer 1998															
Spring 1998					27	10					17				
Winter 1998					34	14					20				
Fall 1997															
Spring 1997															
Winter 1997															

Summer 1996															
Spring 1996															
Winter 1996															
Fall 1995															
Summer 1995															
Spring 1995															
Spring 1994															
Winter 1994															
Fall 1993															
Summer 1993					39	7	7				25				
Spring 1993															
Winter 1993															
Fall/Winter 1992															
Summer 1992															
Spring 1992															
Fall 1991															
est.subtotal cases	20	134	10.5	10.5	308	55	37	31	19	0	164	6	0	151	5
est. total cases	120	588	21	17	879	231	229	81	68	2	266	43.5	4	679.5	57
est. total by %	13.65%	66.89%	2.39%	1.93%	100.00%	26.28%	26.05%	9.22%	7.74%	0.23%	30.26%	4.95%	0.46%	77.30%	6.48%
	AOAO/BOD	OWNER V	OWNER V	OWNER V	TOTAL	mediated	mediated	assn did not	owner did not	elevated	other	mentions	allegation(s)*	of violations of	water leak,
	V OWNER	AOAO/BOD	OWNER	CAM	CASES	to agreemnt	w/o agreemn	mediate*	mediate**	to arbitratn		514B	retaliation	gov docs	intrusion,etc

* association declined, refused, nonresponsive, or withdrew

** owner declined, refused, nonresponsive, or withdrew

*** 'other' includes cases which outcomes were unclear (e.g., 'mediated," "closed," "unable to schedule," resolution before or after mediation, etc.)

° based on interpretation of comments

purple font indicates direct co-relation with bulletin reports

blue font indicates direct and indirect co-relation with bulletin reports

grey fonts indicates interpretation of bulletin reports and are provided only for tracking purposes

blue background indicates unclear data and resolution, e.g. "mediation closed" and "mediated" do not describe with or without agreement

grey background indicates that there was no report of mediation cases in that bulletin

"1/2" was used in tallying whenever there was shared responsibility or a split decision

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TODD HEDRICK; DOUGLAS SCOTT MACKINNON;
RANDY KING; DUANE KOMINE; AND
HAWAIIANA MANAGEMENT COMPANY, LTD.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

COLONEL MARK L. BROWN, U.S. Army (Retired), in his individual capacity, AND HARVEY E. HAMPTON, derivatively on behalf of the ASSOCIATION OF APARTMENT OWNERS OF HOKUA AT 1288 ALA MOANA,	)	CIVIL NO. 1CCV-20-0000871 (DEO) (Other Civil Action)
Plaintiffs,	)	DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' EXPERT REPORTS; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF MATTHEW C. SHANNON; EXHIBITS A-D; NOTICE OF HEARING OF MOTION AND CERTIFICATE OF SERVICE
vs.	)	
WALTER GUILD; TIMOTHY JOHNSON; PHILIP JOHNSON; ALANA	)	*(caption continued on next page)*

KOBAYASHI PAKKALA; THOMAS DOSE; VERNON INOSHITA; HIDEKI HAYASHI; TODD HEDRICK; DOUGLAS SCOTT MACKINNON; RANDY KING; DUANE KOMINE; HAWAIIANA MANAGEMENT COMPANY, LTD.; JOHN DOES 1-100; JANE DOES 1-100; DOE PARTNERSHIPS 1-100; AND DOE CORPORATIONS 1-100,	)	HEARING:
	)	DATE: February 3, 2023
	)	TIME: 9:30 a.m.
	)	JUDGE: Honorable Dean E. Ochiai
	)	
	)	
	)	
	)	Judge: Honorable Dean E. Ochiai
	)	Trial Week: April 10, 2023 (Brown)
	)	Trial Week: April 24, 2023 (Hampton)
Defendants.	)	
	)	

DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S EXPERT REPORTS

Defendants Walter Guild, Timothy Johnson, Philip Johnson, Alana Kobayashi Pakkala, Thomas Dose, Vernon Inoshita, Hideki Hayashi, Todd Hedrick, Douglas Scott MacKinnon, Randy King, Duane Komine, and Hawaiiana Management Company, Ltd. (collectively "Defendants"), by and through their attorneys, Lung Rose Voss & Wagnild, hereby request that the Court enter an order striking Plaintiffs Colonel Mark L. Brown and Harvey E. Hampton's expert reports.

This motion is brought pursuant to Rule 7 of the Hawaii Rules of Civil Procedure ("HRCP"), Rules 401 through 403 and 701 through 704 of the Hawaii Rules of Evidence, Rule 7 of the Rules of the Circuit Courts of the State of Hawaii, and is based on the attached Memorandum in Support of Motion, declarations and exhibits attached hereto, the records and

files herein, and such additional evidence or argument that may be presented prior to or at the hearing on this Motion, all of which are incorporated herein by reference.

DATED: Honolulu, Hawaii, January 13, 2023.

/s/ *Matthew C. Shannon*
MATTHEW C. SHANNON
DAVID A. IMANAKA
JAI W. KEEP-BARNES
KATHERINE T. HIRAOKA

Attorneys for Defendants
WALTER GUILD; TIMOTHY JOHNSON; PHILIP JOHNSON; ALANA KOBAYASHI PAKKALA; THOMAS DOSE; VERNON INOSHITA; HIDEKI HAYASHI; TODD HEDRICK; DOUGLAS SCOTT MACKINNON; RANDY KING; DUANE KOMINE; AND HAWAIIANA MANAGEMENT COMPANY, LTD.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

COLONEL MARK L. BROWN, U.S. Army (Retired), in his individual capacity, AND HARVEY E. HAMPTON, derivatively on behalf of the ASSOCIATION OF APARTMENT OWNERS OF HOKUA AT 1288 ALA MOANA, Plaintiffs, vs. WALTER GUILD; TIMOTHY JOHNSON; PHILIP JOHNSON; ALANA KOBAYASHI PAKKALA; THOMAS DOSE; VERNON INOSHITA; HIDEKI HAYASHI; TODD HEDRICK; DOUGLAS SCOTT MACKINNON; RANDY KING; DUANE KOMINE; HAWAIIANA MANAGEMENT COMPANY, LTD.; JOHN DOES 1-100; JANE DOES 1-100; DOE PARTNERSHIPS 1-100; AND DOE CORPORATIONS 1-100, Defendants.	CIVIL NO. 1CCV-20-0000871 (DEO) (Other Civil Action) MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Plaintiffs Colonel Mark L. Brown ("Plaintiff Brown") and Harvey E. Hampton ("Plaintiff Hampton") have disclosed three supposed "expert" reports riddled with improper opinions in blatant violation of well-settled law on expert testimony. Therefore, Defendants respectfully request that this Court enter an order striking all three reports.

Hawaii law is crystal clear that expert testimony must (1) come from a witness qualified in the topic at issue; (2) assist a finder of fact with knowledge beyond the common

understanding of a layperson; and (3) be reliable (i.e., based on a factual foundation and explicable analysis). As such, it follows that unsupported, conclusory opinions are not proper expert testimony. Further, experts may not offer legal conclusions, lest the expert infringe on the court's authority to determine the applicable law. Lastly, expert testimony is subject to exclusion under Hawaii Rules of Evidence ("HRE") Rule 403, which excludes evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" See HRE Rule 403.

Here, Plaintiffs' reports contravene fundamental canons of evidence by including opinions outside the "experts'" fields of expertise, opinions that do not require expert testimony, and opinions unsubstantiated by evidence or analysis. Further, Plaintiffs' reports contain extensive legal conclusions, going so far as to instruct the finder of fact on the applicable law and what legal conclusions to draw. In some instances, Plaintiffs' experts point the finger at Defendants based on the experts' own imagination and unsubstantiated theories. These fundamental defects will confuse and mislead the finder of fact. More importantly, by presenting these reports to a jury as the views of qualified experts, the Court will essentially validate and give credence to these improper opinions.

For these reasons, Defendants respectfully request that this Court enter an order striking all three reports from the record and precluding those alleged experts from testifying at trial.

II. RELEVANT HISTORY AND BACKGROUND

A. Procedural Background

This case arises from a conflict between Plaintiffs and twelve individually named Defendants, concerning the management of a condominium complex located at 1288 Ala Moana

Boulevard, Honolulu, Hawaii 96814 (the "Hokua"). Defendants consist of ten current and former members of the Board of Directors (the "Board") for the Hokua's Association of Apartment Owners, the Hokua general manager, and the Hokua's management company. See JEFS Dkt. 1 at ¶¶ 4-16. Plaintiff Brown is a former resident and Board member of the Hokua, while Plaintiff Hampton is a current resident who replaced Plaintiff Brown as derivative plaintiff when Plaintiff Brown sold his unit. See JEFS Dkt. 147.

Plaintiffs filed their First Amended Complaint ("FAC") on August 6, 2021. See JEFS Dkt. No. 147. As relevant to this Motion, Plaintiffs' claims arise from (1) general manager Duane Komine purchasing products from Arbonne, the brand used in the Hokua guest suits and health club, and (2) what Plaintiffs perceive as Defendants' "refus[al] to seek action on behalf of the AOAO Hokua against the developers or contractors to correct [construction] defects." See id. at ¶¶ 49-51, 82-92. Plaintiffs allege nine (9) counts against the individual Defendants, including retaliation, breach of fiduciary duty, breach of Chapter 514B, breach of covenant of good faith and fair dealing, negligent and intentional misrepresentation, defamation, unjust enrichment, and conversion. See id. at ¶¶ 93-151.

During the course of this litigation, this Court has repeatedly admonished Plaintiff's counsel against abusing the discovery process by denying Plaintiffs' motions and, most recently, granting Defendants' Motion for Protective Order. See, e.g., JEFS Dkt. Nos. 450, 529, 694.

On December 23, 2022, Plaintiffs disclosed their expert reports. See Exhibits ("Exs.") A-C; Declaration of Matthew C. Shannon ("Shannon Decl.") at ¶ 6. Notably, a current statement of Mr. Luke's qualifications was not provided with his report. See Ex. C. Plaintiffs' expert reports are saturated with legal conclusions, unsupported narratives, and opinions beyond

the experts' own admitted qualifications. See Exs. A-C. Therefore, all three reports must be excluded, and Plaintiff's experts should be barred from testifying at trial.

B. Plaintiffs' Counsel's Prior Use of Improper Expert Testimony

Plaintiffs' counsel is no stranger to attempting to use improper expert testimony in Circuit Court. In an unrelated matter[1] where Defendants' counsel and Plaintiffs' counsel represented opposing parties, Judge Peter T. Cahill questioned Plaintiffs' counsel on whether a similar expert report provided was "really an expert report or is this just an argument?" See Ex. D at p. 7 ¶¶ 8-10 (Transcript of August 12, 2022 hearing re: motion to strike and exclude undisclosed expert and expert report). Judge Cahill continued:

> THE COURT: When does an expert get to come in and say this is what the law says, Judge? I thought lawyers had that job. If we -- if I let this expert testify, then I'm not going to let you represent your clients because I don't need you and this guy coming in here.
>
> . . . .
>
> Hawaii Supreme Court is clear. The only expert on the law is the judge, and I can tell you, I ain't no expert because I get reversed all the time, but the people who decided that the judge is the expert do have the final say.

Id. at p. 7 ¶¶ 19-24, p. 8 ¶¶ 21-25 (formatting altered). Judge Cahill ultimately struck and excluded that expert report, which had also been untimely, calling the tactic "a last-minute scheme, scam, whatever you want to call it." See id. at p. 8 ¶¶ 11-12, p. 9 ¶¶ 21-22.

Clearly, Plaintiffs' counsel has used this tactic in the past to the displeasure of the court, and Plaintiffs' counsel is now trying to do the same thing here. This Court should not

[1] William J. Allred, et al. v. The AOAO of the Whaler on Kaanapali Beach, et al., Civil No. 17-1-0251 (3) (case number 2CC171000251).

allow that to happen. Accordingly, this Court should follow Judge Cahill's lead and strike the offending reports that are chock full of legal arguments and unsupported conclusions.

III. LEGAL STANDARD

"Whether expert testimony should be admitted at trial rests within the sound **discretion of the trial court** and will not be overturned unless there is a clear abuse of discretion." Klink v. State (In re Estate of Klink), 113 Hawai'i 332, 352, 152 P.3d 504, 524 (2007) (citing Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 351, 944 P.2d 1279, 1294 (1997)) (emphasis added). "The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." Id. (citations omitted).

The Court may strike an expert report and its disclosure from the record based on its inherent power "[t]o make and award such judgments, decrees, orders, and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to them by law or for the promotion of justice in matters pending before them." Haw. Rev. Stat. § 603-21.9.

IV. THE COURT MUST STRIKE PLAINTIFFS' IMPROPER EXPERT REPORTS

All three of Plaintiffs' expert reports are improper under Hawaii's well-settled law on expert opinions and testimony. The Hawaii Supreme Court has stated basic qualifications for experts and their testimony:

> In order to provide expert testimony under HRE Rule 702: (1) the witness must be qualified by knowledge, skill, experience, training or education; (2) the testimony must have the capacity to assist the trier of fact to understand the evidence or to determine a fact in issue; and (3) the expert's analysis must meet a threshold level of reliability and trustworthiness.

State v. Metcalfe, 129 Hawai'i 206, 227, 297 P.3d 1062, 1083 (2013).

Regarding the first requirement, a witness can only be qualified as an expert if the witness has "such skill, knowledge, or experience in the field in question as to make it appear that his opinion or inference-drawing would probably aid the trier of fact in arriving at the truth." See Klink, 113 Hawai'i at 352, 152 P.3d at 524. Expert testimony is improper if the testimony goes beyond topics within the expert's "field of expertise[.]" See Craft v. Peebles, 78 Hawai'i 287, 302, 893 P.2d 138, 153 (1995) (holding that the court did not abuse its discretion by refusing to allow two experts to testify about matters outside of their background, experience, and training); see also HRE Rule 702.

The second requirement—which the Hawaii Supreme Court has also referred to as the relevance requirement—focuses on whether expert testimony "assist[s] the trier of fact to understand the evidence or to determine a fact in issue." See State v. Vliet, 95 Hawai'i 94, 106, 19 P.3d 42, 54 (2001) (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591 (1993)). It is important to note that the expert testimony must assist the trier of fact only by supplementing the trier of fact's existing knowledge as a layperson. See id. at 111, 19 P.3d at 59 (citing commentary to HRE Rule 702) ("The trial court's inquiry as to the relevancy requirement is 'whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.'"); see also Brown v. Clark Equip. Co., 62 Haw. 530, 537, 62 Haw. 689, 537, 618 P.2d 267, 272 (1980) ("[W]here the issues are within the common knowledge of the jurors, expert testimony is unnecessary."); State v. David, 149 Hawai'i 469, 478, 494 P.3d 1202, 1211 (2021) ("Jurors are expected to rely upon their general knowledge of how humans operate in the world.").

The third requirement determines the reliability of an expert's testimony. Specifically, "an expert must base his [or her] testimony upon a **sound factual foundation**; **any inferences or opinions must be the product of an explicable and reliable system of analysis**; and such opinions must add to the common understanding of the jury." See In the Interest of Doe, 91 Hawai'i 166, 176, 981 P.2d 723, 733 (App. 1999) (first emphasis added) (quoting State v. Fukusaku, 85 Hawai'i 462, 472-73, 946 P.2d 32, 42-43 (1997)). In this same vein, conclusory opinions are improper as they "do little to assist a jury." See Exotics Haw.-Kona, Inc. v. E. I. du Pont de Nemours & Co., 116 Hawai'i 277, 305, 172 P.3d 1021, 1049 (2007) (holding that, where attorney experts failed to explain their analysis but made conclusory opinions, "[t]he unsubstantiated conclusions of the plaintiffs' experts are insufficient to raise a genuine issue of material fact that would preclude summary judgment."); HRE Rule 704 cmt. (discouraging "the admission of opinions which would merely tell the jury what result to reach").

It is similarly accepted that expert witnesses are not permitted to give legal conclusions or opine on legal questions. See State v. Jones, 148 Hawai'i 152, 166, 468 P.3d 166, 180 (2020) (citing Vliet, 91 Hawai'i at 296-97, 983 P.2d at 197-98); 31A Am. Jur. 2d Expert and Opinion Evidence § 98 ("Expert opinion testimony by attorneys on legal questions, other than the law of another jurisdiction, is generally excluded."). "The fundamental problem with testimony containing a legal conclusion is that conveying the witness' unexpressed, and perhaps erroneous, legal standards to the jury amounts to a usurpation of the court's responsibility to determine the applicable law and to instruct the jury as to that law." Create 21 Chuo v. Southwest Slopes, Inc., 81 Hawai'i 512, 522 n.4, 918 P.2d 1168, 1178 n.4 (App. 1996).

Finally, expert testimony is subject to exclusion under HRE Rule 403, which excludes evidence "if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See HRE Rule 403; see also HRE Rule 704 cmt. ("under Rules 403 and 703 supra, the court has discretion to exclude the testimony entirely if it is prejudicial, confusing, misleading, unnecessarily cumulative, or lacking in trustworthiness.").

For the reasons explained below, each of the Plaintiffs' expert reports ignore these basic rules of evidence and should be stricken. Given the extensive improprieties, it is clear that these reports serve no proper purpose in this matter.

A. Philip Nerney Report

Philip Nerney is ostensibly Plaintiffs' "expert on condominium-related matters" and an attorney who represented condominium associations in the past. See Ex. A at 1. Yet, his report (the "Nerney Report") suffers from obvious, extensive deficiencies, such as:

- The Nerney Report is filled with improper legal conclusions. See, e.g., id. at 6 ("Further, that attitude is **grossly negligent**."); 12 ("Col. Brown has . . . experienced **retaliation**."); 14 ("Mr. Komine's various activities were in **breach of contract**.") (emphases added).

- The Nerney Report clearly invades the Court's authority to instruct the finder of fact on the applicable law. See, e.g., id. at 2-4.

- Mr. Nerney's conclusory opinions are simply narratives and are not substantiated with evidence. See, e.g., id. at 7 ("It is a standard of care to concede what must be conceded, though, and it is objectively established that Col. Brown has been correct about some things.").

- Mr. Nerney does not explain his system of analysis or what his opinion is based on. See, e.g., id. at 6 (providing no support for the assertion that "[t]he attitude expressed by Mr. Guild and by Mr. Johnson fails every element of the standard set forth in HRS § 414D-149(a).").

- Mr. Nerney references deposition testimony from the Association's attorney (who is not a party) **in an unrelated matter**. See id. at 11 n.20, 19 n.34.

- Mr. Nerney opines on topics that do not require expert testimony and can be evaluated by ordinary jurors. See, e.g., id. at 6 (characterizing one Defendant's answers during the deposition as "dismissive[]").

- Mr. Nerney admits that some of his opinions are based on his own speculation, inference, and imagination. See, e.g., id. at 9 ("It is also easy to imagine an unholy alliance between a conflicted Board and Mr. Komine. An obvious inference is that the reticence to investigate Mr. Komine derives from a concern about what that could mean for other defendants.").

- The Nerney Report is likely to confuse the finder of fact as to what the issues are and makes improper comments about counsel. See, e.g., id. at 11 ("Col. Brown may or may not be the niggling sort of busybody defendants may consider him to be. I don't know, and it is irrelevant."), 8 ("Plaintiffs herein are represented by competent counsel who has made more than one board of directors rue the day they played a treacherous game.").

- Mr. Nerney considers topics outside his area of expertise. See, e.g., id. at 13 n.23 (providing information from online sources on medical issues).

Given these deficiencies, the Nerney Report cannot assist a trier of fact in evaluating the evidence in this case. The pervasive nature of the improper opinions completely undermines the Report's reliability and trustworthiness. The Nerney Report goes way beyond simply opining on the standard of care, and instead is a lengthy narrative of improper opinions and legal conclusions masquerading as an "expert opinion". Allowing the Nerney Report to be presented to a factfinder as an "expert" opinion poses a substantial risk of prejudice and unfairness to Defendants. Thus, the Nerney Report should be stricken.

B. Dirk von Guenthner Report

Dirk von Guenthner is Plaintiffs' purported expert on forensic research and accounting, providing testimony on the "purchases, use and related payments for the Arbonne Products." See Ex. B at ¶ 2(d), Ex. 1 at 1. Like Plaintiffs' other expert reports, his report (the "von Guenthner Report") exhibits a flagrant disregard for the rules of expert witness testimony. Instead, the von Guenther Report contains a rambling narrative of unsupported allegations,

assumptions, and supposed "opinions" that are way outside the scope of his alleged expertise as an accountant. This list is by no means exhaustive, but illustrates why the Report should be stricken:

- The von Guenthner Report is filled with improper legal conclusions. See, e.g., id. at ¶ 13(e) ("The GM characterized this issue as a mistake. **I opine that it was premeditated theft.**" (emphasis added)), ¶ 27(g) ("I opine that Leona is **unjustly enriched** for being allowed to keep the $11.98 when the product was **stolen** to begin with." (emphasis added)).

- The von Guenthner Report relies on conclusory statements that are not substantiated. See, e.g., id. at ¶ 13(h) (stating that "I opine that these items were held and sold at the suggested retail price to Leona's other customers or were used by herself and the GM" despite providing no evidence suggesting that any products were resold), ¶ 25(c) ("This assumes that Leona did sell, or could have sold, the bogus products at retail.").

- Introducing his own unsubstantiated theories and inferences—such as that Leona Komine resold the subject Arbonne products—is likely to confuse or mislead the finder of fact. See, e.g., id. at ¶¶ 13(h), 25(c). Once again, these are completely unsupported assumptions.

- Mr. von Guenthner opines on topics beyond the scope of his expertise, such as the propriety of a condominium management executive's conduct. See, e.g., id. at ¶ 8(x) ("I opine that if Wilson had done his job properly, there would not have been any reimbursements to the GM.").

- Mr. von Guenthner also opines on matters that a lay person could form an opinion on without expert testimony. See, e.g., id. at ¶ 15(k) ("I opine that the GM **intentionally** hid these costs from being discovered and questioned." (emphasis added)). These types of "opinions" are especially egregious because they are also not substantiated, and go way beyond his supposed expertise as a forensic accountant.

The law is clear that these types of opinions cannot qualify as expert opinions. The von Guenthner Report cannot be presented to the finder of fact as the testimony of an "expert" because it is simply a narrative that is full of speculation and unsupported arguments, which will unduly influence the jury and prejudice Defendants. It is also full of legal conclusions and is outside the scope of his own admitted (and narrow) expertise as an accountant. For these reasons, the von Guenthner Report should also be stricken.

C. Lance Luke Report

Last, Lance Luke's report (the "Luke Report") is similarly defective. Mr. Luke purports to be a qualified expert in "construction and real estate, including inspection and construction management for condominium association buildings and commercial properties[.]" Ex. C at 3. Mr. Luke claims that his "CV is included with this report[,]" but no CV or any other statement of Mr. Luke's qualifications was attached, so there is no basis to qualify Mr. Luke as an expert in any area. Even if Mr. Luke is qualified to be an expert in condominium construction management as he claims, he is not permitted to opine on matters outside of his expertise. Yet, Mr. Luke repeatedly does just that, offering opinions on condominium management and board conduct. See, e.g., Ex. C at 3 ("It is my opinion that the Hokua Board of Directors should have taken action to put the developer on notice of various construction defects in order to have the defects repaired at the developer's cost."). Other improprieties in the Luke Report include:

- There is a noticeable lack of reference to specific evidence, such as pictures, reports, drawings, or plans. See generally id. In this way, it is completely lacking any support or evidence.

- Mr. Luke speculates about facts without any evidentiary support, and offers his opinion when an expert is not required. See, e.g., id. at 4 ("The Hokua Board of Directors and management had full knowledge of the construction defects . . . .").

- The Luke Report contains blatant legal conclusions. See, e.g., id. at 4 ("The Hokua Board of Directors and management had a fiduciary duty and standard of care to maintain the Hokua common elements free of construction defects and there is no exemption from that duty and care just because the Board is made up of individuals that are connected to the developer.").

- A significant portion of the Luke Report is devoted to impermissible legal opinions about the duties and obligations of board members, which is clearly beyond his alleged expertise as a construction manager. See, e.g., id. at 3-4 ("The Hokua Board of Directors and management had a duty to protect the Association from construction defects, and to notify the developer to fix the defects at the developer's expense.").

- The Luke Report consists primarily of unsupported conclusory statements. See, e.g., id. at 3 (stating that "[b]ased on information provided to me of the pool deck demolition, it appears that the pool deck was not constructed properly from the beginning"). The Luke Report fails to explain what "information" was "provided," and most importantly, what the basis is for his conclusion that the pool deck was not constructed properly.

- Mr. Luke failed to provide any analysis as to **how** he determined that construction defects existed, why those are not maintenance issues, and why those alleged defects are attributable to the original developer of the project.

Mr. Luke's opinions are beyond the scope of his expertise, and lack any factual foundation or analysis. Accordingly, the Luke Report is not reliable and will not properly assist a trier of fact. The pervasive nature of the improprieties show that the objective of the Luke Report is not to provide proper expert testimony, but instead to provide argument cloaked in the heightened authority of an expert. For these reasons, the Luke Report should be stricken.

V. CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court enter an order striking the Nerney Report, the von Guenthner Report, and the Luke Report.

DATED: Honolulu, Hawaii, January 13, 2023.

/s/ *Matthew C. Shannon*
MATTHEW C. SHANNON
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

COLONEL MARK L. BROWN, U.S. Army (Retired), in his individual capacity, AND HARVEY E. HAMPTON, derivatively on behalf of the ASSOCIATION OF APARTMENT OWNERS OF HOKUA AT 1288 ALA MOANA, Plaintiffs, vs. WALTER GUILD; TIMOTHY JOHNSON; PHILIP JOHNSON; ALANA KOBAYASHI PAKKALA; THOMAS DOSE; VERNON INOSHITA; HIDEKI HAYASHI; TODD HEDRICK; DOUGLAS SCOTT MACKINNON; RANDY KING; DUANE KOMINE; HAWAIIANA MANAGEMENT COMPANY, LTD.; JOHN DOES 1-100; JANE DOES 1-100; DOE PARTNERSHIPS 1-100; AND DOE CORPORATIONS 1-100, Defendants.	CIVIL NO. 1CCV-20-0000871 (DEO) (Other Civil Action) DECLARATION OF MATTHEW C. SHANNON

DECLARATION OF MATTHEW C. SHANNON

I, MATTHEW C. SHANNON, do declare as follow:

1. I am a partner at the law firm Lung Rose Voss & Wagnild, counsel for Defendants.

2. I am competent to testify to the matters set forth herein based upon my personal knowledge and information.

3. Attached hereto as Exhibit A is a true and correct copy of Plaintiffs' expert report authored by Philip Nerney, as produced to Defendants' counsel by Plaintiffs' counsel.

4. Attached hereto as Exhibit B is a true and correct copy of Plaintiffs' expert report authored by Dirk von Guenthner, as produced to Defendants' counsel by Plaintiffs' counsel.

5. Attached hereto as Exhibit C is a true and correct copy of Plaintiffs' expert report authored by Lance Luke, as produced to Defendants' counsel by Plaintiffs' counsel.

6. On December 23, 2022, Plaintiffs disclosed their expert reports.

7. Lance Luke's curriculum vitae was not attached to his report. No current statement of Lance Luke's qualifications was provided in conjunction with his expert report.

8. Attached hereto as Exhibit D is a true and correct copy of a transcript of proceedings in case William J. Allred, et al. v. Ass'n of Apartment Owners of the Whaler on Kaanapali Beach, et al., Civil No. 17-1-0251 (3). David E. Case is an attorney with the law firm of Lung Rose Voss & Wagnild.

I, MATTHEW C. SHANNON, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii, January 13, 2023.

/s/ *Matthew C. Shannon*
MATTHEW C. SHANNON

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

COLONEL MARK L. BROWN, U.S. Army (Retired), in his individual capacity, AND HARVEY E. HAMPTON, derivatively on behalf of the ASSOCIATION OF APARTMENT OWNERS OF HOKUA AT 1288 ALA MOANA, Plaintiffs, vs. WALTER GUILD; TIMOTHY JOHNSON; PHILIP JOHNSON; ALANA KOBAYASHI PAKKALA; THOMAS DOSE; VERNON INOSHITA; HIDEKI HAYASHI; TODD HEDRICK; DOUGLAS SCOTT MACKINNON; RANDY KING; DUANE KOMINE; HAWAIIANA MANAGEMENT COMPANY, LTD.; JOHN DOES 1-100; JANE DOES 1-100; DOE PARTNERSHIPS 1-100; AND DOE CORPORATIONS 1-100, Defendants.	CIVIL NO. 1CCV-20-0000871 (DEO) (Other Civil Action) NOTICE OF HEARING ON MOTION AND CERTIFICATE OF SERVICE

NOTICE OF HEARING ON MOTION

TO: TERRANCE M. REVERE, ESQ.
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PLEASE TAKE NOTICE that the foregoing Motion will come for hearing before the Honorable Dean E. Ochiai, Judge of the above-entitled court, via Zoom video conferencing at **9:30 a.m. on February 3, 2023**, or as soon thereafter as counsel may be heard.

If you fail to appear at the hearing, the relief requested may be granted without further notice to you.

All parties to appear at least 10 minutes prior to the scheduled start time. The Zoom meeting ID is: **895 888 6479**. No password is required.

Self-represented parties unable to appear by video may call 888-788-0099 (U.S. toll-free) or 646-558-8656 to participate by telephone. You must enter the above noted Zoom meeting ID when prompted. You must also notify the assigned judge's chambers that you intend to participate by telephone at least 48 hours before the hearing and you must provide the court with the telephone number that you will be using to dial-in for the hearing.

Attorneys and self-represented parties must enter a user name that sets forth their full name, otherwise you will not be admitted into the hearing. Attorneys must also include the suffix "Esq."

All attorneys and parties shall dress appropriately for the hearing. Recording court proceedings is strictly prohibited unless permission is granted by the court. The court may impose sanctions for failure to comply with this notice.

DATED: Honolulu, Hawaii, January 13, 2023.

/s/ *Matthew C. Shannon*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was duly served electronically through Court's JEFS system on the below parties on January 13, 2023.

DATED: Honolulu, Hawaii, January 13, 2023.

/s/ *Matthew C. Shannon*
MATTHEW C. SHANNON
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[Letterhead/date]

Honorable Ronald D. Kouchi
Senate President
415 South Beretania Street
Honolulu, Hawaii 96813

Honorable Scott K. Saiki
House Speaker
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Condominium Property Regime Task Force (Act 189)
Interim Report

Dear President Kouchi and Speaker Saiki:

The Condominium Property Regime Task Force ("Task Force") created in 2023 by Act 189 is directed to provide an interim report no later than twenty days prior to the convening of the regular session of 2024. The Task Force begs leave to report as follows:

The Task Force has thus far focused on the alternative dispute resolution systems contained in Part D of Chapter 514B of the Hawaii Revised Statutes. Proposed legislation accompanying this report would improve the procedures used to address condominium-related disputes.

It would do so by restructuring Part D and making related changes. A description of the sections of the bill, below, is followed by an explanation of the proposal.

Section 1 of the proposed bill sets forth the mandate of Act 189, and the purpose of the proposed legislation.

Section 2 adds the following definition to Hawaii Revised Statutes §514B-3:

"Condominium-related dispute" means a dispute between a unit owner and the board, unit owner and the managing agent, board members and the board, or directors and managing agents and the board;

The defined term is then used in other sections of the bill.

Section 3 consolidates subsections 4 and 5 of section 514B-71(a). Reference is made to support for "alternative dispute resolution, as prescribed in Part D of this chapter" instead of separate references to mediation and to voluntary binding arbitration.

Section 4 amends Hawaii Revised Statutes §514B-106(a). The omitted language is unnecessary due to another proposed change.

Section 5 deletes the existing language contained in subsections (c), (d), (e), (f) and (g) of Hawaii Revised Statutes §514B-146 in favor of clearer language and a streamlined process.

Section 6 deletes the existing language in Hawaii Revised Statutes §514B-157 in favor of language that is congruent with the proposed new Part D.

Section 7 deletes the existing language in Hawaii Revised Statutes §514B-161, 514B-162, 514B-162.5 and 514B-163 in favor of a restructured Part D of chapter 514B.

Section 8 specifies that the provisions of the bill shall apply prospectively.

Section 9 provides a key to identifying proposed statutory changes.

Section 10 provides for the bill to take effect upon enactment.

The following explanation of the proposal begins with the structural change embodied by the proposal. The conforming changes are explained in turn.

The structural change made by the proposal is to provide for the early neutral evaluation of condominium-related disputes that may lead to significant litigation. Early neutral evaluation involves the robust but informal evaluation of the merits of a dispute by a subject matter expert before the dispute escalates. A written evaluation will be admissible as evidence in any action or proceeding that may follow, and may be considered in connection with the award of attorneys' fees and costs in any such action or proceeding.

The evaluation will serve multiple purposes. First, it will efficiently and economically provide an objective analysis of the merits of claims and defenses before substantial investments are made. That will, in and of itself, serve as a tool to promote settlement. Second, the fact that an evaluation will be admissible as evidence in a trial or an arbitration will serve to restrain rejection of the evaluator's evaluation because the evaluation will likely influence the outcome of the trial or the arbitration. Third, the fact that the evaluation may be considered in the award of attorneys' fees and costs will also serve to restrain rejection of the evaluation. Fees and costs incurred after receipt of an evaluation may be considered to be unreasonable and unnecessary, hence not awardable. Fourth, the evaluator may award fees and costs to the prevailing party in the evaluation process. The parties should treat the process as the final determination of the matter barring exceptional circumstances.

Early neutral evaluation will be the next step after mediation in the restructured Part D. This means that the parties will have first presented their positions to a mediator, whose role differs from the evaluator, but who may also provide feedback to the parties. A party that proceeds to litigation or binding arbitration after both mediation and early neutral evaluation will do so advisedly and at the party's own risk.

The essential characteristics of the existing mediation statute are preserved. The fee to be paid by mediation parties is to be reduced from $375 to $150, and may be waived by the commission if the fee will pose an unreasonable economic burden. The subsidy for each individual mediation is to be increased from a maximum of $3,000 to a maximum of $6,000.

The subsidy for parties who agree to binding arbitration is increased from a maximum of $6,000 to a maximum of $10,000. The current non-binding

arbitration provision is abandoned in favor of binding arbitration for those who choose it.

Non-binding arbitration is essentially a misnomer. The award can be rejected and the process may merely serve as an expensive dry run for a trial that then follows.

Under existing law, "The award of [non-binding] arbitration shall not be made known to the trier of fact at a trial de novo." §514B-163(c). In contrast, the evaluation under early neutral evaluation will be admissible as evidence.

Sections 4 through 7 of the bill contain the bulk of the conforming changes related to the reformation of Part D.

Section 4 omits language identifying a refusal to mediate as a potential breach of fiduciary duty. Participation in mediation can be compelled, and the bill eliminates the cap on attorneys' fees incurred to compel mediation.

Section 5 simplifies and clarifies the procedures to dispute assessments, and harmonizes that section with the restructured Part D. The essential characteristics of existing law are preserved. Cumbersome and inefficient language is omitted.

Section 6 preserves existing law providing that the prevailing party in a binding dispute process is entitled to an award of reasonable attorneys' fees and costs. The mechanism to dispute assessments is incorporated by reference, and a safe harbor is provided for owners who accept and comply with the result of an early neutral evaluation. This clear safe harbor is in lieu of a more doubtful one in existing law that purports to apply to mediation and non-binding arbitration.

As noted above, Section 7 repeals the existing sections in Part D in favor of robust subsidy for mediation, binding arbitration and early neutral evaluation. The qualifications of mediators, arbitrators and evaluators are established as is mandatory disclosure of conflicts of interest.

[signed]

Report to the Condominium Property Regime Task Force

MIS- AND DISINFORMATION SHOULD NOT SHAPE OUR POLICIES

BACKGROUND: Hui Oiaio is an independent voice for homeowners in residential community associations, including but not limited to condominiums, planned communities, and cooperatives. We examine matters directly related to residency in homeowners' associations, and we advocate to defend the rights of owners and residents, to enhance the protections they are due, and to promote systemic reform to strengthen democratic governance.

Kokua Council is one of Hawaii's oldest advocacy organizations, serving Hawaii for decades by advocating, informing, and educating the public to improve laws, policies and practices which impact the well-being of seniors, their families, and our communities.

Both the Hui and the Council recognize the impact of association governance on the daily lives of kupuna, affecting ownership costs which have risen and continue to rise beyond historic inflation and exceed increases in their income. No less vulnerable are others with income constraints who own and/or reside in condominium associations.

The typical response from the association trade industry (and, shockingly, that of some DCCA employees who testified in legislative hearings) that owners should sell to escape these rising costs and other effects of misgovernance (e.g., deferred maintenance risking health or safety) reflects a callous disregard for their responsibility in this scheme and an ignorance of current condominium economics: many condominium associations have physically and financially deteriorated and/or are deficient or delayed in upkeeping their safety standards, reducing these associations' ratings as reasonable risks for mortgage lenders or insurers, thereby affecting the salability of these properties.

D&O INSURANCE. Last month, Gordon Arakaki shared an article that was published in the November 2023 issue of Hawaii Bar Journal in which he wrote, "The ICA's decision in *Sakal* appears to have been a substantial factor in the rising costs and lack of availability of Directors & Officers (D&O) liability insurance for condominium and other common interest ownership associations" and he referenced his source as Sue (Surita) Savio, a well-known insurance broker in Hawaii.

However, substantial increases in D&O insurance costs and decreased availability of D&O coverage *preceded* the ICA decision of July 2018.

In 2016, two years *prior* to the ICA decision, Sue Savio presented, "Condos Done Right with Surita Savio"[1] in which she said, to paraphrase, "general liability claims, D&O liability, rates and deductibles are going up…paid out attorney's fees which are usually more than the award," and to which Richard Emery, the host of that session, responded, "Sounds to me [that it is] a rising issue with associations." Both acknowledged the noticeable increase in D&O claims and, consequently, rising costs.

During an April 2018 Condorama seminar[2] which occurred months *before* the ICA decision, Sue Savio addressed "Risk Control and Insurance," and apprised the audience that Hawaii "has more claims than anybody else. We're [the D&O carriers] are out of here. You're a small state with just a few dollars that

[1] https://www.youtube.com/watch?v=CSjxPi55y9I

[2] https://www.youtube.com/watch?v=8wOM10cgYS0&t=353s

you give us, and you have more claims [than] New York…Florida…and California…We [paid] out more directors' and officers' claims…we're going to have a rate increase in Hawaii [and] I wasn't surprised. I knew that's coming, anywhere from 25 to 65 percent [in increased premiums]."

In June 2018, Sue Savio in "AOAO Directors & Officer Insurance Coverage"[3] reiterated, "Hawaii is really terrible for directors' and officers' claims. We have more claims than any other state and you look at somebody as big as California, Florica, New York, you see all these condos and coops and you say why are we so bad, why do we have so many claims."

In these videos Sue Savio did not mention that claims for wrongful foreclosures were aggravating already escalated D&O insurance costs.

Nationwide, in the years *preceding* the ICA decision, concerns of a "hardening" D&O market[4] were reported, exacerbated by concerns over Dodd-Frank Wall Street Reform and other regulatory scrutiny, cyber risks, and fraud. In the decade prior to the ICA decision at least 6.3 million foreclosures had occurred,[5] but an intensive online search of data for that period from the insurance industry did not report that claims for wrongful foreclosures were affecting D&O insurance costs.

In July of 2018, the ICA made their decision on *Sakal v AOAO Hawaiian Monarch*.

This truncated causal nexus--that the ICA decision caused increased insurance costs or the loss of insurance coverage, ignoring other existing influences--repeated by lobbyists in the halls of the State Capitol building gave legislators reason to support SB 551 which became Act 282[6] in 2019 without the Governor's signature.

PROXIES. In July 2023, a video,[7] "Is Self-Governance Under Attack," was produced by ThinkTech Hawaii/Condo Insider, and the hosts were Jane Sugimura and Richard Emery.

These are a few quotations from the two hosts within the first five minutes of the program:

> "Some of these initiatives that people put forth will only harm the industry and increase maintenance fees."
>
> "We got bills on proxies and what the idea was, I guess, that they really wanted to take the discretion away from the board, right, and they only wanted the people who attended the annual meetings to be able to vote on issues and so that would preclude a lot of investor owners and people who couldn't make the annual meeting from participating because they couldn't have the use of proxies."

[3] https://www.youtube.com/watch?v=GMhGIWtKf8A
[4] https://www.businessinsurance.com/article/20120701/NEWS06/307019996/Directors-and-officers-liability-market-hardening and https://www.businessinsurance.com/article/20130121/STORY/399999632/Dodd-Frank-liability-issues-are-still-unsettled-for-companies
[5] https://www.marketwatch.com/story/there-were-63-million-foreclosures-in-the-last-decade-2016-05-31
[6] https://www.capitol.hawaii.gov/sessions/session2019/bills/GM1402_.PDF
[7] https://www.youtube.com/watch?v=nsLUAvqFROE&t=188s

> "I've always argued that they try to change and take away a person's right to be represented by taking away their proxies is unconstitutional because you're now taking away a person's right to be represented in an organization where they own an interest…"

Both the YouTube summary and ThinkTech Hawaii summary of that recorded session incorrectly state,

> "During the 2023 Legislative session, condominium management came under attack by a small group of owners claiming that condo boards, their managing agents and their general counsels were all 'bad' based on anecdotal and not quantitative data. What this group did not acknowledge is that a condominium is a representative democracy and that owners have the ability and the authority to determine their association's fate and direction based on a majority vote of the owners, and if they are not part of the majority, they need to either persuade the other unit owners to agree with their position or accept the fact that as the minority, they cannot change the policies and/or direction of their association. Their personal dissatisfaction with their condominium association or duly elected board should not be a subject matter for legislation."

Everyone has a First Amendment right to state their opinions, but it is appalling that those who portray themselves as experts and instructors wrongly state what the measures proposed.

For LY 2023, measures mentioning the use of proxies were initiated by Kokua Council and Hui Oiaio and

- *none* of them proposed to prevent absentee owners from voting,
- *none* of them proposed to take away the right for owners to be represented,
- *none* of them proposed to limit voting to only those present at the annual meetings,
- *none* of the proposed changes to the election process would have raised maintenance fees, and
- *none* of them argued against democratic principles; instead, our proposals demand the protection of democratic principles.

These proposals were: HB 176,[8] HB 178,[9] HB 377,[10] HB 1297,[11] HB 1501, [12]SB 584,[13] and SB 1201.[14]

These proposals should be read to verify whose statements are correct and whose are misstatements.

Those and similar misstatements, intentional or not, have been injurious to condo owners when the "experts" are not questioned and their mis- or disinformation are accepted as fact. Expert opinions are just that, opinions, and can and have been refuted. As examples, there are two attachments to the email that carries this document entitled "Arbitration Agreement" and "DKT 727." Regarding Docket 727, the Judge agreed and dismissed the experts' testimonies.

(By the way, despite an "expert's" assertion that was quoted above, no Constitutional right to be represented by a proxy could be found.)

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[8] https://www.capitol.hawaii.gov/sessions/session2023/bills/HB176_.HTM
[9] https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=HB&billnumber=178&year=2023
[10] https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=HB&billnumber=377&year=2023
[11] https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=HB&billnumber=1297&year=2023
[12] https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=HB&billnumber=1501&year=2023
[13] https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=SB&billnumber=584&year=2023
[14] https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=HB&billnumber=1297&year=2023

SELF-GOVERNANCE. Instead of restating my position, attached to this document is a letter I wrote to the DCCA in July 2016 (Exhibit A) disputing Phil Nerney's allegations about "threats to self-governance" that preceded his expanded November 2017 Hawaii Bar Journal commentary, "Challenges to Condominium Self Governance."

My arguments remain the same, however, please note that in the time since I wrote that 2016 letter:

- the costs to owners to retain attorneys for legal assistance has been reported as high as $20,000 although most owners report having paid $10,000 as upfront retainers,
- owners and board directors report that the hourly compensation paid to association attorneys now run between $400 and $600 per hour,
- the high number of consumer contacts received by the DCCA Condo Specialists has also ballooned to a high of 96,390 contacts in 2021 and 78,730 in 2021,[15]
- Act 195[16] was signed into law in 2018 which gutted the harmful "priority of payments" scheme mentioned in that letter,
- the number of Hui Oiaio participants has grown three-fold, and
- the long list of their condo associations has grown, too.

Earlier this year, we offered two proposals, HB 178[17] and HB 1501,[18] that suggested the State Implement an out-of-court binding dispute resolution process within the DCCA through an Ombudsman's Office to resolve association-governed community owner complaints with their association Board. (The first proposal was for an Ombudsman's Office for all common interest communities, including condominium associations, planned community associations, and cooperative housing corporations. The second proposal was for an Ombudsman's Office for condominium associations.)

Under our proposals, an Ombudsman's Office would integrate the existing Condominium Specialist position as complaints intake specialists.

Owners' complaints handled by this Office will only concern violations of common interest community laws and/or association governing documents with exceptions approved by DCCA. This will provide owners with an affordable, accessible, effective, and non-litigious venue for alternative dispute resolution to the costly and litigious court system that tests the limited resources of the owner against the unlimited financial and legal resources of the association.

Without this process being implemented, HRS 514B and an association's governing documents will remain mostly administrative, ineffective, continue to be mostly unenforceable, and not lead to resolving the number one issue of owners: enforcement of their rights and protections with their association.

The proposed Ombudsman's Office within the State DCCA will:

- Not use taxpayer general funds; funding is through association registration;
- Not result in material increases in owner assessments or any measurable increase in operating costs on associations, owners, or association management companies;
- Not negatively influence owners from volunteering or increase volunteer legal liability;

[15] https://cca.hawaii.gov/reb/files/2023/02/2022-Annual-Report.pdf
[16] https://www.capitol.hawaii.gov/sessions/session2018/bills/GM1304_.PDF
[17] https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=HB&billnumber=178&year=2023
[18] https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=HB&billnumber=1501&year=2023

- Not inhibit the ability of an association to govern the community;
- Not create more government bureaucracy or entity but build upon that which already exists;
- Not deny an owner or the association the right to a court or other legal action in problem resolution;
- Not interfere or attempt to invalidate or circumvent any local, State, or Federal laws and/or regulations;
- Enforce existing State common interest community association laws and governing documents immediately;
- Allow owners to pursue their rights under the law that they would otherwise not do so because of costs;
- Reduce the millions of dollars that are spent in legal costs between disputing owners and associations; and
- Work to improve association governance through legislative initiatives.

The Ombudsman's Office would receive, review for acceptance or rejection, investigate and render decisions on complaints.

The Office is to be initially funded through an association registration fee of $25.00 per biennium per unit (the equivalent of $1.04 per month per unit). Real Estate Commissioner Richard Emery's claim of 2053 associations could not be validated so, upon inquiry, the DCCA provided a response (attached).

Using the DCCA's number to calculate the amount that can be collected to fund the Ombudsman's Office if only condominium units are considered:

230,729 units X $1.04 = $239,958 per month or, $2,879,497 per year

A minimal non-refundable complaint filing fee (e.g., $25 to $50) would be assessed to mitigate the filing of frivolous complaints and to defray the costs of processing. The Office would be empowered to impose injunctive relief and non-monetary penalties for association non-compliance with HRS 514B or an association's governing documents.

The Office will have the authority to invoke penalties on an association including the removal of an association Board member(s), suspend the association's authority to impose fines, liens or pursue foreclosures, and other penalties as deemed appropriate by the Office. The Office would retain all responsibilities of the DCCA Real Estate Commission's current mission[19] and include that the Office should:

> *"...procure continuing education classes for licensees who specialize in condominium sales, existing condominium board members, and account executives/community managers...[and] distribute informational post cards, electronic copies of chapter 514B, HRS, and Rules to each registered association and registered condominium managing agent ("CMA")."*

And:

> *"review and recommend amendments to licensure requirements to improve consumer protection, continue exploration with Department/PVL of new online licensing application system, streamline the licensing program for new real estate licenses including salespersons, brokers, corporations,*

[19] https://cca.hawaii.gov/reb/files/2023/03/pow22-23.pdf

partnerships, sole proprietors, branch offices, broker experience, including laws, rules, policies, procedures, forms, information, records management, review process, etc."

And:

"develop and collect information and statistical data for education and annual report purposes, especially evaluative mediation under and voluntary binding arbitration under Act 57 (SLH 2020); provide periodic reports to CRC on material information on each case submitted for subsidy programs, to be utilized, in education programs, including Condo Bulletin and REC website."

MEDIATIONS. Accompanying this paper is a simple "linear" analysis of mediation case summaries reported since the Fall of 1991 in issues of the Hawaii Condominium Bulletin[20] (look under "publications"). This analysis is an expansion of an earlier analysis which only went as far back as July 2015 when subsidized evaluative mediations began.

It is considered a "linear analysis" because cases reported as having been "mediated to agreement," "mediated; agreement," "agreement," or something that reflected agreement among the parties were tallied under the column heading, "mediated to agreement."

Similarly, those cases that were reported to have been "mediated, no agreement," "no agreement," or similar are tallied under the column, 'mediated, no agreement."

Those cases in which the association or its board declined or failed to mediate, failed to respond, withdrew from mediation, or similar, are tallied under "assn did not mediate."

When the reported case indicated that the owner withdrew, failed to show up or respond, declined to mediate, or similar, then that case was tallied under "owner didn't mediate."

The rare cases in which the mediation was elevated to arbitration are tallied under that column.

All other cases, when the outcome was unclear (e.g., "mediated," "closed"), if there was no mediation, if both parties declined mediation, or if the case was settled outside of mediation, are tallied under the column, "other."

Those who were present during the second meeting of the CPR Task Force will recall that Condo Specialist Dathan Choy, said, to paraphrase, that that nothing is withheld, and the Hawaii Condominium Bulletins report what information the DCCA receives from the mediation centers.

The DCCA also produced an analysis ("Total Stats FY03-24") that tallied mediation case reports. Rather than review the twenty years documented in that analysis, a shorter sample period was selected—the fiscal year ending 2003 to fiscal year ending 2024 thus far—for examination.

A sizeable deviation in data compared to the linear analysis was noted. For ease of comparison, the most recent copies of the Hawaii Condominium Bulletin for the period FY 2023 and FY 2024 are attached as Exhibit B. Please compare these case summaries with the linear analysis and the DCCA's statistics.

[20] https://cca.hawaii.gov/reb/

Then, during the last CPR Task Force meeting, Richard Emery said, to paraphrase, that the most frequent dispute in mediation is "arguments over insurance deductibles." However, a review of over 30 years of mediation case summaries as reported in all online Hawaii Condominium Bulletins reveals no reference to "insurance deductibles" or "deductibles," and only one reference to "insurance assessment" (in the attached June 2022 Hawaii Condominium Bulletin Mediation Case Summaries).

During those thirty-plus years of Hawaii Condominium Bulletins Mediation Case Summaries, there were 57 references to water, leaks, water intrusions, floods, sprinklers, damage, and two references to wastewater ("sewer"). Although there may be a relationship, these water events are not the same as "insurance deductibles."

This difference is important because disputes over insurance deductibles imply that owners are disputing those charges, whereas disputes over damages and repairs do not convey the same bias regarding owners.

Importantly, the oft repeated phrase, "mediations are successful," must be proven, not to eliminate it as a method of alternative dispute resolution, but to assess whether that method is effective.

In the linear analysis of mediation cases since the Fall of 1991, the number of cases "mediated to agreement" and "mediated; no agreement" are roughly the same. But it is also evident that an even larger number of cases that were submitted to mediation fell into the category, "other," most of which were not settled or were mediated but without reporting any agreement.

Notice, too, that the owners with disputes against their association or boards exceeded the number of disputes by association or boards against owners by more than four-fold.

Although this following conclusion is based on *interpretations* of the mediation case summaries (noted in grey colored font and defined as such on the linear analysis matrix), allegations of violations of governing documents also exceeded the allegations of violations of HRS 514B by huge multiples.

Thus, any alternative dispute resolution method that the Task Force entertains should address disputes by owners against their association or board and disputes about violations of the governing documents, not just HRS 514B issues. Bylaw and House Rules violations should not require elevation to costly Court cases for resolution. As the preface to HB 1509 stated, "Such a resort may be costly to the owner in comparison to the gravity of the dispute and an alternative mechanism should be examined."

ENFORCEMENT. Current HRS 514B laws are mostly administrative and there are few penalties in the law for board members and community association managers (CAMs[21]) who knowingly violate HRS 514B or the association's governing documents, thus unprincipled directors and CAMs have minimal incentive to follow the statutes or governing documents. And penalties against the association punish innocent association members, not the directors or CAM who violated the laws.

There is a harmful misperception that the mere existence of a law means that it should be observed or that it will be enforced.

[21] CAM are community association managers, the individuals who serve associations, and are employed by CMAs, condominium managing agents which may be individuals or companies.

EXHIBIT A

Hui `Oia`i`o
2051 Young Street #51
Honolulu, Hawaii 96826
Oiaio.coco@gmail.com
July 12, 2016

Real Estate Commission
Condominium Review Committee
King Kalakaua Building
335 Merchant Street, Rm 333
Honolulu, HI 96813

Re: THE END OF SELF-GOVERNANCE

Dear Sirs and Madams,

A CAI-HAWAII brochure cautions *"Topics. Threats to self-governance. Strong efforts have been made to substantially impair or to effectively end association self-governance. They will continue."*

A brochure advertising the quarterly HCCA (Hawaii Council of Community Associations) class presents as a *"Hot Topic," "The Future of Self Governance. Will an Ombudsman take away your authority to make decisions? Will Associations lose [their] right of self-governance?"*

The apocalyptic "end of self-governance" incitement is about as sincere as the calls of the boy who cried "wolf," which should be a warning to those heralds to temper their alarms.

THE FALSE ARGUMENT - The House Consumer Protection and Commerce Committee's efforts and that of the Hui's regarding HB1802, the "condo ombudsman" measure, were conflated in a recent CAI Hawaii article, "The End of Self-Governance?" as if we Condo Owners amended the original bill to create the provocative "Condo Czar" under the oxymoronic, "Office of Self-Governance Oversight."

With apologies to those Legislators who tried to assure that Condo Owners will have equal protection under the law, it was the House Committee who contrived that controversial amendment, the so-called "magic bullet" the author mentions.

We Condo Owners knew better than to conjure even the mere appearance of an absolutist authoritarian ("czar") when we ourselves are actively seeking a more egalitarian approach to dispute resolution, including relief from dictatorial Boards and/or Managers.

Our efforts to achieve a fairer and more protective justice system are undermined when dressed in the CAI-Hawaii author's fabrications threatening increased government oversight, loss of access to courts, and loss of ability and right to self-govern. The author suggests that our endeavor assaults the fundamental policy of self-governance, and claims, *"you could literally come to live in government run housing. Really. No joke."*

ARGUMENTUM AD HOMINEM - The pre-emptive efforts to discredit Condo Owners and the manipulated conflation suggests that the author could not find a decent argument against what we represent. Maligned as "dissatisfied," "disgruntled," and now, "unhappy" people who make "unrealistic demands upon legislators," the Hui seeks to help outmatched, overwhelmed condominium Owners who are fighting for their basic rights under our condominium laws.

ONE OF OUR POSITIONS - As an example, the current law fails to address the costliest aspect for parties seeking justice, the "condo lawyers."

While a board must have access to legal counsel in order to discharge its duties, too often boards seek the costly services of a lawyer for matters which simply do not warrant the cost, such as to block an Owner who seeks to exercise his/her right to a copy of the Minutes of Board meetings or an employee's job description.

Owners must hire, at their own expense, a lawyer to enforce their rights and responsibilities, but the majority of Owners are not able to expend the large amounts of money and time required to assert their rights or to enforce compliance by their boards. The average minimum retainer a condominium lawyer requires from an Owner wishing legal representation is $3,000 to $5,000 for the simplest of matters. At an average cost of over $250 per hour, that retainer will not provide much assistance to an Owner.

On the other hand, boards have access to unlimited funds contributed by Owners. Condominium lawyers have an abundance of experience and skill at prolonging matters to the point where a unit Owner can simply no longer afford to continue his/her action or claim. A board could even assess its association for more money if its lawyer needed more.

Further, under the current law, many boards have passed a "priority of payments" such as the following:

> *At any time there are unpaid Legal Fees, Late Fees, Fines, Bad Check Charges, Agreement of Sale Payments, or Special Assessment Fees on an Association Member's account ledger, the next Association/Maintenance Fee payment received from that Association Member will be first applied to liquidating these fees in the order as stated above. After these fees are paid, the remaining amount, if any, will be credited to the Association's Association/Maintenance Fee assessment account. This procedure is sometimes referred to as "Priority of Payments".*

This order of payments, in conjunction with HRS514B-104, *"if the fine is paid, the unit owner shall have the right to initiate a dispute resolution process,"* makes it difficult for an Owner as swelling legal fees must be paid before the fine is even paid, thus forestalling dispute resolution. In one association alone, Owners' legal fees are claimed to be in the tens of thousands of dollars, all which started as $100, $200, and $300 fines over alleged violations, and which continue to balloon as the attorneys prolong resolution and add more attorneys to inflate their ranks. Some of these cases have been going on for years.

ON SEEKING CURES - Rather than recognize that systemic problems may require legislative action, our challengers will have you believe that legislators respond to isolated and peculiar incidents which involve marginalized constituents and warn of kneejerk reactions with lethal consequences of burdensome oversights.

Curiously, the condo industry go to legislators, too, through lobbyists to advocate for them. But their arrogance in being "experts" cannot shroud the faulty laws that they advocated, such as the aforementioned "pay first, dispute later" law.

Simply put, they advocate for their commercial benefit; we advocate for condo owners.

IN SUPPORT OF SELF-GOVERNANCE - Typical government responsibilities were transferred to associations to alleviate public governments from those costs and responsibilities. Condominiums and similar common-interest communities allow greater density and more efficient use of land. These communities can provide amenities and with certain internal controls, such as design or architectural, can protect, preserve and enhance property values. Many condo owners purchased with that knowledge, some even desired those controls, and thus are not averse to the policy of self-governance and appreciate its intent.

What most Condo Owners did not realize was that associations may arbitrarily impose written and unwritten rules on owners and residents, with or without justification, often without due process, and that those same

associations are shielded by attorneys and are nearly immune because applicable statutes are largely not enforceable or do not exist.

Requesting oversight is not the same as vacating the principle of self-governance. Private commercial entities are not exempt from laws and are subject to government oversight; the more risk to consumers, the greater the regulations. Except in the condo industry.

WHO WE ARE - Hui `Oia`i`o which, as an entity, did not exist even a year ago, now numbers in the hundreds, and many of us are, or have been, Board Directors. Many are accomplished professionals with prestigious successes as attorneys and judges, doctors and scientists, engineers, architects, educators, military officers, and business owners, and do not require the plebeian title, "Board Director," to feel fulfilled or acknowledged.

As of this date, we come from over a hundred condominium associations throughout Oahu; there are more but many Hui participants do not want to disclose their association's name for fear of retaliation. Even without a website and without advertisement, we continue to grow, our connections forming by word of mouth; we even have participants from as far away as Alaska, Florida, Japan, and Tahiti who own Hawaii properties.

SUMMARY - In the last two years, the REC itself reported that Condo Specialists received over 28,000 contacts per year from consumers; that simple statistic belies the illusion that all is well in the condo world.

Many Commissioners are Realtors and may have heard from clients of their condo woes. Complaints about rising maintenance fees are often dismissible until you hear that the increases are unmanageable. Complaints about rule violations can be handled with a little education, until you hear that there are no such written rules or the violation was fraudulently manufactured. Complaints about self-dealing, embezzlement, kick-backs, and other unconscionable acts alarm you into realizing that *something* must be done. That *something*—enforcement of existing laws and enhancement of consumer protections--does not abolish self-governance.

We ask that you look beyond those false alarmists "crying wolf," and that you calmly realize that seeking greater protection of ownership rights including a fairer justice system will not force us into government run housing and will not cause us to lose access to courts.

We did not decry mediation which the author defends, but reveal that the steps to getting there are often too arduous to surmount. And we ask that you recognize the fallacious hyperboles in the author's argument and wonder what his real motives are.

Beyond dispute resolution, there is so much that needs to be done for the nearly 40% of Hawaii residents who currently live in condominium and homeowners' associations. In about a dozen years, 80% of all new housing starts will be in community associations.

I leave you with two quotes and a cartoon:

"If all men were angels, there would be no need for government." ~~ James Madison

"If you are not a part of the solution, you are a part of the problem." ~~ Elridge Cleaver

Respectfully,

/s/

Lila Mower, ad hoc spokesperson for Hui `Oia`i`o

EXHIBIT B

Mediation Case Summaries

From June 2022, through August 2022, the following condominium mediations or arbitrations were conducted pursuant to Hawai`i Revised Statutes §§ 514B-161 and 514B-162.5 and subsidized by the Real Estate Commission for registered condominium associations. The Mediation Center of the Pacific conducted additional condominium mediations through the District Courts while mediation providers conducted community outreach in their respective communities.

Dispute Prevention and Resolution, Inc.

AOUO vs. Owner	Owner claimed to have been improperly charged for expenses incurred by AOUO in dealing with tenant.	Mediated to agreement.
Owner vs. AOUO	Dispute regarding change in designation of lanai added on to existing units.	Mediated to agreement.
Owner vs. AOUO	Owner alleged AOUO was not in compliance with financial requirements imposed by Chapter 514B.	Mediated; no agreement.
AOUO vs. Owner	Issue regarding the removal of flooring installed as an accommodation for owners; owners moved from the unit without removing the flooring.	Mediated to agreement.
Owner vs. AOUO	Owner alleges harm due to AOUO's failure to properly follow the reserve provisions of the condo minimum law. Mediated; some issues settled. Parties may agree to continue mediating outstanding issues.	

The Mediation Center of the Pacific, Inc.

Owner vs. AOUO	Dispute over interpretation of bylaws regarding monies received for water damage and insurance assessment. After contact, parties declined to mediate.

2022 Legislative Review

This past legislative session, one bill, Act 62, made changes to the condominium law by amending HRS Chapter 514B. Other bills signed into law, while not amending HRS Chapter 514B, will nonetheless influence condominium living. Here's a review of this past legislative session's bills and how they may affect your life in a condominium association. The text of these and other bills may be found at www.capitol.hawaii.gov/.

Act 62 amended the condominium law. The purpose of the Act is to:

1. specify that a condominium declaration may be amended at any time by the vote or written consent of unit owners representing at least 67% of the common interest;
2. require the developer's public report to include annual reserve contributions based on a reserve study as part of the breakdown of the annual maintenance fees;
3. clarify time and date requirements for petitions to amend bylaws and calls for special meetings; time frame for approval of minutes; and board meeting participation;
4. clarify conditions regarding the use of electronic voting devices;
5. specify that the use of electronic meetings and electronic, machine, or mail voting are to be at the sole discretion of the board and expands the circumstances under which such use is authorized;
6. require that the reserve study be performed by an independent reserve study preparer not affiliated with the managing agent of the association and require that the reserve study be prepared or updated at least every three years; and
7. specify that an association's cash flow plan be based on a 30-year projection.

One noteworthy inclusion in Act 62 is the requirement that the developer's public report include future annual reserve contributions, based on a reserve study, as part of the breakdown of the annual maintenance fees. The developer's public report contains important information about a condominium project. It should be reviewed carefully by prospective buyers when considering a purchase before making any commitments to buy a unit. Act 62 requires that information on future annual reserve contributions be included in the developer's public report. A projection of future reserve contributions helps a prospective buyer to be fully informed of future costs before he or she buys in to the project. The more people are prepared for the social and financial realities of condo living, the greater the chance for a peaceful condominium community.

Mediation Case Summaries

From September 2022, through November 2022, the following condominium mediations or arbitrations were conducted pursuant to Hawai'i Revised Statutes §§ 514B-161 and 514B-162.5 and subsidized by the Real Estate Commission for registered condominium associations. The Mediation Center of the Pacific conducted additional condominium mediations through the District Courts while mediation providers conducted community outreach in their respective communities.

Dispute Prevention and Resolution, Inc.

Owner vs. AOUO	Owners alleged the association was not enforcing or selectively enforcing, the declaration and bylaws of the association.	Mediated to agreement.
Owner vs. AOUO	Owners were fined for allegedly conducting unpermitted work on their unit. Owners allege penalties were retaliatory and selectively enforced.	Mediated; no agreement.
AOUO vs. Owner	AOUO instructed owners to remove certain appliances from their units due to plumbing issues. Owner refused asserting it was a necessary reasonable accommodation.	Mediated; no agreement.
AOUO vs. Owner	Board requested owner remove appliances not allowed pursuant to the house rules. Owner refused.	Mediated; no agreement.
Owner vs. AOUO	Owner alleges AOUO must provide a parking stall to comply with Fair Housing laws.	Mediated; no agreement.
AOUO vs. Owner	AOUO alleges owner properly installed doors to owner's unit in violation of project documents.	Mediated; no agreement.
Owner vs. AOUO	Allegation that the board withheld information regarding litigation from all owners of the association.	Mediated; no agreement.

Mediation Center of the Pacific, Inc.

Owner vs. AOUO	Owner alleged violation of bylaws regarding maintenance fees after foreclosure on owner's unit.	Mediated; no agreement.
Owner vs. AOUO	Alleged violation of house rules regarding the use of medical marijuana. Owner withdrew mediation request.	
Owner vs. AOUO	Owner questioning maintenance fees in comparison with other units. After intake with the parties, no mediation occurred.	

West Hawai'i Mediation Center

Owner vs. AOUO	Issue regarding repair work done on owner's lanai, who was responsible for the work and for the legal fees incurred over this issue. Owner subsequently withdrew request for mediation.	

Mediation Case Summaries

From December 2022, through February 2023, the following condominium mediations or arbitrations were conducted pursuant to Hawai`i Revised Statutes §§ 514B-161 and 514B-162.5 and subsidized by the Real Estate Commission for registered condominium associations. The Mediation Center of the Pacific conducted additional condominium mediations through the District Courts while mediation providers conducted community outreach in their respective communities.

Dispute Prevention and Resolution, Inc.

Owner vs. AOUO	Dispute regarding noise between upstairs and downstairs unit owners and the installation of flooring. Dispute between owners settled; one owner working on remaining issues with AOUO regarding house rules enforcement.	
AOUO vs. Owner	Issues involved delinquent maintenance fees and resulting attorney's fees pursuant to the project documents.	Mediated; no agreement.
AOUO vs. Owner	AOUO alleges modifications made to owner's unit in violation of project documents.	Mediated; no agreement.
Owner vs. AOUO	Owner blamed AOUO and two other unit owners for negative health effects from noxious odors coming from owners' units, in violation of project documents.	Mediated; no agreement.
Owner vs. AOUO	Owner challenged board's decision to begin a construction project and obtain construction loan.	Mediated; no agreement.
Owner vs. AOUO	Owners allege unfair treatment by board to owners not in the association rental pool in violation of declaration and bylaws. Parties have agreed to participate in arbitration after mediation.	Mediated; no agreement.
Owner vs. AOUO	Dispute alleging violation of project documents relating to noise levels at a commercial venue on association property.	Mediated to agreement.
AOUO vs. Owner	Alleged violations of smoking and noise rules by owners.	Mediated; no agreement.
Owner vs. AOUO	Dispute regarding water intrusion into the unit and subsequent mold damage.	Mediated; no agreement.
Owner vs. AOUO	Owners allege meeting mismanagement, lack of reasonable accommodation for owners and removal of water hose on common element property.	Mediated; no agreement.
Owner vs. AOUO	Owners dispute construction projects and resulting assessments.	Mediated; no agreement.
Owner vs. AOUO	Owner alleged improper amendment of declaration regarding lanai enclosures.	Mediated; no agreement.
Owner vs. AOUO	Association asserted that the newly installed water heater was not in compliance with the bylaws.	Mediated; no agreement.
Owner vs. AOUO	Owners allege modifications were made to the common elements in contravention of the declaration.	Mediated; no agreement.

Mediation Case Summaries

Mediation Center of the Pacific, Inc.

Owner vs. AOUO	Owner alleged violation of bylaws regarding maintenance fees after foreclosure on owner's unit.	Mediated; no agreement.
Owner vs. AOUO	Owner alleged violation of house rules and bylaws regarding air conditioning charges, storage locker use, and elevator repairs. After intake, with all parties, owner withdrew from mediation.	
Owner vs. AOUO	Issues involving handicap parking stalls and house rules. Owner withdrew request for mediation.	

Maui Mediation Services

Owner vs. AOUO	Owner disagrees with lighting installed on association property. Dispute resulted in attorney's fees imposed on owner.	Mediated; no agreement.

To consult with any of our subsidized private mediation services, contact one of the following providers:

Oahu
Mediation Center of the Pacific, Inc.
245 N. Kukui Street, #206
Honolulu, HI 96817
Tel: (808) 521-6767
Fax: (808) 538-1454
Email: mcp@mediatehawaii.org

Maui
Mediation Services of Maui, Inc.
95 Mahalani Street, Suite 25
Wailuku, HI 96793\
Tel: (808) 244-5744
Fax: (808) 249-0905
Email: info@mauimediation.org

West Hawaii
West Hawaii Mediation Center
65-1291 Kawaihae Road, #103B
Kamuela, HI 96743
Tel: (808) 885-5525 (Kamuela)
Fax: (808) 887-0525
Email: info@whmediation.org

East Hawaii
Ku'ikahi Mediation Center
101 Aupuni St. Ste. 1014 B-2
Hilo, HI 96720
Tel: (808) 935-7844
Fax: (808) 961-9727
Email: info@hawaiimediation.org

Kauai
Kauai Economic Opportunity, Inc.
2804 Wehe Road
Lihue, HI 96766
Tel: (808) 245-4077 Ext. 229 or 237
Fax: (808) 245-7476
Email: keo@keoinc.org

Lou Chang, A Law Corporation
Mediator, Arbitrator, Attorney
Member, National Academy of Arbitrators
P.O. Box 61188, Honolulu, Hawaii 96839
Tel: (808) 384-2468
Email: louchang@hula.net
Website: www.louchang.com

Charles W. Crumpton
Crumpton Collaborative Solutions LLLC
TOPA Financial Center, Suite 702
745 Fort Street, Honolulu, Hawaii 96813
Tel: (808) 439-8600
Email: crumpton@chjustice.com
Websites: www.acctm.org; www.nadn.org; www.accord3.com; and www.mediate.com

Dispute Prevention and Resolution
1003 Bishop Street, Suite 1155
Honolulu, HI 96813
Tel: 523-1234
Website: http://www.dprhawaii.com/

Mediation Case Summaries

From March through May of 2023, the following condominium mediations or arbitrations were conducted pursuant to Hawai'i Revised Statutes §§ 514B-161 and 514B-162.5 and subsidized by the Real Estate Commission for registered condominium associations. The Mediation Center of the Pacific conducted additional condominium mediations through the District Courts while mediation providers conducted community outreach in their respective communities.

Dispute Prevention and Resolution, Inc.

Owner vs. AOUO	Dispute over the collection of delinquent main tenance fees as allowed by the bylaws.	Mediation; no agreement.
AOUO vs. Owner	Dispute over removal of in-unit appliances.	Mediated to agreement.
Owner vs. AOUO	Owner alleged AOUO breached its fiduciary duty to owner. Parties mediated and exchanged settlement offers.	
AOUO vs. Owner	AOUO alleged owners installed AC unit in violation of bylaws.	Mediated to agreement.
Owner vs. AOUO	Owner alleged accusations of making changes to his unit in prohibition of bylaws were false and hurt his reputation.	Mediated; no agreement
Owner vs. AOUO	Dispute over payment for injuries received in the common area.	Mediated to agreement.
AOUO vs. Owner	Issue regarding AOUOs denial of owner's request to pay off share of owners' loan amount after deadline to pay had passed.	Mediated; no agreement.
Owner vs. AOUO	Dispute involving sewage leak into owner's unit and responsibility for repairs and expenses.	Mediated to agreement.
AOUO vs. Owner	Alleged violation of noise provisions in declaration and bylaws by owner to the disturbance of surrounding unit owners. Mediation resulted in no agreement as such, but the parties agreeing to noise testing guidelines.	

Mediation Center of the Pacific, Inc.

Owner vs. AOUO	Owner alleged property manager and board were ignoring house rule and bylaw violations.	Unable to schedule mediation. Case closed.
Owner vs. AOUO	Owner alleged violation of bylaws in board and property manager not providing notice of board meetings. Owner withdrew request for mediation after discussion with parties and settling dispute.	
Owner vs. AOUO	Owner alleged board not following bylaws in determining dollar amount for damages to owner's unit. Owner subsequently withdrew request for mediation with MCP; said it would use another mediation provider.	
Owner vs. AOUO	Owner alleged violation of the bylaws regarding the discussion of the association's budget at meetings. Parties did not agree to meet for mediation.	

Mediation Case Summaries

Lou Chang, A Law Corporation

Owner vs. AOUO	Issues involved allegations of improper association management, improper use of funds and alleged discrimination against owner. After mediating, several issues were resolved, but no overall agreement reached. Evaluative assessment was provided to the owner.

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Oahu
Mediation Center of the Pacific, Inc.
245 N. Kukui Street, #206
Honolulu, HI 96817
Tel: (808) 521-6767
Fax: (808) 538-1454
Email: mcp@mediatehawaii.org

Maui
Mediation Services of Maui, Inc.
95 Mahalani Street, Suite 25
Wailuku, HI 96793\
Tel: (808) 244-5744
Fax: (808) 249-0905
Email: info@mauimediation.org

West Hawaii
West Hawaii Mediation Center
65-1291 Kawaihae Road, #103B
Kamuela, HI 96743
Tel: (808) 885-5525 (Kamuela)
Fax: (808) 887-0525
Email: info@whmediation.org

East Hawaii
Ku'ikahi Mediation Center
101 Aupuni St. Ste. 1014 B-2
Hilo, HI 96720
Tel: (808) 935-7844
Fax: (808) 961-9727
Email: info@hawaiimediation.org

Kauai
Kauai Economic Opportunity, Inc.
2804 Wehe Road
Lihue, HI 96766
Tel: (808) 245-4077 Ext. 229 or 237
Fax: (808) 245-7476
Email: keo@keoinc.org

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Tel: (808) 384-2468
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Charles W. Crumpton
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TOPA Financial Center, Suite 702
745 Fort Street, Honolulu, Hawaii 96813
Tel: (808) 439-8600
Email: crumpton@chjustice.com
Websites: www.acctm.org; www.nadn.org; www.accord3.com; and www.mediate.com

Dispute Prevention and Resolution
1003 Bishop Street, Suite 1155
Honolulu, HI 96813
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THE AKAMAI BUYER

What to Consider Before You Buy a Condo

Before you make the leap and purchase a condominium unit, check to see whether pets are allowed. If your family unit includes a pet or pets, you'll need this information. Check the bylaws of the association and the house rules for any prohibitions on keeping pets. For example, while pets may be allowed, size and number restrictions are common in associations that allow pets. Is your pet too large? Do you have more than the accepted number of pets?

Also, is smoking allowed in the building in the open common areas? Is smoking allowed in the individual units? Do you have a health condition where it's important to avoid secondhand smoke? Disputes over secondhand smoke are common. Check the bylaws and house rules for any smoking prohibitions. Even if smoking is allowed in individual units only, in some buildings secondhand smoke seeps through to adjacent units.

Knowledge and information are the best tools that a potential buyer can have.

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Mediation Case Summaries

From June through August of 2023, the following condominium mediations or arbitrations were conducted pursuant to Hawai`i Revised Statutes §§ 514B-161 and 514B-162.5 and subsidized by the Real Estate Commission for registered condominium associations. The Mediation Center of the Pacific conducted additional condominium mediations through the District Courts while mediation providers conducted community outreach in their respective communities.

Dispute Prevention and Resolution, Inc.

Owner vs. AOUO	Dispute regarding changing the use of the common elements	Mediated to agreement.
Owner vs. AOUO	Owner alleged selective enforcement of rules by the condo board and harassment of owners.	Mediated to agreement.
Owner vs. AOUO	Dispute over interpretation of provision in the declaration; challenge to this provision by some owners.	Mediated; no agreement.
Owner vs. AOUO	Dispute regarding the cost of common elements as shared among the owners. Participants mediated and have decided to proceed to arbitration.	
Owner vs. AOUO	Allegation of inconsistent enforcement of house rule violations among owners.	Mediated; no agreement.
Owner vs. AOUO	Owners allege lack of any response by AOUO to dog attack and resultant injury to owners. Owners also allege AOUO using unlicensed contractors to repair water leaks into their unit.	Mediated to agreement.

West Hawai'i Mediation Center

Owner vs. AOUO	Owner disputed fines incurred against her and requested mediation.	Mediated; no agreement.

Lou Chang, A Law Corporation

Owner vs. AOUO	Dispute over board policies, board actions, and repair of plumbing damages. Evaluative assessments provided the participants.	Mediated; no agreement.

To consult with any of our subsidized private mediation services, contact one of the following providers:

Oahu
Mediation Center of the Pacific, Inc.
1301 Young Street, 2nd Floor
Honolulu, HI 96814
Tel: (808) 521-6767
Fax: (808) 538-1454
Email: mcp@mediatehawaii.org

Maui
Mediation Services of Maui, Inc.
95 Mahalani Street, Suite 25
Wailuku, HI 96793
Tel: (808) 244-5744
Fax: (808) 249-0905
Email: info@mauimediation.org

West Hawaii
West Hawaii Mediation Center
65-1291 Kawaihae Road, #103B
Kamuela, HI 96743
Tel: (808) 885-5525 (Kamuela)
Tel: (808) 326-2666 (Kona)
Fax: (808) 887-0525
Email: info@whmediation.org

East Hawaii
Ku'ikahi Mediation Center
101 Aupuni St. Ste. 1014 B-2
Hilo, HI 96720
Tel: (808) 935-7844
Fax: (808) 961-9727
Email: info@hawaiimediation.org

Kauai
Kauai Economic Opportunity, Inc.
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Websites: www.acctm.org; www.nadn.org; www.accord3.com; and www.mediate.com

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11. [redacted] I relies on the report of Richard B. Emery to support its claim for $61,642. This appears to represent an amount [redacted] II should have contributed into a reserve account for replacement of the existing water and sewer lines which have been used by both condominium complexes since 1967.

Mr. Emery correctly states in his report that the fundamental principle of a reserve study is to pay for a component for the period it is used. This principle depends upon the estimated life of the component and the estimated cost of replacement.

12. There are serious questions concerning the reliability of Mr. Emery's opinions.

First, there is no actual reserve for utility lines which has been done by [redacted] I or [redacted] II.

Second, Mr. Emery assumes a replacement cost of $500,000 without the benefit of an opinion from any contractors.

Third, for purposes of apportioning use of the utility pipelines, Mr. Emery seems to assume that the use made by the tenants of the one-bedroom units in [redacted] II is the same as the tenants of the [redacted] I complex, which contains 24 two-bedroom units designed to accommodate vacationing families with children.

Fourth, Mr. Emery assumes that pipe failure is solely related to use. Anyone familiar with maintenance of utility pipelines in Hawaii is aware that the intrusion of salt water under the surface of the land has a high corrosive effect. The pipelines in question serve oceanfront developments.

Fifth, Mr. Emery assumes that within the next 55 years the water and sewage pipelines will have to be replaced. He does not discuss current scientific studies

concerning the global effects of climate change, some of which are predicting that the first floors of both subject condominium complexes will be inundated by sea water within 40 years.

Sixth, Mr. Emery fails to mention that for the past 45 years the owners of [redacted] II units have been paying funds into a common facilities maintenance account at a rate significantly higher than the owners of [redacted] I units.

13. The conclusion reached by the Arbitrator is that the claim of damages for past use based upon an assumed need for replacement of the subject utility lines should be denied.

RELATING TO CONDOMINIUMS

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII

SECTION 1. The legislature established a condominium property regime task force within the department of commerce and consumer affairs in 2023, pursuant to Act 189, to:

(1) Examine and evaluate issues regarding condominium property regimes governed by chapter 514B, Hawaii Revised Statutes, and conduct an assessment of the alternative dispute resolution systems that have been established by the legislature;

(2) Investigate whether additional duties and fiduciary responsibilities should be placed on members of the boards of directors of condominium property regimes; and

(3) Develop any legislation necessary to effectuate the purposes of this subsection.

The task force has developed proposed legislation intended to enhance the opportunities for resolution of condominium-related disputes. The purpose of this bill is to promote the use of alternative dispute resolution methods for condominium-related disputes. The legislature finds that the amendment of Part D of chapter 514B of the Hawaii Revised Statutes will promote the use of alternative

dispute resolution methods for condominium-related disputes. Corresponding changes to other parts of chapter 514B will serve the same purpose.

SECTION 2. Section 514B-3 of the Hawaii Revised Statutes is amended to add the following definition:

> **§514B-3 Definitions.** As used in this chapter and in the declaration and bylaws, unless specifically provided otherwise or required by the context:
>
> "Condominium-related dispute" means a dispute between a unit owner and the board, unit owner and the managing agent, board members and the board, or directors and managing agents and the board;

SECTION 3. Section 514B-71 of the Hawaii Revised Statutes is amended to read as follows:

> **§514B-71 Condominium education trust fund.** (a) The commission shall establish a condominium education trust fund that the commission shall use for educational purposes. Educational purposes shall include financing or promoting:
>
> (1) Education and research in the field of condominium management, condominium project registration, and real estate, for the benefit of the public and those required to be registered under this chapter;

(2) The improvement and more efficient administration of associations;

(3) Expeditious and inexpensive procedures for resolving association disputes; and

(4) Support for [~~mediation of condominium related disputes; and~~] alternative dispute resolution, as prescribed in part D of this chapter;

[~~(5) Support for voluntary binding arbitration between parties in condominium related disputes, pursuant to section 514B-162.5.~~]

(b) The commission shall use all moneys in the condominium education trust fund for purposes consistent with subsection (a). Any law to the contrary notwithstanding, the commission may make a finding that a fee adjustment is appropriate and adjust the fees paid by associations to regulate the fund balance to an appropriate level to maintain a reasonable relation between the fees generated and the cost of services rendered by the condominium education trust fund. For the purposes of finding that a fee adjustment is appropriate in order to maintain a reasonable relation between the fees generated and the cost of services rendered by the fund, the commission's review shall include the following:

(1) Frequency and timing of anticipated revenue to the fund;

(2) Identification of a reserve amount based on unanticipated revenue reductions and historical expenditures;

(3) Anticipated expenses paid, including recovery payouts during a biennial budget cycle;

(4) Unanticipated natural disasters or catastrophic weather events that may increase fund payments; and

(5) Any statutory adjustments to fund payout amounts.

The balance of the fund shall not exceed a sum determined by the commission. The sum shall be determined by the commission biennially.

SECTION 4. Section 514B-106(a) of the Hawaii Revised Statutes is amended to read as follows:

§514B-106 Board; powers and duties. (a) Except as provided in the declaration, the bylaws, subsection (b), or other provisions of this chapter, the board may act in all instances on behalf of the association. In the performance of their duties, officers and members of the board shall owe the association a fiduciary duty and exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 414D. [~~Any violation by a board or its officers or members of the~~

~~mandatory provisions of section 514B-161 or 514B-162 may constitute a violation of the fiduciary duty owed pursuant to this subsection; provided that a board member may avoid liability under this subsection by indicating in writing the board member's disagreement with such board action or rescinding or withdrawing the violating conduct within forty-five days of the occurrence of the initial violation.~~]

SECTION 5. Subsections (c), (d), (e), (f) and (g) of section 514B-146 of the Hawaii Revised Statutes are amended by deleting those subsections in their entirety and substituting therefor subsections to read as follows:

~~(c) A unit owner who receives a demand for payment from an association and disputes the amount of an assessment may request a written statement clearly indicating:~~

~~(1) The amount of common expenses included in the assessment, including the due date of each amount claimed;~~

~~(2) The amount of any penalty or fine, late fee, lien filing fee, and any other charge included in the assessment that is not imposed on all unit owners as a common expense; and~~

~~(3) The amount of attorneys' fees and costs, if any, included in the assessment.~~

~~(d) A unit owner who disputes the information in the written statement received from the association pursuant to subsection (c) may request a subsequent written statement that additionally informs the unit owner that:~~

~~(1) Under Hawaii law, a unit owner has no right to withhold common expense assessments for any reason;~~

~~(2) A unit owner has a right to demand mediation or arbitration to resolve disputes about the amount or validity of an association's common expense assessment; provided that the unit owner immediately pays the common expense assessment in full and keeps common expense assessments current;~~

~~(3) Payment in full of the common expense assessment shall not prevent the owner from contesting the common expense assessment or receiving a refund of amounts not owed; and~~

~~(4) If the unit owner contests any penalty or fine, late fee, lien filing fee, or other charges included in the assessment, except common expense~~

~~assessments, the unit owner may demand mediation as provided in subsection (g) prior to paying those charges.~~

~~(e) No unit owner shall withhold any common expense assessment claimed by the association. Nothing in this section shall limit the rights of an owner to the protection of all fair debt collection procedures mandated under federal and state law.~~

~~(f) A unit owner who pays an association the full amount of the common expenses claimed by the association may file in small claims court or require the association to mediate to resolve any disputes concerning the amount or validity of the association's common expense claim. If the unit owner and the association are unable to resolve the dispute through mediation, either party may file for arbitration under section 514B-162; provided that a unit owner may only file for arbitration if all amounts claimed by the association as common expenses are paid in full on or before the date of filing. If the unit owner fails to keep all association common expense assessments current during the arbitration, the association may ask the arbitrator to temporarily suspend the arbitration proceedings. If the unit owner pays all association common expense assessments within thirty days of the date of suspension, the unit owner may ask the arbitrator to recommence the arbitration~~

~~proceedings. If the unit owner fails to pay all association common expense assessments by the end of the thirty-day period, the association may ask the arbitrator to dismiss the arbitration proceedings. The unit owner shall be entitled to a refund of any amounts paid as common expenses to the association that are not owed.~~

~~(g) A unit owner who contests the amount of any attorneys' fees and costs, penalties or fines, late fees, lien filing fees, or any other charges, except common expense assessments, may make a demand in writing for mediation on the validity of those charges. The unit owner has thirty days from the date of the written statement requested pursuant to subsection (d) to file demand for mediation on the disputed charges, other than common expense assessments. If the unit owner fails to file for mediation within thirty days of the date of the written statement requested pursuant to subsection (d), the association may proceed with collection of the charges. If the unit owner makes a request for mediation within thirty days, the association shall be prohibited from attempting to collect any of the disputed charges until the association has participated in the mediation. The mediation shall be completed within sixty days of the unit owner's request for mediation; provided that if the mediation is not completed within sixty days or the parties are unable to resolve the dispute by mediation, the~~

~~association may proceed with collection of all amounts due from the unit owner for attorneys' fees and costs, penalties or fines, late fees, lien filing fees, or any other charge that is not imposed on all unit owners as a common expense.~~

(c) A unit owner has no right to withhold common expense assessments for any reason. A unit owner may, however, dispute the obligation to pay a common expense assessment after payment in full of the assessment.

(d) A unit owner may dispute other assessments, apart from common expense assessments, prior to making payment. A unit owner who disputes an assessment, other than a common expense assessment, may request a written statement clearly detailing:

(1) The common expenses included in an assessment, and stating the due date of each amount of common expense assessed;

(2) The amount of any charge included in the assessment that is not imposed on all unit owners as a common expense, such as a fine or penalty, a late fee or a filing fee; and

(3) The amount of attorneys' fees and costs, if any, included in the assessment.

In responding to such a request, the association shall include the information that under Hawaii law a unit owner has no right to withhold common expense assessments for any reason, but that the obligation to pay a common expense assessment may be disputed after the assessment is paid in full. The association shall also include the information that a unit owner may dispute other assessments, apart from a common expense assessment, before making payment, and that the rights to contest assessments are described in section 514B-146 of the Hawaii Revised Statutes.

(e) Nothing in this section shall limit the rights of an owner to the protection of all fair debt collection procedures mandated under federal and state law.

(f) A unit owner may file an action in any court with jurisdiction, or may request mediation, to contest:

(1) A paid assessment; or

(2) An unpaid assessment other than a common expense assessment.

A unit owner who elects to request mediation shall do so within thirty days after the date of the statement described in subsection (d). A timely demand for mediation shall stay an association's effort to collect the contested assessment for sixty days.

The unit owner shall be entitled to a refund of any amounts paid that are determined to have not been owed.

(g) An association may defend an assessment in court and in mediation. It may proceed to collect an unpaid assessment by any legal means except when collection efforts are stayed pursuant to subsection (f).

SECTION 6. Section 514B-157 of the Hawaii Revised Statutes is amended by deleting that section in its entirety and substituting therefor a new section to read as follows:

~~**[§514B-157] Attorneys' fees, delinquent assessments, and expenses of enforcement.** (a) All costs and expenses, including reasonable attorneys' fees, incurred by or on behalf of the association for:~~

~~(1) Collecting any delinquent assessments against any owner's unit;~~

~~(2) Foreclosing any lien thereon; or~~

~~(3) Enforcing any provision of the declaration, bylaws, house rules, and this chapter, or the rules of the real estate commission;~~

~~against an owner, occupant, tenant, employee of an owner, or any other person who may in any manner use the property, shall be promptly paid on~~

~~demand to the association by such person or persons; provided that if the claims upon which the association takes any action are not substantiated, all costs and expenses, including reasonable attorneys' fees, incurred by any such person or persons as a result of the action of the association, shall be promptly paid on demand to such person or persons by the association.~~

~~(b) If any claim by an owner is substantiated in any action against an association, any of its officers or directors, or its board to enforce any provision of the declaration, bylaws, house rules, or this chapter, then all reasonable and necessary expenses, costs, and attorneys' fees incurred by an owner shall be awarded to such owner; provided that no such award shall be made in any derivative action unless:~~

~~(1) The owner first shall have demanded and allowed reasonable time for the board to pursue such enforcement; or~~

~~(2) The owner demonstrates to the satisfaction of the court that a demand for enforcement made to the board would have been fruitless.~~

~~If any claim by an owner is not substantiated in any court action against an association, any of its officers or directors, or its board to enforce any provision of the declaration, bylaws, house rules, or this chapter, then all~~

~~reasonable and necessary expenses, costs, and attorneys' fees incurred by an association shall be awarded to the association, unless before filing the action in court the owner has first submitted the claim to mediation, or to arbitration under subpart D, and made a good faith effort to resolve the dispute under any of those procedures.~~

[§514B-157] Attorneys' fees and Costs. (a) The prevailing party in any action or proceeding concerning the:

(1) collection of any delinquent assessment;

(2) foreclosure of any lien on an owner's unit; or

(3) Interpretation or enforcement of the declaration, bylaws, house rules, and this chapter, or the rules of the commission;

shall be entitled to an award of all reasonable attorneys' fees and costs.

(b) Attorneys' fees and costs assessed to a unit owner, except pursuant to the judgment of a court or the award of an arbitrator, may be disputed in accordance with the provisions of section 146 of this chapter.

(c) A unit owner who participates in the early neutral evaluation of a condominium-related dispute, and who expressly accepts the whole of the evaluation in writing, and complies with the terms thereof, shall not be subject to any further claim of attorneys' fees and costs in connection with that dispute.

SECTION 7. Part D of chapter 514B of the Hawaii Revised Statutes is amended by repealing sections 514B-161, 514B-162, 514B-162.5 and 514B-163 and by substituting the following sections, to read as follows:

~~**§514B-161 Mediation.** *[Repeal and reenactment on June 30, 2023. L 2018, c 196, §9.]* (a) The mediation of a dispute between a unit owner and the board, unit owner and the managing agent, board members and the board, or directors and managing agents and the board shall be mandatory upon written request to the other party when:~~

~~(1) The dispute involves the interpretation or enforcement of the association's declaration, bylaws, or house rules;~~

~~(2) The dispute falls outside the scope of subsection (b);~~

~~(3) The parties have not already mediated the same or a substantially similar dispute; and~~

~~(4) An action or an arbitration concerning the dispute has not been commenced.~~

~~(b) The mediation of a dispute between a unit owner and the board, unit owner and the managing agent, board members and the board, or directors~~

~~and managing agents and the board shall not be mandatory when the dispute involves:~~

~~(1) Threatened property damage or the health or safety of unit owners or any other person;~~

~~(2) Assessments;~~

~~(3) Personal injury claims; or~~

~~(4) Matters that would affect the availability of any coverage pursuant to an insurance policy obtained by or on behalf of an association.~~

~~(c) If evaluative mediation is requested in writing by one of the parties pursuant to subsection (a), the other party cannot choose to do facilitative mediation instead, and any attempt to do so shall be treated as a rejection to mediate.~~

~~(d) A unit owner or an association may apply to the circuit court in the judicial circuit where the condominium is located for an order compelling mediation only when:~~

~~(1) Mediation of the dispute is mandatory pursuant to subsection (a);~~

~~(2) A written request for mediation has been delivered to and received by the other party; and~~

~~(3) The parties have not agreed to a mediator and a mediation date within forty-five days after a party receives a written request for mediation.~~

~~(e) Any application made to the circuit court pursuant to subsection (d) shall be made and heard in a summary manner and in accordance with procedures for the making and hearing of motions. The prevailing party shall be awarded its attorneys' fees and costs in an amount not to exceed $1,500.~~

~~(f) Each party to a mediation shall bear the attorneys' fees, costs, and other expenses of preparing for and participating in mediation incurred by the party, unless otherwise specified in:~~

~~(1) A written agreement providing otherwise that is signed by the parties;~~

~~(2) An order of a court in connection with the final disposition of a claim that was submitted to mediation;~~

~~(3) An award of an arbitrator in connection with the final disposition of a claim that was submitted to mediation; or~~

~~(4) An order of the circuit court in connection with compelled mediation in accordance with subsection (e).~~

~~(g) Any individual mediation supported with funds from the condominium education trust fund pursuant to section 514B-71:~~

~~(1) Shall include a fee of $375 to be paid by each party to the mediator;~~

~~(2) Shall receive no more from the fund than is appropriate under the circumstances, and in no event more than $3,000 total;~~

~~(3) May include issues and parties in addition to those identified in subsection (a); provided that a unit owner or a developer and board are parties to the mediation at all times and the unit owner or developer and the board mutually consent in writing to the addition of the issues and parties; and~~

~~(4) May include an evaluation by the mediator of any claims presented during the mediation.~~

~~(h) A court or an arbitrator with jurisdiction may consider a timely request to stay any action or proceeding concerning a dispute that would be subject to mediation pursuant to subsection (a) in the absence of the action or proceeding, and refer the matter to mediation; provided that:~~

(1) The court or arbitrator determines that the request is made in good faith and a stay would not be prejudicial to any party; and

(2) No stay shall exceed a period of ninety days.

[§514B-162] Arbitration. (a) At the request of any party, any dispute concerning or involving one or more unit owners and an association, its board, managing agent, or one or more other unit owners relating to the interpretation, application, or enforcement of this chapter or the association's declaration, bylaws, or house rules adopted in accordance with its bylaws shall be submitted to arbitration. The arbitration shall be conducted, unless otherwise agreed by the parties, in accordance with the rules adopted by the commission and of chapter 658A; provided that the rules of the arbitration service conducting the arbitration shall be used until the commission adopts its rules; provided further that where any arbitration rule conflicts with chapter 658A, chapter 658A shall prevail; and provided further that notwithstanding any rule to the contrary, the arbitrator shall conduct the proceedings in a manner which affords substantial justice to all parties. The arbitrator shall be bound by rules of substantive law and shall not be bound by rules of evidence, whether or not set out by statute, except for provisions relating to privileged communications. The arbitrator shall permit discovery

~~as provided for in the Hawaii rules of civil procedure; provided that the arbitrator may restrict the scope of such discovery for good cause to avoid excessive delay and costs to the parties or the arbitrator may refer any matter involving discovery to the circuit court for disposition in accordance with the Hawaii rules of civil procedure then in effect.~~

~~(b) Nothing in subsection (a) shall be interpreted to mandate the arbitration of any dispute involving:~~

~~(1) The real estate commission;~~

~~(2) The mortgagee of a mortgage of record;~~

~~(3) The developer, general contractor, subcontractors, or design professionals for the project; provided that when any person exempted by this paragraph is also a unit owner, a director, or managing agent, such person in those capacities, shall be subject to the provisions of subsection (a);~~

~~(4) Actions seeking equitable relief involving threatened property damage or the health or safety of unit owners or any other person;~~

~~(5) Actions to collect assessments which are liens or subject to foreclosure; provided that a unit owner who pays the full amount of an~~

~~assessment and fulfills the requirements of section 514B-146 shall have the right to demand arbitration of the owner's dispute, including a dispute about the amount and validity of the assessment;~~

~~(6) Personal injury claims;~~

~~(7) Actions for amounts in excess of $2,500 against an association, a board, or one or more directors, officers, agents, employees, or other persons, if insurance coverage under a policy or policies procured by the association or its board would be unavailable because action by arbitration was pursued; or~~

~~(8) Any other cases which are determined, as provided in subsection (c), to be unsuitable for disposition by arbitration.~~

~~(c) At any time within twenty days of being served with a written demand for arbitration, any party so served may apply to the circuit court in the judicial circuit in which the condominium is located for a determination that the subject matter of the dispute is unsuitable for disposition by arbitration.~~

~~In determining whether the subject matter of a dispute is unsuitable for disposition by arbitration, a court may consider:~~

~~(1) The magnitude of the potential award, or any issue of broad public concern raised by the subject matter underlying the dispute;~~

~~(2) Problems referred to the court where court regulated discovery is necessary;~~

~~(3) The fact that the matter in dispute is a reasonable or necessary issue to be resolved in pending litigation and involves other matters not covered by or related to this chapter;~~

~~(4) The fact that the matter to be arbitrated is only part of a dispute involving other parties or issues which are not subject to arbitration under this section; and~~

~~(5) Any matters of dispute where disposition by arbitration, in the absence of complete judicial review, would not afford substantial justice to one or more of the parties.~~

~~Any such application to the circuit court shall be made and heard in a summary manner and in accordance with procedures for the making and hearing of motions. The prevailing party shall be awarded its attorneys' fees and costs in an amount not to exceed $200.~~

~~(d) In the event of a dispute as to whether a claim shall be excluded from mandatory arbitration under subsection (b)(7), any party to an arbitration may file a complaint for declaratory relief against the involved insurer or insurers for a determination of whether insurance coverage is unavailable due to the pursuit of action by arbitration. The complaint shall be filed with the circuit court in the judicial circuit in which the condominium is located. The insurer or insurers shall file an answer to the complaint within twenty days of the date of service of the complaint and the issue shall be disposed of by the circuit court at a hearing to be held at the earliest available date; provided that the hearing shall not be held within twenty days from the date of service of the complaint upon the insurer or insurers.~~

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

~~(f) The award of the arbitrator shall be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate, and shall be served by the arbitrator on each of the parties to the arbitration,~~

~~personally or by registered or certified mail. At any time within one year after the award is made and served, any party to the arbitration may apply to the circuit court of the judicial circuit in which the condominium is located for an order confirming the award. The court shall grant the order confirming the award pursuant to section 658A-22, unless the award is vacated, modified, or corrected, as provided in sections 658A-20, 658A-23, and 658A-24, or a trial de novo is demanded under subsection (h), or the award is successfully appealed under subsection (h). The record shall be filed with the motion to confirm award, and notice of the motion shall be served upon each other party or their respective attorneys in the manner required for service of notice of a motion.~~

~~(g) Findings of fact and conclusions of law, as requested by any party prior to the arbitration hearing, shall be promptly provided to the requesting party upon payment of the reasonable cost thereof.~~

~~(h) Any party to an arbitration under this section may apply to vacate, modify, or correct the arbitration award for the grounds set out in chapter 658A. All reasonable costs, expenses, and attorneys' fees on appeal shall be charged to the nonprevailing party.~~

~~**[§514B-162.5] Voluntary binding arbitration.** *[Section effective January 2, 2019, and repealed June 30, 2023. L 2018, c 196, §9.]* (a) Any parties permitted to mediate condominium related disputes pursuant to section 514B-161 may agree to enter into voluntary binding arbitration, which may be supported with funds from the condominium education trust fund pursuant to section 514B-71; provided that voluntary binding arbitration under this section may be supported with funds from the condominium education trust fund only after the parties have first attempted evaluative mediation.~~

~~(b) Any voluntary binding arbitration entered into pursuant to this section and supported with funds from the condominium education trust fund:~~

~~(1) Shall include a fee of $175 to be paid by each party to the arbitrator;~~

~~(2) Shall receive no more from the fund than is appropriate under the circumstances, and in no event more than $6,000 total; and~~

~~(3) May include issues and parties in addition to those identified in subsection (a); provided that a unit owner or a developer and board are~~

~~parties to the arbitration at all times and the unit owner or developer and the board mutually consent in writing to the addition of the issues and parties.~~

~~**[§514B-163] Trial de novo and appeal**. (a) The submission of any dispute to an arbitration under section 514B-162 shall in no way limit or abridge the right of any party to a trial de novo.~~

~~(b) Written demand for a trial de novo by any party desiring a trial de novo shall be made upon the other parties within ten days after service of the arbitration award upon all parties and the trial de novo shall be filed in circuit court within thirty days of the written demand. Failure to meet these deadlines shall preclude a party from demanding a trial de novo.~~

~~(c) The award of arbitration shall not be made known to the trier of fact at a trial de novo.~~

~~(d) In any trial de novo demanded under this section, if the party demanding a trial de novo does not prevail at trial, the party demanding the trial de novo shall be charged with all reasonable costs, expenses, and attorneys' fees of the trial. When there is more than one party on one or both sides of an action, or more than one issue in dispute, the court shall allocate its award of costs, expenses, and attorneys' fees among the prevailing parties~~

~~and tax such fees against those nonprevailing parties who demanded a trial de novo in accordance with the principles of equity.~~

D. Alternative Dispute Resolution

§514B-_____. Methods of Dispute Resolution. The condominium education trust fund may be used to provide support for the following methods of alternative dispute resolution in connection with any condominium-related dispute, subject to the provisions of this part:

(1) Mediation;

(2) Binding arbitration; and

(3) Early neutral evaluation.

§514B-_____. Mediation. (a) The mediation of a condominium-related dispute described in subsection (b) shall be mandatory upon the written request of a party to the dispute. Participation in mediation of a condominium-related dispute may be compelled pursuant to the procedures of this section.

(b) A condominium-related dispute subject to mandatory mediation is one that involves the interpretation or enforcement of the association's

declaration, bylaws, or house rules; provided that the dispute falls outside the scope of subsection (c).

(c) The mediation of a condominium-related dispute shall not be mandatory if the dispute involves:

(1) Threatened property damage or the health or safety of unit owners or any other person;

(2) Assessments, except as provided in section 146 of this chapter;

(3) Personal injury claims;

(4) Matters that would affect the availability of any coverage pursuant to an insurance policy obtained by or on behalf of an association;

(5) The same or substantially similar issues that have already been mediated; or

(6) Issues that are subject to an action or a binding alternative dispute resolution mechanism that has already been commenced.

(d) A unit owner or an association may apply to the circuit court in the judicial circuit where the condominium is located for an order compelling mediation only when:

(1) Mediation of the dispute is mandatory pursuant to subsection (a);

(2) A written request for mediation has been delivered to and received by the other party; and

(3) The parties have not agreed to a mediator and a mediation date within forty-five days after a party receives a written request for mediation.

(e) Any application made to the circuit court pursuant to subsection (e) shall be made and heard in a summary manner and in accordance with procedures for the making and hearing of motions. The prevailing party shall be entitled to an award of all reasonable attorneys' fees and costs.

(f) Each party to a mediation shall bear the attorneys' fees, costs, and other expenses of preparing for and participating in mediation incurred by the party, unless otherwise specified in:

(1) A written agreement providing otherwise that is signed by the parties;

(2) An order of a court in connection with the final disposition of a claim that was submitted to mediation;

(3) An award of an arbitrator in connection with the final disposition of a claim that was submitted to mediation; or

(4) An order of the circuit court in connection with compelled mediation in accordance with subsection (e).

(g) Any individual mediation supported with funds from the condominium education trust fund pursuant to section 514B-71:

(1) Shall include a fee of $150 to be paid by each party to the mediator; provided that moneys from the fund may be used to pay the fee for

each unit owner who demonstrates to the satisfaction of the commission that the fee will pose an unreasonable economic burden;

(2) Shall receive no more from the fund than is appropriate under the circumstances, and in no event more than $6,000 total;

(3) May include issues and parties in addition to those identified in subsection (a); provided that a unit owner or a developer and board are parties to the mediation at all times and the unit owner or developer and the board mutually consent in writing to the addition of the issues and parties; and

(4) May include an evaluation by the mediator of any claims or defenses presented during the mediation. An evaluative form of mediation shall be required whenever a party to a condominium-related dispute requests.

(h) A court or an arbitrator with jurisdiction may consider a timely request to stay any action or proceeding concerning a dispute that would be subject to mediation pursuant to subsection (a) in the absence of the action or proceeding, and refer the matter to mediation; provided that:

(1) The court or arbitrator determines that the request is made in good faith and a stay would not be prejudicial to any party; and

(2) No stay shall exceed a period of ninety days.

§514B-_____. Binding Arbitration. (a) Support from the condominium education trust fund, for binding arbitration of a condominium-related dispute, is authorized when:

(1) The dispute has first been submitted to an evaluative form of mediation pursuant to section 514B-_____; and

(2) All parties to the dispute agree in writing to be bound, in accordance with and subject to the provisions of chapter 658A.

(b) Support for any individual arbitration shall not exceed what is appropriate under the circumstances, and in no event more than $10,000 total.

§514B-_____. Early Neutral Evaluation. (a) Any party to a condominium-related dispute that is subject to mandatory mediation may request that the dispute be submitted to a process of early neutral evaluation following participation in mediation. Participation in early neutral evaluation of a condominium-related dispute subject to mandatory mediation may be compelled pursuant to the procedures of this section.

(b) A unit owner or an association may apply to the circuit court in the judicial circuit where the condominium is located for an order compelling early neutral evaluation only when:

(1) Mediation of the dispute pursuant to section 514B-___ has been completed;

(2) A written request for early neutral evaluation has been delivered to and received by the other party or parties; and

(3) The parties have not agreed to an evaluator and a hearing date within forty-five days after a party receives a written request for early neutral evaluation.

(c) Any application made to the circuit court pursuant to subsection (b) shall be made and heard in a summary manner and in accordance with procedures for the making and hearing of motions. The prevailing party shall be entitled to an award of all reasonable attorneys' fees and costs.

(d) Each party to an early neutral evaluation shall bear the attorneys' fees, costs, and other expenses of preparing for and participating in the evaluation process incurred by the party, unless otherwise specified in:

(1) A written agreement providing otherwise that is signed by the parties;

(2) An order of the circuit court in connection with compelled participation in the evaluation process, in accordance with subsection (c); or

(3) An evaluator's timely written evaluation, as provided in subsection (g).

(e) A party to the dispute that has received a request for early neutral evaluation in accordance with this section shall not, thereafter, initiate an

action in any court regarding the subject matter of the dispute until ninety-one days after completion of the hearing described in subsection (f); except as may be reasonably required to preserve any claim or defense. Any action so initiated shall be stayed pending completion of the evaluation process, except pursuant to the order of a court.

(f) The evaluation process shall be determined by the evaluator; provided that every evaluation process shall include the reasonable opportunity for each party to the dispute to:

(1) Submit a written position statement, together with supporting declarations and/or exhibits;

(2) Submit a written response to the position statement of any other party; and

(3) Set forth the essential points upon which an asserted claim or defense is based at an informal hearing convened by the evaluator. Rules of evidence, except those concerning privileges, shall not apply at the hearing.

(g) Within ninety days following completion of the hearing, the evaluator shall provide the parties with a written evaluation of the claims and defenses presented by the parties in their written statements and oral presentations. The evaluation shall consist of:

(1) A reasoned decision, determining what relief, if any, should be granted; and

(2) A separate document, containing an award of reasonable attorneys' fees, costs and other expenses to the prevailing party.

(h) The evaluator's timely written evaluation shall:

(1) be admissible as evidence for all purposes in any action or proceeding relating to the subject matter of the dispute; provided that a judge, jury or arbitrator may determine the weight to be given to the evaluation in deciding questions of liability, damages and any other relief; and

(2) bind the parties with respect to the evaluator's award of attorneys' fees, costs and other expenses in connection with the evaluation process.

(i) Support for any individual early neutral evaluation of a dispute shall not exceed what is appropriate under the circumstances, and in no event more than $10,000 total.

§514B-_____. Qualifications of Mediators, Arbitrators and Evaluators. (a) The commission may determine the qualifications of any individual who serves as a mediator, arbitrator or evaluator in a matter involving payment from the fund, provided that:

(1) A mediator shall have a minimum of five years full-time experience working with condominiums in a professional capacity;

(2) An arbitrator shall have a minimum of ten years full-time experience working with condominiums in a professional capacity; and

(3) An evaluator shall have a minimum of ten years full-time experience working with condominiums in a professional capacity.

Alternatively, the individual may demonstrate other exceptional knowledge and experience, such as by serving as a judge for a similar number of years.

§514B-_____. Disclosures by Mediators, Arbitrators and Evaluators.

(a) Before accepting appointment, an individual who is requested to serve as a mediator or as an evaluator shall disclose to all parties involved in the condominium-related dispute any known facts that a reasonable person would consider likely to affect the impartiality of the mediator or evaluator in the mediation or in the early neutral evaluation process, including:

(1) A direct and material financial or personal interest in the outcome of the dispute; and

(2) An existing or past substantial relationship with any of the parties to the dispute, their counsel or representatives, or a witness.

(b) The disclosure obligation of the mediator or evaluator continues after appointment and applies to any facts learned after accepting appointment that a reasonable person would consider likely to affect the impartiality of the mediator or evaluator.

(c) An agreement made in mediation is voidable if the mediator failed to make a disclosure required by subsection (a).

(d) An evaluation made by an evaluator may be excluded from evidence and excluded from other consideration if the evaluator failed to make a disclosure required by subsection (a).

(e) Disclosures by arbitrators shall be governed by chapter 658A.

SECTION 8. The provisions of this act shall apply prospectively.

SECTION 9. New statutory material is underscored. Deleted material is bracketed and struck through.

SECTION 10. This Act shall take effect upon its approval.

Testimony for November 30, 2023
HB1509 - Mediation Task Force

Aloha!

My apologies, this is long and I spent the last several weeks in self-reflection on this issue of Mediation in Condominiums.

I became a first-time buyer and condo owner in 1990. Since then, have owned 4 other condo properties and have served for a time on 3 of the condo property boards. I attended seminars by CAI or HCCA and joined the HCCA board somewhere along the way in the mid 1990's. Then as the years went by and along the way became the education chair for HCCA and it has been a privilege to provide necessary education to Condo Owners and their respective Board of Directors.

Let me start off with this:

Self-Governance:

Management of Condominiums are created by statute and intended to operate as self-governing entities, with minimal government intervention.

An association is governed by its condominium association through a board of directors elected from among the condominium owners.

These board members are usually unpaid volunteers and often have no experience in running a large property. Board members owe a fiduciary duty to the association in the performance of their duties.

To assist with running the association, many associations hire a professional management company, or a full-time resident manager. Neither is required by law, however, and smaller associations often rely on owner volunteers to handle management tasks.
https://files.hawaii.gov/dcca/reb/condo_ed/condo_bull2/cb_06_00/cb1008.pdf

CAI supports public policy that recognizes the rights of homeowners and promotes the self-governance of community associations— affording associations the ability to operate efficiently and protect the investment owners make in their homes and communities.
https://www.caionline.org/Advocacy/Resources/Documents/Infographics/HI_FactsFigures_Info.pdf

Means of self-governance[edit] https://en.wikipedia.org/wiki/Self-governance

The means of self-governance usually comprises some or all of the following:

- A code of conduct that outlines acceptable behavior within the unit or group.[16] This may include a legal or ethical code (e.g. the Hippocratic Oath of doctors, or established codes of professional ethics).
- A means of ensuring external authority does not become involved unless and until certain criteria are satisfied.
- A means of facilitating the intended functions of the unit or group.
- A means of registering and resolving grievances (e.g. medical malpractice, union procedures, and for achieving closure regarding them).[*citation needed*]
- A means of disciplinary procedure within the unit or group,[17] ranging from fines and censure up to and including penalty of death.
- A means of suppressing parties, factions, tendencies, or other sub-groups that seek to secede from the unit or gro

Self-governance, **self-government**, or **self-rule** is the ability of a person or group to exercise all necessary functions of regulation without intervention from an external authority.[2][3][4] It may refer to personal conduct or to any form of institution, such as family units, social groups, affinity groups, legal bodies, industry bodies, religions, and political entities of various degree.[4][5][6] Self-governance is closely related to various philosophical and socio-political concepts such as autonomy, independence, self-control, self-discipline, and sovereignty.[7]
https://en.wikipedia.org/wiki/Self-governance#CITEREFRasmussen2011

References [edit]

1. ^ *Greenland in Figures 2012*.
2. ^ Rasmussen 2011, pp. x–xi.
3. ^ Sørensen & Triantafillou 2009, pp. 1–3.
4. ^ ^ *a b* Esmark & Triantafillou 2009, pp. 29–30.
5. ^ Sørensen & Triantafillou 2009, p. 2.
6. ^ Sørensen & Torfing 2009, p. 43.
7. ^ Rasmussen 2011, p. x.
8. ^ Ghai & Woodman 2013, pp. 3–6.
9. ^ Berlin 1997, pp. 228–229.

Autonomy: In developmental psychology and moral, political, and bioethical philosophy, **autonomy**[note 1] is the capacity to make an informed, uncoerced decision.

It is my belief that the term “self governance” has lost its meaning or intent.

§HRS 514B, City and County Ordinances and Federal laws supersede a Condo governing documents. Christopher Shea Goodwin, when asked a question at a seminar often says “subject to your governing documents”….

Most governing documents may or may not have any provisions for criminal background checks, HRS 514B does. Some governing documents might not have provisions for Conflict of Interest, HRS 514B does.

Governing documents, City Ordinances and State Laws (subject to privacy issues) do not have any provisions for taking pictures of the property. Then how can a Resident Manager and the Board fine ($1000) a resident for taking a picture of the plants?

The term “Self Governing” needs to be changed to “Self Governing in accordance with local, federal and governing documents”.

Condo Dispute Resolution started in 2005. It seems every few years at the legislature there is a bill introduced related to Condo Dispute Resolution.

2023 legislature HB 176 (70 pgs of testimony), without doing an actual count, it appears it is mostly opposed.

Item (b)

(1) Investigate the feasibility of expanding the real estate commission’s enforcement authority to include violations of requirements for association meetings and board of director elections;

(3) of particular: Determine whether additional regulations are necessary for members of the board of directors to comply with their duties and obligations under chapter 514B.

Most of the testimony was in response to the proxy, voting and ombudsman. *There is support for Educational requirements for Board Members.*

> Testimony from John Morris: For example, **HB 176 mandates that board members "certify" that they have read their declaration, bylaws, house rules and other relevant documents. If they fail to do so, they can be automatically removed from the board**. Unfortunately, this requirement fails to recognize that those documents are often long, complex, and difficult to understand or that the directors are volunteers who are serving without any compensation. Moreover, those documents provide a level of detail that is far beyond what a board member needs to know to fulfil his or her responsibilities to the other members of the association. Some boards are already having problems getting directors willing to serve on the board. This section of HB 176 will simply make the problem worse.

These are the same documents each person needs to read before buying into a condominium. Therefore, they have already acknowledged and accepted the governing documents in the sale of the Condo.

I read mine and often will refer to these same documents for various reasons first as an Owner and 2nd as a Board Member.

Refer to Milton Motooka, Esq. Ten tips for avoiding litigation.

TEN TIPS FOR AVOIDING LITIGATION
(BETTER KNOWN AS THE TEN COMMANDMENTS FOR LIFE WITHOUT LAWYERS)

1. Do not become a director unless you *have and will spend the time required to do the job*.
2. Be involved in the operation of the Association and treat its operation as the operation of a business.
3. Be familiar with the project documents and understand the Association's responsibilities, authority and limitations.

TEN TIPS FOR AVOIDING LITIGATION
(BETTER KNOWN AS THE TEN COMMANDMENTS FOR LIFE WITHOUT LAWYERS)

4. When making decisions, carefully review the information provided before proceeding. Do not blindly accept information provided. If necessary, the Board should do independent investigations.
5. When appropriate, seek the advice of professionals.
6. Decisions should be based on what is in the best interest of the Association – not what is "popular," or what is best for you.

Many Condo attorneys will use the term "reasonable" when discussing issues with their respective condo board.

Are the many disputes between an Owner and the Board reasonable?

Many of the testimonies submitted to this task force reflect "not so reasonable".

The statistic provided by Lila Mower in Lourdes Scheibert testimony dates November 23, 2023, show a large portion of disputes are allegations of violations (93.575%) to the governing documents.

Telling an owner, they should “get out and sell” is such an insulting response to a very large problem facing the condo community since the days of Richard Port. Retaliation tactics are often used to force down an owner until he/she finally gives up and sells.

CAI touts the “sense of community”. Where is the sense of community with mediation failures at 93.575%? (Lourdes Sheibert Nov 30, 2023 testimony)

Condominiums are “self-governing” in accordance with State, City Ordinances, Federal Laws and the governing documents. Condo Boards have existing rules and regulations to follow, yes they can amend them with the proper approval of the owners.

Condo Boards represent their owners and need to apply the “business judgment rule”, fiduciary duty and prudent decision making. They have a support system in place to use the hired management company and their respective condo attorney for guidance.

If Condo boards followed the above, there would be very few “Kings and Queens” or rogue boards that create the headache for most boards following the rules and regulations.

Licensing of Management Companies and the individual CAM/Property Manager needs to move forward and pass legislation. Licensing to require pre licensing and exam and yearly continuing education.

Condo Board Education for new board members needs to move forward and pass legislation. A yearly “Law update” will most certainly keep our Hawaii Board members updated and a reminder of the task they have volunteered and accepted to follow.

Mediation requires an unbiased mediator and not a condo attorney. Condo attorney mediators already have a conflict of interest.

Testimonies submitted note that in their cases the mediator started the mediation only to disclose at that time of a “conflict of interest”. That should have been done in the mediation planning, just the same as a board member with a conflict of interest.

Bottom line, everyone in the condo needs (and is required in statute) to follow the rules and regulations of the State, City Ordinances and governing documents. The board has the added requirement of Federal Law regulations.

Respectfully,

Raelene Tenno