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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

KUPALE OOKALA, INC., a Hawai'i
non-profit corporation; CENTER FOR
FOOD SAFETY, a Washington, D.C.
non-profit corporation,

Plaintiffs,

v.

BIG ISLAND DAIRY, LLC, a Hawai'i
limited liability company,

Defendant.

Civil No. 17-00305-BMK

CONSENT DECREE

1 **WHEREAS**, Plaintiffs Kupale Ookala, Inc., and Center for Food Safety
2 (collectively, “Plaintiffs”) filed a Complaint in this Court seeking civil penalties, as
3 well as declaratory and injunctive relief, against Defendant Big Island Dairy, LLC
4 (“BID,” and collectively with Plaintiffs, the “Parties”) on June 28, 2017, alleging
5 violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (the “CWA” or the
6 “Act”);

7 **WHEREAS**, BID operates a dairy concentrated animal feeding operation or
8 “CAFO,” located near Mile Marker 30, Ookala, HI;

9 **WHEREAS**, CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the
10 unpermitted discharge of any pollutant to waters of the United States;

11 **WHEREAS**, Plaintiffs brought their action against BID for alleged CWA
12 violations for unpermitted discharges pursuant to Section 505 of the Act, 33 U.S.C.
13 § 1365;

14 **WHEREAS**, BID is ceasing its dairy operations at the dairy facility, is
15 winding up its affairs, and intends to ultimately dissolve as an LLC entity;

16 **WHEREAS**, BID is subject to regulation and oversight by the Hawaii
17 Department of Health (“HDOH”), which is the delegated agency for CWA
18 compliance in the State of Hawaii;

19 **WHEREAS**, BID will continue to be subject to HDOH inspection and
20 enforcement while BID is in the process of ceasing dairy operations;

1 terms of this Consent Decree or this Court’s jurisdiction to enter and enforce this
2 Consent Decree.

3 2. Retention of Jurisdiction. This Court shall retain jurisdiction for the
4 purposes of issuing such further orders and directions as may be necessary and
5 appropriate for the implementation or modification of this Consent Decree,
6 enforcing compliance with, or resolving disputes regarding the provisions of this
7 Consent Decree. The Parties agree that Magistrate Judge Barry M. Kurren shall
8 take jurisdiction over the decisions concerning implementation, modification, or
9 enforcement of this Consent Decree and such decision or action with respect to this
10 Consent Decree, if appealable, shall be directly appealable to the Ninth Circuit
11 Court of Appeals.

12 3. Reservation of Rights. The Parties reserve the right to enforce the
13 terms of this Consent Decree and to take any action authorized by federal or state
14 law not inconsistent with, or precluded by, this Consent Decree.

15 4. Parties Bound. This Consent Decree shall be binding upon Plaintiffs,
16 BID, and their respective officers, agents, servants, employees, successors, and
17 assigns. However, nothing in this Consent Decree shall be construed as preventing
18 or prohibiting Plaintiffs from enforcing environmental laws against any future
19 owner and/or operator of a dairy CAFO or other agricultural operation upon the
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1 land which BID, LLC used, owned, and/or leased from the State of Hawaii for its
2 dairy CAFO.

3 5. Counterparts. This Consent Decree may be signed in counterparts,
4 and such counterpart signature pages shall be given full force and effect.

5 6. Authorization. The undersigned representative for each Party certifies
6 and affirmatively represents that he/she is fully authorized by the Party whom
7 he/she represents to enter into the terms and conditions of this Consent Decree.

8 7. DOJ and EPA Review. The Parties recognize that, under 33. U.S.C. §
9 1365(c)(3), this Consent Decree can only be entered forty-five (45) days after the
10 Attorney General of the United States and the Administrator of the Environmental
11 Protection Agency receive a copy of this proposed Consent Decree. Within three
12 (3) business days of execution of this Consent Decree by all Parties, Plaintiffs shall
13 serve copies of the executed Consent Decree upon the Administrator of the United
14 States Environmental Protection Agency, the Attorney General, and the Regional
15 Administrator for EPA Region 9, and Plaintiffs shall provide notice to the Court of
16 the foregoing requirements, as required pursuant to 40 C.F.R. § 135.5.

17 8. Final Judgment. The Parties waive the right to appeal from entry of
18 this Consent Decree, and all prior orders of the Court. Upon approval and entry of
19 this Consent Decree by the Court, this Consent Decree shall constitute a final, non-

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1 appealable judgment of the Court under Rules 54 and 58 of the Federal Rules of
2 Civil Procedure.

3 9. Effective Date. The effective date of this Consent Decree shall be the
4 date upon which the Court enters in the civil docket a copy of this Consent Decree,
5 signed by the Court.

6 10. Reliance on Counsel. Each Party acknowledges and represents that it
7 has relied on the legal advice of its attorneys, listed at the end of this Consent
8 Decree, who are the attorneys of each Party's choosing, and that the terms of this
9 Consent Decree have been completely explained to the Party by its attorney(s), and
10 that the terms are fully understood and voluntarily accepted.

11 11. Survival. In the event that any part of this Consent Decree is deemed
12 by a court of competent jurisdiction to be unlawful, void, or for any reason
13 unenforceable, and if that part is severable from the remainder of this Consent
14 Decree without frustrating its essential purpose, then the remaining parts of the
15 Consent Decree shall remain valid, binding, and enforceable.

16 12. Compliance. In operating its dairy facility, BID shall abide by this
17 Consent Decree.

1 **BID’S AGREEMENTS AND OBLIGATIONS CONCERNING HDOH**
2 **OVERSIGHT AND ADMINISTRATIVE ORDER ON CONSENT**

3 13. As described in the recitations *supra*, BID shall exercise its best
4 efforts to enter an Administrative Order on Consent (“AOC”)¹ with HDOH that
5 resolves outstanding Notices of Violations and Orders concerning BID’s
6 compliance with the CWA and Hawaii law and addresses BID’s cessation of dairy
7 and milking operations. To that end, BID shall exercise all best efforts to include in
8 the AOC the following terms:

- 9 a. BID shall cease its operations as a CAFO, dairy producer, and dairy
10 processor:
- 11 i. Target date to terminate all operations: April 30, 2019,
12 however, presence of some young stock may continue into
13 May;
 - 14 ii. Milking shall cease no later than February 28, 2019;
 - 15 iii. BID may explore the possibility of selling its assets at the dairy
16 site to a buyer that may undertake dairying and milk processing
17 in accordance with its own permits and regulatory approvals.

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¹ The Parties acknowledge that there may be other orders issued or entered by HDOH that are
20 not necessarily identified as an “Administrative Order on Consent” to resolve the NOVO. It is
the explicit intent of the Parties that the provisions of Paragraph 13 be included in any such
order, administrative or otherwise, issued by HDOH to BID to resolve the NOVO.

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- b. BID shall, in an orderly manner:
 - i. Reduce and eliminate the number of animals in confinement;
 - ii. Maintain adequate staff to oversee dairy operations, including waste and nutrient management consistent with BID’s draft Comprehensive Nutrient Management Plan (CNMP), dated June 25, 2018 (or as later superseded);
 - iii. Clean the confinement and waste treatment facilities, and consult with the HDOH throughout the process, and
 - iv. Provide HDOH and Plaintiffs progress reports as BID completes the cattle removal and facilities clean-up activities in subparagraphs d. and e. of this Paragraph, to be provided by the 10th of each month with respect to the activities taken during the prior calendar month (said reports to include land application records for all nutrient applications during the prior calendar month).

- c. Timelines. The timelines for cattle removal and facilities clean-up in subparagraphs d. and e. of this Paragraph may be accelerated if business plans allow. These timelines may be exceeded if environmental conditions or animal welfare needs dictate.

1 d. Cattle Removal Schedule: Confined animals not to exceed the
2 following numbers:

- 3 i. Nov. 2018: 750 mature cows, 700 young stock.
4 ii. Dec. 2018: 725 mature cows, 675 young stock.
5 iii. Feb. 2019: 725 mature cows, 600 young stock.
6 iv. Mar. 2019: 500 mature cows, 600 young stock.
7 v. Apr. 2019: 0 mature cows, 400 young stock.
8 vi. May 2019: 0 mature cows, 0 young stock.

9 e. Facilities Clean-up Schedule:

- 10 i. Dec. 2018: Upper heifer pens scraped, washed, and flushed.
11 Transfer pipes to lagoons double flushed with clean water, and
12 inlets thereafter capped.
13 ii. Mar. 2019: Upper free stall pens scraped, washed, and flushed.
14 Transfer pipes to lagoons double flushed with clean water, and
15 inlets thereafter capped.
16 iii. Apr. 2019: Lower free stall pens scraped, washed, and flushed.
17 Transfer pipes to lagoons double flushed with clean water, and
18 inlets thereafter capped.
19 iv. May 2019: Old free stall pens scraped, washed, and flushed.
20 Transfer pipes to lagoons double flushed with clean water, and

1 inlets thereafter capped. In addition, the composter and pads
2 around the composter, waste transfer pits, and separator cells
3 shall be scraped, washed with a high volume-low pressure
4 system, and scrubbed. All wastewater from cleaning activities
5 shall be collected and transferred to the lagoons. Feed areas
6 shall also be cleared of feed, swept, and washed, and all
7 wastewater from cleaning activities shall be collected and
8 transferred to the lagoons.

9 v. June 2019: Upper and lower lagoons agitated and cleared of
10 solid and liquid manure, the contents thereof being
11 agronomically land applied pursuant to revised draft CNMP
12 dated June 25, 2018. Both lagoons shall then be refilled with
13 clean water, agitated, re-washed, and emptied again, the
14 contents thereof being agronomically land applied pursuant to
15 the revised draft CNMP dated June 25, 2018.

16 f. HDOH Inspection and Enforcement:

17 i. BID shall immediately report to HDOH any pollutant
18 discharge, as defined by the Clean Water Act, from its CAFO
19 facilities and activities to regulated waters, namely Kaula,
20 Alaialoa and Kaohaoha Gulches.

1 ii. HDOH shall further have all inspection, investigative, and
2 enforcement powers as allowed by applicable law.

3 g. Penalties:

4 i. Penalty Payments. Due to the potential insolvency of BID and
5 the winding down of BID's milking and dairying operations,
6 the Parties have agreed to defer all civil penalty claims and
7 payments to the HDOH administrative process. No civil
8 penalties will be assessed or paid in the resolution of this
9 litigation. Presently, HDOH has collected a civil penalty of
10 \$25,000 from BID, and has also assessed an additional civil
11 penalty of up to \$91,000, which shall be resolved through the
12 AOC.

13 ii. Stipulated Administrative Penalties. The AOC shall include a
14 schedule for assessment of stipulated administrative penalties
15 payable in the event BID violates the AOC or violates the CWA
16 during the period of December 1, 2018 through the date of
17 entry of the anticipated AOC.

18 14. Penalty Allocation: All civil penalties collected by HDOH as
19 provided in this subparagraph g. are intended by the Parties to be paid to an
20 appropriate Supplemental Environmental Project or Environmentally Beneficial

1 Project, completed in accordance with applicable HDOH rules for the benefit of
2 the Ookala community. The Plaintiffs shall work with HDOH to determine any
3 appropriate project or projects for the funds. Plaintiffs shall not oppose terms
4 identified in the AOC that substantially conform to the provisions of Paragraph 13,
5 inclusive of all subparagraphs, *supra*. However, nothing in this Paragraph shall be
6 construed as prohibiting Plaintiffs from providing comments to HDOH about the
7 terms of the AOC.

8 15. Plaintiffs shall promptly report to BID and HDOH any actual or
9 suspected pollutant discharges to regulated waters, including any discharges
10 observed as part of site monitoring set forth in Paragraph 21 herein. The Parties
11 hereby agree that HDOH shall be permitted to investigate any such reported
12 discharge, and shall have exclusive jurisdiction as to an appropriate penalty,
13 remedy, enforcement, and the like. Plaintiffs shall not seek the assessment of
14 additional civil penalties against BID, except as provided by Paragraph 14. HDOH
15 shall be solely responsible for any further assessment of civil penalties for past or
16 future discharges or other violations of the CWA or Hawaii environmental laws by
17 BID.

18 **RELEASE OF CLAIMS & COVENANT NOT TO SUE**

19 16. Plaintiffs hereby provide a full and general release of all claims,
20 known and unknown, against BID (inclusive of its agents, owners, managers,

1 employees, insurers, and the like), based in whole or in part on facts now existing,
2 known or unknown, patent or latent.

3 17. BID hereby provides a full and general release of all claims, known
4 and unknown, against Plaintiffs (inclusive of Plaintiffs' members, principals,
5 agents, officers, employees, and the like), based in whole or in part on facts now
6 existing, known or unknown, patent or latent.

7 18. Plaintiffs covenant not to: (a) sue or otherwise commence or continue
8 any citizen suit or other civil or administrative action against BID (inclusive of its
9 agents, owners, managers, employees, insurers, and the like) in relation, in whole
10 or in part, to past conduct, acts, and omissions of BID (inclusive of its agents,
11 owners, managers, employees, insurers, and the like); (b) file or initiate any new
12 complaints, lawsuits, or the like in any forum against BID, it being the intent of the
13 Parties that regulation of, and enforcement against, BID under the CWA and
14 Hawaii environmental laws will be exclusively in the discretion of HDOH until
15 such time that BID fully ceases its operations at the dairy site and dissolves as a
16 business entity, as anticipated pursuant to the forthcoming AOC.

17 19. Notwithstanding the provisions of Paragraphs 16 & 18, Plaintiffs may
18 provide complaints to HDOH about suspected discharges, may conduct monitoring
19 as outlined *infra*, and may provide comments to HDOH on issues related to
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1 ongoing HDOH inspection, compliance, and enforcement activity, including but
2 not limited to the provisions and implementation of the AOC.

3 20. The releases and covenants contained in Paragraphs 16 & 18 shall not
4 be construed as preventing or prohibiting Plaintiffs from enforcing environmental
5 laws against any future owner and/or operator of a dairy CAFO or other operation
6 using or sited upon the land which BID used, owned, and/or leased from the State
7 of Hawaii for its dairy CAFO.

8 **MONITORING AND ENFORCEMENT**

9 21. Plaintiffs' designee shall have site access per the current site access
10 stipulation filed with the Court (ECF No. 87), provided that:

- 11 a. Inspections shall be limited to twice per week, for no more than three
12 hours each visit. One inspection shall be at a scheduled day and time
13 each week. The other inspection may be at any time upon notice of
14 reasonable suspicion of a discharge event per the terms of the existing
15 stipulation;
- 16 b. Plaintiffs' designee reports to BID the specific facts which warrant the
17 aforementioned reasonable suspicion of a discharge event (facts such
18 as manure smelling water in the gulches); and
- 19 c. All costs and expenses of the inspections shall be borne by the
20 Plaintiffs and their respective designee.

1 provide adequate notice and opportunity for Plaintiffs' representative to be present
2 at any and all times that the Big Gun is operating on such down-gradient field(s).

3 **ATTORNEYS' FEES AND COSTS**

4 25. BID shall pay Plaintiffs' attorneys' fees and costs, which are a
5 substantial compromise of the total fees and costs incurred by Plaintiffs in the
6 amount of \$450,000. Costs alone, including expert fees, exceeded \$250,000.
7 Plaintiffs acknowledge that on December 11, 2018, Plaintiffs received from BID
8 \$200,000 as partial payment of this total amount. BID shall deliver to Plaintiffs
9 the remainder of this total amount within sixty (60) calendar days of approval and
10 entry of this Consent Decree by the Court. The payment of the remainder is subject
11 to separate personal guarantees by the managers (Steven Whitesides and Derek
12 Whitesides, father and son) of BID, LLC.

13 **DISPUTE RESOLUTION**

14 26. The Dispute Resolution procedures of this section shall be the
15 exclusive mechanism for the Parties to raise and resolve disputes arising under or
16 with respect to this Consent Decree ("Covered Dispute").

17 27. A Covered Dispute shall be considered to have arisen when one Party
18 sends the other Part(ies) a written Notice of Dispute.

19 28. Any Covered Dispute shall, in the first instance, be the subject of
20 informal negotiations between the Parties in an attempt to resolve the dispute in

1 good faith and in an expeditious manner. The Parties shall have thirty (30) days
2 following receipt of a Notice of Dispute to reach agreement, unless otherwise
3 agreed.

4 29. If the Parties cannot reach agreement on the dispute during the 30-day
5 period provided under Paragraph 28, the Parties shall jointly file a motion with the
6 Court requesting resolution of the Covered Dispute. The Parties shall append to
7 that motion written statements not to exceed ten (10) double-spaced pages
8 (excluding attachments or exhibits) setting forth their respective proposed
9 resolutions of the dispute. All disputes shall be resolved by Judge Kurren in
10 accordance with Paragraph 2 of this Consent Decree.

11 30. The Parties shall comply with any written agreement reached as a
12 result of informal negotiations conducted during the 30-day period provided for by
13 Paragraph 28, including any extension of time to comply with a schedule or
14 deadline required by this Consent Decree, so long as the agreement does not
15 constitute a material change to any terms of this Consent Decree.

16 **NOTICES**

17 31. Unless otherwise specified herein, any notification, submission,
18 statement of position, or communication required by this Consent Decree shall be
19 made electronically, unless otherwise requested, and addressed as follows:
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1 As to Plaintiffs: Charles M. Tebbutt, charlie@tebbuttlaw.com

2 Parker Jones, parker@tebbuttlaw.com

3 As to BID: Daniel V. Steenson, dan@sawtoothlaw.com

4 David P. Claiborne, david@sawtoothlaw.com

5 32. Any Party may, by written notice to all other Parties, change its
6 designated notice recipient or notice address provided above.

7 33. Notices submitted pursuant to this section shall be deemed submitted
8 upon electronic transmission, unless otherwise provided in this Consent Decree or
9 by mutual agreement of the Parties in writing.

10 **MODIFICATION**

11 34. Integration. This Consent Decree contains the entire agreement of the
12 Parties and shall not be modified by any prior oral or written agreement,
13 representation, or understanding. Any non-material modification of this Consent
14 Decree after entry may be made without approval of the Court but must be in
15 writing and approved by the Parties.

16 35. Any material modification to any term of this Consent Decree shall
17 be effective only upon approval by the Court.

18 **TERMINATION**

19 36. This Consent Decree shall terminate upon complete satisfaction of all
20 of the following terms:

- 1 a. BID ceases all milking and dairy operations at the dairy facility; and
- 2 b. BID completes all requirements and obligations under this Consent
- 3 Decree, including but not limited to the obligations contained in
- 4 Paragraphs 21 and 23-24; and
- 5 c. BID provides written notice to Plaintiffs that it has satisfied its
- 6 requirements and obligations under this Consent Decree.

7 37. Should Plaintiffs disagree with BID's notification under Paragraph 36
8 c., Plaintiffs may invoke Dispute Resolution within ten (10) calendar days of
9 receipt of the certification.

10 38. Following the notification that BID has completed all work required
11 under the Consent Decree, either Party, or the Parties jointly, may move this Court
12 to terminate this Consent Decree.

13 WE HEREBY CONSENT TO ENTRY OF THIS CONSENT DECREE:

14 Plaintiff Kupale Ookala:

15 By: /s/ See ECF No. 98, PageID # 1535

17 Plaintiff Center for Food Safety:

18 By: /s/ See ECF No. 98, PageID # 1536

1 Defendant Big Island Dairy, LLC:

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3 By: /s/ See ECF No. 98, PageID # 1537

4 /s/ See ECF No. 98, PageID # 1537
5 Steven Whitesides

/s/ See ECF No. 98, PageID # 1537
Derek Whitesides

6 IT IS SO ORDERED THIS 14th DAY OF March, 2019.

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8 /s/ Barry M. Kurren
9 HON. BARRY M KURREN
10 United States Magistrate Judge
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