

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

RICHARD KAPELA DAVIS, MICHAEL )	CIVIL NO. 11-00144 LEK-BMK
HUGHES, DAMIEN KAAHU, ROBERT )	
A. HOLBRON, JAMES KANE, III, )	
ELLINGTON KEAWE, KALAI POAHA, )	
TYRONE KAWAELANILUA`OLE )	
NA`OKI GALDONES, )	
)	
Plaintiffs, )	
)	
vs. )	
)	
NEIL ABERCROMBIE, in his )	
official capacity as the )	
Governor of the State of )	
Hawaii; TED SAKAI, in his )	
official capacity as the )	
Director of the Hawaii )	
Department of Public Safety; )	
CORRECTIONS CORPORATIONS OF )	
AMERICA, )	
)	
Defendants. )	
_____ )	

**ORDER REGARDING REMAINING CLAIMS**

On August 13, 2014, this Court issued an entering order that, *inter alia*, ordered the parties to submit simultaneous letter briefs regarding the claims that they contend remain for trial and the relief being requested for those claims. [Dkt. no. 622.] On August 20, 2014, Plaintiffs Richard Kapela Davis, Tyrone K.N. Galdones, Robert A. Holbron, Michael Hughes, Damien Kaahu, James Kane, III, Ellington Keawe, and Kalai K. Poaha (collectively "Plaintiffs") and Defendants Ted Sakai, in his official capacity as the Director of the Hawai`i Department of Public Safety, and Corrections Corporation

of America (collectively "Defendants") submitted their respective letter briefs. [Dkt. nos. 633 (Pltfs.' 8/20/14 Letter), 634 (Def.' 8/20/14 Letter).] Upon review of the many orders that this Court has issued in this case and the parties' letter briefs, this Court HEREBY FINDS that the claims identified in this Order are the only remaining claims in this case.

**I. Class Claims**<sup>1</sup>

- A. Counts I (federal free exercise), VI (federal equal protection), XI (state free exercise), XVI (state equal protection), and XXII (Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA")) regarding daily, outdoor, group worship by the Prospective Relief Class and the Protective Custody Prospective Relief Subclass;
- B. Counts III (federal free exercise), XIII (state free exercise), and XXIV (RLUIPA) regarding lack of daily access to personal amulets and *`ohe hano ihu* (bamboo nose flute) by the Prospective Relief Class and the Protective Custody Prospective Relief Subclass;
- C. Counts VIII (federal equal protection) and XVIII (state equal protection) regarding lack of daily access to personal amulets, *`ohe hano ihu*, coconut oil, and *malo*, *kihei*, and *pau* (native garments) by the Prospective Relief Class and the Protective Custody Prospective Relief Subclass;
- D. Counts III, VIII, XIII, XVIII, and XXIV regarding lack of access to communal sacred items in protective

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<sup>1</sup> Each of the classes and subclasses described in this section was defined in this Court's Order Granting in Part and Denying in Part Plaintiffs' Amended Second Motion for Class Certification ("9/30/14 Certification Order"), filed September 30, 2014. Dkt. no. 644 at 69-72, available at 2014 WL 4956454, at \*28-30. The 9/30/14 Certification Order, however, mistakenly refers to the Protective Custody Prospective Relief Subclass as the "Prospective Relief Subclass." 2014 WL 4956454, at \*29.

custody by the Protective Custody Prospective Relief Subclass;

- E. Counts I through V (federal free exercise), VI through X (federal equal protection), and XXII through XXVI (RLUIPA) by the Damages Class and the Protective Custody Damages Subclass; and
- F. Counts I, II, III, V, VI, VII, VIII, X, XXII, XXIII, XXIV, and XXVI by the SHIP Damages Subclass.<sup>2</sup>

## **II. Clarification of Remaining Class Claims**

### **A. Claims Regarding Access to a Spiritual Advisor**

At an October 20, 2014 status conference addressing the class notification process ("10/20/14 Conference"), Defendants argued that the Court's orders are inconsistent and that there are no spiritual advisor claims remaining. In particular, Defendants relied on this Court's Amended Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment; Granting in Part and Denying in Part Plaintiff Robert Holbron's Counter-motion for Summary Judgment on His Claims; and Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment Against Defendants as to Their Claims under the Religious Land Use and Institutionalized Persons Act, filed June 13, 2014 ("6/13/14 Summary Judgment Order"). [Dkt. no. 544.<sup>3</sup>]

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<sup>2</sup> "SHIP" refers to Saguaro Correctional Center's ("Saguaro") Special Housing Incentive Program.

<sup>3</sup> The 6/13/14 Summary Judgment Order is available at 2014 WL 2716856.

The scope of the 6/13/14 Summary Judgment Order is "limited to Plaintiffs' claims seeking prospective declaratory and injunctive relief." 2014 WL 2716856, at \*3. Thus, although this Court granted summary judgment in favor of Defendants as to the claims regarding access to a spiritual advisor (Counts V, X, XV, XX, and XXVI), *id.* at \*40-42, this Court's rulings do not prevent the Damages Class and Subclasses from pursuing those claims. In other words, this Court ruled that Defendants' **current** policies and procedures regarding access to a spiritual advisor for inmate practitioners of the Native Hawaiian religion do not violate either the United States Constitution, the Hawai'i State Constitution, or RLUIPA. That ruling does not prevent the Damages Class and Subclasses from litigating the issue of whether, during the relevant time period,<sup>4</sup> **previous** policies and procedures regarding access to a spiritual advisor violated the United States Constitution and/or RLUIPA.<sup>5</sup>

At the 10/20/14 Conference, Defendants pointed out that the 6/13/14 Summary Judgment Order states:

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<sup>4</sup> The relevant period is between "four years prior to February 7, 2011 until the resolution of this lawsuit." 9/30/14 Certification Order, 2014 WL 4956454, at \*29-30 (certification of the Damages Class and Subclasses).

<sup>5</sup> This Court granted summary judgment to Defendants as to all of Plaintiffs' claims for damages arising directly under the Hawai'i State Constitution. *See* Order Granting in Part and Denying in Part Defs.' Motion for Summary Judgment Re: Sovereign Immunity/Damages, filed 7/31/14 (dkt. no. 596) ("7/31/14 Summary Judgment Order"), at 37, available at 2014 WL 3809499.

The relevant Plaintiffs for the RLUIPA claim regarding access to a spiritual advisor are Plaintiffs Holbron, Kane, and Keawe (collectively, "the Spiritual Advisor Plaintiffs"). This Court dismissed Plaintiffs Davis, Galdones, Hughes, Kaahu, and Poaha's federal claims regarding access to a spiritual advisor on exhaustion grounds. [Order Granting in Part and Denying in Part Defendants' Motion to Dismiss for Failure to Exhaust,] 2013 WL 1568425, at \*13 [(D. Hawai'i Apr. 11, 2013)].

2014 WL 2716856, at \*19 n.24. Defendants emphasized that the Spiritual Advisor Plaintiffs are all restricted custody inmates. Defendants' position appears to be that, because none of the Spiritual Advisor Plaintiffs were in the general inmate population at Saguaro, the Damages Class does not have an adequate representative for the spiritual advisor claims and cannot proceed as to those claims. Plaintiff Holbron, however, has been in administrative segregation, SHIP, **and** the general population at different times during the relevant time period. Thus, he is an adequate representative of the Damages Class and the SHIP Damages Subclass as to, *inter alia*, the spiritual advisor claims. This Court therefore REJECTS Defendants' argument that there are no remaining class claims<sup>6</sup> regarding access to a spiritual advisor.

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<sup>6</sup> In this Order, the word "class" in general terms like "class notice" and "class claims" refers collectively to the certified classes **and** the certified subclasses.

**B. Claims Regarding Access to Kihei and Malo**

At the 10/20/14 Conference, the Court instructed the parties to meet and confer to discuss a proposed class notice, as well as the manner of and schedule for distribution. The parties were unable to reach an agreement and, on November 3, 2014, Plaintiffs and Defendants each submitted a letter with their respective proposed notice ("Plaintiffs' 11/3/14 Letter" and "Defendants' 11/3/14 Letter").<sup>7</sup>

Defendants argue that Section 2 of Plaintiffs' proposed notice includes "claims that Defendants assert are no longer part of this case (cell access [to] kihei and malo and Makahiki for non-general population inmates)."<sup>8</sup> [Defs.' 11/3/14 Letter at 4.]

In the 7/31/14 Summary Judgment Order, this Court reviewed its rulings in the 6/13/14 Summary Judgment Order, and stated that the remaining claims seeking prospective relief included, *inter alia*, "the portions of Counts VIII and XVIII related to . . . malo[ and] kihei." Order, 2014 WL 3809499, at \*2. Further, the 6/13/14 Summary Judgment Order stated that "there are genuine issues of fact as to the question of whether any difference in the restrictions on the Native Hawaiian

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<sup>7</sup> This Court will issue a separate order addressing the parties' other disputes regarding the proposed notice to potential class members.

<sup>8</sup> This Court will address the disputed Makahiki claims *infra* Section II.C.

practitioners' **in-cell retention list** and in the restrictions on their communal worship items, as compared to the restrictions for inmates of other religions, survives strict scrutiny." 2014 WL 2716856, at \*36 (emphasis added) (federal equal protection analysis); *id.* at \*37 (applying the same analysis to Plaintiffs' state equal protection claim).

The Court therefore REJECTS Defendants' argument that there are no remaining class claims regarding in-cell access to *kihei* and *malo*.

**C. Claims Regarding the Observance of Makahiki**

Defendants argue that there are no remaining claims regarding the observance of Makahiki for the classes of "non-general population inmates." [Defs.' 11/3/14 Letter at 4.]

The 9/30/14 Certification Order did not identify any remaining claims regarding the observance of Makahiki for either the Prospective Relief Class or the Protective Custody Prospective Relief Class. Further, as noted *supra* Section II.A., the rulings in the 6/13/14 Summary Judgment Order are "limited to Plaintiffs' claims seeking prospective declaratory and injunctive relief." 2014 WL 2716856, at \*3. Thus, although this Court granted summary judgment in favor of Defendants as to the Makahiki claims (Counts II, VII, XII, XVII, and XXII), *id.* at \*40-42, the rulings do not prevent the Damages Class and Subclasses from litigating the federal claims. See 7/31/14

Summary Judgment Order, 2014 WL 3809499, at \*16 (granting summary judgment in favor of Defendants as to all of Plaintiffs' claims for damages arising directly under the Hawai'i State Constitution).

Thus, the Damages Class and Subclasses may pursue Counts II, VII, and XXII regarding the observance of Makahiki, and the Court REJECTS Defendants' argument that there are no remaining class claims regarding the observance of Makahiki.

### **III. Individual Claims**

The claims listed below - which belong to individual Plaintiffs and are in addition to the claims they are pursuing as class representatives - remain for trial.

- A. Plaintiff Galdones's state law retaliation claim, set forth in his Supplemental Complaint for Damages and for Classwide Declaratory and Injunctive Relief ("Supplemental Complaint"), filed August 22, 2012. [Dkt. no. 146.]
- B. Plaintiffs Kane and Keawe's federal claims for compensatory damages, nominal damages, and retrospective equitable relief based on alleged violations that occurred while they were in protective custody at Red Rock Correctional Center ("Red Rock"). See 7/31/14 Summary Judgment Order, 2014 WL 3809499, at \*11 (ruling that Plaintiffs' remaining claims under 42 U.S.C. § 1983 and RLUIPA claims for damages are limited to compensatory and nominal damages). These are the claims regarding: the observance of Makahiki (Counts II, VII, and XXII); access to sacred items (Counts III, VIII, and XXIV); and access to a spiritual advisor (Counts V, X, and XXVI).
- C. Plaintiffs Kane and Keawe's claims for prospective equitable relief regarding the observance of Makahiki in protective custody at Saguario (Counts II, VII, XII, XVII, and XXII).



- D. Plaintiff Davis's federal claims for compensatory damages, nominal damages, and retrospective equitable relief based on the exclusion from certain Makahiki ceremonies (Counts II, VII, and XXII) on the ground that he allegedly had insufficient attendance at the Native Hawaiian religion classes that were a prerequisite to participation.
- E. Plaintiff Holbron's claims for prospective equitable relief regarding the practice of the Native Hawaiian religion in administrative segregation and SHIP. These are: the observance of Makahiki (Counts II, VII, XII, XVII, and XXII); access to sacred items (Counts III, VIII, XIII, XVIII, and XXIV); and access to a spiritual advisor (Counts V, X, XV, XX, and XXVI). However, as a threshold matter, Plaintiff Holbron must establish that there is a reasonable expectation that he may be placed in administrative segregation and/or SHIP in the future. See 6/13/14 Order, 2014 WL 2716856, at \*5.

#### **IV. Clarification of Remaining Individual Claims**

##### **A. Plaintiff Galdones's Retaliation Claim**

The parties agree that Plaintiff Galdones's state law retaliation claim remains for trial. This Court, however, notes that, to the extent that Plaintiff Galdones seeks prospective equitable relief, he must first establish that there is a reasonable expectation that he will be retaliated against in the future or that he will suffer further effects of the alleged retaliation for the April 2012 incident described in the Supplemental Complaint. See 6/13/14 Summary Judgment Order, 2014 WL 2716856, at \*6. This Court also notes that it granted summary judgment in favor of Defendants as to Plaintiff Galdones's request for punitive damages associated with his state law

retaliation claim. See 7/31/14 Summary Judgment Order, 2014 WL 3809499, at \*18.

**B. Plaintiffs Kane and Keawe's Individual Claims**

As noted *supra*, the scope of the 6/13/14 Summary Judgment Order is limited to Plaintiffs' claims seeking prospective declaratory and injunctive relief. 2014 WL 2716856, at \*3. Thus, with regard to any claims alleging violations at Red Rock, the 6/13/14 Summary Judgment Order only granted summary judgment in favor of Defendants as to "Plaintiffs' claims for **prospective** equitable relief regarding Red Rock." Id. at \*4 (emphasis added). Although the 9/30/14 Certification Order declined to certify any damages class consisting of former Red Rock inmates; 2014 WL 4956454, at \*23-28; nothing in this Court's orders prevents Plaintiffs Kane and Keawe from pursuing their individual federal claims for compensatory damages, nominal damages, and retrospective relief regarding alleged violations of their rights while they were at Red Rock.

Plaintiffs did not include the claims regarding the observance of Makahiki among the claims that the Protective Custody Prospective Relief Subclass would pursue. [Pltfs.' Amended Second Motion for Class Certification, filed 7/1/14 (dkt. no. 560), at 7-8.] This Court therefore did not certify the Protective Custody Prospective Relief Subclass as to the Makahiki claims. See 9/30/14 Certification Order, 2014 WL 4956454, at

\*29. Although the 6/13/14 Summary Judgment Order granted summary judgment in favor of Defendants as to the Makahiki claims (Counts II, VII, XII, XVII, and XXII); 2014 WL 2716856, at \*40-42; the scope of those ruling is limited to Plaintiffs' claims regarding inmate practitioners of the Native Hawaiian religion in the general population at Saguaro; id. at \*21.<sup>9</sup> Thus, nothing in this Court's orders prevents Plaintiffs Kane and Keawe from pursuing their individual claims for prospective equitable relief regarding the observance of Makahiki in protective custody at Saguaro.

**C. Plaintiff Davis's Makahiki Claim**

In addition to the federal claims regarding the observance of Makahiki that he is pursuing as a representative of the Damages Class, Plaintiff Davis has argued that he was excluded from certain Makahiki ceremonies because he did not attend a sufficient number of classes beforehand. He has argued that he was wrongfully denied access to the required classes

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<sup>9</sup> In the section titled "Defendants' Motion as to Plaintiffs in the General Inmate Population," this Court stated: "although Plaintiff Holbron alleges claims regarding religious access during restricted custody, those claims are outside of the scope of this order because Plaintiff Holbron is no longer in restricted custody and is currently in the general inmate population, as are the other Plaintiffs[;]" 6/13/14 Summary Judgment Order, 2014 WL 2716856, at \*21; except for Plaintiff Poaha. This Court granted summary judgment in favor of Defendants as to Plaintiff Poaha's claims for prospective relief because he was transferred to Halawa Correctional Facility. Id. at \*5.

because, *inter alia*: there was not enough space in the classes to accommodate all of the practitioners of the Native Hawaiian religion; and Saguario imposed additional restrictions on class attendance because it considered the classes educational, rather than religious. This portion of Plaintiff Davis's federal claims regarding the observance of Makahiki is distinct from the Damages Class's claims. Nothing in this Court's orders prevents Plaintiff Davis from pursuing this individual portion of the federal Makahiki claims.

**D. Individual Claims that Plaintiffs Will Not Pursue**

If Plaintiffs have decided not to pursue any of the remaining individual claims listed *supra* Section III.A., Plaintiffs must submit a stipulation for this Court's signature by **December 1, 2014**. If Plaintiffs are unable to obtain a stipulation from Defendants, Plaintiffs must file a motion to dismiss, pursuant to Fed. R. Civ. P. 41(a)(2), by **December 9, 2014**, and said motion and supporting memorandum are not to exceed ten pages.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, November 10, 2014.



/s/ Leslie E. Kobayashi  
Leslie E. Kobayashi  
United States District Judge