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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

CIVIL BEAT LAW CENTER FOR THE PUBLIC INTEREST, INC., Plaintiff, vs. DEPARTMENT OF PUBLIC SAFETY, Defendant.	CIVIL NO. 1CCV-22-735 (Other Civil Action) CROSS-MOTION FOR SUMMARY JUDGMENT; COMBINED MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DECLARATION OF ERIC A. SEITZ; DECLARATION OF R. BRIAN BLACK; EXHIBITS 1-12; and NOTICE OF HEARING HEARING MOTION JUDGE: Honorable John M. Tonaki TRIAL DATE: NONE HEARING DATE: January 19, 2023 HEARING TIME: 10:00 a.m.

CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Rules 56 and 57 of the Hawai`i Rules of Civil Procedure, and based on the accompanying memorandum of law, declarations, and exhibits and the pleadings filed in this action, Plaintiff Civil Beat Law Center for the Public Interest, Inc. (Law Center) respectfully moves this Court for summary judgment against Defendant

Department of Public Safety (PSD). The Law Center seeks an order pursuant to the Uniform Information Practices Act (Modified), Hawai`i Revised Statutes ch. 92F, requiring the PSD to disclose the records requested on March 17, 2022, regarding reports prepared by an independent monitoring panel regarding PSD's response to the COVID-19 pandemic.

DATED: Honolulu, Hawai`i, December 21, 2022

/s/ Robert Brian Black
ROBERT BRIAN BLACK
Attorney for Plaintiff
Civil Beat Law Center for the Public Interest, Inc.

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Plaintiff Civil Beat Law Center for the Public Interest (Law Center) requested monitoring reports that Defendant Department of Public Safety (PSD or Department) shared with plaintiffs and opposing counsel as part of a voluntary settlement in a federal class action concerning the Department's deficient response to the COVID-19 pandemic. PSD claims that it had these reports prepared confidentially to avoid "the threat of future litigation." Dkt. 33 at 3, 15.[1] But, when PSD agreed to monitoring and creation of these reports to be shared with opposing counsel, it knew that opposing counsel was "assembling a team of people to pursue damages claims probably in the state courts for everybody who got COVID, staff and inmates." Decl. of R. Brian Black, dated December 21, 2022 [Black Decl.], Ex. 4 at 20-23 ("We're not done here, but this is just a phase, a first step."). The Department has not and cannot meet its burden to justify withholding these reports from the public.

The Law Center respectfully requests that the Court deny the Department's motion for summary judgment, grant the Law Center's cross-motion for summary judgment, and order disclosure of all information requested.

I. STATEMENT OF FACTS

A. *Chatman v. Otani*

On April 28, 2021, several incarcerated individuals filed a class action against the Department, alleging that it mismanaged the COVID-19 pandemic resulting in unconstitutional conditions of confinement.[2] Black Decl. Ex. 1 at 11. On July 31, the court granted provisional class certification and a preliminary injunction. *Id.* at 66-68. Based on the evidence presented, the court expressed concern that PSD was not following its own COVID-19 response plan: "the mere existence of policies is of little value if implementation and compliance are lacking."[3] *Id.* at 38-39, 48-49 ("The

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[1] Pinpoint citations to "Dkt." entries refer to the page of the PDF.

[2] Initially before this Court as *Nash v. State of Hawai`i, Department of Public Safety et al.*, 1CCV-21-541, the Department removed the action to federal court.

[3] And the court's concerns were not limited to pandemic response. Black Decl. Ex. 1 at 45 n.21 ("These conditions are alarming, with or without COVID-19.").

declarations relied upon by Defendant offer summaries of provisions in the Response Plan without specific examples of compliance. . . . Policies are meaningless if they are not followed."). As of July 2021, 1,575 inmates and 240 correctional staff had contracted COVID-19, and seven inmates had died. *Id.* at 50. Incarcerated people in Hawai`i were testing positive for COVID-19 at a rate of 17.4 times as high and dying of COVID-19 at a rate of 5.1 times as high as the respective positivity and death rates in Hawai`i overall. *Id.*; Marshall Project, *A State-By-State Look at 15 Months of Coronavirus in Prisons* (July 1, 2021), *at* www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons.

The court held that the plaintiffs had a "strong likelihood" of success on the merits. *Id.* at 49, 50, 52. The evidence supported findings that:

- "[M]any of the failures . . . are more than simple lapses and demonstrate objective deliberate indifference."
- "Many of the concerning facts outlined in the preceding section support a finding of subjective deliberate indifference because they evince Defendant's knowing disregard of excessive risk to inmate health and safety."
- "Defendant knowingly (1) transported *symptomatic* inmates from a facility *with an active COVID-19 outbreak*, (2) who *told staff* they were ill, (3) who were *infected*, (4) but whose infections were unconfirmed due to *late or no testing*, (5) *on an airplane*, (6) to a facility with no active COVID-19 cases *that previously experienced an outbreak*, and (7) then housed those inmates *with COVID-negative inmates*. There is almost no clearer an example of complete disregard for the Response Plan and abandonment of precautionary measures to prevent the spread of COVID-19 between [Department] facilities and islands."

Id. The court held that the Department's "recent efforts to remediate egregious conditions—that should never have occurred in the first place—do not persuade the Court that [PSD] can and will successfully manage the pandemic moving forward." *Id.* at 56. The court further found:

> With inmate COVID-19 infections far exceeding the general rate in Hawai`i, and multiple severe outbreaks in [PSD] facilities through the course of the pandemic, Defendant has not adequately protected the health and safety of the inmates. And the continued spread of COVID-19 in [PSD] facilities will impact [PSD] staff and other individuals who enter [PSD] facilities, along with their families and surrounding communities.

Id. at 61.

The court ordered the Department to "*fully comply*" with its COVID-19 Pandemic Response Plan. *Id.* at 66-67. PSD attempted to modify the injunction twice. In the first attempt, the Department sought to limit the scope of the injunction to certain sections of the Department's Response Plan, claiming that other portions of the plan were unworkable. In response, the court denied the motion and held:

> As discussed above, the Court rejects Defendant's contradictory positions regarding the Response Plan. Defendant previously pointed to the virtues of the Response Plan and claimed to have implemented it. He cannot reverse course weeks later and characterize the Response Plan as an unenforceable guidance document, nor feign an inability to comply due to vague standards and/or scarce staff time. The Court intended and expects Defendant to comply with the *entire* Response Plan.

Black Decl. Ex. 2 at 13. In the second attempt, the Department sought to modify its Response Plan. The court denied the motion and "again cautioned that eliminating safety measures may constitute a violation of the [preliminary injunction order] if such elimination is not supported by COVID-19 conditions and corresponding medical/scientific guidance during the relevant time period." *Id.* Ex. 3 at 5.

At that point, the Department settled. Dkt. 33 at 20 (Def. Ex. A). The settlement required an "independent Agreement Monitoring Panel ('AMP') . . . with appropriate knowledge and expertise in correctional health care and managing infectious disease in a correctional setting or in the management of correction systems." *Id.* at 22 ¶¶ 2-3. The AMP would "provide non-binding, informed guidance and recommendations to aid [the Department] in its continuing effort to implement the [Pandemic Response Plan] . . . . [and] devise procedures for the monitoring of [the settlement agreement] and the standards for developing its guidance and recommendations." *Id.* at 23-24 ¶¶ 5-6; Black Decl. Ex. 4 at 26-27 (deputy attorney general explaining that the report "is designed to

given guidance direction as to how -- they're going to identify areas of concern, areas for improvement and -- and give guidance and suggestions for Public Safety as to how to go about implementing those recommendations"). The settlement required that members of the AMP be given access to PSD facilities, policies, records, staff, inmates, consulting physicians, and experts with PSD's full cooperation.[4] Dkt. 33 at 25 ¶ 7.

The settlement tasked the AMP with preparing monthly reports. *Id.* at 26-27 ¶ 10. "The reports should address each facility's efforts to follow the [Pandemic Response Plan] and identify areas needing improvement." *Id.* PSD included a provision in the settlement that the AMP reports were confidential.[5] *Id.* at 25 ¶ 7 ("Furthermore, the parties agree to keep the AMP reports confidential and not disseminate such reports to third parties, except as in accordance with a protective order."); Decl. of Eric A. Seitz, dated December 16, 2022 [Seitz Decl.], ¶ 3 ("The Department of Public Safety insisted that the Settlement require confidentiality for the reports prepared by the Agreement Monitoring Panel."). To justify the confidentiality, the Department referenced the mediation privilege at HRS § 658H-4. Dkt. 33 at 25 ¶ 7.

The *Chatman* court reviewed the settlement agreement for fairness to the provisionally certified class. At the fairness hearing, individuals objected to the settlement because it did not include monetary damages. Black Decl. Ex. 4 at 20. Plaintiffs' counsel responded: "we are committed in the next stage, and we are putting

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[4] The settlement provided that "non-public information obtained by the AMP shall be maintained in a confidential manner" and required confidentiality agreements to protect against disclosure of information that would "implicate safety and security, or medical privacy, or any other confidential documents." Dkt. 33 at 25 ¶ 7. The Department has not claimed in this litigation that the requested AMP reports disclose medical privacy or other confidential information that could be redacted. Instead, PSD argues only that the AMP reports must be withheld in their entirety.

[5] Although the *Chatman* plaintiffs did not consider the confidentiality provision justified, they agreed as a matter of expediency to protect those incarcerated and the community. The Department was withholding details about events within its facilities, hampering public health solutions during deadly outbreaks. Seitz Decl. ¶¶ 4-6; *see* Black Decl. Ex. 4 at 21-22, 42-43.

together and assembling a team of people to pursue damages claims probably in the state courts for everybody who got COVID, staff and inmates." *Id.* The court confirmed with counsel that the settlement "does not preclude any individual inmates from pursuing financial damages." *Id.* (plaintiffs' counsel: "we made that clear during the course of the discussions"). And plaintiffs' counsel reiterated the plan "to start filing claims for people who died, people who became very sick, or anybody who contracted COVID. We're not done here, but this is just a phase, a first step." *Id.* at 23. The deputy attorney general then reinforced that future claims by class members were anticipated. *Id.* at 25 ("So while some class members may be disappointed that there is no monetary component to this settlement, they -- they can bring those claims in another action at another time.").

The AMP issued six reports between October 1, 2021, and March 22, 2022. *Id.* at 5. The *Chatman* plaintiffs do not have an objection to public disclosure of the AMP reports. Seitz Decl. ¶¶ 7-9.

B. The Law Center's March 17, 2022 Request

On March 17, 2022, the Law Center requested all of the AMP reports. Black Decl. Ex. 5. The request affirmatively addressed the obvious claims for withholding based on the confidentiality provision in the settlement agreement. *Id.* The request explained that "an agency cannot avoid its statutory duties under the UIPA by entering into a confidentiality agreement." *Id.* And as it concerned the asserted statutory mediation privilege in the settlement agreement, the request quoted the relevant statutory language that the privilege "does not apply to records that must be disclosed under the UIPA." *Id.*

On March 31, the Department denied the request without citing any relevant law. *Id.* Ex. 6 ("The AMP reports are confidential and are also not discoverable."). The Law Center immediately requested that PSD provide the relevant law in compliance with HAR § 2-71-14(b). *Id.* After the Department failed to provide a proper response, the Law Center sought assistance from the Office of Information Practices (OIP) simply to get a proper notice of denial. *Id.* Ex. 7 at 2 ("PSD's response to Mr. Black's record

request is deficient because it does not include a citation to the law allowing it to deny access to the AMP report."). On April 14, PSD's counsel denied the request solely on the basis of the settlement agreement. *Id.* Ex. 8.

Based on the limited scope of the Department's denial, on April 27, the Law Center appealed the denial to OIP for resolution. *Id.* Ex. 9. On May 16, PSD submitted a response to the appeal that argued—for the first time—withholding based on the attorney work product doctrine, relying on HRS § 92F-13(2) (exception for discovery privileges). *Id.* Ex. 10 at 3 ("The AMP reports were thus prepared in anticipation of litigation and are protected from disclosure by the work product privilege.").

In light of the new work product argument, on June 6, the Law Center asked PSD to reconsider its denial. *Id.* Ex. 11. On June 22, the Department reaffirmed its refusal to release any information in the AMP reports. *Id.* Ex. 12.

C. Procedural History

On June 24, the Law Center filed its Complaint in this action, seeking disclosure of the requested AMP reports. Dkt. 1. The Complaint alleged that PSD claimed the AMP reports could be withheld under the attorney work product doctrine. Dkt. 1 at 4 ¶ 17 ("On May 16, 2022, the Attorney General's office further claimed that the AMP reports are 'protected from disclosure by the work product privilege.'"). The Department's July 18 Answer expressly denied any reliance on the attorney work product doctrine. Dkt. 20 at 3 ¶ 6. Instead, PSD relied on the deliberative process privilege and a general claim for frustration of a legitimate government function. *Id.* ("[PSD] denies the allegations as written in paragraph 17 of the complaint and further states that the AMP reports may be withheld from disclosure under the deliberative process privilege. Disclosure of the AMP reports would also frustrate a legitimate government function.").

On July 24, counsel for the *Chatman* plaintiffs filed a class action complaint for damages concerning the Department's negligence in managing response to the COVID-19 pandemic. *Acosta-Canon v. State of Hawai`i Dep't of Public Safety*, 1CCV-22-874 DEO, Dkt. 1.

II. STANDARD OF REVIEW

The standard of review on a motion for summary judgment is well-settled:

> Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, [this court] must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai`i 92, 104, 176 P.3d 91, 103 (2008). When the non-moving party—here PSD—has the burden of proof at trial, summary judgment is proper upon a showing that the non-moving party cannot meet its burden. *Thomas v. Kidani*, 126 Hawai`i 125, 130, 267 P.3d 1230, 1235 (2011).

III. THE PUBLIC IS ENTITLED TO KNOW WHAT ACTUALLY HAPPENED WITHIN HAWAI`I PRISONS DURING THE COVID-19 PANDEMIC.

The UIPA protects the public's basic right to know what its government is doing. Here, the *Chatman* plaintiffs raised serious allegations about unconstitutional conditions in Hawai`i prisons during the COVID-19 pandemic. Incarcerated people entrusted to the care of the Department got sick, including deaths, allegedly due to the Department's mismanagement. The plaintiffs claimed that PSD was not even following its own pandemic response plan. PSD argued otherwise, but refused to provide details. Then an independent group of experts went into the facilities, observed what was actually happening, examined whether the Department in fact was following its own response plan, and made recommendations for further action to protect the lives of the people in PSD's care and employ. Beyond the allegations and denials, the public is entitled to know what actually happened.

The Legislature enacted the UIPA's broad disclosure mandate to "[p]romote the public interest in disclosure." HRS § 92F-2(1).

> In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and

> conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore the legislature declares that *it is the policy of this State that the formation and conduct of public policy*—the discussions, deliberations, decisions, and actions of government agencies—*shall be conducted as openly as possible*.

HRS § 92F-2 (emphasis added). In furtherance of the Legislature's presumption of public access to government records, the UIPA provides: "All government records are open to public inspection unless access is restricted or closed by law." HRS § 92F-11(a). As OIP has explained in numerous opinions, "the UIPA's affirmative disclosure provisions should be liberally construed, its exceptions narrowly construed, and all doubts resolved in favor of disclosure." *E.g.*, OIP Op. No. 05-16 at 6-7. And if there is any dispute about access: "The agency has the burden of proof to establish justification for nondisclosure." HRS § 92F-15(c).

IV. THE SETTLEMENT AGREEMENT DOES NOT JUSTIFY WITHHOLDING.

After OIP's admonition to the Department that it must cite the relevant law justifying nondisclosure, the only authority that the Department cited was the settlement agreement. Black Decl. Ex. 8 ("Attached is a copy of the settlement agreement in Chatman which requires the AMP reports to be kept confidential."). The settlement agreement does not justify nondisclosure.

The Hawai`i Supreme Court and OIP have long held that the confidentiality provisions in contracts are not a basis to withhold records under the UIPA.

> [P]arties may not do by contract that which is prohibited by statute. . . . In the instant case, the confidentiality provision of the CBA purportedly requires the HPD to fail to perform its duty to disclose disciplinary records as mandated by HRS Chapter 92F, notwithstanding that the duty to provide access to government records is not discretionary under the UIPA. With respect to public records statutes, the virtually unanimous weight of authority holds that an agreement of confidentiality cannot take precedence over a statute mandating disclosure. . . . [T]he confidentiality provision in SHOPO's CBA with the City prevents the HPD from performing its duties under the UIPA and is therefore unenforceable.

SHOPO v. Soc'y of Prof'l Journalists - Univ. of Haw. Chapter, 83 Hawai`i 378, 405-06, 927 P.3d 386, 413-14 (1996). And the Hawai`i Supreme Court recently reaffirmed that principle, quoting the comparable position under federal law: "[T]o allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate." *Honolulu Civil Beat Inc. v. Dep't of the Att'y Gen.*, 151 Hawai`i 74, 82 n.9, 508 P.3d 1160, 1168 n.9 (2022) (quoting *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 263 (D.C. Cir. 1982)).

One of the earliest OIP opinions rejected an identical claim to that asserted by the Department in its notice to requester. When disclosure is required under the UIPA, "[t]his result is not changed by the confidentiality provisions of the [settlement] agreements, which must yield to the provisions of the UIPA." OIP Op. No. 89-10 at 8; *accord* OIP Op. No. 04-02 at 18 ("While confidentiality provisions frequently are inserted in settlement agreements, the ODC and the Board are hereby advised that such provisions do not supercede [sic] the requirements of the UIPA and do not protect the document from public disclosure."); OIP Op. No. 02-01 at 3, 20-23 ("A confidentiality provision in a settlement agreement that contravenes the agency's duty to the public is impermissible under Hawaii law."); OIP Op. No. 92-21 at 2, 6-7 ("Unlike private litigants, however, one promise the State cannot validly make is a promise of confidentiality, unless the information subject to the promise is, itself, protected from disclosure by one of the exceptions in section 92F-13, Hawaii Revised Statutes."); *see also* OIP Op. No. 90-02 at 3 ("It is a well-settled principle of public records law that government promises of confidentiality cannot override the . . . mandate of public access to government records."). Thus, a confidentiality provision in a settlement agreement (or any form of agreement) cannot be enforced to withhold records that must be disclosed under the UIPA.

The reference to the mediation privilege in the settlement agreement does not help the Department. HRS § 658H-4 recognizes a privilege against disclosure "[e]xcept as provided in 658H-6." HRS § 658H-4(a). The mediation privilege expressly does not protect against disclosure under the UIPA. HRS § 658H-6(a)(2) ("There is no privilege

under section 658H-4 for a mediation communication that is . . . [a]vailable to the public under chapter 92F . . . ."); *accord* HRS § 658H-8 ("Unless subject to disclosure pursuant to . . . chapter 92F, mediation communications are confidential . . . ."); Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Mediation Act (2003) § 6 cmt. ("Section 6(a)(2) makes clear that the privileges in Section 4 do not preempt state open meetings and open records laws . . . ."), § 8 cmt. (mediation confidentiality agreements "are also not enforceable if they conflict with public records requirements").[6]

Accordingly, the settlement agreement—the sole basis for nondisclosure referenced in the Department's notice to requester—does not justify withholding the AMP reports from the public.

V. PSD WAIVED ANY ARGUMENT BASED ON LEGAL AUTHORITY OTHER THAN THE SETTLEMENT AGREEMENT.

Denial of the public's right to access government records should not be a guessing game. Contrary to its obligations under the law, PSD has been evasive in stating its basis for nondisclosure. The Department should be held to the justifications recited in its notice to requester, or at a minimum bound by its affirmative denial of reliance on the attorney work product doctrine in its Answer. Agencies cannot be permitted to constantly shift the purported basis for withholding government information from the public.

HAR § 2-71-14(b)(2) provides: "When an agency intends to deny access to all or part of the information in the requested record, the agency's notice to the requester shall state . . . [t]he specific legal authorities under which the request for access is denied under section 92F-13, HRS, or other laws." When OIP promulgated the rule, it explained: "This information about the agency's denial of access will be reviewed by the court or the OIP if the requester decides to appeal this denial." OIP, Impact

[6] The plain language of the law speaks for itself; the commentary to the uniform law only confirms the intent. *See* HRS § 1-24 ("All provisions of uniform acts adopted by the State shall be so interpreted and construed as to effectuate their general purpose to make uniform the laws of the states and territories which enact them.").

Statement for Proposed Rules of the Office of Information Practices on Agency Procedures and Fees for Processing Government Record Requests (1998), *available at* oip.hawaii.gov/impact-statement-for-oips-administrative-rules/. Here, after being told that its initial response was "deficient" for generally claiming confidentiality without citing specific legal authority, the Department's only response was to reference the settlement agreement. Black Decl. Ex. 6-8. Despite its obligation to do so—if it believed the doctrine applied—the Department made no reference to the attorney work product doctrine or any other authority.

Then, when the Law Center filed an appeal that only addressed the settlement agreement, PSD shifted its position and claimed for the first time that nondisclosure was justified under the attorney work product doctrine and HRS § 92F-13(2). *Id.* Ex. 9-10 ("The AMP reports were thus prepared in anticipation of litigation and are protected from disclosure by the work product privilege."). Next, the Law Center filed its Complaint addressing the settlement agreement and the attorney work product doctrine. Dkt. 1 at 4 ¶¶ 16-17 ("On May 16, 2022, the Attorney General's office further claimed that the AMP reports are 'protected from disclosure by the work product privilege.'"). But PSD shifted its position again to expressly deny protection under the attorney work product doctrine and instead justify withholding under the deliberative process privilege and HRS § 92F-13(3) (frustration of a legitimate government function). Dkt. 20 at 3 ¶ 6. Now, in its motion for summary judgment, the Department has gone back to the attorney work product doctrine, as well as continuing the deliberative process privilege claim. Neither of those justification were stated in PSD's April 14 notice to requester, which is what is properly before this Court.

PSD waived its argument under the attorney work product doctrine and HRS § 92F-13(2) by:

- failing to assert it in the notice to requester, HAR § 2-71-14(b)(2);
- expressly denying it in its Answer, *Ching v. Dung*, 148 Hawai`i 416, 427-28, 477 P.3d 856, 867-68 (2020) (denials and statements in pleadings are judicial

admissions that bind a party); HRCP 8(b) (partial denials must "specify so much of it as is true and material and shall deny only the remainder"); and

- failing to plead it as an affirmative defense, HRCP 8(c) (pleading must set forth affirmative defenses).[7]

It also waived its argument under the deliberative process privilege and HRS § 92F-13(3) by failing to assert it in the notice to requester.

VI. NO DISCOVERY PRIVILEGE JUSTIFIES WITHHOLDING.

Even if the Court considers PSD's *waived* work product argument, the argument fails. An independent panel prepared the requested AMP reports according to the requirements of the settlement agreement and distributed those reports to the Department's opposing counsel as counsel prepared for future litigation against PSD for damages. The attorney work product doctrine does not protect documents under these circumstances.

HRS § 92F-13(2) provides that an agency is not required to disclose records "to the extent that such records would not be discoverable." "This section protects from disclosure those documents which would be protected under Rule 26 of the Hawaii Rules of Civil Procedure." OIP Op. No. 89-10 at 5.

The work product doctrine covers documents "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." HRCP 26(b)(4); *Anastasi v. Fid. Nat'l Title Ins. Co.*, 137 Hawai`i 104, 113-14, 366 P.3d 160, 169-70 (2016). The doctrine protects the adversarial process by preventing "exploitation of a party's efforts in preparing for litigation." *ACLU of N. Cal. v. U.S. Dep't of Justice*,

[7] As to unenumerated affirmative defenses, "[a]ny matter that does not tend to controvert the opposing party's prima facie case as determined by applicable substantive law should be pleaded, and is not put in issue by a denial." *Touche Ross, Ltd. v. Filipek*, 7 Haw. App. 473, 487, 778 P.2d 721, 730 (1989) (internal quotations omitted). Under the UIPA, it is not part of the requester's *prima facie* burden to disprove all possible justifications for nondisclosure. HRS § 92F-15(c) ("The agency has the burden of proof to establish justification for nondisclosure.").

880 F.3d 473, 484, 486 (9th Cir. 2018) ("core purpose . . . to encourage effective legal representation *within the framework of the adversary system* by removing counsel's fears that his thoughts and information will be invaded by his adversary").

As to the first threshold—"prepared in anticipation of litigation"—the Hawai`i Supreme Court adopted the Ninth Circuit's "because of" test. *Anastasi*, 137 Hawai`i at 114, 366 P.3d at 170 (citing *United States v. Richey*, 632 F.3d 559 (9th Cir. 2011)). "In applying the 'because of' standard, courts must consider the totality of the circumstances and determine whether the 'document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation.'" *Id.* at 113, 366 P.3d at 169.

Here, the AMP reports were not "prepared in anticipation of litigation." *Richey*, 632 F.3d at 568 (no work product protection for appraisal report and work file prepared for tax deduction, regardless of whether IRS audit anticipated). To the contrary, the AMP reports were created because of a settlement agreement that *terminated* litigation. OIP Op. No. 89-10 at 5-6 (no attorney work product protection for documents prepared "to conclude litigation"). Fear of future litigation does not turn every government record into work product. OIP Op. No. 92-05 at 7-8 (rejecting discovery privilege claims even though documents may be "relevant in litigation") ("Moreover, courts in other jurisdictions have uniformly held that the fear of litigation against the government is not a valid exception to disclosure under state public records laws that are similar to the UIPA."). The Department has not presented any evidence that the AMP would have issued these reports in a substantially different form in the absence of any potential litigation. To the contrary, the settlement agreement proscribed the contents of the reports. Dkt. 33 at 23-24, 26-27 ¶¶ 5, 10; *e.g.*, *Nevada v. U.S. Dep't of Energy*, 517 F. Supp. 2d 1245, 1261-62 (D. Nev. 2007) (no work product protection when content of document governed by requirements unrelated to litigation). The AMP reports were prepared as required by, and according to the terms of, the settlement agreement, not "because of" potential litigation against the Department for damages.

As to the second threshold—by a party or party representative—PSD's assertion also fails. The AMP was "independent." Dkt. 33 at 22 ¶ 2. It did not perform work by or on behalf of the Department; plaintiffs selected two of the five representatives, and both parties agreed on the fifth. *Id.* at 22-23 ¶ 4. The purpose of the AMP was to get an objective expert assessment of PSD's compliance with its own response plan. *Id.* at 23-24 ¶¶ 5-6, 26-27 ¶ 10; Black Decl. Ex. 4 at 21-22, 26-27, 42-43; Seitz Decl. ¶¶ 4-6 ("There was an critical need to provide access by independent experts to the prisons to obtain accurate information about what was happening and to make recommendations to contain the virus."). The difference is illustrated in the U.S. Supreme Court's remarks rejecting an extension of the work product doctrine to accountants. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984).

> The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential adviser and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.

Id. AMP did not act by or on behalf of the Department; thus its work is not covered by the attorney work product doctrine.

Lastly, even if the work product doctrine did apply to the AMP reports in this case—it does not—the protection has been waived because the reports have been shared with PSD's adversary. *E.g.*, *Richey*, 632 F.3d at 567 ("The work-product doctrine's protections are waivable."). Attorney work product protection is waived if "disclosure is made to an adversary in litigation or 'has substantially increased the

opportunities for potential adversaries to obtain the information.' Put another way, disclosing work product to a third party may waive the protection where 'such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary.'" *United States v. Sanmina Corp.*, 968 F.3d 1107, 1121 (9th Cir. 2020) (citations omitted). Here, the AMP reports were distributed directly to plaintiffs' counsel—PSD's adversary—who explicitly told the Department that he planned to file further litigation for damages. Dkt. 33 at 26 ¶ 10; Black Decl. Ex. 4 at 20, 23, 25. Disclosing information to a party's adversary is not consistent with the core purpose of the attorney work product doctrine—*i.e.*, protecting information from disclosure to a party's adversary. *Cf. Honolulu Civil Beat Inc. v. Dep't of the Att'y Gen.*, 146 Hawai`i 285, 297-98, 463 P.3d 942, 954-55 (2020) ("Because the lawyer-client privilege works to suppress otherwise relevant evidence, the limitations which restrict the scope of its operation . . . must be assiduously heeded. [T]he privilege must be strictly limited to the purpose for which it exists." (citation and internal quotations omitted)). Thus, PSD's non-existent work product claim was waived in any event.

PSD asks this Court to equate FOIA Exemption 5 with HRS § 92F-13(2). Dkt. 33 at 9-11. The Hawai`i Supreme Court already has admonished that the UIPA must be interpreted according to its own language and history when it differs from the federal Freedom of Information Act. *Peer News LLC v. City & County of Honolulu*, 143 Hawai`i 472, 486 n.23, 431 P.3d 1245, 1259 n.23 (2018) ("But these cases interpreting the federal statute are relevant to the Hawai`i legislature's intent when enacting the UIPA only insofar as they demonstrate that the legislature was clearly aware that other jurisdictions had codified the deliberative process privilege, thus making their rejection of such a privilege all the more clear."). Hawai`i agencies cannot simply incorporate federal concepts into the UIPA, especially in an effort to read its exceptions broadly to permit expansive withholding contrary to the UIPA's purpose to "[p]romote the public interest in disclosure" and ensure that government business is "conducted as openly as possible." HRS § 92F-2. Under HRS § 92F-13(2), if an agency cannot justify nondisclosure under the litigation standards for the attorney work product doctrine—

which PSD has failed to do here—then it cannot withhold records under some more expansive federal exception.

Moreover, PSD misstates several issues concerning federal law. The U.S. Supreme Court has not adopted the consultant corollary doctrine under Exemption 5. The *Klamath* Court recognized that some lower courts had held that consultant reports may be covered by the deliberative process privilege. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10-11 (2001). But the Supreme Court reserved decision on the issue because *Klamath* could be resolved on other grounds. *Id.* at 12 ("once the intra-agency condition is applied, it rules out any application of Exemption 5 to tribal communications on analogy to consultants' reports (assuming, which we do not decide, that these reports may qualify as intra-agency under Exemption 5)." (footnote omitted)). The consultant corollary doctrine also is irrelevant to Hawai`i law because it solely concerns the "intra-agency" language in FOIA Exemption 5. *E.g.*, *id.* at 12 n.3 ("Because we conclude that the documents do not meet this threshold condition, we need not reach step two of the Exemption 5 analysis and enquire whether the communications would normally be discoverable in civil litigation.").

Also, the District of Columbia District Court decision in *100Reporters* did not hold that reports similar to the AMP reports requested here were protected by the attorney work product doctrine. The only work product documents at issue in that case were: (1) "emails between DOJ attorneys that related to the monitorship"; (2) "draft versions of notices to the Court about the corporate monitorship and proposed order"; and (3) email messages between DOJ attorneys and SEC attorneys." *100Reporters LLC v. U.S. Dep't of Justice*, 248 F. Supp. 3d 115, 156 (D.D.C. 2017). There is nothing in the opinion to indicate that these documents came from an independent consultant or were shared with an anticipated adversary. "These documents are classic attorney work-product, and disclosure would risk putting the thoughts and strategies of agency counsel on public display." *Id.* at 158. *100Reporters* is not the massive expansion of the work

product doctrine to any "government records pertaining to litigation in which the State is a party" as described in the Department's motion.[8] Dkt. 33 at 11.

PSD has not proven that the AMP reports are protected by a litigation discovery privilege. If a litigant against the Department may obtain the AMP reports in discovery, HRS § 92F-13(2) is not a valid basis for withholding the documents from the public.

VII. THE DELIBERATIVE PROCESS PRIVILEGE "IS PLAINLY INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE UIPA."

PSD offers no basis for its blatant disregard of the holding in *Peer News*. Overturning 30 years of "palpably erroneous" OIP precedent regarding the deliberative process privilege, the Hawai`i Supreme Court explained:

> OIP has maintained in multiple opinions issued over an extended period that HRS § 92F-13(3) creates a deliberative process privilege. As discussed, however, such an interpretation is contrary to the clear and unambiguous language of HRS § 92F-13(3) and the statement of purposes and policies contained in HRS § 92F-2. And, like in Peer News, the privilege is plainly inconsistent with the legislative history of the UIPA, which indicates that the legislature specifically rejected a deliberative process exception before enacting the law. OIP therefore palpably erred in adopting an interpretation of HRS § 92F-13(3) that is irreconcilable with the plain text and legislative intent of the statute.

Peer News, 143 Hawai`i at 485-86, 431 P.3d at 1258-59. Contrary to the Department's position, the *Peer News* court did not "narrow" the deliberative process privilege. Dkt. 33 at 12. PSD attempts to spin a footnote in the opinion as undermining the case's entire holding. *Id.* at 13. According to PSD, the Hawai`i Supreme Court's footnote held that agencies may withhold pre-decisional documents that inhibit the candor of agency employees. *Id.*

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[8] The *100Reporters* court analyzed the monitoring reports at issue in that case solely under the deliberative process privilege. 248 F. Supp. 3d at 150-55. Unlike federal law, Hawai`i does not have a privilege in litigation to protect against discovery of deliberative process records. *Peer News*, 143 Hawai`i at 484 n.20, 431 P.3d at 1257 n.20. Because HRS § 92F-13(2) only permits withholding "to the extent that such records would not be discoverable," the deliberative process privilege discussion in *100Reporters* is irrelevant to 92F-13(2)—as well as being entirely frivolous for the reasons discussed below.

As background, the deliberative process privilege under federal law protects an agency's pre-decisional and deliberative records from disclosure. *E.g.*, OIP Op. No. 00-01 at 4-5.

> [I]t serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course which were not in fact the ultimate reasons for the agency's action.

Id. at 4 n.2. That is the privilege that the Hawai`i Supreme Court rejected.

The Department cites OIP Opinion 04-15 regarding revenue estimates prepared by the Department of Taxation (DOTAX) that OIP held, before *Peer News*, protected by the deliberative process privilege. Dkt. 33 at 12. The more relevant discussion occurs in OIP Opinion F19-05 regarding revenue estimates by DOTAX that OIP held, after *Peer News*, not protected from disclosure.[9] OIP Op. No. F19-05.

In Opinion F19-05, DOTAX made the same argument as PSD here that the *Peer News* footnote authorized withholding along similar grounds as the deliberative process privilege. *Id.* at 7-9. OIP acknowledged that read in isolation, the footnote may support withholding deliberative documents as long as the agency explains "without using the term [deliberative process privilege] how the disclosure of deliberative and predecisional material would deter its staff from expressing candid opinions or otherwise impair its ability to reach sound decisions." *Id.* at 9. Then, OIP explained at length why that reading is simply wrong. *Id.* at 9-12.

> [I]t is clear that the Court was not recognizing inhibition of agency personnel from expressing candid opinions as a legitimate basis for frustration by itself, but instead was noting that disclosure of pre-decisional documents might frustrate a specific government function other than decisionmaking, particularly one enumerated in SSCR 2580,

[9] DOTAX appealed OIP's decision to the circuit court pursuant to HRS § 92F-43. *In re OIP Opinion Letter No. F-19-05*, No. 1SP191000191. The court upheld OIP. *Id.* Dkt. 25.

> and could potentially be withheld (with sufficient explanation) to avoid frustration of that other government function.

Id. at 12. OIP then rejected DOTAX's effort to repackage the rationale for the deliberative process privilege in different words and claim frustration of a legitimate government function. *Id.* at 13. Thus, records cannot "be withheld on the basis that their disclosure would frustrate an agency's ability to produce sound decisions."[10] *Id.*

PSD offers the justification: "To require disclosure of such expert recommendations before final decisions have been made would impair PSD's decision-making and discourage its staff from being candid, and chill efforts to seek expert assistance during a dynamic, unprecedent public health emergency."[11] Dkt. 33 at 13. The Department merely restates the rationale for the deliberative process privilege. That justification obviously fails in light of controlling Hawai`i precedent.

Lastly, even if the deliberative process privilege still existed in Hawai`i—it does not—PSD would not be able to withhold the entirety of the AMP reports as it has done here. The expansive privilege recognized by OIP before *Peer News* required that agencies disclose facts. OIP Op. No. 98-05 at 6 n.2 ("because the [Internal Affairs] Reports consist of factual material, the deliberative process privilege is not considered here."). Significant portions of the AMP reports concerned facts about what was happening in the Department's facilities. Seitz Decl. ¶ 5; Black Decl. Ex. 4 at 21 (plaintiffs' counsel: "it was our concern, first of all, to get accurate information about what was happening in the prisons, because as you know, that information was not forthcoming"), at 48 (deputy AG: "both parties believe is the best way to get in, do the

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[10] "Opinions and rulings of the office of information practices shall be admissible and shall be considered as precedent unless found to be palpably erroneous." HRS § 92F-15(b).

[11] PSD's claim that disclosure would chill efforts to seek expert assistance during the pandemic is ridiculous in light of the fact that the experts only got involved because incarcerated individuals filed a lawsuit. The Department did seek out help; it was forced by litigation to examine the deficiencies in its practices. This is not a situation where PSD undertook a voluntary internal audit in search of best practices.

investigation and fact-finding"). The Court need not review the AMP reports for redactions, however, because PSD's reliance on the deliberative process privilege fails to prove a justification for nondisclosure under HRS § 92F-13(3).

PSD proffers information about the dangers of COVID-19 and "the need to act quickly—and to rely on all resources and expertise available—respond [sic] to the COVID-19 emergency." Dkt. 33 at 14-15. But that explanation stands in stark contrast to the Department's alleged negligence and mismanagement in responding to the pandemic. Black Decl. Ex. 1 at 49, 50, 52 ("Many of the concerning facts outlined in the preceding section support a finding of subjective deliberate indifference because they evince Defendant's knowing disregard of excessive risk to inmate health and safety."). Governor Ige declared an emergency in March 2020. PSD did not permit independent experts into its facilities for a year and a half, and then only after litigating for months. That does not reflect any "need to act quickly" in responding to the emergency, and those delays only further support disclosure, not secrecy.

PSD has not met its burden to prove that disclosure will frustrate a legitimate government function.

CONCLUSION

Based on the foregoing, the Law Center respectfully requests that the Court deny the Department's motion for summary judgment, grant the Law Center's cross-motion for summary judgment, and order disclosure of all AMP reports.

DATED: Honolulu, Hawai`i, December 21, 2022

/s/ Robert Brian Black
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

CIVIL BEAT LAW CENTER FOR THE PUBLIC INTEREST, INC., Plaintiff, vs. DEPARTMENT OF PUBLIC SAFETY, Defendant.	CIVIL NO. 1CCV-22-735 (Other Civil Action) DECLARATION OF ERIC A. SEITZ

DECLARATION OF ERIC A. SEITZ

Eric A. Seitz hereby declares under penalty of perjury as follows:

1. I am counsel of record for the plaintiffs in *Chatman v. Otani*, Civil No. 21-00268 JAO-KJM. I make this declaration based on personal knowledge.

2. I negotiated the Settlement Agreement and General Release (Settlement) on behalf of the *Chatman* plaintiffs.

3. The Department of Public Safety insisted that the Settlement require confidentiality for the reports prepared by the Agreement Monitoring Panel (AMP).

4. I did not believe that were any valid reasons for confidentiality since the AMP reports concern matters of substantial public interest about whether state actors -- the Department of Public Safety and its staff -- were complying with their duties to protect inmates during a life-threatening pandemic and were accurately reporting upon conditions in Hawaii state correctional facilities.

5. There was an critical need to provide access by independent experts to the prisons to obtain accurate information about what was happening and to make recommendations to contain the virus.

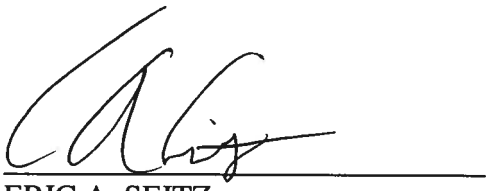
6. Due to the urgency of getting the panel of experts into the prisons and addressing the on-going inability to control the virus that already had sickened thousands of inmates and staff and killed several of them, we made the decision that any concerns about confidentiality should not delay the implementation of a settlement.

7. I have reviewed all of the reports issued by the AMP.

8. Knowing the contents of the AMP reports, I am not aware of any basis for withholding those reports from the public.

9. In behalf of counsel for the *Chatman* plaintiffs and our clients we have no objections to disclosure of the AMP reports.

DATED: Honolulu, Hawai`i, December 16, 2022



ERIC A. SEITZ

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

CIVIL BEAT LAW CENTER FOR THE PUBLIC INTEREST, INC., Plaintiff, vs. DEPARTMENT OF PUBLIC SAFETY, Defendant.	CIVIL NO. 1CCV-22-735 (Other Civil Action) DECLARATION OF R. BRIAN BLACK

DECLARATION OF R. BRIAN BLACK

1. I am the attorney for Plaintiff Civil Beat Law Center for the Public Interest (Law Center). I make this declaration in support of the Law Center's Cross-Motion for Summary Judgment based on personal knowledge and public records.

2. Attached as Exhibit 1 is a true and correct copy of excerpts from the Honorable Jill A. Otake's July 13, 2021 Order (1) Granting Plaintiffs' Motion for Provisional Class Certification and (2) Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order, as publicly filed in United States District Court for the District of Hawaii in *Chatman et al. v. Otani*, Civ. No. 21-268 JAO-KJM [hereinafter *Chatman*], Dkt. 37.

3. Attached as Exhibit 2 is a true and correct copy of Judge Otake's August 12, 2021 Order Denying Defendant's Motion to Clarify and/or Modify Preliminary Injunction, as publicly filed in *Chatman*, Dkt. 61.

4. Attached as Exhibit 3 is a true and correct copy of Judge Otake's August 18, 2021 Order Denying Defendant's Second Motion to Modify Preliminary Injunction, as publicly filed in *Chatman*, Dkt. 79.

5. Attached as Exhibit 4 is a true and correct copy of excerpts from the transcript of the November 8, 2021 Final Fairness Hearing and Plaintiffs' Motion for

Approval of Attorneys' Fees and Costs, Settlement Agreement, and Joint Motion for Settlement Approval, as publicly filed in *Chatman*, Dkt. 133.

6. Attached as Exhibit 5 is a true and correct copy of the Law Center's March 17, 2022 request for records.

7. Attached as Exhibit 6 is a true and correct copy of the March 31, 2022 e-mail chain between the Department of Public Safety (PSD or Department) and the Law Center regarding the March 17 request.

8. Attached as Exhibit 7 is a true and correct copy of the April 6, 2022 letter from the Office of Information Practices (OIP) to PSD regarding the Department's "deficient" response to the March 17 request.

9. Attached as Exhibit 8 is a true and correct copy without the attachments—the Settlement Agreement and confidentiality agreements attached as Exhibits A and B to PSD's motion for summary judgment—of the Department's April 14, 2022 notice to requester.

10. Attached as Exhibit 9 is a true and correct copy without the attachments—which are separate exhibits—of the Law Center's April 27, 2022 OIP appeal of the Department's April 14 notice to requester.

11. Attached as Exhibit 10 is a true and correct copy of the Department's May 16, 2022 response to the Law Center's OIP appeal, as provided to the Law Center in response to a public records request to OIP.

12. Attached as Exhibit 11 is a true and correct copy of the Law Center's June 6, 2022 letter to the Department and its counsel regarding the March 17 request.

13. Attached as Exhibit 12 is a true and correct copy of the Department's June 22, 2022 letter in response to the Law Center's June 6 letter.

I, R. BRIAN BLACK, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai`i, December 21, 2022

/s/ R. Brian Black
R. BRIAN BLACK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ANTHONY CHATMAN, FRANCISCO ALVARADO, ZACHARY GRANADOS, TYNDALE MOBLEY, and JOSEPH DEGUAIR, individually and on behalf of all others similarly situated, Plaintiffs, vs. MAX N. OTANI, Director of State of Hawai‘i, Department of Public Safety, in his official capacity, Defendant.	CIVIL NO. 21-00268 JAO-KJM ORDER (1) GRANTING PLAINTIFFS' MOTION FOR PROVISIONAL CLASS CERTIFICATION AND (2) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

ORDER (1) GRANTING PLAINTIFFS' MOTION FOR PROVISIONAL CLASS CERTIFICATION AND (2) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

This putative class action concerns the alleged conditions in Hawaii's prisons and jails that have contributed to multiple COVID-19 outbreaks. Plaintiffs Anthony Chatman ("Chatman"), Francisco Alvarado ("Alvarado"), Zachary Granados ("Granados"), Tyndale Mobley ("Mobley"), and Joseph Deguair ("Deguair") (collectively, "Plaintiffs") contend that the Department of Public Safety ("DPS"), headed by Defendant Max Otani ("Defendant"), has mishandled

Exhibit 1

the pandemic and failed to implement its Pandemic Response Plan ("Response Plan") in violation of their Eighth and Fourteenth Amendment rights. Plaintiffs seek provisional class certification and request a temporary restraining order and preliminary injunction; namely, the appointment of a special master to oversee the development and implementation of Plaintiffs' proposed response plan. For the following reasons, the Court GRANTS Plaintiffs' Motion for Provisional Class Certification ("Class Certification Motion"), ECF No. 20, and GRANTS IN PART AND DENIES IN PART Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order ("Injunction Motion"). ECF No. 6.

Defendant is ORDERED to immediately implement and *adhere* to DPS's Response Plan at all eight DPS facilities and comply with the specific conditions outlined herein.

BACKGROUND

I. Factual History[1]

Hawaii's state prisons and jails have been plagued by COVID-19 outbreaks at five of its eight facilities, resulting in the infection of more than 50% of the inmate population (1,532 inmates out of a population of approximately 3,000) and 272 DPS staff, and seven deaths. ECF No. 18 ("SAC") ¶¶ 1–2, 113–14; *see also*

[1] The facts are from the Second Amended Class Action Complaint for Injunctive Relief and Declaratory Judgment ("SAC"), unless otherwise indicated.

http://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/ (last visited July 13, 2021).

The first outbreak occurred at Oahu Community Correctional Center ("OCCC") in August 2020, and to date, OCCC has had 452 cases of COVID-19. SAC ¶ 102.

In November 2020, Waiawa Correctional Facility ("Waiawa") experienced an outbreak, causing 90% of the inmate population to contract COVID-19. *Id.* ¶ 103. During the outbreak, dirty clothes from Waiawa were laundered at Halawa Correctional Facility ("Halawa") by inmates and staff, and Halawa staff were forced to work at Waiawa due to staff shortages there. *Id.* ¶ 104. These practices resulted in an outbreak at Halawa, where 544 inmates became infected and seven died from COVID-19. *Id.* ¶ 105.

In March 2021, an outbreak at Maui Community Correctional Center ("MCCC") resulted in 100 inmate COVID-19 infections, which represents one-third of MCCC's inmate population. *Id.* ¶ 106.

The most recent outbreak occurred at Hawai'i[2] Community Correctional Center ("HCCC"), beginning in late May 2021. *Id.* ¶ 107. Within three weeks,

[2] Plaintiffs misidentify this as Hilo Correctional Community Center. SAC ¶ 4.

two-thirds of the inmate population contracted COVID-19. *Id.* Twenty DPS staff and 228 pretrial detainees tested positive for COVID-19 during this period.[3] *Id.* ¶ 5. Plaintiffs attribute this rapid and extensive spread to the allegedly unsanitary conditions in holding areas at HCCC, most notably a room known as the "fishbowl." *Id.* The fishbowl is approximately 31.5 feet by 35.3 feet[4] and 40 to 60 pretrial detainees have been housed there, with no toilet or running water, causing detainees to urinate and sometimes defecate in the room. *Id.* ¶¶ 5–6; ECF No. 22-2 ¶ 38.

A. Plaintiffs

Plaintiffs are currently incarcerated or detained at DPS correctional facilities in Hawai‘i.

1. Anthony Chatman

Chatman has been incarcerated at Halawa since July 2019. SAC ¶ 123. While Chatman was housed in module 4A-2 in December 2020, two inmates who tested positive for COVID-19 were placed in his quad, then-designated a COVID-negative quad, and allowed to mingle with other inmates in the quad without masks. *Id.* ¶¶ 124, 127–28. Nearly all inmates in the quad tested positive for

[3] Defendant does not dispute these figures.

[4] The SAC identifies the dimensions as 30 feet by 30 feet. SAC ¶ 5.

COVID-19 shortly thereafter, including Chatman's roommate. *Id.* ¶ 129. Chatman's roommate nevertheless remained in their cell, and Chatman then contracted COVID-19. *Id.* ¶¶ 130–31. He too stayed in the cell, "sick as a dog," without receiving meaningful medical treatment. *Id.* ¶ 131. Chatman claims that upon his departure from his cell, it was not cleaned before the next occupant moved in. *Id.* ¶ 132.

Chatman filed a grievance after contracting COVID-19 and appealed each denial to exhaust his administrative remedies. *Id.* ¶¶ 133–34. Despite the COVID-19 outbreak at Halawa, Chatman has yet to see any social distancing practices — during recreation and dining, or in the common areas and cells — and reports that 60 people eat shoulder to shoulder in an approximately 400 square foot room. *Id.* ¶¶ 135–36.

2. Francisco Alvarado

Alvarado, a 52 year old inmate with lupus, was previously incarcerated at Halawa from 2019 to March 2021, and is currently incarcerated at Kulani Correctional Facility ("Kulani"). *Id.* ¶¶ 137–40. At Halawa, Alvarado was a module clerk who prepared paperwork for inmates' movement within the facility and delivered meals to cells. *Id.* ¶ 141. He witnessed inmates remaining in their cells after testing positive for COVID-19, comingling of COVID-positive inmates with asymptomatic inmates, and transfer of asymptomatic inmates into unsanitized

cells previously occupied by COVID-positive inmates. *Id.* ¶ 142. During meal deliveries, Alvarado was exposed to COVID-positive inmates, who were not forced to wear masks, through "open screen" cell doors. *Id.* ¶ 143.

When Alvarado contracted COVID-19 in December 2020, he requested medical assistance but received little to none. *Id.* ¶¶ 144, 146. His underlying medical condition caused him to sustain serious damage to his kidneys. *Id.* ¶ 145. Alvarado filed a grievance regarding the conditions that caused him to contract COVID-19 but he never received a response. *Id.* ¶¶ 146, 148–49. He was initially informed that the COVID-19 outbreak created a backlog of grievances and was instructed to file another grievance. *Id.* ¶ 150. However, between January and March 2021, he was repeatedly told that no grievance forms were available. *Id.* ¶¶ 151–53.

3. Joseph Deguair

Deguair, an asthmatic, has been incarcerated at HCCC since December 4, 2020. *Id.* ¶¶ 154–55. Before the May 2021 COVID-19 outbreak at HCCC, Deguair noticed an absence of mitigation efforts to prevent the spread of COVID-19. *Id.* ¶ 157. For example, he reports seeing symptomatic detainees housed with those who had not been tested for COVID-19, and social interaction between COVID-positive detainees and the general population during recreation time. *Id.* ¶¶ 157–59.

Due to these conditions, Deguair requested an inmate grievance form almost every day during the last two weeks of May to file a grievance. *Id.* ¶ 160. Multiple Adult Corrections Officers ("ACOs") told Deguair there were no forms and that he could not file a grievance. *Id.* ¶¶ 161–62. Since testing positive for COVID-19 on June 1, 2020, Deguair has requested a grievance form daily, only to be told none were available. *Id.* ¶¶ 163–64. ACOs told Deguair that there was nothing they could do to help him obtain a form or file a grievance. *Id.* ¶¶ 165, 167. Even when he attempted to file a grievance by phone, he was told during the call that he could not file a grievance and would have to wait. ECF No. ¶ 166.

4. Tyndale Mobley

Mobley received a COVID-19 vaccine prior to his incarceration at HCCC. *Id.* ¶¶ 168, 170. COVID-positive inmates were initially contained within the main HCCC building, though staff moved freely without masks between the main building and the unit housing Mobley. *Id.* ¶¶ 172–73. Mobley once confronted a guard who returned from the main building without a mask, and she responded that she did not want or need to wear a mask. *Id.* ¶ 174. This guard contracted COVID-19. *Id.* ¶ 174.b.

At the beginning of June 2021, two inmates with COVID-19 were housed in Mobley's cell block. *Id.* ¶ 175. Two additional COVID-positive inmates were moved into the cell block and the four infected inmates were instructed to stay on

the opposite end of the room from the non-infected inmates. *Id.* ¶ 176. Nearly all the inmates in the cell block then contracted COVID-19. *Id.* ¶ 177. Mobley and the COVID-positive inmates shared restroom facilities and he saw no efforts by staff to sanitize the facilities. *Id.* ¶¶ 178–79.

Mobley attempted to file grievances every day starting in late May or early June 2021, but the guards said they had no grievance forms and that there was no way to file a grievance. *Id.* ¶¶ 180–82, 184–85. Mobley was diagnosed with COVID-19 on June 6, 2021. *Id.* ¶ 183.

5. Zachary Granados

Granados has been incarcerated at Waiawa since August 2020. *Id.* ¶ 186. In November 2020, certain inmates housed in Waiawa's building 9 displayed COVID-19 symptoms. *Id.* ¶ 188. Upon testing positive in the medical unit, they returned to building 9, where nearly every inmate later contracted COVID-19. *Id.* ¶ 188.a–c. Around the same time, inmate kitchen workers contracted COVID-19 so Granados, along with other inmates from building 10, filled in for the COVID-positive kitchen workers. *Id.* ¶¶ 187, 189.a. The kitchen was not sanitized before the building 10 inmates stepped in, and four days later, one of those inmates tested positive for COVID-19. *Id.* ¶ 189.b–c.

Guards in building 9 wore "hazardous materials" suits because building 9 housed the COVID-positive inmates. *Id.* ¶ 190. Granados saw the guards wear these suits into building 10 to conduct head counts. *Id.* ¶ 191.

Approximately 30 COVID-positive inmates were transferred to building 10 from other buildings in mid-November 2020, after which Granados contracted COVID-19. *Id.* ¶¶ 192–93. Granados was bedridden for one week as a result. *Id.* ¶ 194.

In early December 2020, Granados filed a grievance regarding Waiawa's conditions, followed by appeals after receiving responses. *Id.* ¶¶ 195–96.

B. DPS's Management of COVID-19

In addition to the facilities housing Plaintiffs, DPS operates and manages Kauai Community Correctional Center ("KCCC"), MCCC, OCCC, and the Women's Community Correctional Center ("WCCC"). *Id.* ¶ 43. Plaintiffs allege that Defendant has mishandled and failed to manage outbreaks at its facilities notwithstanding its Response Plan, which has been in place since March 2020. *Id.* ¶ 83. In particular, Plaintiffs identify the following deficiencies: (1) housing up to 60 residents/detainees in a single room; (2) failure to provide adequate water; (3) failure to provide sanitary living conditions or proper hygiene; (4) failure to separate COVID-positive inmates; (5) failure to properly quarantine new intakes; (6) failure to communicate with DPS staff and inmates regarding proper COVID-

19 protocols; (7) failure to protect elderly and medically vulnerable inmates; (8) failure to allow adequate social distancing; (9) failure to provide personal protective equipment or enforce proper mask wearing; and (10) failure to consistently or adequately evaluate, monitor, and treat inmates with COVID-19 symptoms. *Id.* ¶¶ 92–122.

Plaintiffs propose the following classes and subclasses:

> **Post-Conviction Class**: All present and future sentenced prisoners incarcerated in a Hawai‘i prison.
>
> Post-Conviction Medical Subclass: Includes all present and future Post-Conviction Class members whose medical condition renders them especially vulnerable to COVID-19 as determined by guidelines promulgated by the CDC. *See* U.S. Centers for Disease Control and Prevention, *People Who Are At Higher Risk* (last viewed June 9, 2021) https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.
>
> **Pretrial Class**: All present and future pretrial detainees incarcerated in a Hawai‘i jail.
>
> Pretrial Medical Subclass: Includes all present and future Pretrial Class members whose medical condition renders them especially vulnerable to COVID-19 as determined by guidelines promulgated by the CDC. *See* U.S. Centers for Disease Control and Prevention, *People Who Are At Higher Risk* (last viewed June 9, 2021) https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.

Id. ¶ 198.

II. Procedural History

Plaintiffs initiated this action on April 28, 2021, in the Circuit Court of the First Circuit, State of Hawai‘i. ECF No. 1-1. On June 8, 2021, Defendants and the other originally named defendants removed the action. ECF No. 1. Plaintiffs immediately filed a First Amended Class Action Complaint for Injunctive Relief and Declaratory Judgment ("FAC") and the Injunction Motion. ECF Nos. 5–6.

On June 18, 2021, Plaintiffs filed a Supplement to the Injunction Motion. ECF No. 14.

On June 22, 2021, Plaintiffs filed the SAC pursuant to a stipulation entered into by the parties and approved by Magistrate Judge Kenneth J. Mansfield. ECF Nos. 17–18. The SAC asserts three causes of action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2241: unconstitutional punishment in violation of the Fourteenth Amendment (Count One), unconstitutional conditions of confinement in violation of the Fourteenth Amendment (Count Two), and unconstitutional conditions of confinement in violation of the Eighth Amendment (Count Three). SAC ¶¶ 209–44. The first claim applies to the pretrial subclass, the second claim applies to the pretrial class, and the third claim applies to the post-conviction subclass. *Id.* at 53, 57, 59.

Plaintiffs request injunctive relief to require Defendant to implement the following response plan ("Proposed Response Plan"):

a. Physically distance all residents from one another and staff within DPS correctional facilities, which imposes at least six feet of distance between individuals at all times;

b. Provide all residents in DPS custody sanitary living conditions (*i.e.*, ensure regular access to a working toilet, sink, and drinking water);

c. Identify residents who may be high-risk for COVID-19 complications, in accordance with guidelines from the CDC, and prioritize these individuals for medical isolation or housing in single cells;

d. On a daily basis, thoroughly and professionally disinfect and sanitize the DPS correctional facilities;

e. Provide hygiene supplies that are not watered down, including supplies to wash hands and disinfect common areas, to inmates at all times and free of charge;

f. Implement policies and procedures requiring that common areas be disinfected between uses;

g. Provide adequate personal protection equipment and sanitizer, including but not limited to masks, to all staff members and residents (and ensure that these materials are replaced at least every third day);

h. Implement a testing procedure to identify residents who are possibly carrying COVID-19, including testing to identify asymptomatic carriers and those with one or more symptoms of COVID-19;

i. Implement a quarantine and isolation procedure that is in line with CDC guidelines for all individuals exposed to COVID-19 and new intakes to DPS correctional facilities;

j. Take particularly heightened precautions with respect to food handling and delivery, such as ensuring that people who come into contact with food are not displaying any potential

symptoms of COVID-19, have not recently been in contact with people displaying potential symptoms of COVID-19, and people who come into contact with food wear appropriate personal protective equipment at all times when in contact with food;

k. Provide regular, accurate, up-to-date educational and informational memorandum to DPS staff and inmates regarding the status of how COVID-19 is affecting the facility, including what measures employees and inmates must take in the event of an outbreak;

l. Develop comprehensive plans to educate and promote COVID-19 vaccination for all DPS residents and staff and ensure residents are provided regular access to vaccines; []

m. Prohibit DPS employees from restricting access to inmate grievance forms or from preventing the submission of grievances, and prohibit retaliation against any DPS employee or inmate for making complaints or filing grievances regarding conditions or practices in DPS facilities that promote the spread of COVID-19[; and]

n. In accordance with CDC guidelines, ensure that medical isolation of inmates with COVID-19 is distinct from punitive solitary confinement of incarcerated/detained individuals, both in name and in practice. This includes making efforts—where feasible—to provide similar access to radio, TV, reading materials, personal property, and the commissary as would be available in regular housing units.

Id. at 61–64.

Plaintiffs pray for certification of the proposed classes and subclasses, entry of judgment declaring Defendant's practices and actions violated the Constitution, entry of an order requiring Defendant to execute the Proposed Response Plan,

appointment of a special master to oversee the development and implementation of the Proposed Response Plan, and attorneys' fees and costs. *Id.* at 65.

Defendant filed his Opposition and Plaintiffs filed their Reply to the Injunction Motion on June 23 and 25, 2021, respectively. ECF Nos. 22, 26. On June 28, 2021, Defendant filed his Opposition to the Class Certification Motion. ECF No. 28. Plaintiffs filed their Reply on July 1, 2021. ECF No. 29.

The Court held a hearing on the Injunction Motion and Class Certification Motion on July 8, 2021. ECF No. 35.

LEGAL STANDARDS

I. Class Certification

Provisional class certification may be granted for the purposes of preliminary injunction proceedings. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1005 n.4 (9th Cir. 2020) (citation omitted). "Class actions are 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 784 (9th Cir. 2021) (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013)). As such, Federal Rule of Civil Procedure ("FRCP") 23 "imposes 'stringent requirements' for class certification." *Id.* (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013)). "The party seeking class certification has the burden of affirmatively demonstrating that the class meets the

of vaccines against the new variants.[12] For the purposes of provisional class certification and preliminary injunctive relief, the Court certifies the classes proposed by Plaintiffs. If circumstances change during the course of litigation, the parties may request modification of the class definitions.

Having met FRCP 23(a)'s and 23(b)(2)'s requirements, Plaintiffs are entitled to provisional class certification.

II. TRO/Preliminary Injunction[13]

A. *Winter* Factors

The Court now turns to the *Winter* factors to determine whether Plaintiffs are entitled to a preliminary injunction. Plaintiffs urge the Court to review their requested injunction as prohibitory, not mandatory, because they are requesting maintenance of the status quo, defined by Defendant as DPS facilities

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[12] To illustrate, at least one Plaintiff contracted COVID-19 post vaccination. ECF No. 26-10 ("Mobley Decl.") ¶¶ 3, 15.

[13] Defendant's supposition that the Injunction Motion was mooted by the filing of the SAC, asserted for the first time in opposition to the Class Certification Motion, ECF No. 28 at 7 n.1, is unavailing. In assessing the Injunction Motion, the Court evaluates the causes of action and relief requested in the SAC, which are substantially similar to the FAC. So Defendant's reliance on *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012) (en banc), is misdirected. Given the expedited nature of the request, judicial economy would not be served by ordering Plaintiffs to file a renewed Injunction Motion, especially when Defendant submitted his opposition *after* Plaintiffs filed the SAC and had an opportunity to challenge a preliminary injunction based on the allegations therein.

implementing the Response Plan. ECF No. 26-1 at 11–12. Insofar as Plaintiffs claim that DPS is not complying with its Response Plan, and they request the appointment of a special master to develop and implement their Proposed Response Plan, they arguably seek a mandatory injunction, *i.e.*, an order requiring Defendant to take certain action. *See Marlyn Nutraceuticals*, 571 F.3d at 879 (citation omitted). Even though DPS claims it is compliant, the problematic conditions identified by Plaintiff would not change if the status quo is merely maintained, and Plaintiffs would not obtain the relief they desire. *See Hernandez*, 872 F.3d at 999 ("Mandatory injunctions are most likely to be appropriate when 'the status quo . . . is exactly what will inflict the irreparable injury upon complainant.'" (alteration in original) (citation omitted)). Assuming without deciding that the requested injunction is mandatory, Plaintiffs meet the corresponding stringent standard for the reasons discussed below.[14] And because

[14] The Ninth Circuit recognizes that its "approach to preliminary injunctions, with separate standards for prohibitory and mandatory injunctions, is controversial," and has faced widespread criticism. *Hernandez*, 872 F.3d at 997. Other district courts in the Ninth Circuit that addressed similar requests for preliminary injunctive relief have applied the heighted mandatory injunction standard. *See*, *e.g.*, *Maney v. Brown*, Case No. 6:20-cv-00570-SB, __ F.3d __, 2021 WL 354384, at *10–16 (D. Or. Feb. 2, 2021) ("*Maney II*"); *Alcantara v. Archambeault*, No. 20cv0756 DMS (AHG), __ F.3d __, 2020 WL 2315777, at *7 n.5 (S.D. Cal. May 1, 2020); *Doe v. Barr*, Case No. 20-cv-02263-RMI, 2020 WL 1984266, at *3–6 (N.D. Cal. Apr. 27, 2020).

they satisfy this standard, they would easily meet the more lenient "sliding scale" standard also employed by the Ninth Circuit.[15]

1. Likelihood of Success on the Merits[16]

Plaintiffs contend that they are likely to succeed on their claims because the harm from COVID-19 is sufficiently serious and DPS recognizes the seriousness, but it nevertheless continues to violate its own policies. ECF No. 6-1 at 21–28. Defendant argues that Plaintiffs have not shown a likelihood of success on the merits or that there are serious questions going to the merits because he has proactively adopted and implemented measures to prevent and control the spread of COVID-19 in DPS facilities. ECF No. 22 at 29.

a. Deliberate Indifference

Plaintiffs challenge the conditions of their confinement under the Eighth and

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[15] Under the "sliding scale" approach to preliminary injunctions, "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). The issuance of a preliminary injunction may be appropriate when there are "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff . . . so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* at 1135.

[16] Defendant does not challenge Plaintiffs' exhaustion of administrative remedies under the Prison Litigation Reform Act ("PLRA"). *See* 42 U.S.C. § 1997e(a).

Fourteenth Amendments. "Inmates who sue prison officials for injuries suffered while in custody may do so under the Eighth Amendment's Cruel and Unusual Punishment Clause or," in the case of pretrial detainees, "under the Fourteenth Amendment's Due Process Clause." *Castro v. County of Los Angeles*, 833 F.3d 1060, 1067–68 (9th Cir. 2016) (citation omitted). The Eighth Amendment imposes duties on prison officials, "who must provide humane conditions of confinement" such as "ensur[ing] that inmates receive adequate food, clothing, shelter, and medical care" and "tak[ing] reasonable measures to guarantee the safety of the inmates[.]" *Farmer*, 511 U.S. at 832–33 (internal quotation marks and citations omitted). "[P]retrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'" *Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015) (citations omitted).

Both clauses require a plaintiff to "show that the prison officials acted with 'deliberate indifference.'" *Castro*, 833 F.3d at 1068. Deliberate indifference requires a showing that "prison officials were aware of a 'substantial risk of serious harm' to an inmate's health or safety" and that there was no "'reasonable' justification for the deprivation, in spite of that risk." *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010) (quoting *Farmer*, 511 U.S. at 837, 844) (footnotes omitted). This requires a state of mind derived from criminal recklessness; that is, "the official must both be aware of facts from which the inference could be drawn

that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837; *see also Clem v. Lomeli*, 566 F.3d 1177, 1181 (9th Cir. 2009).

To succeed on an Eighth Amendment claim, a plaintiff must "'objectively show that he was deprived of something "sufficiently serious," and 'make a subjective showing that the deprivation occurred with deliberate indifference to the inmate's health or safety.'" *Thomas*, 611 F.3d at 1150 (quoting *Foster v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009)). Establishing a Fourteenth Amendment violation is less burdensome as a plaintiff need only a show objective deliberate indifference, not subjective deliberate indifference. *See Gordon v. County of Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018).

i. Objective Deliberate Indifference

The Ninth Circuit applies the following test in evaluating objective deliberate indifference:

> (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries.

Id. at 1125. The third element requires the defendant's conduct to be objectively unreasonable, which turns on the facts and circumstances of each case. *See id.* (citation omitted). An individual is not deprived of life, liberty, or property under the Fourteenth Amendment based on a "mere lack of due care by a state official." *Id.* (internal quotation marks and citation omitted). Consequently, a plaintiff "must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.'" *Id.* (footnote and citation omitted). This standard dispenses of the need to prove "subjective elements about the officer's actual awareness of the level of risk." *Id.* n.4. (citation omitted). Applying this standard, Plaintiffs have shown a strong likelihood of success on their Fourteenth Amendment claim and the objective prong of their Eighth Amendment claim.

At this point in the pandemic, the seriousness and transmissibility of COVID-19 is well established, and it has proven uniquely problematic for prisons and other detention facilities. DPS is no exception, having experienced outbreaks at more than half of its facilities and inmate COVID-19 infections exceeding 50%. If the conditions described in the declarations submitted by Plaintiffs continue, the risk of harm to all inmates is undeniable. The Court therefore focuses on whether Defendant has done or is doing enough to reasonably keep inmates healthy and safe.

The parties offer somewhat differing accounts of the conditions at DPS facilities.[17] Defendant submits declarations from each DPS facility's warden – Cramer Mahoe ("Mahoe"), Scott Harrington ("Harrington"), Sean Ornellas ("Ornellas"), Wanda Craig ("Craig"), Eric Tanaka ("Tanaka"), Deborah Taylor ("Taylor"), Francis Sequeira ("Sequeira"), and Neal Wagatsuma ("Wagatsuma"); the Deputy Director for DPS's Corrections Division – Tommy Johnson ("Johnson"); DPS's Corrections Health Care Administrator – Gavin Takenaka ("Takenaka"); and an Advanced Practice Registered Nurse and Section Health Care Administrator for HCCC – Stephanie Higa ("Higa"), that uniformly recite provisions from the Response Plan, while Plaintiffs share personal reports from inmates *and DPS staff* at different facilities. In other words, Defendant conveys what *should* happen at DPS facilities and Plaintiffs reveal what *is* occurring or has occurred at the facilities.

The wardens' declarations contain boilerplate language indicating that their facilities have adopted the same or substantially similar policies, which are also

[17] At the hearing, defense counsel argued that Plaintiffs failed to submit any declarations concerning KCCC and WCCC and that those facilities would therefore inappropriately be subject to an injunction. The Court is unconvinced. Inmates are frequently moved between facilities, so outbreaks are a system-wide concern. KCCC and WCCC should not be exempt from the injunction, as the injunction would order relief contemplated by the Response Plan, and all facilities are subject to the Response Plan.

consistent with the general DPS policies identified by Johnson, Takenaka, and Higa. *See* ECF Nos. 22-1 ("Takenaka Decl."); 22-2 ("Johnson Decl."); 22-3 ("Mahoe Decl."); 22-4 ("Harrington Decl."); 22-5 ("Ornellas Decl."); 22-6 ("Craig Decl."); 22-7 ("Tanaka Decl."); 22-8 ("Taylor Decl."); 22-9 ("Sequeira Decl."); 22-10 ("Wagatsuma Decl."); 22-11 ("Higa Decl."). But the mere existence of policies is of little value if implementation and compliance are lacking.

The declarations Plaintiffs submitted offer on-the-ground descriptions of what is actually happening at the facilities. And the reality is that the inmates have no motivation to fabricate (they are not seeking release nor money damages), while DPS staff have a *disincentive* to raise these issues concerning their employer in such a public forum. Therefore, the Court finds credible the declarations Plaintiffs submitted. This is not to say that the declarations supplied by Defendant are incredible; rather, as detailed below, the declarations Plaintiffs submitted were more compelling due to their specificity and direct perspective.

In a nutshell, Defendant defends his COVID-19 response by claiming that DPS has proactively and vigilantly addressed COVID-19, beginning with the adoption of a department-wide Response Plan on March 23, 2020 — consistent with CDC guidelines that has been updated to reflect evolving CDC guidance — and a pandemic response plan tailored to each DPS facility, based on space, unique challenges, and population and staff needs. ECF No. 22 at 14–15; Johnson Decl.

¶¶ 8–9. According to Defendant, the following measures have been implemented at DPS facilities: screening, quarantine and medical isolation, medical care, sanitation and hygiene, social distancing, personal protective equipment ("PPE"), education and information, testing, and vaccination. ECF No. 22 at 15–20.

Screening and Testing: Defendant claims that all facilities have screening procedures for inmates, staff, and visitors — new inmates are screened by medical staff for COVID-19 symptoms and risk factors while staff, visitors, volunteers, and vendors are screened for symptoms through surveys and temperature checks prior to entry. ECF No. 22 at 16; Takenaka Decl. ¶¶ 15–16; Johnson Decl. ¶¶ 13–14; Harrington Decl. ¶ 15; Ornellas Decl. ¶¶ 8–9; Craig Decl. ¶ 8; Tanaka Decl. ¶ 13; Taylor Decl. ¶ 12; Sequeira Decl. ¶ 13; Wagatsuma Decl. ¶ 12; Higa Decl. ¶ 9. At HCCC, existing inmates are also supposedly screened through self-reporting, temperature and symptom checks for those in quarantine units, medical assessments for older inmates and those with certain medical conditions, and upon departure and return to the facility. Higa Decl. ¶¶ 10–12.

Defendant also represents that COVID testing is continuously conducted at all DPS facilities and that DPS performs diagnostic and screening testing and has expanded non-exposure asymptomatic screening testing to: (1) broad-based testing; (2) new admission and day 14 routine intake quarantine testing; (3) pre-medical procedure testing; (4) pre-release testing for inmates entering community

programs; (5) pre-flight testing for inmates transferred to another facility; and (6) surveillance testing of randomly selected inmates. Takenaka Decl. ¶¶ 19–20, 25.

Plaintiffs paint a different picture, providing declarations from inmates and staff averring that not all new inmates are screened or tested for COVID-19, nor are all inmates tested before transferring to another facility. ECF No. 6-4 (Decl. of Lisa O. Jobes ("Jobes Decl.")) ¶ 6.g; ECF No. 6-6 (Decl. of Ryan Tabar ("Tabar Decl.")) ¶ 6.b; ECF No. 6-7 (Decl. of Marie Ahuna ("Ahuna Decl.")) ¶ 5.f; ECF No. 6-10 (Decl. of Isaac Nihoa ("Nihoa Decl.")) ¶ 11; ECF No. 6-13 ("Alvarado Decl. I") ¶¶ 10–11; ECF No. 6-15 (Decl. of Dustin Snedeker-Abadilla ("Snedeker-Abadilla Decl. I")) ¶ 6; ECF No. 26-7 (Decl. of William Napeahi ("Napeahi Decl.")) ¶ 9; ECF No. 26-8 (Decl. of Pokahea Lipe ("Lipe Decl.")) ¶ 6; ECF No. 26-16 (Decl. of Todd Bertilacci ("Bertilacci Decl.")) ¶ 8; ECF No. 26-17 ("Snedeker-Abadilla Decl. II") ¶¶ 7–9. Mahoe, HCCC's Warden, admits that inmates are not tested upon arrival and are placed in a holding area separated by chain-link fences — dubbed the "dog cages" — to be later screened by healthcare staff.[18] Mahoe Decl. ¶¶ 11–13.

[18] The Court is troubled by the allegation that the HCCC administration fails to inform staff when COVID-positive inmates are in close proximity. Rosete-Arellano Decl. ¶ 12 (learning from DPS guards that COVID-positive inmates were being held in the dog cages and in the hallway); Jobes Decl. ¶ 9 (learning from a detainee in the dog cages that other detainees in the dog cages had COVID-19); Nihoa Decl. ¶ 4 (learning from the inmates he was supervising that they had

(continued . . .)

Quarantine and Medical Isolation: Defendant represents that DPS employs medical and isolation strategies to contain and control COVID-19 transmission and that each facility has units designated for quarantine and medical isolation. ECF No. 22 at 16; Harrington Decl. ¶ 16; Ornellas Decl. ¶ 10; Craig Decl. ¶ 10; Tanaka Decl. ¶ 14; Taylor Decl. ¶ 13; Sequeira Decl. ¶ 14; Wagatsuma Decl. ¶ 13; Johnson Decl. ¶¶ 25–26. Defendant also offers the caveat that exceptions are sometimes necessary due to space and security concerns. Johnson Decl. ¶¶ 15, 27.

Plaintiffs describe a "quarantine" process that involves mixing multiple inmates with unknown COVID statuses in the HCCC dog cages, the fishbowl, or a visitor's room, and introducing new inmates into those spaces daily. ECF No. 6-1 at 14–15; Jobes Decl. ¶¶ 6.h–i, 7; Nihoa Decl. ¶ 13; Snedeker-Abadilla Decl. I ¶ 10; Lipe Decl. ¶ 9. This is consistent with Mahoe's admission that HCCC frequently lacks the physical space to completely quarantine new inmates for ten days and instead places them in the fishbowl, a multi-purpose room, to monitor them for COVID-19 symptoms and to separate them from the inmate population. Mahoe Decl. ¶ 16. And while all incoming inmates are purportedly screened for COVID-19 symptoms and exposure upon arrival at the facilities, *see* Takenaka

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(. . . continued)
COVID-19 and testing positive for COVID-19 a few days later). While DPS staff are not parties to this action and the Court is not factoring this into Plaintiffs' likelihood of success, the alleged lack of notification illustrates another symptom of the indifference.

Decl. ¶ 16, at the hearing, Defendant's counsel admitted that the intake process at HCCC — which precedes any testing and involves the housing of numerous inmates in confined spaces — can take several hours.

Plaintiffs also report multiple instances of DPS mixing COVID-positive and/or symptomatic inmates with COVID-negative inmates, which resulted in clusters of COVID-19 infections at different facilities. ECF No. 6-1 at 13–14; ECF No. 26-6 ("Deguair Decl.") ¶¶ 7, 9, 13; Napeahi Decl. ¶¶ 6–8, 11–12, 15–21, 25; Lipe Decl. ¶¶ 16–20, 29–30; ECF No. 26-9 ("Chatman Decl.") ¶ 6; ECF No. 26-10 ("Mobley Decl.") ¶¶ 8–11, 15–16; ECF No. 26-11 (Decl. of Tyson Olivera-Wamar ("Olivera-Wamar Decl.")) ¶¶ 7–19; ECF No. 26-12 ("Granados Decl.") ¶¶ 9–10; ECF No. 26-15 (Decl. of Nicholas Hall ("Hall Decl.")) ¶¶ 8–18; Bertilacci Decl. ¶¶ 9–10, 14–17; ECF No. 6-14 (Decl. of Jeffrey Parent ("Parent Decl.")) ¶ 13.

Living Conditions/Social Distancing: Defendant asserts that DPS has implemented social distancing strategies, adapted for each facility, including limitation of transports and movements, suspension of visitation and certain programs, restructured recreation and meals, bunk rearrangement so inmates sleep head to foot, staggered pill lines, medication administration at modules, and spaced seating in common areas.[19] ECF No. 22 at 17–18; Harrington Decl. ¶¶ 13–14;

[19] Defendant accuses Plaintiffs of failing to submit evidence showing that social distancing is supported by medical evidence, *see* ECF No. 22 at 43, while (continued . . .)

Ornellas Decl. ¶¶ 15–16; Craig Decl. ¶¶ 16–17; Tanaka Decl. ¶¶ 11–12; Taylor Decl. ¶¶ 10–11; Sequeira Decl. ¶¶ 11–12; Wagatsuma Decl. ¶¶ 10–11; Johnson Decl. ¶ 23.

Meanwhile, Plaintiffs describe eating shoulder-to-shoulder in the chow halls and indicate that inmates are regularly packed into small spaces — 40 to 60 inmates in the fishbowl, which measures 31.5 feet by 35.3 feet,[20] where they sleep on thin mats on the floor three to six inches apart; up to seven inmates in the dog cages, which measure five feet by ten feet; up to ten inmates in the visitor's room at HCCC, which is ten feet by twelve feet; 40 to 60 inmates in a 25-foot-by-35-foot room at Waiawa called the "pavilion." Jobes Decl. ¶ 8; Ahuna Decl. ¶ 5.h–i; Tabar Decl. ¶ 7.a; Parent Decl. ¶ 21; Snedeker-Abadilla Decl. I ¶¶ 8, 12. The dog cages, fishbowl, and visitor's room do not have bathrooms or running water, so inmates housed there have restricted access to restrooms and water. Because guards often deny inmates' restroom and water requests, inmates are forced to urinate on

(. . . continued)
simultaneously claiming that DPS facilities are social distancing to the extent possible, submitting declarations from Johnson and the wardens attesting that they have implemented social distancing practices, and emphasizing that an inability to social distance does not amount to deliberate indifference. *See id.* at 39.

[20] *See* Johnson Decl. ¶ 38.

themselves, on walls, or in cups. And constant toilet clogging and overflow in the adjacent restroom causes the fishbowl to smell like urine and feces.[21] Jobes Decl. ¶ 8; Tabar Decl. ¶¶ 7–8; ECF No. 6-8 (Decl. of Erin Loredo ("Loredo Decl.")) ¶¶ 10, 12–17; Snedeker-Abadilla Decl. I ¶¶ 15–17, 19–26. Inmates are unable to wash their hands in these holding areas and they are not provided with cleaning products. Snedeker-Abadilla Decl. I ¶ 30; Tabar Decl. ¶ 7.p. Staff have also observed mice and rats in the area, as well as other parts of HCCC. Rosete-Arellano Decl. ¶ 9; Loredo Decl. ¶ 19.

Mahoe represents that ACOs "do their best" to provide water to inmates in the dog cages but may not be able to readily allow restroom access depending on circumstances. Mahoe Decl. ¶ 15. He refutes allegations that inmates in the fishbowl are denied restroom access or water, stating that a water jug is filled during every meal and upon request. *Id.* ¶ 20. It is unclear if this is mere policy or actual practice because staff claims that Mahoe has not performed a walk-through of the facility since he started working at HCCC, despite DPS policy that the warden should do two daily walk-throughs to ensure compliance with protocols. Jobes Decl. ¶¶ 12–13.

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[21] These conditions are alarming, with or without COVID-19. "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones[.]" *Farmer*, 511 U.S. at 832 (citations omitted).

HCCC started moving inmates from the fishbowl to other housing units, and Johnson issued a directive that inmates may not stay overnight in the dog cages. Johnson Decl. ¶ 39; Mahoe Decl. ¶ 24. At the hearing, Plaintiffs' counsel argued that the new housing accommodations are equally unsuitable because not only are they smaller and proportionately as overcrowded as the fishbowl, they similarly have no running water or toilets.

Mask Wearing/PPE: Defendant argues that staff are always required to wear masks unless medically or operationally excepted and that PPE is provided for certain tasks like entering quarantine or isolation units, transporting inmates, and interacting with an individual with suspected or confirmed COVID-19. Defendant also supplies inmates and staff with multiple cloth masks that can be laundered. ECF No. 22 at 18; Johnson Decl. ¶¶ 17, 18, 21. According to Plaintiffs, mask wearing is inconsistent at best with minimal enforcement, if at all, and masks and PPE are not necessarily provided to staff. Ahuna Decl. ¶¶ 8–9; Rosete-Arellano Decl. ¶ 15; Loredo Decl. ¶ 8; Nihoa Decl. ¶ 4.b–c; Alvarado Decl. I ¶ 7.e, g.

Cleaning Supplies and Protocols: According to Defendant, inmates are provided with soap and towels in restrooms and cells; additional are supplied at the inmates' request, and towels are laundered twice daily. ECF No. 22 at 17; Johnson Decl. ¶ 20. Defendant also represents that the facilities maintain an enhanced

cleaning schedule for housing units; transportation vans are sanitized daily; high touch areas are cleaned and sanitized daily; common areas and housing are disinfected and cleaned daily; staff disinfects their work areas; and inmates receive cleaning supplies and gloves to clean their personal areas. ECF No. 22 at 17; Tanaka Decl. ¶ 9; Taylor Decl. ¶ 8; Sequeira Decl. ¶ 9; Wagatsuma Decl. ¶ 8; Harrington Decl. ¶ 10; Ornellas Decl. ¶ 14; Craig Decl. ¶ 15.

The declarations submitted by Plaintiffs suggest otherwise. Plaintiffs, other inmates, and staff claim that inmates do not receive cleaning supplies; hand sanitizer and wipes are unavailable in housing units; soap must be purchased with commissary money; cleaning is left to the inmates' discretion; when provided, cleaning products are watered down; and cells housing COVID-positive inmates are not cleaned before new occupants move in. Chatman Decl. ¶ 18; ECF No. 26-13 ("Alvarado Decl. II") ¶ 4.g,i–j; Snedeker-Abadilla Decl. I ¶¶ 27, 30; Parent Decl. ¶¶ 6.b–c, 15, 20.b; Ahuna Decl. ¶ 11; Loredo Decl. ¶ 9 (indicating that she was not provided with cleaning supplies for her office at HCCC).

Identification of Older and Medically Vulnerable Inmates: Defendant explains that medical staff conducts assessments within 14 days of admission, including the identification of older adults and inmates with medical conditions that put them at an increased risk of severe illness from COVID-19. Takenaka Decl. ¶ 18. Both staff and inmates indicate that no assessments occur, and inmates

with medical conditions have not been isolated or identified as high risk, which resulted in COVID-19 infections and hospitalization. Nihoa Decl. ¶ 10; Alvarado Decl. I. ¶ 8; ECF No. 6-9 (Decl. of Jason Cummings ("Cummings Decl.")) ¶¶ 7–13; *cf.* Snedeker-Abadilla Decl. I ¶¶ 10–11, 31–34 (explaining that he was held in the fishbowl for months, and was initially told it was for "quarantine" even though he was housed with 40 to 50 other males and new detainees were added daily).

The evidence before the Court demonstrates that Defendant has not taken reasonable available measures to abate the risks caused by the foregoing conditions, knowing full well — based on multiple prior outbreaks — that serious consequences and harm would result to the inmates. And Plaintiffs have suffered injuries as a result. *See Roman*, 977 F.3d at 943 ("The Government was aware of the risks these conditions posed, especially in light of high-profile outbreaks at other carceral facilities that had already occurred at the time, and yet had not remedied the conditions. Its inadequate response reflected a reckless disregard for detainee safety."). Defendant did not submit persuasive evidence contradicting the detailed accounts of Plaintiffs, inmates, and DPS staff showing a failure to implement and/or comply with the Response Plan. The declarations relied upon by Defendant offer summaries of provisions in the Response Plan without specific examples of compliance. Johnson provides some details about measures taken to address the HCCC outbreak and Mahoe responds to certain allegations concerning

the fishbowl, dog cages, PPE, cleaning supplies, communications, and social distancing during recreation time. However, they too were couched in generalities.

Policies are meaningless if they are not followed. Although Defendant attempts to characterize the failures identified by Plaintiffs as "occasional lapses in compliance by PSD staff," *see* ECF No. 22 at 33, many of the failures — such as the cramped housing of inmates in the fishbowl at HCCC or the need for inmates to urinate in cups due to a lack of access to toilets — are more than simple lapses and demonstrate objective deliberate indifference. Consequently, there is a strong likelihood that Plaintiffs will prevail on the merits of their Fourteenth Amendment claim and satisfy the objective prong of their Eighth Amendment Claim.

ii. Subjective Deliberate Indifference

This subjective standard applicable to Eighth Amendment claims requires an official to "know[] of and disregard[] an excessive risk to inmate health or safety." *Gordon*, 888 F.3d at 1125 n.4. (internal quotation marks and citation omitted). Thus, the Court must determine if Plaintiffs will be able to establish that Defendant is aware of, but is disregarding, an excessive risk to Plaintiffs' health or safety by failing to take measures to prevent or mitigate the spread of COVID-19 in DPS facilities.

Defendant cannot reasonably claim ignorance of the seriousness of COVID-19 at this stage in the pandemic, nor the consequences that could result from a

failure to take necessary steps to prevent transmission in DPS facilities. Approximately 1,575 inmates and 240 correctional staff have contracted COVID-19, and seven inmates died. *See* https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/ (last visited July 13, 2021). Prisoners have tested positive for COVID-19 at 17.4 times the rate in Hawai‘i overall and have died at 5.1 times the rate. *See* https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons (last visited July 13, 2021). Halawa, MCCC, OCCC, Waiawa, and HCCC already experienced outbreaks and given DPS's alleged current *practices* (not policies), others are inevitable. Despite this knowledge, it appears that Defendant continues to disregard the excessive risk to inmate health and safety. The inmate populations are in constant flux and the arrival of new inmates presents an ongoing threat of exposure to new sources of infection, especially if new inmates are not properly screened, tested, or quarantined. Many of the concerning facts outlined in the preceding section support a finding of subjective deliberate indifference because they evince Defendant's knowing disregard of excessive risk to inmate health and safety. However, the recent transfer of inmates best exemplifies this disregard, and here, shows that there is a strong likelihood that Plaintiffs will establish subjective deliberate indifference.

In an effort to alleviate overcrowding at HCCC during the middle of a COVID-19 outbreak, Defendant chartered private flights to transport dozens of inmates to facilities on Oahu. Johnson Decl. ¶ 36; ECF 26-14. Notwithstanding Defendant's public statement that only inmates who were medically cleared of COVID-19 were considered for transfer, *see* ECF No. 26-14, inmates who were symptomatic and untested, or had yet to receive test results, were among those transferred. Hall Decl. ¶¶ 9–11; Bertilacci Decl. ¶ 8; Snedeker-Abadilla Decl. II ¶ 7; Napeahi Decl. ¶¶ 9, 11–12; Olivera-Wamar Decl. ¶¶ 7, 9–12, 14. Many of these inmates informed staff that they felt ill. Hall Decl. ¶ 12; Napeahi Decl. ¶ 13; Olivera-Wamar Decl. ¶¶ 8, 13. At least nine of these inmates tested positive for COVID-19 at Halawa. ECF No. 26-1 at 6. Inmates from HCCC were grouped with inmates from other facilities while they awaited their COVID-19 test results. Hall Decl. ¶¶ 14–15; Bertilacci Decl. ¶ 9; Olivera-Wamar Decl. ¶¶ 15–16; Napeahi Decl. ¶¶ 15–17. COVID-positive and COVID-negative inmates are housed in the same open-air modules, share common spaces and devices, and are able to shake hands through the bars of their cells. Olivera-Wamar Decl. ¶¶ 15, 19; Bertilacci Decl. ¶¶ 9–10, 13–17; Hall Decl. ¶ 14; Napeahi Decl. ¶¶ 20, 23, 25. One of the COVID-positive transferees has requested, but not received, medical treatment for his symptoms. Napeahi Decl. ¶ 24.

This is problematic on multiple levels. Defendant knowingly (1) transported *symptomatic* inmates from a facility *with an active COVID-19 outbreak*, (2) who *told staff* they were ill, (3) who were *infected*, (4) but whose infections were unconfirmed due to *late or no testing*, (5) *on an airplane*, (6) to a facility with no active COVID-19 cases *that previously experienced an outbreak*, and (7) then housed those inmates *with COVID-negative inmates.* There is almost no clearer an example of complete disregard for the Response Plan and abandonment of precautionary measures to prevent the spread of COVID-19 between DPS facilities and islands.

Creating and successfully implementing a workable policy to mitigate the spread of COVID-19 in a carceral setting is an unenviable task. But Defendant has had ample time to do so and the prior outbreaks should have served as cautionary tales. The Court finds that Plaintiffs have demonstrated, through the foregoing facts, that they have a strong likelihood of success on their Eighth Amendment claim.

2. Irreparable Harm

Plaintiffs argue that they will suffer irreparable harm without an injunction because DPS's failure to meet public health standards places them at risk of serious infection and death. ECF No. 6-1 at 28. Defendant counters that Plaintiffs have

not presented evidence demonstrating that a COVID-19 outbreak is imminent or, were another outbreak possible, that it is likely. ECF No. 22 at 42.

"A plaintiff seeking preliminary relief must 'demonstrate that irreparable injury is likely in the absence of an injunction.'" *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (citation omitted). "At a minimum, a plaintiff seeking preliminary injunctive relief must demonstrate that it will be exposed to irreparable harm." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (citation omitted). As a prerequisite to injunctive relief, "a plaintiff must *demonstrate* immediate threatened injury"; a speculative injury is not irreparable. *Id.* (citations omitted). "Irreparable harm is . . . harm for which there is no adequate legal remedy, such as an award of damages." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (citation omitted). "[A]n alleged constitutional infringement will often alone constitute irreparable harm," *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (internal quotation marks and citation omitted), but not if "the constitutional claim is too tenuous." *Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984).

The Court already determined that Plaintiffs are likely to succeed on the merits and "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). In addition, Plaintiffs clearly

identify the irreparable harm they will suffer if conditions at DPS facilities persist. Comingling COVID-positive inmates with non-infected inmates, unsanitary living conditions, lack of social distancing, failure to provide PPE, failure to enforce mask wearing and proper usage, insufficient COVID-19 screening and testing, and lack of adequate medical care, increase Plaintiffs' risk of contracting COVID-19 and potentially suffering serious illness or death. *See Maney v. Brown*, 464 F. Supp. 3d 1191, 1216 (D. Or. 2020) ("*Maney I*") (citations omitted). Indeed, the Hawai'i Supreme Court determined that multiple DPS facilities are overcrowded and in light of the pandemic, "they have the potential to . . . place the inmates at risk of death or serious illness." *In re Individuals in Custody of State*, No. SCPW-20-0000509, 2020 WL 5015870, at *1 (Haw. Aug. 24, 2020) ("*In re Inmates II*") (discussing MCCC, HCCC, and KCCC); *see In re Individuals in Custody of State*, No. SCPW-20-0000509, 2020 WL 4873285, at *1 (Haw. Aug. 17, 2020) ("*In re Inmates I*") (discussing OCCC). And facilities remain overcrowded. *See* https://dps.hawaii.gov/wp-content/uploads/2021/07/Pop-Reports-Weekly-2021-07-05.pdf (last visited July 13, 2021). Accordingly, Plaintiffs have established that they are likely to suffer irreparable injury.

The Court rejects Defendant's assertion that this determination requires Plaintiffs to confirm the *imminence of a COVID-19 outbreak* at a DPS facility. ECF No. 22 at 42. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("We have

great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year."). Plaintiffs' concerns about harm are not speculative for the reasons explained above. As they currently exist, DPS's practices — exacerbated by the shared and confined spaces in carceral settings — are likely to cause irreparable harm because they present a considerable risk of exposure to COVID-19, with or without an outbreak. *See Maney II*, __ F.3d at __, 2021 WL 354384, at *15; *Criswell*, 2020 WL 5235675, at *23–24; *Torres v. Milusnic*, 472 F. Supp. 3d 713, 740–41 (C.D. Cal. 2020); *Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36, 40 (N.D. Cal. 2020); *Kaur v. DHS*, Case No. 2:20-cv-03172-ODW (MRWx), 2020 WL 1939386, at *3 (C.D. Cal. Apr. 22, 2020). And, in any case, "a remedy for unsafe conditions need not await a tragic event." *Helling*, 509 U.S. at 33.

Regardless of whether another outbreak is imminent, the Court is unconvinced that DPS's recent efforts in the midst of this litigation have eliminated the *ongoing* harm to Plaintiffs. On June 10, 2021 — one day after Plaintiffs filed the Injunction Motion and the same day the Court held a status conference on the matter — Johnson issued a directive that inmates are not to be placed in the dog cages overnight. Mahoe Decl. ¶ 14. Then, shortly before Defendant's opposition deadline, DPS began relocating inmates from the fishbowl

to other housing units at HCCC. *Id.* ¶ 24; Johnson Decl. ¶ 39. The timing of DPS's actions is suspect. And given Plaintiffs' counsel's allegation that DPS actually replicated these deficient housing conditions elsewhere in the facility, any improvement in conditions is debatable. Furthermore, improvements at HCCC do not remedy the many other dangers identified above that promote the spread of COVID-19 in DPS facilities. DPS's recent efforts to remediate egregious conditions — that should never have occurred in the first place — do not persuade the Court that DPS can and will successfully manage the pandemic moving forward. After all, the five severe outbreaks demonstrate otherwise. Based on DPS's record of handling of COVID-19 in its facilities, it is not unreasonable to assume that issues will persist and that future outbreaks are likely, driven in part by the inmates' inter-facility movement and constant introduction of new inmates into the facilities.

Defendant claims that DPS will be irreparably harmed if an injunction issues because the Court would assume administration over its facilities.[22] ECF No. 22 at 42 (citation omitted). Putting aside the fact that this is not the salient inquiry, the

[22] Defendant cites *Swain v. Junior*, 958 F.3d 1081, 1090 (11th Cir. 2020), for this proposition. *Swain* concerned a motion for stay pending appeal of a preliminary injunction. *See id.* at 1085. Therefore, the defendants bore the burden of establishing that they would be irreparably harmed absent a stay. *See id.* at 1088, 1090. *Swain* has no application under this factor, as the Court considers whether Plaintiffs will suffer irreparable harm in the absence of an injunction, not whether an injunction will cause Defendant to suffer irreparable harm.

Court struggles to identify any harm to DPS, let alone irreparable harm, when the injunction would merely require DPS to do not only what it *should* be doing but what it claims it *has* been doing throughout the course of the pandemic. "Self-inflicted wounds are not irreparable injury." *Al Otro Lado*, 952 F.3d at 1008 (internal quotation marks, brackets, and citations omitted). "An injunction cannot cause irreparable harm when it requires a party to do nothing more than what it maintained, under oath, it was already doing of its own volition." *Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960, at *3 (9th Cir. June 17, 2020) ("*Ahlman II*").

For these reasons, the Court finds that Plaintiffs have demonstrated that they will be irreparably harmed in the absence of an injunction.

3. Balance of Equities/Public Interest

Plaintiffs contend that the equities weigh in favor of protecting them, DPS staff, and the community from the spread of COVID-19, and that any burden to Defendant — economic or administrative — is relatively limited. ECF No. 6-1 at 30–33. Instead of addressing the applicable considerations, Defendant argues that Plaintiffs have failed to provide the necessary evidence entitling them to relief[23]

[23] Citing *Roman v. Wolf*, Defendant asserts that "an 'injunction should, to the extent possible, reflect the scientific evidence about COVID-19 presented to [a] district court' and 'should stem from medical evidence properly before the court.'" ECF No. 22 at 42–43 (alteration in original) (citing *Roman*, 977 F.3d at 946).

(continued . . .)

and that DPS already implemented the measures that Plaintiffs request. ECF No. 22 at 42–43. Defendant also argues that injunctive relief is disfavored because of federalism concerns and the policy against court interference with prison administration. *Id.* at 43–44.

In assessing whether Plaintiffs establish that the balance of equities tip in their favor, "the district court has a 'duty . . . to balance the interests of all parties and weigh the damage to each.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (alteration in original) (citation omitted). "When the reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the public interest will be 'at most a neutral factor in the analysis rather than one that favor[s] [granting or] denying the preliminary injunction.'" *Id.* at 1138–39 (alterations in original) (citation omitted). When an injunction's impact "reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction." *Id.* at 1139 (citations omitted). "'The public interest inquiry primarily

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(. . . continued)
These principles have no bearing on Plaintiffs' *entitlement* to injunctive relief. The *Roman* court affirmed the issuance of a preliminary injunction but vacated and remanded specific provisions of the injunction due to the drastic changes that occurred after its issuance. *See Roman*, 977 F.3d at 945. The above references to scientific and medical evidence were provided for the district court's consideration on remand. *Id.* at 946. They are not tied to the balancing of equities/public interest factor.

addresses impact on non-parties rather than parties.'" *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) (citation omitted). It also requires the Court to "'consider whether there exists some critical public interest that would be injured by the grant of preliminary relief.'" *Cottrell*, 632 F.3d at 1138 (citation omitted).

Here, the equities tip sharply in Plaintiffs' favor because they face irreparable harm to their health and constitutional rights. *See Castillo v. Barr*, 449 F. Supp. 3d 915, 923 (C.D. Cal. 2020). The Court acknowledges that Defendant has a strong interest in the administration of DPS facilities, *see Woodford v. Ngo*, 548 U.S. 81, 94 (2006), and that "separation of powers concerns counsel a policy of judicial restraint." *Turner v. Safley*, 482 U.S. 78, 85 (1987); *see also* 18 U.S.C. § 3626(a)(2) ("The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity[.]"). And "[w]here a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities." *Turner*, 482 U.S. at 85 (citation omitted). That said, Defendant "cannot suffer harm from an injunction that merely ends an unlawful practice . . . to avoid constitutional concerns," *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (citation and footnote omitted), particularly when Defendant claims it is already complying with its Response Plan.

Additionally, "while States and prisons retain discretion in how they respond to health emergencies, federal courts do have an obligation to ensure that prisons are not deliberately indifferent in the face of danger and death." *Valentine v. Collier*, 590 U.S. __, 140 S. Ct. 1598, 1599 (2020) (statement of Sotomayor, J., joined by Ginsburg, J.); *see Brown v. Plata*, 563 U.S. 493, 511 (2011) ("Courts nevertheless must not shrink from their obligation to 'enforce the constitutional rights of all "persons," including prisoners.'" (citation omitted)). "Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown*, 563 U.S. at 511.

It is noteworthy that the injunctive relief requested and ordered here simply requires DPS to comply with its own policies. Defendant will not be burdened or harmed if DPS must do what he insists it is already doing. *See Ahlman II*, 2020 WL 3547960, at *3. Moreover, this mitigates federalism concerns and allows the Court to address alleged constitutional violations without becoming too "enmeshed in the minutiae of prison operations." *Bell*, 441 U.S. at 562.

The public interest would also be served by requiring DPS to adhere to policies it formulated, which are designed to limit the spread of COVID-19, especially when non-compliance causes the violation of constitutional rights. *See Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) ("[I]t is always in the public interest to prevent the violation of a party's

constitutional rights." (internal quotation marks and citation omitted)). With inmate COVID-19 infections far exceeding the general rate in Hawai‘i, and multiple severe outbreaks in DPS facilities throughout the course of the pandemic, Defendant has not adequately protected the health and safety of the inmates. And the continued spread of COVID-19 in DPS facilities will impact DPS staff and other individuals who enter DPS facilities, along with their families and surrounding communities. *See In re Inmates II*, 2020 WL 5015870, at *1 (recognizing the endangerment to "the lives and well-being of staff and service providers who work [at DPS facilities], their families, and members of the community at large"). These considerations support the issuance of a preliminary injunction.

In sum, Plaintiffs have demonstrated that there is a strong likelihood of success on the merits of their claims, that they will suffer irreparable injury if relief is not granted, and that the balance of hardships and public interest weigh heavily in their favor.

B. Scope of Injunctive Relief

Plaintiffs request the same injunctive relief in the Injunction Motion that they ultimately seek in this litigation — the appointment of a special master pursuant to 18 U.S.C. § 3626(f)(1)(A) to oversee the development and

implementation of their Proposed Response Plan.[24] *Compare* SAC at 61–65 *with* ECF No. 14-1 at 2–5. It is typically improper "to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial. This is particularly true where the relief afforded, rather than preserving the status quo, completely changes it." *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808–09 (9th Cir. 1963). But even if the injunction here is mandatory, it is mild because it merely requires Defendant to adhere to its Response Plan and employ practices that comport with CDC guidelines. *See Hernandez*, 872 F.3d at 999–1000.

1. Appointment of a Special Master

The PLRA authorizes the Court to appoint a special master in a civil action regarding prison conditions (1) "who shall be disinterested and objective and who will give due regard to the public safety, *to conduct hearings on the record and prepare proposed findings of fact*" (2) "*during the remedial phase of the action* only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment." 18 U.S.C. § 3626(f)(1)(A)–(B) (emphases added).

[24] Plaintiffs initially requested an evaluation of whether inmates should be released to comply with CDC guidelines. ECF No. 6-1 at 34. At the time, the FAC was the operative pleading, and it also requested the same relief. ECF No. 5 at 75. The SAC does not request this relief, nor is it outlined in Plaintiffs' supplemental memorandum regarding the specific injunctive relief sought. ECF No. 14.

Because this case is not in the remedial phase, appointment of a special master under § 3626(f) is improper. *See McCormick v. Roberts*, Civil Action No. 11-3130-MLB, 2012 WL 1448274, at *2 (D. Kan. Apr. 26, 2012) (denying motion to appoint special master pursuant to § 3626(f) because the case had yet to enter the remedial phase); *Roberts v. Mahoning County*, 495 F. Supp. 2d 713, 714 (N.D. Ohio 2006) (discussing work of special master appointed after a bench trial to assist the parties with a remedial phase aimed at achieving final resolution). Plaintiffs have not presented any cases, and the Court has found none, appointing a special master pursuant to § 3626(f) at the preliminary injunction phase in a civil case regarding prison conditions.

At the hearing, Plaintiffs requested that their request be considered pursuant to FRCP 53 instead of § 3626(f). The PLRA defines a "special master" as "any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court." 18 U.S.C. § 3626(g)(8). Therefore, the Court finds that even if it were to award relief under FRCP 53, it would still be subject to the constraints of § 3626(f).

Additional reasons support denial of the request at this time. Special masters are ordinarily appointed after liability is established or a consent decree or injunction issues, to assist courts with enforcement. *See*, *e.g.*, *Brown*, 563 U.S. at

511; *Balla v. Idaho State Bd. of Corr.*, No. 1:81-cv-1165-BLW, 2011 WL 108727, at *1–2 (D. Idaho Jan. 6, 2011); *Plata v. Schwarzenegger*, 603 F.3d 1088, 1097 (9th Cir. 2010); *Hook v. Ariz. Dep't of Corr.*, 107 F.3d 1397, 1399–400 (9th Cir. 1997).

Courts have *contemplated* the appointment of a special master in cases involving ICE facilities *when a defendant failed to comply with orders*. *See*, *e.g.*, *Roman v. Wolf*, ED CV 20-00768 TJH, 2020 WL 6107069, at *2 (C.D. Cal. Oct. 15, 2020); *Fraihat v. ICE*, Case No. EDCV 19-1546 JGB (SHKx), 2020 WL 6541994, at *13 (C.D. Cal. Oct. 7, 2020). Plaintiffs cite two cases in which special masters were appointed. However, the appointments followed ICE's pattern of non-compliance and the PLRA does not apply to civil detainees.[25] *See* ECF No. 26-19; *Gayle v. Meade*, Case No. 20-21553-Civ-COOKE/GOODMAN, 2020 WL 4047334, at *2 (S.D. Fla. July 17, 2020). The final case cited by Plaintiffs is a consent order addressing class certification and appointing a special master pursuant to FRCP 53. ECF No. 26-18.

None of the circumstances in these cases are present here. Accordingly, the Court denies Plaintiffs' request to appoint a special master. This does not foreclose the possibility that a special master or another person with a similarly contemplated role may be appointed in the future, if appropriate.

[25] *See Agyeman v. INS*, 296 F.3d 871, 886 (9th Cir. 2002).

2. Limitations on Relief

The PLRA also authorizes the Court to issue a preliminary injunction in a civil action regarding prison conditions. *See* 18 U.S.C. § 3626(a)(2). "[I]njunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." *Id.*; *see also Melendres v. Maricopa County*, 897 F.3d 1217, 1221 (9th Cir. 2018) ("We have long held that injunctive relief 'must be tailored to remedy the specific harm alleged.'" (some internal quotation marks and citation omitted)). Courts are required to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief."[26] 18 U.S.C. § 3626(a)(2); *see also*

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[26] Paragraph (1)(B) provides:

> The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless—
>
> > (i) Federal law requires such relief to be ordered in violation of State or local law;
> >
> > (ii) the relief is necessary to correct the violation of a Federal right; and
> >
> > (iii) no other relief will correct the violation of the Federal right.

18 U.S.C. § 3626(a)(1)(B).

Maricopa County, 897 F.3d at 1221 ("Federalism principles make tailoring particularly important where, as here, plaintiffs seek injunctive relief against a state or local government." (citation omitted)). District courts nevertheless retain "broad discretion to fashion injunctive relief" so long as the injunctive relief "is 'aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.'" *Maricopa County*, 897 F.3d at 1221 (some internal quotation marks and citation omitted).

Preliminary injunctive relief automatically expires "90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period." 18 U.S.C. § 3626(a)(2).

Although Plaintiffs' requested injunctive relief is largely appropriate, the Court has made necessary adjustments to ensure that the relief is narrowly tailored to correct the constitutional violations identified herein and is the least intrusive means to correct the harm to Plaintiffs. Based on the foregoing, the Court GRANTS the Injunction Motion and ORDERS Defendant to *fully comply* with the Response Plan,[27] focusing in particular on the following:

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[27] To be clear, the Court is referring to the State of Hawaii Department of Public Safety Pandemic Response Plan COVID-19 (May 28, 2021 Revision). ECF No. 22-12. At the hearing, Plaintiffs' counsel conceded that she does not take issue

(continued . . .)

- Section 3.a (Good Health Habits).
- Section 3.b (Environmental Cleaning).
- Section 3.c (Social Distancing Measures).
- Section 3.d (Encourage the use of Masks and Other No-Contact Barriers).
- Section 6 (New Intake Screening).
- Section 8 (Personal Protective Equipment (PPE)).
- Section 10 (Medical Isolation/Cohorting (*Symptomatic Persons*)).
- Section 12 (Quarantine (*Asymptomatic Exposed Persons*)) – with an emphasis on the provisions concerning the (1) identification of inmates who are at increased risk for severe illness and (2) single cell and available housing prioritization of inmates with increased risk of severe illness from COVID-19.
- Section 13 (Surveillance for New Cases).

Defendant is further ORDERED to:

- Provide sanitary living conditions to all inmates in DPS custody, *i.e.*, regular access to a working toilet, sink, and drinking water.
- Prohibit DPS employees from restricting access to inmate grievance forms or from preventing the submission of grievances with respect to COVID-19 issues.

(. . . continued)
with the Response Plan itself, and indeed, the Court agrees that it is a rather comprehensive plan that addresses the proper management of COVID-19 at DPS facilities.

Oversight is hereby referred to Magistrate Judge Mansfield, who is authorized to address compliance with the preliminary injunction, engage in factfinding procedures he deems appropriate, and issue certified factual findings to the undersigned. The parties are directed to attend status conferences with Magistrate Judge Mansfield once a month. One week prior to each status conference, the parties shall file a joint status report. If they are unable to do so, they shall file separate status reports. The parties are directed to contact Magistrate Judge Mansfield's chambers to schedule the first status conference during the week of July 19, 2021. The parties need not file a status report but should be prepared to discuss compliance with the injunction.

C. FRCP 65(c)

FRCP 65(c) permits a court to grant preliminary injunctive relief "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). While this language appears to be mandatory, "Rule 65(c) invests the district court 'with discretion as to the amount of security required, *if any*.'" *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) (some internal quotation marks and citation omitted). Based on the class composition and record before it, the Court waives the bond requirement.

CONCLUSION

In accordance with the foregoing, the Court HEREBY (1) GRANTS Plaintiffs' Motion for Provisional Class Certification, ECF No. 20, and (2) GRANTS IN PART AND DENIES IN PART Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order. ECF No. 6.

IT IS SO ORDERED.

DATED: Honolulu, Hawai'i, July 13, 2021.

Jill A. Otake
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ANTHONY CHATMAN, FRANCISCO ALVARADO, ZACHARY GRANADOS, TYNDALE MOBLEY, and JOSEPH DEGUAIR, individually and on behalf of all others similarly situated, Plaintiffs, vs. MAX N. OTANI, Director of State of Hawai‘i, Department of Public Safety, in his official capacity, Defendant.	CIVIL NO. 21-00268 JAO-KJM ORDER DENYING DEFENDANT'S MOTION TO CLARIFY AND/OR MODIFY PRELIMINARY INJUNCTION

ORDER DENYING DEFENDANT'S MOTION TO CLARIFY AND/OR MODIFY PRELIMINARY INJUNCTION

On July 13, 2021, the Court issued an Order (1) Granting Plaintiffs' Motion for Provisional Class Certification and (2) Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order ("PI Order"). ECF No. 37; *see also Chatman v. Otani*, Civil No. 21-00268 JAO-KJM, 2021 WL 2941990 (D. Haw. July 13, 2021). On July 29, 2021, Defendant Max Otani ("Defendant") filed a Motion to Clarify and/or Modify Preliminary Injunction ("Motion"), requesting the Court do the following:

Exhibit 2

- Clarify statements regarding vaccines in the PI Order.
- Modify the PI Order, clarifying that sections of the Response Plan not specifically referenced in the PI Order fall outside the scope of the injunction.
- Confirm that Defendant and DPS employees may enforce general rules and policies with respect to inmate grievances.

ECF No. 45 at 4.[1] The Court elects to decide this Motion without a hearing pursuant to Rule 7.1(c) of the Local Rules of Practice for the U.S. District Court for the District of Hawaii. For the following reasons, the Court DENIES the Motion.

DISCUSSION

"'The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible,'" and when it "invokes equity's power to remedy a constitutional violation by an injunction mandating systemic changes to an institution[, it] has the continuing duty and responsibility to assess the efficacy and consequences of its order." *Brown v. Plata*, 563 U.S. 493, 542 (2011) (citations omitted). "'A party seeking modification . . . of an injunction bears the burden of establishing that a significant change in facts or law warrants revision . .

[1] Defendant also initially requested an order requiring him to incorporate the vaccination policy, attached as Exhibit A, as Addendum 1 to the Department of Public Safety's ("DPS") Pandemic Response Plan ("Response Plan"). ECF No. 45 at 3. He withdraws this request because a superseding version is presented in connection with his Second Motion to Modify Preliminary Injunction. ECF No. 55 at 16 n.12.

. of the injunction.'" *Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2019) (quoting *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000)) (other citation omitted). This "requirement presumes that the moving party could have appealed the grant of the injunction but chose not to do so, and thus that a subsequent challenge to the injunctive relief must rest on grounds that could not have been raised before." *Alto v. Black*, 738 F.3d 1111, 1120 (9th Cir. 2013) (citation omitted).

The Prison Litigation Reform Act ("PLRA") permits modification of prospective relief before the relief is terminable to the extent it "would otherwise be legally permissible." 18 U.S.C. § 3626(b)(4). Courts "shall promptly rule on any motion to modify . . . prospective relief in a civil action with respect to prison conditions." 18 U.S.C. § 3626(e)(1).

As a preliminary matter, Defendant has not established that a significant change in law or facts warrants revision of the injunction in the manner requested. Therefore, the Court DENIES the Motion to the extent it seeks modification of the PI Order. The Court confirms its rulings in the PI Order as detailed below.

A. Vaccination

1. Statement Regarding Vaccines

Defendant asks the Court to clarify a statement in the PI Order regarding

vaccination — that there is "conflicting information about the length of protective immunity following COVID-19 infection and the efficacy of vaccines against the new variants." *Chatman*, 2021 WL 2941990, at *12 (footnote omitted). Defendant believes that this statement is contrary to available information and may contribute to vaccine hesitancy. ECF No. 45-1 at 6. A plain reading of the PI Order demonstrates otherwise.

The subject statement was *not* a general pronouncement about vaccines. Critically, the Court made the statement in the *class certification* context to address Defendant's efforts to *exclude* from the proposed classes all inmates who are vaccinated and who contracted and recovered from COVID-19. Defendant argued:

> There is simply no scientific, medical, or other basis to include inmates who have either already contracted and recovered from COVID-19 or who have been fully vaccinated for COVID-19 as class members in this case. . . . As such, any class that includes "all present and future" inmates is overly broad and, if the Court is inclined to grant Plaintiffs' Motion, the class definition should be redrawn to exclude these inmates and consideration should be given as to whether a facility has achieved herd immunity.

ECF No. 28 at 19. In other words, Defendant contended, without adequate support, that inmates who are vaccinated and/or who previously contracted COVID-19 should not be part of the classes because they would unlikely be

affected by COVID-19.[2] *Id.* at 18–19. The Court's statement addressed that conclusory assumption. It did not question the soundness of COVID-19 vaccination and in fact supports and encourages vaccination. As noted in the PI Order, even the "Response Plan treats vaccinated individuals the same as unvaccinated individuals for the purposes of quarantine following exposure to someone with suspected or confirmed COVID-19, citing the 'turnover of inmates, higher risk of transmission, and challenges in maintaining recommended physical distancing in correctional settings.'" *Chatman*, 2021 WL 2941990, at *12 n.11 (quoting ECF No. 22-12 at 45).

The Court maintains its rationale for including all inmates in the classes — regardless of vaccination status or prior COVID-19 infection — and new developments only further support it. Recent updates from the Centers for Disease Control and Prevention ("CDC") reaffirm the efficacy of the vaccines against severe illness and death, even as to the Delta variant, but also confirm that fully vaccinated individuals (1) can become infected with and transmit the Delta variant[3]

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[2] At the hearing, defense counsel argued that vaccinated and previously infected inmates have little to no risk of contracting COVID-19. This is inconsistent with the data cited below.

[3] The CDC stated:

> Delta infection resulted in similarly high SARS-CoV-2 viral loads in vaccinated and unvaccinated people. High viral loads suggest an

(continued . . .)

and (2) may not be protected if they have weakened immune systems, including those on immunosuppressive medications. *See* https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html (last visited Aug. 12, 2021). Moreover, the CDC is investigating the duration of vaccine immunity. *See id.* It also posted a study indicating that unvaccinated individuals who were previously infected with COVID-19 "are more than twice as likely to be reinfected with COVID-19 than those who were fully vaccinated after initially contracting the virus" and that "COVID-19 vaccines offer better protection than natural immunity alone and that vaccines, even after prior infection, help prevent reinfections." https://www.cdc.gov/media/releases/2021/s0806-vaccination-protection.html (last visited Aug. 12,

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(. . . continued)

> increased risk of transmission and raised concern that, unlike with other variants, vaccinated people infected with Delta can transmit the virus. This finding is concerning and was a pivotal discovery leading to CDC's updated mask recommendation. The masking recommendation was updated to ensure the vaccinated public would not unknowingly transmit virus to others, including their unvaccinated or immunocompromised loved ones.

https://www.cdc.gov/media/releases/2021/s0730-mmwr-covid-19.html (last visited Aug. 12, 2021). The CDC also posted a Morbidity and Mortality Weekly Report citing the recent Provincetown, Massachusetts COVID-19 outbreak, where 74% of the 469 the infected individuals in the study were vaccinated. *See* https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s_cid=mm7031e2_w (last visited Aug. 12, 2021). The Court *does not* cite this to criticize COVID-19 vaccines, but to demonstrate that Defendant incorrectly assumed and argued that vaccinated and previously-infected inmates have little to no risk of contracting of COVID-19.

2021). While it is certainly true that vaccinated individuals are far less likely to contract COVID-19 and suffer serious illness, there remains some risk of infection[4] and transmission of the Delta variant. *See, e.g.*, https://www.jhsph.edu/covid-19/articles/new-data-on-covid-19-transmission-by-vaccinated-individuals.html (last visited Aug. 12, 2021); https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html (last visited Aug. 12, 2021). This is especially true in a carceral setting, which compounds the problem for the unvaccinated in particular.

The resistance to vaccination by inmates and DPS staff[5] has contributed to the facilities' already heightened vulnerability to outbreaks. Excluding vaccinated and previously infected inmates from the classes who may still be susceptible to contracting COVID-19 and becoming ill would unjustifiably deprive them of any relief awarded in this action. While highly effective at preventing serious illness

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[4] Defendant points to the Court's observation in the PI Order that at least one Plaintiff (Tyndale Mobley) contracted COVID-19 post-vaccination as inconsistent with the efficacy of the vaccine. ECF No. 45-1 at 6 n.7. The Court offered the example to highlight that Defendant's efforts to disregard vaccinated inmates was unfounded, and the latest data confirms that more definitively. Defendant also brushes off Mobley's illness, arguing that Mobley's declaration did not indicate what serious symptoms he experienced, if any. *Id.* Mobley represented that he suffered from several symptoms and is concerned about the long-term consequences. ECF No. 26-10 ¶ 18. Defendant's suggestion that only serious post-vaccination COVID-19 cases matter wholly ignores the larger and more pervasive issue of *infection and transmission* within DPS facilities.

[5] The Court does not fault Defendant for the lower vaccination rates in some facilities, but he must nevertheless be prepared for and confront the impact to DPS facilities.

and death, vaccines do not guarantee protection from infection, nor illness or transmission. The same is true of prior infection. This is why, as the Court found before, *all* present and future inmates are entitled to the relief accorded in this action.

2. Vaccine Addendum

Defendant initially requested an order requiring DPS to incorporate an addendum into the Response Plan regarding vaccination requirements for DPS staff, and to implement said policy. In light of Governor Ige's Emergency Proclamation Related to the COVID-19 Response, issued on August 5, 2021, which contains a vaccination mandate for State employees, Defendant withdrew this request and it is moot in any event. The Court informs Defendant that while it appreciates his efforts to obtain authorization to amend the Response Plan, he should not run to the Court for expedited relief with each proposed modification, as the Court's role is not to pre-approve or preliminarily endorse state policies. Defendant is not precluded from revising the Response Plan, particularly if modifications enhance COVID-19 mitigation measures in DPS facilities but he is cautioned that any modifications decreasing or eliminating *existing* safety measures in the Response Plan (May 28, 2021 Revision) may violate the PI Order. *See Chatman*, 2021 WL 2941990, at *24 & n.27 (citing ECF No. 22-12).

B. Scope of Injunction

Defendant also requests clarification that the injunction only pertains to the specific sections listed in the PI Order and not the balance of the Response Plan. To support this restrictive interpretation of the PI Order, Defendant explains that: (1) the Response Plan was not designed to be scrutinized and enforced by courts and was never intended to carry the force of law; (2) because the Response Plan delineates vague or ambiguous standards, it would be difficult for Defendant, DPS staff, or counsel, to ascertain whether they are compliant; and (3) compliance with the Response Plan in full would be unduly burdensome and render the injunction overbroad, and would divert already limited staff time to ensure compliance. ECF No. 45-1 at 11–13.

Defendant's contentions are not well taken. Defendant tried to avoid the issuance of the injunction altogether by repeatedly highlighting his proactivity regarding the development and implementation of the Response Plan. His present contention that the Response Plan is too vague or ambiguous to adhere to is contradictory, especially in view of his representations in Status Report No. 1 Regarding Compliance with the Preliminary Injunction that four facilities are in full compliance, three facilities are in full compliance except for section 3(a), and one facility is in full compliance except for sections 3(b), 10, and 13. ECF No. 48.

In defense of DPS's conduct, Defendant previously argued that it adopted the Response Plan "in order to prevent, contain, and control the spread of COVID-19 at the State's correctional facilities" and that the Response Plan "is constantly reviewed and has been updated on several occasions as CDC guidelines and information have evolved." ECF No. 22 at 14–15. Defendant also represented that each facility has a response plan tailored to address its unique needs, and he identified nine categories of measures that were being *implemented*. *Id.* at 15–20. At the hearing, defense counsel repeatedly argued that that the Response Plan was being implemented at DPS facilities, and even argued that the Response Plan was working. Nonetheless, Defendant now claims that "none of the affidavits [he] submitted . . . averred that [he] was already complying with *every provision* in the [Response Plan] across-the-board," ECF No. 45-1 at 14, as if partial compliance then[6] — when in the midst of a COVID-19 outbreak — justifies a narrowing of the injunction or incomplete compliance now.

[6] The Court never stated that Defendant claimed — through the many declarations submitted — wholesale compliance with the Response Plan. *See Chatman*, 2021 WL 2941990, at *20 ("[T]he injunction would merely require DPS to do not only what it *should* be doing but what it claims it *has* been doing throughout the course of the pandemic."). But Defendant certainly capitalized on that inference. He repeatedly insisted that he proactively adopted and implemented measures to prevent and control the outbreaks and spread of COVID-19 at the facilities, except for "occasional lapses," if the declarations submitted by Plaintiffs were believed. ECF No. 22 at 29, 32–33, 36–38.

The Court is unmoved by Defendant's assertion that the interpretation of and adherence to the Response Plan — the creation and implementation of which was initially touted as evincing constitutional compliance — is suddenly too burdensome. *See Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960, at *3 (9th Cir. June 17, 2020) ("Defendants' new position cannot be reconciled with Balicki's sworn statement in the district court, which represented not only that Defendants were willing and able to implement each of the specific measures requested by Plaintiffs (and later incorporated into the injunction), but that they had in fact *already implemented them*. Nowhere in their papers have Defendants attempted to explain why the measures they assured the district court had already been taken have suddenly become impossible to carry out." (footnote omitted)). It is unclear why Defendant would create a plan with which DPS is unable or unwilling to comply. Notwithstanding his initial reliance on the Response Plan, Defendant currently likens it to the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, arguing that such a plan does not provide a workable plan according to the Ninth Circuit.[7] ECF No. 45-1 at 12 (quoting *Roman v. Wolf*, 977 F.3d 935, 946 (9th Cir. 2020)). In *Roman v. Wolf*, the Ninth Circuit held:

[7] According to Defendant, the CDC guidelines is a key document upon which the Response Plan is based. ECF No. 45-1 at 12.

> Second, although our court previously stayed the district court's preliminary injunction except to the extent it required compliance with the CDC's guidelines for correctional and detention facilities, we think developments since the stay have made clear that those guidelines do not provide a workable standard for a preliminary injunction. The guidance document spans 25 pages and makes hundreds of recommendations, many of which lack specificity.

977 F.3d at 946. The district court's preliminary injunction contained this reference to the CDC guidelines, one of 28 requirements imposed in its order:

> 13. Respondents shall immediately put into effect at Adelanto all mandates, best practices, recommendations and guidelines issued by the United States Centers for Disease Control and Prevention, the State of California, and the San Bernardino County Department of Public Health for the prevention of the transmission of the coronavius [sic] and COVID-19.

Roman v. Wolf, Civil No. 20-00768 TJH-PVC, ECF No. 55 (Preliminary Injunction). There are material differences between the aforementioned paragraph in the *Roman* injunction and the PI Order. This Court did not order Defendant to comply with general guidelines issued by an independent organization with no knowledge of Hawaii's correctional facilities; it ordered Defendant to comply with DPS's *own* Response Plan.[8] Defendant's reliance on and incorporation of the CDC

[8] In his Reply, Defendant emphasizes both the requirement that injunctions be "narrowly drawn, extend no further than necessary to correct the harm . . . and be the least intrusive means necessary to correct that harm," ECF No. 55 at 9 (emphases omitted) (quoting 18 U.S.C. § 3626(a)(2)), and the inquiry of whether a "'vindication of federal rights could have been achieved with less involvement by (continued . . .)

guidelines was of his own volition and, based on his ardent promotion of the Response Plan, it is reasonable to assume that the incorporated provisions could be feasibly implemented at DPS facilities. Otherwise, creating the Response Plan was merely an academic exercise. As discussed above, the Court rejects Defendant's contradictory positions regarding the Response Plan. Defendant previously pointed to the virtues of the Response Plan and claimed to have implemented it. He cannot reverse course weeks later and characterize the Response Plan as an unenforceable guidance document, nor feign an inability to comply due to vague standards and/or scarce staff time.

The Court intended and expects Defendant to comply with the *entire* Response Plan. *See Chatman*, 2021 WL 2941990, at *24 ("Based on the foregoing, the Court GRANTS the Injunction Motion and ORDERS Defendant to *fully comply* with the Response Plan[.]" (footnote omitted)). Defendant's arguments do not support a different outcome. If Defendant formulated the Response Plan to prevent the spread of COVID-19 in DPS facilities, as he claimed, the Court struggles to understand how partial compliance will achieve that. Given

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(. . . continued)
the court in directing the details of defendants' operations.'" *Id.* (quoting *Armstrong v. Brown*, 768 F.3d 975, 986 (9th Cir. 2014)). Considering that the Court's injunction merely requires Defendant to comply with DPS's Response Plan, which he *already* claimed to be doing, the foregoing are more than satisfied. In the simplest terms, Defendant was ordered to follow the plan he created and to do what he said he was doing.

the current COVID-19 surge in Hawai‘i, with cases and positivity rates higher than they have ever been during the pandemic, it is imperative that Defendant take all necessary steps to mitigate spread within the facilities to protect inmates, staff, and the community at large.[9]

C. Inmate Grievances

Defendant seeks clarification that he may continue to enforce general procedures regarding frivolous or untimely inmate grievances, but he does not explain the practical effect that will have on COVID-19 grievances.[10] He points to frivolous, abusive/threatening, and untimely grievances as necessitating the continued enforcement of its grievance rules.[11] ECF No. 55 at 19–20. The Court recognizes the importance of maintaining a grievance system and it did not enjoin Defendant from generally enforcing grievance rules and procedures. But if

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[9] It is noteworthy that DPS is currently grappling with additional COVID-19 outbreaks at Kauai Community Correctional Center, Halawa Correctional Facility, Oahu Community Correctional Center, and Maui Community Correctional Center. https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/#gallery-2 (updated Aug. 11, 2021) (last visited Aug. 12, 2021).

[10] Defendant improperly raises substantive arguments and presents legal authority for the first time in the Reply. These arguments should have been raised in opposition to the motion for preliminary injunction.

[11] It is unclear how COVID-related grievances would fall into the abusive/threatening category, when Defendant defines this category to include grievances threatening staff, posing a substantial threat to security and discipline, or comprising a string of insults. ECF No. 55 at 19 & n.21.

Defendant's enforcement of grievance procedures impairs an inmate's ability to obtain a grievance form or submit a grievance regarding COVID-19 issues, doing so violates the PI Order.[12] *See Chatman*, 2021 WL 2941990, at *24 ("Prohibit[ing] DPS employees from restricting access to inmate grievance forms or from preventing the submission of grievances with respect to COVID-19 issues.").

CONCLUSION

In accordance with the foregoing, the Court DENIES Plaintiffs' Motion to Clarify and/or Modify Preliminary Injunction. ECF No. 45.

IT IS SO ORDERED.

DATED: Honolulu, Hawai'i, August 12, 2021.

Jill A. Otake
United States District Judge

[12] For example, Defendant cannot deny forms to an inmate then later deem a grievance untimely. Nor can Defendant refuse to accept a grievance then claim a failure to exhaust under the PLRA. *See Valentine v. Collier*, 590 U.S. __, 140 S. Ct. 1598, 1600 (2020) (statement of Sotomayor, J., joined by Ginsburg, J.) (explaining that the exhaustion requirement only pertains to "'available' judicial remedies." (quoting *Ross v. Blake*, 578 U.S. __, 136 S. Ct. 1850, 1858–59 (2016))); *Andres v. Marshall*, 867 F.3d 1076, 1079 (9th Cir. 2017) ("When prison officials improperly fail to process a prisoner's grievance, the prisoner is deemed to have exhausted available administrative remedies.").

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ANTHONY CHATMAN, FRANCISCO ALVARADO, ZACHARY GRANADOS, TYNDALE MOBLEY, and JOSEPH DEGUAIR, individually and on behalf of all others similarly situated, Plaintiffs, vs. MAX N. OTANI, Director of State of Hawai‘i, Department of Public Safety, in his official capacity, Defendant.	CIVIL NO. 21-00268 JAO-KJM ORDER DENYING DEFENDANT'S SECOND MOTION TO MODIFY PRELIMINARY INJUNCTION

ORDER DENYING DEFENDANT'S SECOND MOTION TO MODIFY PRELIMINARY INJUNCTION

On July 13, 2021, the Court issued an Order (1) Granting Plaintiffs' Motion for Provisional Class Certification and (2) Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order ("PI Order"). ECF No. 37; *see also Chatman v. Otani*, Civil No. 21-00268 JAO-KJM, 2021 WL 2941990 (D. Haw. July 13, 2021). On July 29, 2021, Defendant Max Otani ("Defendant") filed a Motion to Clarify and/or Modify Preliminary Injunction, *see* ECF No. 45, followed by the present Second Motion to Modify Preliminary Injunction ("Motion") on August 8, 2021. ECF No. 51.

Exhibit 3

The Court elects to decide this Motion without a hearing pursuant to Rule 7.1(c) of the Local Rules of Practice for the U.S. District Court for the District of Hawaii. For the following reasons, the Court DENIES the Motion.

DISCUSSION

"'The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible,'" and when it "invokes equity's power to remedy a constitutional violation by an injunction mandating systemic changes to an institution[, it] has the continuing duty and responsibility to assess the efficacy and consequences of its order." *Brown v. Plata*, 563 U.S. 493, 542 (2011) (citations omitted). "'A party seeking modification . . . of an injunction bears the burden of establishing that a significant change in facts or law warrants revision . . . of the injunction.'" *Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2019) (quoting *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000)) (other citation omitted). This "requirement presumes that the moving party could have appealed the grant of the injunction but chose not to do so, and thus that a subsequent challenge to the injunctive relief must rest on grounds that could not have been raised before." *Alto v. Black*, 738 F.3d 1111, 1120 (9th Cir. 2013) (citation omitted).

The Prison Litigation Reform Act ("PLRA") permits modification of prospective relief before the relief is terminable to the extent it "would otherwise

be legally permissible." 18 U.S.C. § 3626(b)(4). Courts "shall promptly rule on any motion to modify . . . prospective relief in a civil action with respect to prison conditions." 18 U.S.C. § 3626(e)(1).

Defendant requests leave to revise the Department of Public Safety's ("DPS") Pandemic Response Plan ("Response Plan"). Although Defendant limits his discussion to the provisions concerning the elimination of quarantine and testing requirements for vaccinated and previously infected inmates, there are in fact a number of revisions to the Response Plan. ECF No. 51-1 at 6 n.7 (mentioning the existence of other revisions); ECF No. 51-7 (redline of the Response Plan). In its Order Denying Defendant's Motion to Clarify and/or Modify Preliminary Injunction ("Order"), issued on August 12, 2021, the Court stated: "Defendant is not precluded from revising the Response Plan, particularly if modifications enhance COVID-19 mitigation measures in DPS facilities but he is cautioned that any modifications decreasing or eliminating *existing* safety measures in the Response Plan (May 28, 2021 Revision) may violate the PI Order." *Chatman v. Otani*, Civil No. 21-00268 JAO-KJM, 2021 WL 3574866, at *3 (D. Haw. Aug. 12, 2021) (citation omitted).

The Court maintains this position. Its role is to ensure that Defendant is not violating Plaintiffs' constitutional rights, not to micromanage DPS policy or operations. Not only would preapproval of every amendment to the Response Plan

be counterproductive and inefficient as a practical matter, it would encroach on the State's penological interests. The Court's obligation to monitor compliance with the PI Order is distinct from Defendant's need to manage DPS facilities. That is, monitoring efforts are not designed to hamstring Defendant from making necessary changes, especially as COVID-19 cases surge in the state and the outbreaks at DPS facilities persist. *See* https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/ (updated Aug. 17, 2021) (last visited Aug. 18, 2021). If Defendant is taking *protective* measures regarding inmates' health — even if doing so results in changes to the Response Plan — that arguably would not violate the PI Order.

For example, Defendant continues to request an order authorizing an addendum regarding the vaccination of DPS staff. ECF No. 51-1 at 6 n.7; ECF No. 51-5 ¶ 11. The Court noted in the Order that the request to add a vaccine addendum is moot. *See Chatman*, 2021 WL 3574866, at *3. Following Defendant's initial request to add a vaccine addendum for DPS staff, Governor Ige issued an Emergency Proclamation Related to the COVID-19 Response on August 5, 2021, which contains a vaccination/testing mandate for State (and county) employees. The vaccine/testing mandate therefore applies irrespective of whether it is added to the Response Plan. An order is not required to amend the Response Plan in this manner, as Defendant can determine how he presents the mandate to

DPS staff. Defendant *should not* interpret this to mean the Court disapproves of vaccination. The Court commends any efforts to inoculate inmates and staff.

With respect to Defendant's primary request regarding quarantines, he mispresents that the proposed amendment reflects *updated* CDC guidance. ECF No. 51-1 at 7 ("CDC has similarly issued updated guidance and recommendations for fully vaccinated inmates and staff in a correctional setting."). The CDC guidance he quotes is from a ***June 9, 2021*** update, which was issued more than one month before the issuance of the PI Order and it precedes the Delta variant surge. *See* https://www.cdc.gov/coronavirus/2019-ncov/community/quarantine-duration-correctional-facilities.html (last visited Aug. 18, 2021); https://www.nytimes.com/2021/06/22/health/delta-variant-covid.html (last visited Aug. 18, 2021). This alone precludes Defendant from satisfying the standard for modifying an injunction because there is no change to the facts or law in the manner Defendant suggests. Indeed, circumstances have worsened since the Court imposed the injunction.

Based on the foregoing, the Court DENIES Defendant's Motion. Defendant is free to amend the Response Plan without Court involvement,[1] but he is again cautioned that eliminating safety measures may constitute a violation of the PI Order if such elimination is not supported by COVID-19 conditions and corresponding medical/scientific guidance during the relevant time period.

[1] This does not mean that the Court expressly approves the proposed amendments.

CONCLUSION

In accordance with the foregoing, the Court DENIES Defendant's Second Motion to Modify Preliminary Injunction. ECF No. 51.

IT IS SO ORDERED.

DATED: Honolulu, Hawai'i, August 18, 2021.

Jill A. Otake
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

FRANCISCO ALVARADO; individually and on behalf of all others similarly situated, et al., Plaintiffs, vs. MAX N. OTANI, Director of State of Hawaii, Department of Public Safety, in his official capacity, Defendant.	CIVIL NO. 21-00268JAO-KJM November 8, 2021 9:00 a.m. FINAL FAIRNESS HEARING AND [116] PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS SETTLEMENT AGREEMENT [117] JOINT MOTION FOR SETTLEMENT APPROVAL VIA VIDEO TELECONFERENCE

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JILL A. OTAKE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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For the Defendant: SKYLER G. CRUZ
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ALSO PRESENT: ROBERT AKUNA, DESMOND DOMINGO, RAMSEY JARDINE, CHAYNE MARTEN, RICHARD ELINE

Exhibit 4

Official Court Reporter: ANN B. MATSUMOTO, RPR
United States District Court
300 Ala Moana Boulevard
Honolulu, Hawaii 96850

Proceedings recorded by machine shorthand, transcript produced with computer-aided transcription (CAT).

MONDAY, NOVEMBER 8, 2021 9:00 O'CLOCK A.M.

COURTROOM MANAGER: The United States District Court for the District of Hawaii, with the Honorable Jill Otake presiding, is now in session.

Civil Number 21-00268JAO-KJM, Francisco Alvarado, individually and on behalf of others similarly situated, et al. versus Max N. Otani, Director of the State of Hawaii, Department of Public Safety, in his official capacity.

This case has been called for a final fairness hearing and a hearing on plaintiffs' motion for approval of attorneys' fees and costs, settlement agreement, and joint motion for a final settlement approval, which is being conducted by video teleconference.

Counsel, please make your appearances for the record, starting with the plaintiff. And Mr. Seitz, if I could please ask you to also provide us the names of the inmates at both Maui -- excuse me -- Correctional Center as well as the Halawa Correctional. Thank you.

MR. SEITZ: Good morning, Judge. Eric Seitz and Kevin Yolken appearing for the individually named plaintiffs in the plaintiff class. I'm not sure with masked who's present from the facilities, so I would ask that they briefly just identify themselves.

Gentlemen from MCCC, would you please just state your names for the record?

65 years old, and he told me he had the Moderna vaccine. And they said go by the science. And because I am 69 years old, the science that I understand was that the Johnson & Johnson was the least effective of the three, and that was the only one that was being offered to me. In regards to my -- my roommate, I don't know how he got the Moderna, but he did get the Moderna vaccine. I would have felt safer getting the Moderna or the Pfizer. But then after hearing about some of the problems with the Johnson & Johnson, I was afraid to risk it.

THE COURT: All right.

HFC INMATE: I think it would be better to be unvaccinated.

THE COURT: Thank you, Mr. Marten.

Let me turn now to the attorneys to respond to the objections.

And let me start with you, Mr. Seitz. And I -- if you want, I can outline specific positions that they've raised this morning, or you can just go ahead and respond yourself.

MR. SEITZ: I have no problem responding, Judge. I took some notes.

THE COURT: Great. Thank you.

MR. SEITZ: First of all, let me say to the gentlemen who indicated their concerns that we share all of those concerns, and we continue to share those concerns.

However, there are a number of other things that have

been happening that I think need to be understood. First of all, let me tell you, Judge, since the proposed settlement was posted at the facilities, and in fact since we started this lawsuit, my office receives, I would say, between five to 15 calls and letters every single day from class members and family members expressing the same kind of concerns. And since we had a settlement proposal in this case, we've explained to people many of those concerns are related to the absence of monetary damages. And we've explained to everybody that this case was never intended, and we could not get as a class monetary damages because each person's experience is different, but that we are committed in the next stage, and we are putting together and assembling a team of people to pursue damages claims probably in the state courts for everybody who got COVID, staff and inmates. And that will be coming probably starting in January, and we anticipate that we're going to pursue those claims until hopefully that they're successful. So --

THE COURT: And, Mr. Seitz, just to clarify, am I correct that the settlement agreement does not preclude any individual inmates from pursuing financial damages?

MR. SEITZ: Yes.

THE COURT: All right.

MR. SEITZ: And we made that clear during the course of the discussions.

Secondly, after months of trying, before we filed this lawsuit, it was our concern, first of all, to get accurate information about what was happening in the prisons, because as you know, that information was not forthcoming. And our desire was to get experts into the prison to be able to, one, tell us what was happening and, two, be able to make public health and other medical recommendations to prison staff directly as to how they could better deal with this situation.

We suffered enormous resistance in that process, up to and until June when we filed this lawsuit. And we have been trying since August, the previous year, August of 2020, to get into the prisons to document what was actually happening.

We filed this lawsuit and as everybody knows, the court issued an injunction. And the injunction was very broad. And to our knowledge, Department of Public Safety complied with some aspects but not all of those aspects, and we fully intended to go forward with the litigation and get a permanent injunction.

But that's basically what we were seeking, an injunction to address the situation and the conditions in the prison to try to prevent further outbreaks and the spread and to deal with the circumstances that have led the spread to occur and to increase in -- in all of the institutions that have been affected.

In light of the settlement, the settlement allowed

our experts to get in. And our experts visited, as some of you know, about two or three weeks ago. And my information, and I was at Halawa last week, my information is that antic -- first of all, after the settlement agreement, there have been significant improvements made, not everything that we would like, but significant improvements along the lines of what the Court ordered in its preliminary injunction.

In anticipation of the experts coming in, we understand that there was a massive effort to clean up and ensure that when they came in they would see conditions in the best possible light, and they are preparing their report from that visit, which is due tomorrow.

We have not given up or sacrificed any of the concerns in the settlement agreement. Basically it sets out most of what the Court ordered the state to do to take preventative steps to address the threat of further outbreaks. And actually, in the last month or so, the numbers of COVID cases that have been reported positive and the seriousness of those cases has dropped dramatically. We get reports every day about the number of tests administered, the number of positives for both staff and inmates. And there has been a dramatic drop, which is somewhat comparable to what's happening in the larger community as well.

So we have, I think, over the course of the last four or five months, seen some significant improvements.

A lot of the problems that we face have to do with overcrowding in the prisons. A lot of people talk about the fact that people are there who don't need to be there. We tried to address that with the Hawaii Supreme Court on at least two occasions with only moderate success. Those are institutional and larger questions that were way beyond our ability to address in this particular case.

This case was about COVID and about prevention. And I think we've gone about as far as we can go with this case.

So I am particularly happy with the injunction that the Court issued. I am satisfied that the settlement basically encourages the facility to continue to take the measures that the injunction ordered them to do. I'm satisfied that our experts, in particular the two medical experts that we named to the panel, are very good at ferreting out information and assisting the medical staff in the prisons with their recommendations, which we will see for the first time tomorrow and we'll continue to monitor. And we will then move on, as I said, in January, to start filing damages claims for people who died, people who became very sick, or anybody who contracted COVID. We're not done here, but this is just a phase, a first step.

Now, somebody also mentioned -- I know the Court is going to ask me specific questions about this further in this hearing. Somebody indicated that we're getting a windfall from

this.

Let me just tell you that since August of last year, or even before that, since April of 2020, my law office has invested hundreds and hundreds, maybe even thousands of hours all together in addressing the COVID issues in the prisons.

And from the time we filed this lawsuit in May, I believe, of 2021 up through August of 2021, I had three lawyers who I was paying and all of my staff working on this case full-time to the extent that we could not work on other cases. So we have invested enormously in this case. And the fees that we've been awarded are basically fees that cover the overhead of my office. That's really all. There's no windfall for us here.

And essentially we'll be talking about that in relation to other questions that the Court has addressed to us. But I want to assure you we didn't take this case to make money, and we're not making any money.

Basically I've been loaning and getting loans to enable us to finance this litigation up to now, and all we're really going to do is be able to repay those loans.

THE COURT: Thank you, Mr. Seitz.

I think you misspoke that you've been awarded fees already. So I want to clarify for the inmates that Mr. Seitz has not yet been awarded any fees. That's one of the questions I -- I need to address. Thank you --

MR. SEITZ: Thank you.

THE COURT: -- Mr. Seitz.

Mr. Cruz, let me hear from you in terms of your response to the objections that were raised this morning.

MR. CRUZ: Yes. Thank you, Your Honor.

And I would also just like to begin by thanking the class members who are participating this morning. It is certainly helpful to hear their objections and -- and be able to respond to them.

I -- I tend to share Mr. Seitz' view on -- on the terms of the settlement and -- and responses to the objections.

So I won't belabor the points that he's made too much, but I will add that the -- the concern with the monetary damages, I think Mr. Seitz correctly states that are -- are really not a concern that the Court need to consider too strongly in this particular case because the settlement does not foreclose any class member's ability to bring a damages claim at a future point in time.

So while some class members may be disappointed that there is no monetary component to this settlement, they -- they can bring those claims in another action at another time.

As far as -- as the current conditions at the facilities, we understand that -- that, you know, things may not be the way that -- that certain inmates would like them to be. But I think as Mr. Seitz has -- has stated, and correctly,

there have been significant improvements since the filing of the lawsuit, since the entry of the preliminary injunction, and since the settlement agreement.

And two points I want to make about that is -- and I'll just briefly refer to the settlement agreement which is attached to the -- the motion that's the subject of today's hearing. The ECF is 117-6.

And there are sections in the settlement agreement that I think are important to point out, in case the class members wish to take another look.

On -- beginning on page 8, Section C addressed -- includes specific measures on quarantine and isolation for the pub -- for the Department of Public Safety to implement. On the next page, Section D, there are specific provisions concerning vaccination and testing. And on page 10, paragraph E, there are specific agreements as to -- as to what will be done for sanitation.

So there are specific benefits in the settlement agreement for the class members who are incarcerated. And in addition to that, I think what's even more important is this creation of the Agreement Monitoring Panel, which we refer to as the AMP. Because this is a panel, as -- as Mr. Seitz points out, of experts who have gone and visited the facilities in person in October, who are preparing a report that is specifically designed -- that will be provided to Public Safety

and is designed to give guidance and direction as to how -- they're going to identify areas of concern, areas for improvement and -- and give guidance and suggestions for Public Safety as to how to go about implementing those recommendations.

So I think that hopefully many of the concerns that these class members have raised will be concerns that have been directly observed by these experts and addressed in their report.

I think the last point I'll briefly address, but as Mr. Seitz and the Court have pointed out is really the subject of another motion, but since there was an objection as to the attorneys' fees being a windfall, I will just say that -- that, you know, our office reviewed Mr. Seitz' office time sheets in great detail. You know, while -- while we may not necessarily agree as to the reasonableness of every hour expended, there's no question that a great number of hours were expended in pursuing the claims in this case -- in this case.

And we think that had the case continued, and if -- if the plaintiffs were successful, attorneys' fees could have far exceeded the amount of the settlement that we reached. So I -- I wouldn't characterize it as a windfall.

THE COURT: Thank you, Mr. Cruz.

And let me ask you, Mr. Cruz. What I hear you saying, and I want you to clarify this for me if I'm wrong, is

that the objections that have been raised this morning, that expressed some factual scenarios that arguably violate the terms of the settlement agreement, that those should be ferreted out by the AMP, the Agreement Monitoring Panel. And whether or not that's a categorical problem across the board or just an incidental problem is something that parties will learn about. Is that what I hear you saying?

MR. CRUZ: I -- I think that's a fair summary. And I'd also like to add that any class member, as directed by this Court, in fact, in a preliminary injunction order, is free to file a grievance if there's a specific issue that they've experienced relating to COVID. And -- and so that, you know, if -- if there's a concern that an issue may not be addressed as quickly as they might like through the AMP process, they can certainly file a grievance and have it looked at right away that way.

THE COURT: Let's take, for example, the -- the chow hall situation that Mr. Marten offered a few moments ago. And I just want to understand. So if he is representing -- if what he represents is accurate and is something that is happening on a daily basis, if you could explain to us and in particular to Mr. Marten what the next steps would be, I think having an example of that would assist all of us this morning.

MR. CRUZ: Yes, Your Honor.

I'll first point out, as Mr. Seitz mentioned, that

some of these concerns, like the chow hall example, are -- are larger institutional concerns that are -- are difficult to address via this lawsuit. They -- they stem from in many cases overcrowding and other issues that are -- are systemic and -- and may not be able to address -- be addressed in a perfect -- in a perfect way.

But if it is the case that there are class members who -- who believe that the chow hall procedures are not being handled in a manner that's safe, in other words, there's not adequate social distancing to allow safety, then I -- I believe the appropriate thing to do in that situation is to submit a grievance detailing that concern.

Generally speaking, the more information that can be put in the grievance allows the response to be more effective: The date that the incident occurred, the location, the specific issue, what, if any, ACOs or which ACOs were on duty, who can verify the claims or so that -- and other witnesses for the prison officials to -- to interview, in terms of analyzing or investigating that claim. That would be my suggestion, Your Honor.

THE COURT: All right. Thank you.

Let me now turn to some more general questions that I have for the parties based on what they submitted. And let me start -- actually, let me finish this last discussion with all of you this morning at MCCC and at Halawa.

I do express my sincere gratitude that you are appearing this morning. You are, I understand, courageous in doing so, and I -- I view that courage favorably, and I thank you very much for your time this morning and your comments.

HFC INMATE: (Raises hand.)

THE COURT: Let me turn to this -- a question I have is, in that -- the joint response that the parties filed, in it you argue that the settlement is warranted, and you proposed that the objections be forwarded to the Agreement Monitoring Panel, as Mr. Cruz also did with regard to the objections raised this morning.

I have two questions. The first is: What is the mechanism for that? In other words, who's going to refer which objections that are raised in the -- in ECF No. 115, and the objections that were raised this morning, who is actually going to refer those to the monitoring panel?

Who's going to -- second question is: Who decides which of the objections will go to the monitoring panel?

And the third question is whether or not -- I mean, basically don't I need to meaningfully consider the objections, including the factual allegations, in deciding whether or not the settlement is fair, adequate, and reasonable? Or are you saying that I just -- I don't need to make any assessment of these factual allegations raised in the objections because somebody else is going to be taking care of that? That --

that's what I'm concerned about.

So let me start with you, Mr. Seitz, or -- with those three questions.

MR. SEITZ: Well, first of all, any objections or concerns that we receive I forward, my office forwards to the monitoring panel.

THE COURT: Great. Okay.

MR. SEITZ: So, you know, Mr. Cruz says file grievances. But if anybody files grievances and they want to send copies to us, we will automatically submit those through Judge Foley to the monitoring panel for their consideration. And we will not screen them. We will send them all.

Secondly, I think the objections that have been raised, as I said, are all valid objections. But the essence of those objections is, one, that insofar as monetary relief is concerned, it clearly goes beyond the scope. So although those are legitimate concerns, it's not something that should affect the approval of the settlement this morning. And with respect to the fact that there are still lingering ongoing problems at the institutions, we all know that. And we were not in a position to remedy everything. That's not what this case was about. This case was about finding out what's going on accurately and putting in place a process where we can begin to address them.

And I think notwithstanding the concerns at Halawa or

at MCCC or an outbreak that occurred among staff, more recently, for example, at the Hawaii Community Correctional Center, that we now are in a much better position to address those as a consequence of this litigation. And we will continue to do so by providing that information to the monitoring panel, getting recommendations, and then determining whether or not those recommendations are followed up by the state. And if they're not, we have a mechanism in the settlement agreement to go back to the court. And if that expires and we have not found an adequate basis for doing that by the time that the settlement process is over, we can always file another lawsuit if there are lingering problems.

So in my view, this lawsuit has accomplished -- and I think the Court can find that this Court has very substantially accomplished what we set out to do in a limited manner. It's not a be-all and end-all to solving problems in the prisons. We're going to continue to do that. But I think the Court can adequately find that the settlement successfully resolves the issues that we've raised, that the Court by its preliminary injunction pointed to, and the settlement perpetuates in our efforts to provide some relief.

THE COURT: Thank you, Mr. Seitz.

I don't remember if it's in the materials or not, but if you could just for the record explain who Judge Foley is in relation to this case and also for the inmates who are in

attendance this morning.

MR. SEITZ: Judge Foley is the fifth member of the monitoring panel that was created by virtue of the settlement. So we have two experts who are medical experts. There are two people who were -- who were put on the panel by the recommendation of the Attorney General's office. One is the director of medical services, and the other is an administrator, Tommy Johnson. And Judge Foley is the fifth member of that panel.

THE COURT: Thank you.

And -- and, Mr. Seitz, your two members who you selected, if you could just identify them so that the inmates know who they are.

MR. SEITZ: Yes. Kim Thorburn is a doctor. She was the first medical director who was hired to create a medical system statewide in the Hawaii prisons by virtue of a previous lawsuit, class action lawsuit that I initiated back in 1984, I believe.

And Dr. Venters, Homer Venters is a former director of medical services for the New York City prisons, who is now serving as a court-appointed monitor in several lawsuits around the country and is widely regarded as one of the top experts as an infectious disease and public -- public health expert, who agreed to come to Hawaii to bring his expertise --

THE COURT: All right.

MR. SEITZ: -- to serve as a member of the panel.

THE COURT: Thank you.

Mr. Cruz, will you rest on Mr. Seitz's response to my last question, or is there anything that you wish to add?

MR. CRUZ: I'll rest, Your Honor.

THE COURT: All right. Thank you.

Let me turn now to my questions for you in particular, Mr. Cruz. And some of them are just factual confirmation of things, then I have a couple of other questions.

At page 6 of the joint motion, it is represented that no later than October 12 the defendant will direct Public Safety staff to print and reproduce a sufficient number of copies of a revised notice informing class members of the new date for this hearing and the deadline to object and the deadline to request to appear.

Can you confirm that that did in fact happen?

MR. CRUZ: Yes, Your Honor. The -- the notice was drafted by our office in -- in consultation with plaintiffs' counsel, forwarded to the director of the Department of Public Safety for dissemination amongst the wardens, and the notice was posted throughout the facilities.

THE COURT: Director Otani's declaration at paragraph 5 outlines some locations where these notifications were posted. And I just would like you to explain for my sake

inclined to approve the settlement, what is the mechanism that the parties envision? Is it a stipulation? Is it -- and an order? I mean, what in particular were you envisioning?

MR. SEITZ: Actually, we were envisioning probably a stipulation. But if the Court, pursuant to the agreement, were to simply to order it dismissed based upon approval, I think that's adequate. The point was simply to protect the interests of the defendants to ensure that in return for what we are getting out of this agreement, that the case would ultimately be dismissed. But how it ultimately gets dismissed I think is less important than that they get that ultimate result.

THE COURT: All right. Thank you.

Mr. Cruz, would you agree with that?

MR. CRUZ: Yes, Your Honor.

THE COURT: All right. Mr. Seitz, let me then turn to a few more substantive questions now.

Are you satisfied at this point with how the Agreement Monitoring Panel was working?

MR. SEITZ: Yes.

THE COURT: And my next question is: I saw a couple of themes in the written objections that I wanted to raise specifically with you. One of them is that this agreement gives Public Safety an out or a cover, without any real accountability. How do you respond to that?

MR. SEITZ: Well, we would have preferred much more

stringent matters, and we would have preferred requiring them to do certain things. But we were not able to negotiate at this part of the settlement. So the important things for us, as I said earlier, were to get our experts in there, to be able to have our experts confer with people working in the prisons to provide their recommendations, and at least to bring in some knowledge of what's worked elsewhere to provide some benefit to the Department of Public Safety here.

If that's as far as we could go with this case, coupled with the impact of the Court's preliminary injunction, then in my view, that's an enormous amount of progress. As I say, I would have preferred a lot of other things. We had very extensive settlement discussions, which the magistrate presided over and assisted us with. And we went as far as the parties were able to go by way of an agreement.

So nobody's necessarily always happy with a settlement. We all tell people we do the best we can and everybody walks away a little bit unhappy. But in our view, what we achieved here was essentially what we set out to achieve. And it appears that we've turned a corner in terms of the way COVID is being handled and treated in the prisons, which is to everybody's benefit.

THE COURT: Thank you.

Let me ask you in terms of the fact that this agreement does appear to -- am I right that this agreement

precludes future claims for injunctive or declaratory relief?

MR. SEITZ: Related to what's been brought in this particular complaint. So in other words, nobody can go back and say that there's declaratory relief that's warranted for something that happened at Oahu Community Correctional Center in August of 2021 or August of '20, when the first outbreak occurred.

But there's nothing to preclude if there are continuing violations after this litigation is ended, there's nothing to preclude anybody from bringing in -- bringing a lawsuit over those continuing violations and seeking injunctive or declaratory relief.

And to that extent, it may remain an open question as to what happened previously, although this lawsuit doesn't contain any findings or conclusions. But certainly it wouldn't preclude, in my view, a litigant saying, hey, we've been down this road before. Although it may be necessary to -- to document what happened earlier as a basis for proving what is happening in any subsequent litigation that may be brought.

THE COURT: Mr. Cruz, do you agree with Mr. Seitz's characterization with regard to that?

MR. CRUZ: To a certain extent, Your Honor. I would -- I would just say that, you know, it's speculative to -- to take a position on a lawsuit that hasn't been filed.

We -- we wouldn't say, certainly, that any and all

equitable claims relating to COVID are precluded by this settlement agreement. Certainly there could be situations that were not -- that did not exist or were not contemplated prior to the settling or filing of this lawsuit that could potentially be the subject of a new lawsuit. Although I -- I think we would have perhaps different views on whether a continuing matter could be the subject of a -- a new lawsuit. But I certainly wouldn't preclude plaintiffs from filing it.

THE COURT: Don't I need to know what the meeting of the minds is in that regard in order to assess the fairness and adequacy of the settlement agreement? I mean, if you are not in agreement as to what it precludes, isn't that problematic?

MR. CRUZ: I don't think we're not in agreement. I think what we agreed is that the settlement does not preclude future actions for declaratory and injunctive relief relating to COVID-19 claims that did not exist prior to this lawsuit.

THE COURT: All right. Thank you.

Mr. Seitz, would you agree with that?

MR. SEITZ: Yes.

THE COURT: All right. Thank you.

Let me turn now to the attorneys' fees question, Mr. Seitz.

The Ninth Circuit encourages District Courts to cross-check their attorneys' fees awards using a second method of calculation.

What is the comparative percentage of recovery for your requested award?

MR. SEITZ: Well, if I go with Mr. Cruz's suggestion of $5 million as an ultimate benefit to the class -- and let me tell you, I think it's much higher than that -- then our award percentage-wise, I don't know what it is, but it's maybe -- I can't -- my math in my head. But $250,000 of an attorney's award against an ultimate value of 5 million, or higher, in my view, is eminently reasonable.

THE COURT: All right. Thank you.

At this point I do not have any further questions, but I will allow you, Mr. Seitz, to make a few final remarks if you wish. And then I'll let Mr. Cruz do so as well.

MR. SEITZ: Well, Judge, first of all, I want to acknowledge my associates, Mr. Yolken and Gina Szeto-Wong, who did the bulk of the work on this and worked weekends and nights, were in contact with hundreds of inmates and staff members. And I want to acknowledge the -- the persons from MCCC and Halawa who are here today because they like many people were forthcoming in giving us information, which we then had to verify and put into the many, many declarations which the Court received and read.

This was an enormous effort. And -- and in my experience -- and I've done maybe 12 or 15 class actions in Hawaii over the years -- this was an enormous undertaking,

which I think has produced benefit that everybody can point to and has opened a door to further benefit, which I think will be forthcoming.

So I am particularly proud of the work that my office and my staff have done. I'm very grateful to the magistrate for his incredible amount of time that he spent with us. Again, he spent enormous amount of time. And to the Court, because I think the issuance of the preliminary injunction certainly led to our ability to settle this case, which I think has saved everybody incredible amounts of time and effort and -- and expense that we would otherwise have incurred had we not been able to reach this settlement.

So I'm hopeful that this will be beneficial. We will know more tomorrow when we get the first report from the monitoring panel. But that's just the start. I did receive some oral reports of their visits to the prisons, and I am pleased that people in the prisons apparently, according to what I was told, were very open with them, were accessible to them. And that's a very good sign.

So I believe we're moving forward, and I believe that there are no reasons why the Court should hesitate or be concerned to confirm the settlement that we've reached and hopefully the fees that we have agreed upon.

THE COURT: Thank you.

Mr. Cruz?

MR. CRUZ: Thank you, Your Honor.

Yes. I will just briefly say that, you know, we'd like to express our -- our thanks as well to -- to everyone who participated in this lawsuit. There was a tremendous effort by the plaintiffs, very clearly, to -- to pursue this, these claims.

The inmates, many of -- many of the inmates and class members put a lot of time and effort into sharing their concerns, which was very enlightening for us.

The Department of Public Safety put a tremendous amount of time and resources into addressing this, the claims, and working on this case. And we -- we appreciate everyone's efforts. We also share our appreciation and gratitude to this court and to the magistrate judge, both of which put in a tremendous amount of time reviewing all of our many, many lengthy submissions and doing so on a very truncated schedule, due to the nature of the claims in this case.

We -- we believe that the settlement agreement was hard fought and -- but that it is a good agreement. And what is particularly good about this agreement is the creation of this monitoring panel, which we -- both parties believe is the best way to get in, do the investigation and fact-finding, and respond as quickly to -- to the concerns that they discover as possible, by a panel of -- of people who have expertise in these matters.

And -- and so with that, I think we have nothing further. Thank you.

THE COURT: Thank you, Mr. Cruz.

And thank you, Mr. Seitz.

HFC INMATE: (Raising hand.)

THE COURT: Let me start by saying that I am inclined to approve the settlement agreement.

COURTROOM MANAGER: Judge? I'm sorry --

THE COURT: Yes?

COURTROOM MANAGER: -- to interrupt you. Could you take a recess, please?

THE COURT: Sure. We will take a short -- Ms. Mizukami, how long of a recess do we need?

COURTROOM MANAGER: Five minutes.

THE COURT: All right. We will take a brief five-minute recess. Thank you.

(Break was taken.)

COURTROOM MANAGER: This Honorable Court is now in session.

THE COURT: Thank you.

The reason, everyone, that we needed to take a recess is it turns out that for a few minutes toward the end, at least, my courtroom received information from the public line that somebody on the public line was playing music quite loudly. And so certain other people in the public line could

COURT REPORTER'S CERTIFICATE

I, Ann B. Matsumoto, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that pursuant to 28 U.S.C. Sec. 753 the foregoing is a complete, true, and correct transcript of the stenographically recorded proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at Honolulu, Hawaii, November 12, 2021.

/s/ Ann B. Matsumoto
ANN B. MATSUMOTO, RPR

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

700 Bishop Street, Suite 1701
Honolulu, HI 96813

Office: (808) 531-4000
Fax: (808) 380-3580
info@civilbeatlawcenter.org

VIA ELECTRONIC MAIL

March 17, 2022

Max N. Otani, Director
Department of Public Safety
1177 Alakea Street
Honolulu, HI 96813

Re: Public Records Request

Dear Director Otani:

Pursuant to the Uniform Information Practices Act (UIPA), Hawai`i Revised Statutes (HRS) § 92F-11 and Hawai`i Administrative Rules § 2-71-12, this letter is a formal request on behalf of the Civil Beat Law Center for the Public Interest (Law Center) for access to government records maintained by the Department of Public Safety (Department).

The Law Center requests the following documents in electronic format:

(1) all independent Agreement Monitoring Panel reports from September 2021 to March 2022, created pursuant to the September 2, 2021 Settlement Agreement and General Release in *Chatman v. Otani*, No. 21-CV-268 JAO-KJM (D. Haw.); and

(2) the confidentiality agreements signed pursuant to Paragraph 7 of the above-referenced settlement agreement.

We would note at the outset that it is well-settled that an agency cannot avoid its statutory duties under the UIPA by entering into a confidentiality agreement. *SHOPO v. Soc'y of Prof'l Journalists - Univ. of Haw. Chapter*, 83 Hawai`i 378, 405-06, 927 P.3d 386, 413-14 (1996); *accord* OIP Op. No. 03-16 at 7; OIP Op. No. 90-02 at 3 ("It is a well-settled principle of public records law that government promises of confidentiality cannot override the . . . mandate of public access to government records.").

And the Department's reference to HRS § 658H-4 in the settlement agreement is equally unavailing. That provision does not apply to records that must be disclosed under the UIPA. HRS §§ 658H-6(a)(2) ("Exceptions to privilege"), 658H-8 ("Unless subject to disclosure pursuant to . . . chapter 92F, mediation communications are confidential"); Uniform Mediation Act (2003) § 6 cmt. ("Section 6(a)(2) makes clear that the privileges in Section 4 do not preempt state open meetings and open records laws . . . ."), § 8 cmt.

Exhibit 5

(mediation confidentiality agreements "are also not enforceable if they conflict with public records requirements").

To the extent that the Department concludes that a UIPA exception may apply to this request, we would emphasize that the UIPA exceptions are discretionary and **may be waived by you as Director of the Department of Public Safety**. *SHOPO v. City & County of Honolulu*, 149 Hawai`i 492, 509, 494 P.3d 1225, 1242 (2021) ("the statute gives agencies discretion to disclose notwithstanding the exception."). The Law Center strongly encourages the Department to favor increased transparency and greater public access to these monitoring reports. As the COVID-19 pandemic winds down, it is critical that the public understand what happened within the Department during the height of the pandemic, whether these independent monitors were effective, and how society can better address future emergencies within correctional facilities. Disclosure is consistent with State policy and the spirit of the UIPA to conduct government business "as openly as possible." HRS § 92F-2.

If further clarification or description of the requested records is needed, the Law Center may be contacted by e-mail at info@civilbeatlawcenter.org or telephone at 808-531-4000.

Regards,

R. Brian Black
Executive Director

From: **R. Brian Black** brian@civilbeatlawcenter.org
Subject: Re: [EXTERNAL] Public Records Request
Date: March 31, 2022 at 2:15 PM
To: PSD.Office.of.the.Director psd.office.of.the.director@hawaii.gov

Please identify the state law, federal law, or court order that makes the reports confidential. This e-mail does not comply with the requirements for an agency response to a public records request. HAR 2-71-14(b).

Regards,

R. Brian Black
Executive Director
Civil Beat Law Center for the Public Interest
700 Bishop Street, Suite 1701
Honolulu, HI 96813
(808) 531-4000

On Mar 31, 2022, at 2:10 PM, PSD.Office.of.the.Director <psd.office.of.the.director@hawaii.gov> wrote:

Aloha Mr. Black,
The AMP reports are confidential and are also not discoverable. We would refer you to the Office of the Attorney General.

Hawaii Department of Public Safety
Office of the Director
Phone: (808) 587-1288
Fax: (808) 587-1282
Email: psd.office.of.the.director@hawaii.gov
Mail: 1177 Alakea Street, 6th floor
Honolulu, HI 96813
Website: DPS.Hawaii.gov
Social media: www.Facebook.com/HawaiiPSD
www.Twitter.com/HawaiiPSD

From: R. Brian Black
Sent: Thursday, March 17, 2022 9:05 PM
To: PSD.Office.of.the.Director
Cc: Fellow
Subject: [EXTERNAL] Public Records Request

Aloha, please see the attached request.

Regards,

R. Brian Black
Executive Director
Civil Beat Law Center for the Public Interest
700 Bishop Street, Suite 1701
Honolulu, HI 96813
(808) 531-4000
<3-17-22 Records Request.pdf>

Exhibit 6

DAVID Y. IGE
GOVERNOR

STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAI'I 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oip@hawaii.gov
www.oip.hawaii.gov

CHERYL KAKAZU PARK
DIRECTOR

April 6, 2022

VIA EMAIL

The Honorable Max N. Otani
Director
Department of Public Safety

Re: Request for Assistance to Access Records (U RFA-P 22-59)

Dear Director Otani:

The Office of Information Practices (OIP) received a request for assistance from Mr. Brian Black of the Civil Beat Law Center for the Public Interest with respect to his request made under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA), for an electronic copy of:

(1) all independent Agreement Monitoring Panel reports from September 2021 to March 2022, created pursuant to the September 2, 2021 Settlement Agreement and General Release in Chatman v. Otani, No. 21-CV-268 JAO-KJM (D. Haw.); and

(2) the confidentiality agreements signed pursuant to Paragraph 7 of the above-referenced settlement agreement.

Mr. Black indicated that he made a written request to Department of Public Safety (PSD) dated March 17, 2022, and that he has received an incomplete response from PSD. Specifically, Mr. Black provided OIP with a copy of an email dated March 31, 2022, from PSD to him which denied access to the "AMP reports" on the basis that they are "confidential and are also not discoverable" but did not provide a legal citation to the law allowing the denial. PSD did not respond to the portion on Mr. Black's request seeking a copy of the signed confidentiality agreement. PSD also generally referred Mr. Black to the Department of the Attorney General but did not explain why it was doing so or who would help him there.

Mr. Black replied to PSD's denial in an email dated March 31, 2022, which asked PSD to identify the state or federal law or court order that makes the requested record confidential. Mr. Black indicated he did not receive a response. Copies of Mr. Black's request to OIP and his record request to PSD are enclosed for your information.

Exhibit 7

PSD's response to Mr. Black's record request is deficient because it does not include a citation to the law allowing it to deny access to the AMP report. Legal justification for each denial of access is required under section 2-71-14(b), Hawaii Administrative Rules (HAR), to be provided when denying access to records. PSD's response is also deficient because it did not respond to the request for a copy of the signed confidentiality agreement.

Please provide Mr. Black with the citation to the law or court order allowing PSD to deny access to the AMP report within ten business days from the date of this letter. HAR § 2-71-14; HRS § 92F-15. In response to his request for a copy of the signed confidentiality agreement, PSD should, within ten business days, provide a copy of the record or: (1) specify the record, or parts, that will not be disclosed; and (2) the agency's specific legal authorities under which access is denied under section 92F-13, HRS,[1] and other laws. HAR § 2-71-14.

Please also provide OIP with notice of the action taken by PSD so that this issue can be resolved promptly.

By copy of this letter Mr. Black is also informed that a record requester is entitled to file a lawsuit for access within two years of a denial of access to government records. HRS §§ 92F-15, 92F-42(1) (2012). If the requester decides to file a lawsuit, the requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012). An action for access to records is heard on an expedited basis, and, if the requester is the prevailing party, the requester is entitled to recover reasonable attorney's fees and costs. HRS §§ 92F 15(d), (f).

Alternatively, if the agency denies access to the requested records, the requester may file an appeal to OIP in accordance with chapter 2-73, HAR. HRS § 92F-15.5 (2012).

This letter also serves as notice that OIP is not representing anyone in this request for assistance. OIP's role herein is as a neutral third party.

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[1] The UIPA also provides generally that when compliance with any provision of the UIPA would cause an agency to lose or be denied funding or other assistance from the federal government, compliance with that provisions shall be waived but only to the extent necessary to protect eligibility for such federal assistance. HRS § 92F-4 (2012).

Thank you in advance for your cooperation and assistance in this matter. Please do not hesitate to contact OIP if you have any questions or require assistance.

Very truly yours,

Carlotta Amerino
Staff Attorney

CMA:rtt
Enclosures

cc: Mr. Brian Black (without enclosures)
Ms. Laurie Nadamoto

DAVID Y. IGE
GOVERNOR

HOLLY T. SHIKADA
ATTORNEY GENERAL

VALERIE M. KATO
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

April 14, 2022

Mr. R. Brian Black, Esq.
Civil Beat Law Center for the Public Interest
700 Bishop Street, Suite 1701
Honolulu, Hawaii 96813

Dear Mr. Black:

RE: Office of Information Practices Request for Assistance to Access Records U RFA-P 22-59

I am writing to provide you the basis of the Department of Public Safety's (PSD) denial of your request for a copy of the reports issued from September 2021 to March 2022 by the Agreement Monitoring Panel (AMP) created by the settlement agreement in Chatman v. Otani, et.al., No. 21-CV-268 JAO-KJM (D.Haw.). Attached is a copy of the settlement agreement in Chatman which requires the AMP reports to be kept confidential.

As to your second request for copies of the confidentiality agreements signed by members of the AMP and PSD pursuant to the settlement agreement in Chatman, please find attached the requested copies.

If you have any questions, please contact me at the above address.

Very truly yours,

LISA M. ITOMURA
Deputy Attorney General

cc: OIP
PSD
file

Exhibit 8

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

700 Bishop Street, Suite 1701
Honolulu, HI 96813

Office: (808) 531-4000
info@civilbeatlawcenter.org

VIA ELECTRONIC MAIL

April 27, 2022

Cheryl Kakazu Park, Director
Office of Information Practices
No. 1 Capitol District Building
250 South Hotel Street, Suite 107
Honolulu, HI 96813

Re: Appeal of Denial of Access to Agreement Monitoring Panel (AMP) Reports (related U RFA-P 22-59)

Dear Director Park:

On March 17, 2022, we sent a public records request to the Department of Public Safety (PSD) for all independent AMP reports from September 2021 through March 2022. On March 31, PSD denied the request, stating only that "[t]he AMP reports are confidential and are also not discoverable." After we raised concerns to OIP about the adequacy of the denial, on April 14, the Attorney General's office responded that a settlement agreement "requires the AMP reports to be kept confidential." PSD's denial of access based on the confidentiality provision of a settlement agreement is not justified.

Confidentiality agreements have no bearing on disclosures required by law. "[T]he virtually unanimous weight of authority holds that an agreement of confidentiality cannot take precedence over a statute mandating disclosure." *Honolulu Civil Beat Inc. v. Dep't of the Atty. Gen.*, No. SCAP-21-57, slip op., at 17 n.9 (Haw. Apr. 26, 2022) (quoting *SHOPO v. SPJ*, 83 Hawai`i 378, 405-06, 927 P.2d 386, 413-14 (1996)). "[I]t is the provisions of HRS Chapter 92F, rather than those of the [confidentiality provision of a contract], which govern the duty of disclosure." *SHOPO v. SPJ*, 83 Hawai`i at 406, 927 P.2d at 414; *accord* OIP Op. No. 10-01 at 2-3 ("A confidentiality provision in an agreement to which a state or county agency is a party must yield to the provisions of the UIPA. Therefore, the County may not withhold the [requested documents] from public disclosure based upon the Settlement Agreement's confidentiality clause." (citations omitted)).

The Law Center respectfully submits this appeal requesting that OIP require PSD to release the AMP reports as requested. PSD cannot contract away the public's right to access documents under the UIPA by entering into a confidentiality agreement.

Exhibit 9

If further clarification of these concerns is needed, I may be contacted by e-mail at info@civilbeatlawcenter.org or telephone at 808-531-4000.

Regards,

R. Brian Black
Executive Director
Civil Beat Law Center for the Public Interest

Enclosures: (1) March 17 Request
(2) March 31 Denial
(3) April 14 Letter

DAVID Y. IGE
GOVERNOR

HOLLY T. SHIKADA
ATTORNEY GENERAL

VALERIE M. KATO
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

May 16, 2022

Ms. Carlotta Amerino, Esq.
Office of Information Practices
No. 1 Capital District Building
250 South Hotel Street, Suite 107
Honolulu, HI 96813

Dear Ms. Amerino:

RE: Notice of Appeal from Denial of Access to General Records (U Appeal 22-33)

On behalf of the Department of Public Safety ("PSD"), I am submitting the following response to Mr. Brian Black's appeal in this matter.

I. Concise Statement of the Factual Background

Anthony Chatman, Francis Alvarado, Zachary Granados, Tyndale Mobley, and Joseph Deguair, represented by Eric Seitz, filed a class action lawsuit in federal court against Max Otani, Director of the Department of Public Safety ("PSD"), in his official capacity, Chatman, et.al., v. Otani, et.al., Civil No. CV-21-00268 JAO-KJM. In the lawsuit the plaintiffs, inmates at various correctional facilities in Hawaii, claimed that PSD had mishandled the COVID-19 pandemic and failed to follow its own Pandemic Response Plan (PRP), thereby violating their constitutional rights under the Eighth and Fourteenth Amendments of the U.S. Constitution.

On July 13, 2021, United States District Court Judge Jill A. Otake issued in Chatman an "Order (1) Granting Plaintiffs' Motion for Provisional Class Certification and (2) Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order" (PI Order). As part of the PI Order, she ordered PSD to comply with its PRP.

After several settlement conferences with Magistrate Judge Kenneth J. Mansfield, the parties in Chatman settled the case. On September 2, 2021, the parties executed a "Settlement Agreement and General Release" (Settlement Agreement), which included among its terms the establishment of an "Agreement Monitoring Panel" (AMP). The AMP, made up of five individuals (two chosen by Plaintiffs, two chosen by Defendant, and one individual chosen by

Exhibit 10

agreement of both parties), were to provide "non-binding, informed guidance and recommendations" to PSD in its compliance with its PRP. See Exhibit A attached, pp. 3-4.

On September 9, 2021, Judge Otake issued an "Order Granting The Parties' (1) Joint Motion for Preliminary Approval of Settlement and for Order Setting Fairness Hearing and (2) Joint Motion for Order Approving Notice and Directing Giving Notice the Class," finding the Settlement Agreement met the standard for preliminary approval under Federal Rules of Civil Procedure 23(e) and scheduling a hearing to determine final approval for October 22, 2021. The Settlement Agreement was attached as Exhibit A to the Joint Motion for Preliminary Approval of Settlement and for Order Setting Fairness Hearing. See Exhibit B attached, at 1, fn. 1. The hearing was later reset for November 8, 2021.

After a hearing on November 8, 2021, Judge Otake issued on November 10, 2021, an "Order Granting (1) Joint Motion for Final Settlement Approval and (2) Plaintiffs' Motion for Approval of Attorneys' Fees and Costs Settlement Agreement," finding that the Settlement Agreement was fair, reasonable and adequate. As the lawsuit only sought declaratory/injunctive relief, claims for monetary relief were not released or waived. In fact, at the November 8, 2021 hearing Plaintiffs' counsel represented that he was going to file a COVID-19 damages lawsuit in state court in January 2022. See Exhibit C attached, at 6, fn. 6; at 9-10. Although the case was dismissed with prejudice, the court retained jurisdiction "regarding all matters relating to the administration, consummation, and enforcement of the Settlement Agreement and Fee Settlement Agreement and for any other necessary purpose relating to the settlement." Exhibit C, at 10.

II. A List Identifying or Describing Each Record Withheld

Mr. Black requested copies of all reports produced by the AMP from September 2021 through March 2022 pursuant to the settlement agreement in Chatman.

Pursuant to the Settlement Agreement, the AMP visited all PSD correctional facilities in Hawaii, reviewed PSD policies and procedures, revised PRPs for each facility, and were given access to confidential information such as medical records and security protocols. They were also free to have confidential conversations with PSD staff and individuals housed in the facilities. The panel produced six reports, from October 1, 2021, to March 22, 2022, which set out their observations and recommendations. See Exhibit D attached.

III. An Explanation of the Agency's Position

PSD properly denied Mr. Black's request for the AMP reports based on several exceptions to disclosure set out in Hawaii Revised Statutes (HRS) section 92F-13.

First, the AMP reports were properly withheld given that they arose out of a federal lawsuit in which the State of Hawaii was a party and are not discoverable. HRS section 92F-13(2) states in relevant part:

> This part shall not require disclosure of:
> * * *
> (2) Government records pertaining to the prosecution or defense of

> any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable[.]

OIP has previously stated that HRS section 92F-13(2) prevents disclosure of any government records that would be protected by HRCP Rule 26, such as the attorney-client, work product and any other judicially-recognized privileges. See OIP Opinion Letter No. (Op.Ltr.No.) 89-10 at 5; Op.Ltr.No. 92-14 at 6-9. Hawaii Rules of Civil Procedure (HRCP) Rule 26(b)(4) states that "the court shall protect against disclosure of mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation." The work product privilege has been defined to cover materials "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)[.]" HRCP Rule 26 (b)(4). The key issues then is whether the materials were prepared in anticipation of litigation or trial. Anastasi v. Fidelity Nat. Title Ins.Co., 137 Hawaii 104, 113 (2016).

Here, the members of the AMP were chosen the same day the Settlement Agreement was signed (September 2, 2021) and the group was required to be "operational" by September 17, 2021. The panel was to provide "non-binding, informed guidance and recommendations to aid DPS[PSD] in its continuing efforts to implement the PRP, as well as evolving health guidance that may require change to DPS's[PDS's] COVID-19 response." Exhibit D, "First Report of the Agreement Monitoring Panel," dated October 10, 2021, pg. 4. The AMP was thus receiving, reviewing, and accessing confidential information from PSD pursuant to the Settlement Agreement well before it was approved by the court, and its reports reflect the members' mental impressions and opinions of PSD's compliance with its PRP and the safety protocols to prevent and control COVID-19 infections in its facilities, which are the basis of the Chatman lawsuit. See Exhibit A. Although Chatman has since been dismissed, Plaintiffs' counsel has represented to Judge Otake that he will be filing a COVID-19 damages lawsuit in state court. Exhibit C, at 6, fn.6. The AMP reports were thus prepared in anticipation of litigation and are protected from disclosure by the work product privilege. See OIP Op.Ltr.No. 92-14 at 6-7 (lawsuit need not have been filed yet for work product privilege to attach as long as the documents were prepared in anticipation of litigation).

The fact that the AMP members are not attorneys does not mean that the work product privilege cannot apply. As set out in HRCP Rule 26(b)(4), materials "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)" are covered by the work product privilege (emphasis added). Lewis v. Wells Fargo & Co., 266 F.R.D. 433, 439-441 (N.D.Cal.2010) (work product privilege applies to work by non-attorneys).

The fact that the AMP reports were shared with both counsel for Plaintiffs and for Defendant does not prevent the work product privilege from attaching. In 100Reporters LLC v. United States Department of Justice, 248 F.Supp.3d 115 (D.C.2017), the plaintiffs, a non-profit organization of journalists, requested copies of documents from the U.S. Department of Justice (DOJ) concerning an independent compliance monitor program for Siemens Corporation. Siemens agreed to the independent compliance monitor program as part of settlement agreements with the DOJ and the Securities Exchange Commission (SEC). The agreements required Siemens to provide the Monitor, paid by Siemens, access to its confidential records, conduct on-

site observations of the company's internal procedures, and meet and talk with officers, directors, and staff, along with other tasks. The Monitor was to write reports, shared with Siemens and the DOJ and SEC, concerning his assessment of the effectiveness of Siemens' compliance with anti-corruption laws, make recommendations, and ensure compliance with the settlement agreements. Siemens was allowed to review and adopt or contest the Monitor's recommendations. The DOJ eventually authorized a termination of the monitoring, concluding that Siemens had satisfied its obligations under the settlement agreements. 100Reporters, 248 F.Supp.3d at 127-129. 100Reporters then requested from the DOJ various documents concerning the Siemens monitoring program under the Freedom of Information Act (FOIA). DOJ produced some documents but withheld others, based in part on FOIA Exemption 5. 100Reporters, 248 F.Supp.3d at 129-131.

Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5). Documents that are covered by the attorney-client privilege, the work product privilege and what is called the "deliberative process" privilege may be protected from disclosure under this exemption. 100Reporters, 248 F.Supp.3d at 145. The United States Supreme Court has also noted what is called a "consultant corollary" to Exemption 5, which protects communications between an agency and an outside consultant. Department of Interior v. Klamath Water Users Protective Association, 532 U.S. 1, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001). In a "typical" case, "the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done." 100Reporters, 248 F.Supp.3d at 146-147, quoting Klamath, 532 U.S. at 10 (discussing deliberative process privilege). The key issue in deciding whether the consultant corollary applied was whether the outside consultant was advocating for any interests or only for "truth and its sense of what good judgment calls for." 100Reporters, 248 F.Supp.3d at 148, quoting Klamath, 532 U.S. at 11. The Monitor was found to be covered by the consultant corollary, as he was exercising independent judgment, and his documents were deemed "intra-agency" documents under Exemption 5. 100Reporters, 248 F.Supp.3d at 149.

Here, like the Monitor in 100Reporters, the AMP was exercising independent judgment in assessing PSD's compliance with its PRP and making recommendations. Its reports may thus be covered by the work product privilege even though shared with both Plaintiffs' counsel and Defendant's counsel.

IV. Conclusion

Based on the cases and analyses set forth, PSD believes that it properly denied Mr. Black's request for the AMP reports pursuant to HRS section 92F-13(2).

If you have any questions, please do not hesitate to call me at 586-8379 or contact me at the above address.

Very truly yours,

LISA M. ITOMURA
Deputy Attorney General
Attorney for PSD

cc: PSD
File
Attachments

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

700 Bishop Street, Suite 1701
Honolulu, HI 96813

Office: (808) 531-4000
Fax: (808) 380-3580
info@civilbeatlawcenter.org

VIA U.S. MAIL

June 6, 2022

Max N. Otani, Director
Department of Public Safety
1177 Alakea Street
Honolulu, HI 96813

Lisa M. Itomura, Deputy Attorney General
Department of the Attorney General
425 Queen Street
Honolulu, HI 96813

Re: March 17, 2022 Public Records Request for AMP Reports

Dear Director Otani and Deputy Attorney General Itomura:

The Civil Beat Law Center for the Public Interest (Law Center) requests that the Department of Public Safety (the Department) reconsider its denial of access to information that is clearly public record under the Uniform Information Practices Act (Modified), Hawai`i Revised Statutes (HRS) Chapter 92F (UIPA).

The Law Center requested all independent Agreement Monitoring Panel (AMP) reports from September 2021 to March 2022, created pursuant to the September 2, 2021 Settlement Agreement and General Release in *Chatman v. Otani*, No. 21-CV-268 JAO-KJM (D. Haw.). The Department now claims that the AMP reports are "protected from disclosure by the work product privilege."

The Department's assertion that the attorney work product doctrine applies to reports generated by a panel of individuals appointed by both the Department *and its opposing counsel* is patently incorrect.

We appreciate your consideration and welcome the opportunity to address this matter in a timely manner that avoids an unnecessary waste of resources. **If we do not hear further by June 22, 2022, we will assume that the Department has no interest in resolving this matter without judicial intervention.**

Regards,

R. Brian Black
Executive Director

Exhibit 11

DAVID Y. IGE
GOVERNOR

HOLLY T. SHIKADA
ATTORNEY GENERAL

VALERIE M. KATO
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

June 22, 2022

Mr. R. Brian Black
The Civil Beat Law Center for the Public Interest
700 Bishop Street, Suite 1701
Honolulu, HI 96813

Dear Mr. Black:

RE: Request for AMP Reports dated March 17, 2022,

I am writing in response to your letter dated June 6, 2022, addressed to Department of Public Safety (PSD) Director Max Otani and myself, concerning the department's denial of Civil Beat's request for copies of the AMP reports generated as part of the settlement agreement in Chatman, et.al., v. Otani, et.al., Civil No. CV-21-00268 JAO-KJM. In your letter you criticize PSD's response to Civil Beat's appeal to the Office of Information Practices U Appeal 22-33, and demand that the department "address this matter in a timely manner[.]" If PSD does not contact you by June 22, 2022, you assume that the department has "no interest in resolving this matter without judicial intervention."

PSD has considered your arguments and does not agree that the AMP reports must be disclosed in their entirety. The department does not seek to resolve this issue in court, but understands that Civil Beat will decide how it wants to handle this dispute.

Sincerely,

Lisa M. Itomura
Deputy Attorney General

cc: PSD
file

Exhibit 12

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

CIVIL BEAT LAW CENTER FOR THE PUBLIC INTEREST, INC., Plaintiff, vs. DEPARTMENT OF PUBLIC SAFETY, Defendant.	CIVIL NO. 1CCV-22-735 (Other Civil Action) NOTICE OF HEARING

NOTICE OF HEARING

TO: Craig Y. Iha
Lisa M. Itomura
Department of the Attorney General
425 Queen Street
Honolulu, Hawai`i 96813
Attorneys for Defendant

NOTICE IS HEREBY GIVEN that Plaintiff's Cross-Motion for Summary Judgment shall come on for hearing before the Honorable John M. Tonaki, Judge of the above-entitled court, in his courtroom at Ka`ahumanu Hale, 777 Punchbowl Street, Courtroom 17, Honolulu, Hawai`i 96813, on January 19, 2023, at 10:00 a.m. or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawai`i, December 21, 2022

/s/ Robert Brian Black
ROBERT BRIAN BLACK
Attorney for Plaintiff
Civil Beat Law Center for the Public Interest, Inc.