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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.

1CCV-22-0000735

DEFENDANT DEPARTMENT OF  
PUBLIC SAFETY'S MEMORANDUM IN  
OPPOSITION TO PLAINTIFF'S CROSS-  
MOTION FOR SUMMARY JUDGMENT  
AND REPLY TO PLAINTIFF'S  
MEMORANDUM IN OPPOSITION TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT; CERTIFICATE  
OF SERVICE

HEARING:

Time: 10:00 a.m.

Date: January 19, 2023

Judge: Honorable John M. Tonaki

DEFENDANT DEPARTMENT OF PUBLIC SAFETY'S MEMORANDUM IN  
OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT  
AND REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

**I. INTRODUCTION**

As set forth in its "Motion For Summary Judgment" (Motion), filed on November 18,

2022, Defendant Department of Public Safety (“PSD”) is constrained to keep confidential the reports produced by the Agreement Monitoring Panel (“AMP”) set up by the settlement of Chatman, et. al., v. Otani (“Chatman”), Civil No. CV-21-00268 JAO-KJM. Therefore, as discussed below, Plaintiff’s “Cross-Motion For Summary Judgment” (“Cross-Motion”) should be denied and summary judgment should be entered in favor of PSD.

## **II. STANDARD OF REVIEW**

Summary judgment should be entered “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 a judgment as a matter of law.” Hawaii Rules of Civil Procedure (HRCPP) Rule 56(c). “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.” Critchfield v. Grand Wailea Co., 93 Hawai‘i 477, 482-3, 6 P.3d 349, 354-5 (2000) (citations omitted).

In determining whether a genuine issue of material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. Tradewind Ins. Co., Ltd. v. Stout, 85 Haw. 177, 180, 938 P.2d 1196, 1199 (1997). When the defendant is the moving party, summary judgment is proper as a matter of law if, after viewing the record in a light most favorable to the plaintiff, there is no genuine issue of material fact regarding one or more of the essential elements of the defense which the motion seeks to establish and it is clear that the plaintiff would not be entitled to recover under any discernible theory. Giulani v. Chuck, 1 Haw. App. 379, 383, 620 P.2d 733, 736 (1980).

## **III. ARGUMENT**

### **A. PSD Has Not Waived Any Defenses**

Plaintiff's claim that PSD failed to comply with Hawaii Administrative Rules ("HAR") 2-71-14(b)(2) and Hawaii Rules of Civil Procedure ("HRCP") Rule 8(c) and waived its defenses set out in its Motion is based on the initial documents filed with the Office of Information Practices ("OIP") in Plaintiff's appeal of the denial of its request for the AMP reports and on the answer filed in the instant case. Cross-Motion, Combined Memorandum Of Law In Support Of Plaintiff's Cross-Motion For Summary Judgment And In Opposition To Defendant's Motion For Summary Judgment ("Memo"), p. 10-12. Yet a review of PSD's responses shows that in fact Plaintiff had notice of its arguments therein and even responded to them.

In Hawaii Broadcasting Co. Inc. v. Hawaii Radio Inc., et.al., 82 Hawai'i 106, 919 P.2d 1018 (App.1996), the plaintiff filed three motions for summary judgments in a case against the defendants for failure to pay for two radio stations. One of the issues was the plaintiff's claim that the defendants had waived defenses for failure to plead them in their answer in violation of HRCP Rule 8(c). On appeal, the Intermediate Court of Appeals ("ICA") turned to interpretations of the federal rules for guidance as HRCP Rule 8(c) is similar to the federal rules.

The primary purpose of requiring affirmative defenses to be pleaded is to give notice to the parties of such defenses. 6A C. Wright, A. Miller, M. Kane, Federal Practice and Procedure: Civil 2d § 1492, at 12 (1990). Under the liberal amendment practice of the civil procedure rules, "issues not raised by the pleadings [that] are tried by express or implied consent of the parties, . . . shall be treated in all respects as if they had been raised in the pleadings." HRCP Rule 15(b). Therefore, the "[f]ailure to plead an affirmative defense is immaterial if evidence of the defense is introduced and not objected to for failure to plead it, and no surprise is claimed."

Hawaii Broadcasting Co. Inc., 82 Hawai'i at 112, 919 P.2d at 1024, citing Godoy v. Hawaii County, 44 Haw. 312, 322, 354 P.2d 78, 83 (1960) (quoting 2 J. Moore, Moore's Federal Practice at 1696 n. 30 (2d. ed)); and Camarillo v. McCarthy, 998 F.2d 638, 639 (9<sup>th</sup> Cir. 1993) (affirmative defense can be raised for the first time on summary judgment absent prejudice). As

the plaintiff did not object to the defendants' arguments and in fact opposed them in its second and third motions for summary judgment, the ICA found the defendants' failure to plead two of its defenses in its answer to be immaterial. Hawaii Broadcasting Co. Inc., 82 Hawai'i at 113, 919 P.2d at 1025.

The Hawai'i Supreme Court later explained,

"The purpose of [HRCP] Rule 15(b) is to allow an amendment of the pleadings to 'bring the pleadings in line with the actual issues upon which the case was tried[.]'" Cresencia [v. Kim], 10 Haw.App. at 477, 878 P.2d at 734 (quoting 3 J. Moore and R. Freer, Moore's Federal Practice Paragraph 15.13[2], at 15-130 (2d. ed. 1994), and to "'promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel or on the basis of a statement of the claim or defense that was made at a preliminary point in the action and later proves to be erroneous.'" Id. at 477-78, 878 P.2d at 734 (quoting 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure: Civil 2d § 1491, at 5-6 (1990) (footnote omitted)).

Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 433, 32, P.3d 52, 77 (2001).

Here, PSD set out its "attorney work product doctrine and HRS § 92F-13(2)" defenses in its response dated May 16, 2022, in Plaintiff's OIP appeal. Cross-Motion, Exhibit 10. Plaintiff responded to PSD's arguments in a letter dated June 6, 2022, and did not object to any failure to provide notice per HAR 2-71-14(b)(2) in the OIP appeal. Cross-Motion, Exhibit 11. As notice is the primary purpose of HRCP Rule 8(c), PSD therefore complied with the rule and Plaintiff had notice of PSD's defenses in its Motion even before it filed the complaint in the instant case. Plaintiff also had notice of the deliberative process privilege as one of the PSD's defenses as it was set out in its answer to the complaint herein.<sup>1</sup> So its claims that PSD waived its defenses of

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<sup>1</sup> Plaintiff's claims that in the instant court case PSD waived its "attorney work product doctrine and HRS § 92F-13(2)" and deliberative process privilege defenses by failing to provide notice of the defenses in its OIP appeal are not supported by the law.

“attorney work product doctrine and HRS § 92F-13(2)” and the deliberative process privilege are not supported by the facts or the law. Cross-Motion, Memo, pg. 11-12.

B. AMP Reports Were Produced in Anticipation of Litigation

Plaintiff’s argument that the AMP reports were not produced in anticipation of litigation is in part undercut by the fact that the plaintiffs in Chatman and other inmates are pursuing or are preparing to file litigation against PSD. Cross-Motion, Memo, pg. 4-5. While the Chatman plaintiffs agreed in its settlement not to use the AMP reports themselves in future litigation, there is no doubt that information gained during the litigation of Chatman before the AMP was constituted, while it was in existence and preparing its reports, and afterwards is being used in litigation now and going forward. Motion, Exhibit A.

Plaintiff’s argument that PSD waived the work-product privilege by sharing the AMP reports with counsel for the Chatman plaintiffs is also not as clear cut as it claims. Cross-Motion, Memo, p. 14-15. If counsel for the Chatman plaintiffs is PSD’s “adversary,” as labeled by Plaintiff, then this argument seems to contradict Plaintiff’s previous claim that the AMP reports were not prepared in anticipation of litigation. Cross-Motion, Memo, pg. 15.

PSD’s alleged “express waiver” also does not fit so neatly into the definition set out in United States v. Sanmina Corp., 968 F.3d 1107, 1116-1117 (9<sup>th</sup> Cir. 2020), quoting Bittaker v. Woodford, 331 F.3d 715, 719 (9<sup>th</sup> Cir. 2003): “when a party discloses privileged information to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making the information public.” Here Chatman counsel was bound by the settlement to keep the AMP reports and the information therein confidential and has in fact kept them confidential. Thus the sharing of the AMP reports with counsel for the Chatman plaintiffs does not in itself constitute a waiver of the work-product privilege.

C. The Deliberative Process Privilege Does Still Exist

Lastly, Plaintiff's claim that the deliberative process privilege no longer exists at all in Hawai'i is without support in the law. Cross-Motion, Memo, p. 17-20. While Plaintiff can challenge whether PSD has shown that the deliberative process privilege justifies withholding the AMP reports, it cannot pronounce the privilege itself non-existent in the absence of the Hawai'i Supreme Court dismissing its footnote in Peer News LLC v. City and County of Honolulu, 143 Hawai'i 472, 480 n. 15, 431 P.3d 1245, 1253 n. 15 (2018), as cited in PSD's Motion, p. 9-13.

**IV. CONCLUSION**

For all of the foregoing reasons, PSD respectfully requests that the Court deny the Plaintiff's Cross-Motion For Summary Judgment and grant its Motion For Summary Judgment.

DATED: Honolulu, Hawai'i, January 11, 2023.

STATE OF HAWAI'I

ANNE E. LOPEZ  
Attorney General  
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/s/ Lisa M. Itomura  
LISA M. ITOMURA  
Deputy Attorney General

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CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served on the parties, through the Judiciary Electronic and Filings Service System (JEFS), or by U.S. Mail, postage prepaid, on the date below:

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DATED: Honolulu, Hawai'i, January 11, 2023.

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