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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

RICHARD PARTAL II, KRISTINE MARIE
PARTAL, AND ELLEN PARTAL,

Plaintiffs,

vs.

DAVID Y. IGE, in his official capacity as
Governor of the State of Hawai'i; the STATE
OF HAWAI'I; HARRY KIM, in his official
capacity as the Mayor of Hawai'i County; and

CIVIL NO. 3CCV-20-0000277

~~PROPOSED~~ ORDER GRANTING
MOTION OF DEFENDANTS DAVID IGE
AND STATE OF HAWAI'I TO DISMISS
PLAINTIFFS' FIRST AMENDED
COMPLAINT, FILED AUGUST 10, 2020,
and GRANTING MOTION OF
DEFENDANT HARRY KIM TO DISMISS
PLAINTIFFS' FIRST AMENDED
COMPLAINT, FILED AUGUST 11, 2020,

John and/or Jane Does 1-10, in either official or individual capacities,

Defendants.

and DENYING PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, FILED AUGUST 14, 2020

Hearing Date: September 1, 2020

Hearing Time: 9:00 AM

Judge: The Honorable Wendy M. DeWeese

No Trial Date

~~PROPOSED~~ ORDER GRANTING MOTION OF DEFENDANTS DAVID IGE AND STATE OF HAWAI'I TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT, FILED AUGUST 10, 2020, and GRANTING MOTION OF DEFENDANT HARRY KIM TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT, FILED AUGUST 11, 2020, and DENYING PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, FILED AUGUST 14, 2020

On September 1, 2020, at 9:00 a.m., the following motions came on for hearing before the Honorable Wendy M. DeWeese: (1) *Motion to Dismiss Plaintiffs' First Amended Complaint* filed on August 10, 2020 by Defendants DAVID Y. IGE, in his official capacity as Governor of the State of Hawai'i, and the STATE OF HAWAI'I (collectively, the "**State Defendants**"); (2) *Motion to Dismiss Plaintiffs' First Amended Complaint* filed on August 11, 2020 by Defendant HARRY KIM, in his official capacity as Mayor of Hawai'i County ("**Defendant Kim**"); and (3) *Cross-Motion for Partial Summary Judgment* filed on August 14, 2020 by Plaintiffs RICHARD PARTAL II, KRISTINE MARIE PARTAL, and ELLEN PARTAL (collectively, "**Plaintiffs**").

James Hochberg, Harmeet Dhillon, and Christina West appeared on behalf of Plaintiffs. Nicholas McLean, Craig Iha, Ewan Rayner, and Max Levins appeared on behalf of the State Defendants. D. Kaena Horowitz appeared on behalf of Defendant Kim.

The Court, having considered the motions, the memoranda filed by the parties, the arguments contained therein, the declarations and exhibits, and the records and files herein in connection with the motions, and having considered the arguments of counsel, and being otherwise fully advised, hereby finds, concludes and orders as follows:

BACKGROUND AND THE PARTIES' ARGUMENTS

1) By their First Amended Complaint, Plaintiffs seek an order declaring Governor Ige's 7th, 8th, and 9th supplemental emergency proclamations to be facially invalid, and invalid as applied to Plaintiffs. Plaintiffs also seek an order temporarily, preliminarily, and permanently enjoining and prohibiting Governor Ige and Mayor Kim from issuing further emergency orders,

enforcing existing emergency orders, or otherwise interfering with Plaintiffs' constitutional rights and liberties. Plaintiffs further seek an order and a judgment declaring as unlawful Mayor Kim's enforcement of the orders. Plaintiffs seek attorneys' fees and costs pursuant to the private attorney general doctrine.

2) The State Defendants and Defendant Kim have filed motions to dismiss Plaintiffs' First Amended Complaint dismiss pursuant to Hawai'i Rules of Civil Procedure 12(b)(6). Pursuant to HRCP Rule 12(b)(6), the Court must view the complaints in the light most favorable to the plaintiff and must deem the factual nonconclusory allegations in the complaint to be true for purposes of the motions. However, a dismissal is appropriate when there is an absence of law to support a claim. *Justice v. Fuddy*, 125 Hawai'i 104, 108 (App. 2011).

3) All parties to this case agree that this case raises an issue of statutory interpretation—namely, the interpretation of Chapter 127A, and specifically HRS § 127A-14(d). This raises a question of law.

4) The State Defendants argue that the text of § 127A-14(d) contains no language prohibiting supplementary or additional emergency proclamations. (The Court notes that it also contains no language expressly authorizing them, either.) The purpose of 127A, defendants argue, is to confer comprehensive powers to protect the public and save lives. There is nothing limiting the number of emergency proclamations, and each proclamation triggers a new sixty-day period under HRS § 127A-14(d).

5) Defendants argue that the supplementary emergency proclamations are distinct and particularized emergency proclamations based on independent evaluations of the relevant circumstances by Governor Ige, that chapter 127A confers upon the Governor emergency powers necessary to prepare for and respond to emergencies and disasters. And that based on the

express language of the statute, the Legislature's intent is to provide for and confer comprehensive powers, and that the statute shall be liberally construed to effectuate those purposes. HRS chapter 127A further refers to emergencies of “unprecedented size and destructiveness,” HRS § 127A-1(a), and expressly empowers the Governor to take any and all steps necessary or appropriate to carry out the purposes of Chapter 127A. HRS § 127A-12(a)(19).

6) Defendants argue that the statute provides that the Governor or Mayor shall be the “sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency[.]” HRS § 127A-14(c). Defendants further argue that established practice demonstrates that the use of supplementary proclamations is lawful under the statutes, and that HRS § 127A-14(d) is not ambiguous—but if it is, the State’s interpretation is the better one. Additionally, Defendants argue that the constitutional backdrop vesting in the governor inherent executive powers, supports Defendants’ interpretation. Defendants also argue that Plaintiffs cannot recover attorneys’ fees and costs on the basis of sovereign immunity.

7) Defendant Kim’s motion to dismiss parallels that of the State Defendants. Defendant Kim argues that Plaintiffs’ interpretation fails to take into consideration the context of the entire statute, and that the plain reading of the statute demonstrates that the Governor is vested with broad authority and comprehensive powers that should be liberally construed. In the context of the entire statute, Defendant Kim argues that it is clear that the Governor is vested with authority to issue separate and successive emergency proclamations. Defendant Kim further argues that he rightfully relied on that authority and/or took action in reliance upon those proclamations. Furthermore, Defendant Kim argues that HRS chapter 127A permits Defendant Kim to take any and all steps necessary or appropriate to carry out the purposes of chapter 127A

during an emergency period. Defendant Kim is requesting a dismissal with prejudice and attorneys' fees and costs, labelling Plaintiffs' filings as frivolous.

8) Plaintiffs' opposition characterizes the issue as one of statutory interpretation and argues that this case essentially centers on the question of whether, as a matter of law, the automatic termination of the emergency orders, as stated in § 127A-14(d), means that Governor Ige's COVID-19 emergency proclamation and orders pursuant thereto automatically terminated on the sixtieth day after he issued his first COVID-19 emergency proclamation on March 4th, 2020. Plaintiffs argue that there is no statutory language giving the Governor the option to extend a state of emergency beyond the sixtieth day. (As Defendant Ige argues, however, there is also no language prohibiting successive emergency proclamations and/or requiring the Legislature to act at the conclusion of the sixty days.) Additionally, Plaintiffs argue that the text of § 127A-14(d) supports Plaintiffs' position. Plaintiffs argue that the Court should employ the canon of statutory construction *expressio unius est exclusio alterius*, and argue that the statute should be given its plain meaning and effect, and that there is no justification for departure from the plain meaning.

9) Moreover, Plaintiffs argue that the history and purpose of 127A support Plaintiffs' argument that there is an automatic limit on the Governor's powers. Plaintiffs argue that the extraterritorial authority cited to by Defendants actually supports Plaintiffs' position and that the Governor's supplemental emergency proclamations are unlawful.

10) Plaintiffs argue that HRS chapter 127A is not ambiguous and supports their claims, and urge that time limits on executive powers is appropriate under HRS chapter 127A and in light of Hawaii's overall constitutional scheme. Lastly, Plaintiffs argue that their request

for attorneys' fees and costs is not barred by sovereign immunity and argue that their claims are not frivolous.

CONCLUSIONS OF LAW

11) In *Four Star Insurance Agency, Inc. v. Hawaiian Electric Industries*, 89 Hawai'i 427 (1999), the Hawai'i Supreme Court stated:

Although we obtain the intention of the legislature primarily from the language of the statute itself, we have rejected an approach to statutory construction which limits us to the words of a statute, for when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination. Thus, the plain language rule of statutory construction, does not preclude an examination of sources other than the language of the statute itself even when the language appears clear upon perfunctory review. Were this not the case, a court may be unable to adequately discern the underlying policy which the legislature seeks to promulgate and, thus, would be unable to determine if a literal construction would produce an absurd or unjust result, inconsistent with the policies of the statute.

Id. at 431 (quotation omitted).

12) The Court may depart from the plain reading of a statute where a literal interpretation would lead to absurd and/or unjust results. *Sato v. Tawata*, 79 Hawai'i 14, 20, 897 P.2d 941, 947 (1995).

13) A Court may examine sources other than the language of the statute itself to determine if a literal construction would produce absurd or unjust results inconsistent with the policies of the statute. *Dines v. Pac. Ins. Co.*, 78 Hawai'i 325, 337, 893 P.2d 176, 188 (1995) (Ramil, J., dissenting).

14) The Court may consider the reason and spirit of the law and the cause which induced the Legislature to enact it to discover its true meaning. *Gray v. Admin. Dir. of the Court, State of Hawaii*, 84 Hawai'i 138, 148, 931 P.2d 580, 590 (1997).

15) Lastly, courts must construe statutes to avoid absurd results, and a rational, sensible and practicable interpretation of the statute is preferred to one which is unreasonable impracticable, inconsistent, contradictory, and illogical. *Keliipuleole v. Wilson*, 85 Hawai‘i 217, 941 P.2d 300 (1997).

16) The Court views its obligation in construing a statute as to ascertain and give effect to the intention of the Legislature, which is to be obtained primarily from the language of the statute itself. However, the Court must read the statute and the statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

17) The Court has considered the language of the statute in the context of the chapter as a whole and finds that the defendants’ analysis and interpretation is the correct one. Defendants’ statutory construction makes sense and does not produce an absurd or unjust result.

18) Defendants’ interpretation is consistent with the reason and the spirit of the law as expressed by the language of Chapter 127A as a whole.

19) Based thereon, the Court concludes that the text of HRS § 127A-14(d) does not support Plaintiffs’ argument. HRS chapter 127A contains no language prohibiting supplementary or additional emergency proclamations. The purpose of 127A is to confer comprehensive powers to protect the public and save lives. There is nothing limiting the number of emergency proclamations. Each additional emergency proclamation triggers a new sixty-day period. The supplementary emergency proclamations are distinct and particularized emergency proclamations based on independent evaluations of the relevant circumstances on the ground by the Governor.

20) HRS chapter 127A’s language confers upon the Governor emergency powers necessary to prepare for and respond to emergencies and disasters. Based on the express

language of the statute, the Court concludes that it is the Legislature's intent to provide for and confer comprehensive powers and the statute shall be "liberally construed" to effectuate the purpose of the chapter. HRS § 127A-1(c).

21) HRS chapter 127A further refers to emergencies of "unprecedented size and destructiveness," HRS § 127A-1(a), and it expressly empowers the government to take all steps necessary or appropriate to carry out the purposes of the chapter.

22) The Governor or mayors shall be the "sole judge" of the existence of circumstances giving rise to a state of emergency. HRS § 127A-14(c).

23) The Court further determines that established practice demonstrates that the use of supplementary proclamations is lawful. The Court concludes that HRS § 127A-14(d) is not ambiguous, but if it were, the State Defendants' interpretation of the statute is the better one.

24) The constitutional backdrop, which vests in the Governor inherent executive powers, also supports the Defendants' interpretation. *See* Haw. Const. art. V.

25) In light of the Court's determinations, the Court concludes that no law or facts can remedy the deficiencies in Plaintiffs' First Amended Complaint. The Court therefore grants Defendants' motions to dismiss and dismisses the First Amended Complaint with prejudice.

26) The Court understands that Plaintiffs argue that the executive branch is engaged in an unlawful "power grab." However, the Court notes that the Legislature has not acted in this particular area, despite there being no prohibition against them doing so.

27) Despite this Court's interpretation (and contrary to the Plaintiffs' suggestion), the Governor's authority is not without restraint. To support each successive emergency proclamation, the Governor must identify the existence of the danger, threat, or circumstances

giving rise to a declaration of a state of emergency. When the facts on the ground no longer justify such a determination, the Governor's emergency powers will cease.

28) In this action, Plaintiffs have not challenged or contested the factual existence and widespread severe impact of the COVID-19 pandemic within the State.

29) With respect to any other bases to dismiss raised by Defendants, the Court does not need to reach those other independent bases and declines to do so.

30) With respect to the request for attorneys' fees by Defendant Kim, the Court declines to conclude that Plaintiffs' arguments are frivolous. Such a finding is a high bar: The Court would have to determine not only that Plaintiffs' arguments are without merit, but also make a finding of bad faith. The Court cannot find bad faith on the part of Plaintiffs. Accordingly, the Court denies Defendant Kim's request for attorneys' fees and costs.

31) In light of the Court's dismissal of Plaintiffs' First Amended Complaint with prejudice, Plaintiffs' *Cross-Motion for Partial Summary Judgment*, filed herein on August 14, 2020, is moot. The Court therefore DENIES Plaintiffs' *Cross-Motion for Partial Summary Judgment*.

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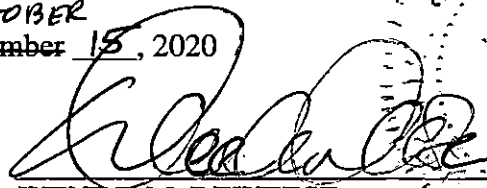
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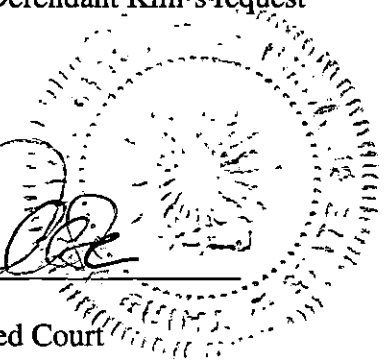
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ORDER

WHEREFORE, the State Defendants' *Motion to Dismiss Plaintiffs' First Amended Complaint* is GRANTED, and Defendant Kim's *Motion to Dismiss Plaintiffs' First Amended Complaint* is GRANTED. Plaintiffs' First Amended Complaint is dismissed with prejudice. Plaintiffs' *Cross-Motion for Partial Summary Judgment* is DENIED. Defendant Kim's request for attorneys' fees is DENIED.

DATED: ~~Honolulu~~, Hawai'i, ^{OCTOBER} September 15, 2020
Ka'ua-Kana


WENDY M. DEWEESE
Judge of the Above-Entitled Court



APPROVED AS TO FORM:

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Harmeet Dhillon, Esq.
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