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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Richard Kapela Davis, Michael Hughes, Damien Kaahu, Robert A. Holbron, James Kane, III, Ellington Keawe, Kalai Poaha, and Tyrone Kawaelanilua’ole Na’oki Galdones, Plaintiffs, vs.	CIVIL NO. 11-00144 LEK/BMK (Declaratory and Injunctive Relief and Other Civil Action) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF**

Neil Abercrombie, in his official capacity as the Governor of the State of Hawaii; Ted Sakai, in his official capacity as Director of the Hawaii Department of Public Safety, Corrections Corporation of America, Defendants.	**CLASS SETTLEMENT AGREEMENT REACHED BY COUNSEL ON MAY 14, 2015 AND REQUEST TO SET FAIRNESS HEARING** Honorable Leslie E. Kobayashi (Oral Argument Requested)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AGREEMENT REACHED BY COUNSEL ON MAY 14, 2015 AND REQUEST TO SET FAIRNESS HEARING

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I. INTRODUCTION

On May 14, 2015, approximately two weeks before the June 2, 2015 trial date, the parties participated in a settlement conference before Magistrate Judge Kurren. (Doc. 706EO). At that settlement conference, the parties agreed to settle this lawsuit in its entirety ("May 14 Agreement"). The last detail for Defendants to address was to confirm that Hawaii Department of Public Safety ("DPS") would agree to write guidelines for SCC that mirrored what CCA agreed to do per the terms of the May 14 Agreement. DPS agreed. Thus, what remained was for the parties to commit the May 14 Agreement to writing which should have been a mere technicality. Over the next nine months, however, Class counsel[1] prevented that from happening by making additional demands that exceeded the scope of the May 14 Agreement.

Because the May 14 Agreement is fair, reasonable, and adequate, Defendants move the Court to preliminarily approve it, order notice to the class members, and set a fairness hearing for its final approval. *See* Fed.R.Civ.P. 23(e)(1), (2), and (5). In the alternative, if the Court does not preliminarily approve the May 14 Agreement, Defendants request the Court to immediately reinstate proceedings and rule on the pending Motion for Decertification (Doc. 696). Defendants further request the Court to sanction Class counsel and award Defendants their attorneys' fees and costs for having been forced to unnecessarily engage Class counsel regarding the terms of the May 14 Agreement for the past nine months. The failure to quickly consummate the May 14 Agreement and

[1] Primary negotiation of the terms of the May 14 Agreement, all subsequent discussions as to any details to be added to the Agreement, and all discussions/responses to additional demands made by Plaintiffs'/Class counsel have occurred exclusively as between Class counsel Sharla Manley and Defendants' counsel Rachel Love.

finally end this litigation is the result of Class counsel inappropriately demanding more and more than the Agreement provides, apparently serving the interest of a couple or a few objecting Class representative Plaintiffs rather than the interests of the Class as a whole.

II. ASSERTED AND REMAINING CLAIMS

A. Original Claims

Plaintiffs are eight DPS inmates, incarcerated at either SCC or Red Rock Correctional Center ("RRCC") during the relevant time period, and who practice the Native Hawaiian religion.[2] Remaining Defendants are Corrections Corporation of America ("CCA"), which owns and operates both correctional facilities and the Director of DPS, both sued in their official capacities. Plaintiffs allege Defendants prohibited them from engaging in certain Native Hawaiian religious practices, in violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), and their constitutional rights (Equal Protection and Free exercise of Religion) under the United States and Hawaii Constitutions.

In their Second Amended Complaint, Plaintiffs Davis, Hughes, Kaahu, Holbron, Kane, Keawe, and Poaha asserted 26 statutory and constitutional claims. (Doc. 145.) Plaintiffs requested injunctive relief for: (1) specific additional Makihiki practices and food, regardless of inmate classification or segregation status; (2) daily outdoor group sunrise worship; (3) designated outdoor worship space with an outdoor rock altar; (4) daily, consultation with a Native-Hawaiian spiritual advisor; and (5) the unfettered in-cell possession of certain religious items. (Doc. 145 at ¶¶ 46-52.) Plaintiff Galdones filed a separate Supplemental Complaint, asserting his own claims for retaliation. (Doc. 146.)[3]

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[2] All Hawaiian inmates assigned to RCCC were permanently transferred to SCC as of May 30, 2013. (Doc. 544 at 4, fn. 4.)

[3] The Court dismissed Galdones' federal law retaliation claim for failure to exhaust

B. Claims Dismissed on Dispositive Motion

Most of Plaintiffs' claims were dismissed before the Class was certified.

Dismissed For Failure to Exhaust Administrative Remedies (PLRA)

- Plaintiffs Davis, Hughes, Kaahu, and Poaha's access to a spiritual advisor claims. (Doc. 286 at 24-25.)
- Plaintiff Galdones' access to spiritual advisor and federal retaliation claims. (Doc. 286 at 28-29.)
- Plaintiff Keawe's daily group worship and sacred space with rock altar claims. (Doc. 286 at 33-34.)

Dismissed as Moot

- All claims for prospective equitable relief regarding RRCC. (Doc. 544 at 12-13; Doc. 596 at 4.)
- Plaintiff Poaha's claims for prospective equitable relief. (Doc. 529 at 28; Doc. 596 at 4.)
- Plaintiff Galdones' state-law retaliation claim for prospective relief. (Doc. 544 at 17-18.)
- Plaintiff Holbron's claims for prospective relief. (Doc. 654 at 11.)

Dismissed on Summary Judgment

- **Makahiki**. All Makahiki claims for prospective relief based upon current practices. Current Makahiki protocol deemed constitutionally sufficient. (Doc. 497 at 66-67; 544 at 70-71,). Only damages claims for allege *past* denial of Makahiki participation remain. (Doc. 654 at 8.)
- **Outdoor Sacred Space With Stone Altar**. All claims for a designated outdoor, sacred space with a stone altar. (Doc. 497

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administrative remedies but allowed his state law retaliation claim to proceed. (Doc. 286).

at 87-88; Doc. 544 at 94-95.)

- **Spiritual Advisor**. All prospective relief claims for access to a spiritual advisor based on current practices. (Doc. 497 at 91-93; Doc. 544 at 97-100.) Accordingly, only damages claims for *past* alleged denial of access to spiritual advisor remained. (Doc. 654 at 4.)

- **Religious Items**. All RLUIPA, First Amendment, and Equal Protection claims for daily access to the following religious items: (1) ti leaf; (2) lei; (3) block of lama wood; (4) pa'akai; (5) kapa (cloth); (6) 'apu (coconut shell bowl); (7) kala (seaweed); (8) ti shoots; (9) olena (yellow ginger); (10) pahu (tree stump drum); (11) ipu (gourd drum); (12) ipu heke (double gourd drum); (13) 'ohe ka eke 'eke (percussion instrument); (14) pu niu (small knee drum); and (15) moena (floor mats). (Doc. 544 at 88.)[4] And all RLUIPA and First Amendment claims for (1) coconut oil; and (2) malo, kihei, and pau (native garments). (Doc. 497 at 71, 73, 79; 544 at 75 & 88; Doc. 654 at 7.) Accordingly, only Equal Protection claims remained on these items.

- **Damages**. All claims for damages and retrospective relief against Defendant Sakai (Doc. 596 at 7); all claims for damages based on a spiritual injury (Doc. 596 at 25); all claims for damages for violations of Hawaii constitutional provisions (Doc. 596 at 37; Doc. 654 at 4 n.5); Plaintiff Galdones' claim for punitive damages, (Doc. 596 at 41; Doc. 654 at 9-10), which was the only punitive damages claim pled in this case (Doc. 145).

[4] Accordingly, the only remaining RLUIPA and First Amendment claims for daily access to religious items are: (1) personal amulets; and (2) bamboo nose flutes. (Doc. 544 at 85.) The only remaining Equal Protection claims for access to religious items are: (1) personal amulets; (2) bamboo nose flutes; (3) coconut oil; and (4) malo, kihei, and pau (native garments). (Doc. 497 at 71, 73, 79; 544 at 75 & 88; Doc. 654 at 7.) Defendants, however, dispute the existence of any claims regarding access to coconut oil as such claims were never pled or administratively exhausted as required by the PLRA prior to filing suit.

- **Claims against Defendant Abercrombie**. All claims asserted against former Governor Abercrombie. (Doc. 390 at 51.)

C. Class Certification/Class Claims for Trial

After the Court ruled on dispositive motions, Plaintiffs moved for class certification a second time—approximately 3.5 years after Plaintiffs' filed their original Complaint. The Court granted in part and denied in part Plaintiffs' Amended Second Motion for Class Certification. (Doc. 560.) The Court did not certify compensatory or nominal damages claims to the extent they required examining the circumstances of each individual Plaintiff's claim. (Doc. 644 at 52-55.) The Court certified only the following class/subclass claims:

RLUIPA, First Amendment, Equal Protection & Hawaii Constitutional Claims (Prospective Relief) (Doc. 544 at 49-50, 77, 85, 87; Doc. 654 at 2.)

- SCC General Population ("GP") class and Protective Custody ("PC") subclass claims for daily group outdoor sunrise services.

- SCC GP class and PC subclass claims for daily in-cell access to sacred religious items: (1) personal amulets; and (2) bamboo nose flutes.

- SCC PC subclass claims for periodic communal access to sacred items.

RLUIPA, First Amendment & Equal Protection Claims (Nominal Damages/Retrospective Relief) (Doc. 544 at 67, 52-55)

- SCC GP damages class and SHIP damages subclass claims for access to a spiritual advisor (historical only – present programming constitutionally sufficient). (No prospective relief – nominal damages/retrospective relief only).

- SCC GP damages class, SHIP damages subclass, and PC damages subclass for Makahiki access (historical – present

programming constitutionally sufficient). (No prospective relief – nominal damages/retrospective relief only).

- SCC PC damages subclass for periodic communal access to sacred items. (Nominal damages/retrospective relief).

Equal Protection Claims (Doc. 497 at 71, 73, 79; Doc. 544 at 75, 77, 87-88; Doc. 654 at 2, 7)

- Class claims for daily in-cell access to sacred religious items: (1) personal amulets; (2) bamboo nose flutes; (3) coconut oil; and (4) malo, kihei, and pau (native garments) (Prospective/nominal damages/retrospective relief).

D. May 14, 2015 Agreement

In agreeing to settle all remaining claims under the May 14 Agreement, the parties understood that Defendants were not admitting to any liability, and that its terms shall apply ***only to*** the operations at SCC and to the DPS inmates registered as Native Hawaiian practitioners at SCC. (Transcript of Settlement Terms on the Record dated 5/14/16, Exh. 1, at 4:17-20; 13:3-6.) The Magistrate Judge presiding over the Settlement Conference stated that such terms were "clearly in the best interest of all of the parties." (Id. at 16:22:16-25; 17:1.)

The terms of the May 14 Agreement are clear:

Religious Items:

- Registered Native Hawaiian practitioners in GP and PC may: (1) retain in-cell one each of lava lava (pau)[5], kīhei, and malo in a Ziploc bag with the inmate's in-cell property; (2) retain previously authorized pa'akai (sea salt), written religious materials (chants/ genealogies), and ti leaf; (3) check out a 'ohe hano ihu (bamboo nose flute) for religious use; (4) have access to communal religious items stored in the chapel during group programming; (5) purchase a small

[5] During the course of subsequent discussions, the Parties agreed that lava lava and pau mean the same thing.

amount of coconut oil for in-cell religious use only; and (6) purchase one approved amulet. (Id. at 4:21-5:1-6; 10:7-13.)

- Kīhei, malo and lava to be made by SCC Native Hawaiian practitioners in the GP religious programming classes. (Id. at 5:7-12, 20-25.) Parties to work together to identify a vendor source for materials, SCC to procure source materials, inmates paying their pro rata share for fabric cost through their inmate accounts (donations restricted). (Id. at 5:13-19.)

- Bamboo nose flute loaner system to be implemented for the six flutes available in the SCC chapel for week long checkouts, subject to individualized safety/security restriction. SCC to purchase six additional flutes for the loaner system. (Id. at 6:1-10.)

- Counsel to work together to identify and approve vendor source for amulets, in five shapes, subject to SCC approval, inmates paying their pro rata cost for amulets through their inmate accounts. (Id. at 6:19-25; 7-1-2.)

- SCC to source coconut oil in bulk from a Hawaiian company, inmates paying their pro rata share, with process to be put into place for frequency of refills. (Id. at 7:3-16.)

- Registered Native Hawaiian practitioners in administrative/ disciplinary segregation custody (including SHIP I/II/III), may retain: (1) one approved amulet; (2) pa'akai (sea salt); (3) written religious materials (chants/genealogies); and (4) either a lava lava, kīhei, or malo (Parties to work together to elect one standard item/no individual inmate election. No possession of coconut oil or bamboo nose flutes for safety/security reasons. (Id. at 10:7-20; 14:3-10.)

- SCC agrees to publish in-cell retention list in SCC chapel and add list to SCC Policy 14-6. (Id. at 6:11-14.)

- While donations are restricted, replacement of communal use religious items may be requested and SCC agrees to work with inmate population to identify a source/vendor for replacement. (Id. at 7:23-25; 8:1-5.)

- SCC agrees to publish a communal items list in SCC chapel and add list to SCC Policy 14-6. (Id. at 8:6-10.)

Religious Programming:

- Registered Native Hawaiian practitioners in GP: (1) permitted outdoor worship classes six times a year for 1.5 hours each time during regularly scheduled ritual class; and (2) permitted to participate in two solstice/equinox and two Makahiki celebrations each year. (Id. at 8:11-25.)

- Registered Native Hawaiian practitioners in PC: (1) permitted once a week group gathering for 1.5 hours in a secure location to be determined by the facility; (2) provided access to limited number of communal items stored in the chapel; and (3) permitted limited, two Makahiki celebrations each year within a few days of the GP Makahiki celebrations, provided the same food offerings permitted for GP. (Id. at 9:1-25; 10:1-6.)

- Upon request and subject to availability, registered Native Hawaiian practitioners in segregation/SHIP I may request to meet with a spiritual advisor (if available) for Makahiki, the spiritual advisor may meet with the inmate through the cell door for approximately 15-20 minutes for non-disruptive ministry/prayers/chants. Ceremonial food offerings administered by the spiritual advisor through the cell door food slot and, by written advance request, inmate may receive (in-cell) the meal tray provided to GP inmates participating in Makahiki. (Id. at 10:21-25; 11:1-20.)

- Upon request and subject to availability, registered Native Hawaiian practitioner inmates in SHIP II/III may request to meet with a spiritual advisor (if available) for Makahiki, the spiritual advisor may meet with the inmates in the dayroom of the SHIP II/III pods (separate gatherings) for non-disruptive chants/prayers/administering of ceremonial food offerings. (Id. at 11:21-25; 12:1-17.) By written advance request, inmates may receive (in-cell) the meal tray provided to GP inmates participating in Makahiki. (Id. at 11:21-25; 12:1-17.)

- Participation in programming subject to restrictions for safety/security/operational risks based on an individualized assessment of an inmate's history/behavior. (Id. at 12:18-22.)

Waiver of Claims/Damages and Costs Payment:

- The individual Plaintiffs and the Class waive and release all claims, including all claims for damages. (Id. at 13:7-21.)

- Defendant CCA agrees to pay a total amount of $70,000.00 to the Native Hawaiian Legal Corporation for costs incurred. Parties to incur their own attorneys' fees. (Id. at 14:11-22.)

Other Provisions:

- Within sixty (60) days after the Court has approved the final Settlement Agreement, the agreed upon religious programming and items will be made available for SCC inmates registered as Native Hawaiian practitioners. (Id. at 7:17-19.)

- If an inmate changes his religion from Native Hawaiian to another religion, he will no longer be allowed to possess the in-cell items, use any communal religious items, or participate in Native Hawaiian programming. (Id. at 6:15-18; 12:23-25; 13:1-2.)

- The Parties agree there will be no consent decree or court-ordered monitoring, and the Court will not retain jurisdiction over enforcement of this Agreement. (Id. at 13:7-14.)

III. THE COURT SHOULD PRELIMINARILY APPROVE THE MAY 14 AGREEMENT BECAUSE IT MEETS ALL OF THE REQUIREMENTS OF RULE 23(e)(2)

A. The May 14 Agreement is Fair, Reasonable, and Adequate

"[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litigation*, 516 F.3d 1095, 1101 (9th Cir. 2008) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). "[R]ejection of a settlement

creates not only delay but also a state of uncertainty on all sides, with whatever gains were potentially achieved for the putative class put at risk." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

Preliminary approval of a class action settlement in governed by Rule 23(e), which provides that the "claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed.R.Civ.P. 23(e); *see also Donkerbrook v. Title Guar. Escrow Servs., Inc.*, CIV. 10-00616 LEK, 2011 WL 1587521, at *1-2 (D. Haw. Apr. 25, 2011) (analyzing preliminary approval request under Rule 23(e)). Rule 23(e)'s procedure "protect[s] the unnamed members of the class from unjust or unfair settlements affecting their rights." *Howerton v. Cargill, Inc.*, CIV. 13-00336 LEK, 2014 WL 6976041, at *3 (D. Haw. Dec. 8, 2014) (quoting *In re Syncor*, 516 F.3d at 1100).

In examining a class action settlement, overall fairness is key. *Donkerbrook* 2011 WL 1587521, at *1-2. When evaluating a proposed class settlement, the Court should balance the following eight factors: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Id.* (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). "This list of factors is not exclusive and the court may balance and weigh different factors depending on the circumstances of each case." *Adoma v. Univ. of Phoenix, Inc.*, 913 F. Supp. 2d 964, 975 (E.D. Cal. 2012) (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993)).

This Court should preliminarily approve the May 14 Agreement, because it provides Plaintiffs/the Class the primary relief sought in this litigation – increased

access to religious items and programming at CCA's SCC prison located in Arizona. The agreement is thus fair, adequate, reasonable, and meets all the requirements of Rule 23(e).

1. Strength of Plaintiffs' Claims

In evaluating the strength of Plaintiffs' claims, the Court need not "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute for it is the very uncertainty of the outcome of litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Officers for Justice v. Civil Serv. Comm'n of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982); *Hanlon*, 150 F.3d at 1026. The Court, instead, should objectively evaluate the "strengths and weaknesses inherent in the litigation and the impact of those considerations on the parties' decisions to reach these agreements." *Adoma*, 913 F. Supp. 2d at 975 (citation omitted).

Here, Plaintiffs' remaining claims are primarily brought under RLUIPA and the First Amendment. Inmate religious freedoms, however, are legitimately restricted by the inherent challenges of the prison environment where safety, security and orderly prison operations are paramount. *See Holt v. Hobbs*, 135 S. Ct. 853, 859, 862 (2015); *Turner v. Safley*, 482 U.S. 78, 89 (1987).

To establish violations of RLUIPA, Plaintiffs will have to prove at trial that a prison practice/restriction substantially burdens their ability to practice their religion. *Id.* at 863. If successful, the burden shifts to Defendants to show its policies or practices are: (1) in furtherance of a compelling government interest; and (2) the least restrictive means. *Id.* (citing 42 U.S.C. § 2000cc-1(a)). Under the First Amendment analysis, courts apply a less restrictive rational basis test: a prison policy or practice is valid if it is "reasonably related to legitimate

penological interests." *Turner*, 482 U.S. at 89. A prison policy or practice that satisfies RLUIPA's strict scrutiny test also satisfies the rational basis test for First Amendment claims. *See Greene v. Solano County Jail*, 513 F.3d 982, 986 (9th Cir. 2008).

Here, it is undisputed that the Native-Hawaiian religious practices vary widely from individual to individual—resulting in widely varying practices demanded by Native Hawaiian practitioners. (Doc. 644 at 32-33, 52-55; Doc. 676-01.) Because prison operations require uniformity and predictability, implementing a policy to cater to these unique individual differences raises serious legitimate safety and security concerns.

The efforts to address Plaintiffs' amulet claim illustrate these problems and the complexity of this case. Early in this litigation, Plaintiffs Davis and Kane moved for a preliminary injunction, demanding return of their individual choice amulets – a kukui nut and turtle necklace, respectively. The Court denied Plaintiffs' motion after an evidentiary hearing, finding with respect to Davis' claim, that CCA had a compelling interest in preventing inmates from using religious items to conceal contraband. (Doc. 182 at 57.) Davis' alleged sacred kukui nut amulet was found in a pouch with contraband items. (Id.) The Court also found on Davis' RLUIPA violation allegation, that SCC's policy of limiting inmate personal property, including religious property, to previously approved and inventoried items was the least restrictive means to accomplish a compelling governmental interest. (Id. at 60.) In denying Davis' Free Exercise claim, the Court found that allowing each inmate to retain a religious item of his own choice would have a significant impact on officer and prisoner resources. (Id. at 63.)

In totality, the remaining claims for trial are not claims which the Class can demonstrate a likelihood of success on the merits. As the Ninth Circuit has explained, "the very essence of a settlement is compromise, a yielding of

absolutes and an abandoning of highest hopes." *Officers for Justice v. Civil Serv. Comm'n of City & county of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982) (internal citation omitted). Because of the factual and legal complexity of this case, the risk of proceeding to trial without victory is real. The May 14 Agreement provides certain, fair, reasonable, and adequate closure of this litigation.

2. Risk, Expense, Complexity and Duration of Further Litigation

Class action challenges to alleged civil rights violations are necessarily complex, so pursuing a long and expensive trial, when the outcome is uncertain, risks losing the relief that is guaranteed Plaintiffs in the settlement. *See Harris v. Pernsley*, 654 F. Supp. 1042, 1049 (E.D. Pa. 1987) ("Litigation of the constitutionality of conditions of confinement… would be very complex for all parties, extremely expensive, at least for the defendants, and most likely of great duration, a burden for all parties, and not in the interest of the administration of justice.").

Here, the issues are undeniably complex, involving difficult questions of factual law regarding what constitutes Native-Hawaiian religious practices and explanations of the safety and security issues associated with allowing unrestricted practice in the prison environment. Because these issues are beyond the common knowledge of jurors, they will have to be explained mostly through retained and non-retained expert testimony—at significant costs to the parties.

Moreover, the Class faces an uncertain outcome at trial. Many claims have already been dismissed on dispositive motion, including claims for daily access to many religious items, a sacred outdoor space, a rock altar, certain Makahiki practices, present access to a spiritual advisor, and claims based on a spiritual injury. Damages claims have also been limited to nominal. And because the

remaining claims are not strong, the class members have more to gain from settlement than they do from a trial on the remaining claims. With the May 14 Agreement, however, the class members are guaranteed a certain, fair, reasonable and adequate resolution of this litigation.

Even after the substantial risk and expense of a protracted trial (where each of the eight Class representative Plaintiffs must present mini trials on each of the numerous remaining claims), the outcome will not be final. As a case of first impression, the non-prevailing party will certainly appeal—further delaying the final resolution of this case. *See Jones v. Gusman*, 296 F.R.D. 416, 467-68 (E.D. La. 2013) (finding failure to settle would require protracted motions practice and potential appeals and these delays in obtaining inmates needed relief weigh in favor of settlement); *Hawker v. Consovoy*, 198 F.R.D. 619, 627-28 (D. N.J. 2001) (finding inmates avoid having to wait any longer for equitable relief by settling the case now). The risk, expense, complexity and certain duration of further litigation and appeals favors preliminary approval.

3. Risk of Maintaining Class Status

That a class action may be decertified at any time generally weighs in favor of approving a class settlement. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009); Fed.R.Civ.P. 23(c)(1)(C). "District courts are required to reassess their class rulings as the case develops." *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 140 (3d Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999). Decertification should be granted if developments in the facts or law demonstrate that class wide treatment of the claims is no longer appropriate. *See United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir. 2010).

Defendants moved for decertification (Doc. 696) following the United States Supreme Court's ruling in *Holt v. Hobbs*, 135 S.Ct. 853 (2015), which made clear that RLUIPA requires an individualized analysis of each inmate's claim. Although briefing is complete, the Court has not ruled on the motion, because the parties informed the Court of its settlement. If the May 14 Agreement is not preliminary approved, Defendants assert the Class should be decertified for the reasons stated in their briefing, and because a trial will only reveal the individualized nature and relief of the remaining claims.

4. May 14 Agreement Terms

Even if the Class prevailed at trial, which Defendants assert will not be the case, the Class would not be entitled to more injunctive relief than provided by the May 14 Agreement. *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998) ("To qualify for injunctive relief, the class members must demonstrate that they will sustain irreparable injury and the remedies at law are inadequate. In order to meet this standard, 'the plaintiffs must establish… the right to and necessity for injunctive relief.").

The May 14 Agreement also specifically addresses all of the remaining claims. All class members will enjoy in-cell possession of an amulet; segregation/SHIP subclass members will have access to a lava lava (pau), kihei or malo; and GP/PC class and subclass members will have access to all three native garments. GP/PC will also be permitted in-cell retention of sea salt, written chants/genealogies, ti leaf, and coconut oil, as well as access to a loaner bamboo nose flute.

Additionally, all class and subclass members will enjoy some level of twice yearly Makahiki celebrations. Both GP and PC inmates will be permitted weekly group meetings/gatherings. GP practitioners may participate in solstice/equinox

outdoor celebrations twice a year, as well as six yearly outdoor ritual classes for class participants. All custody levels will continue to have access to a volunteer spiritual advisor where such volunteers elect to minister to SCC inmates. These increased religious practice and programming guarantees provided by the May 14 Agreement are fair, reasonable, and adequate to address the remaining claims.

While the Agreement does not provide monetary relief, such relief has already been limited to nominal damages by the Court.[6] Therefore, the Class is not foregoing significant monetary relief that otherwise may be available if the case proceeded to trial and the Class prevailed. The terms are fair, reasonable, adequate, and should be preliminarily approved.

5. Stage of Proceedings

This factor favors approval of a class settlement when "[e]xtensive discovery has been conducted, and the parties had gone through one round of summary judgment proceedings," and, as a result, "counsel had a good grasp on the merits of their case before settlement talks began." *Rodriguez*, 563 F.3d at 967; *see also In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32–33 (1st Cir. 2009) ("If the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the [class action] settlement is reasonable.").

This case is more than five years old. The parties reached a settlement on the eve of trial, after more than four years of extensive discovery (expert discovery, numerous depositions, expert site visit, written/e-discovery), along

[6] Class representative Plaintiffs' various remaining individual claims that mirror the remaining Class claims are likewise limited to injunctive relief and nominal damages. Plaintiffs disclosed no evidence to support compensatory damages claims. Therefore, Plaintiffs do not stand to gain greater relief on their individual claims than could be recovered on the Class claims.

with numerous discovery battles, and substantial dispositive motion practice. (Doc. 644 at 36.) Counsel have more than sufficient knowledge of the facts to evaluate the merits of the remaining claims and defenses where discovery has been completed, all relevant have been facts disclosed, and the multiple dispositive motions have been briefed. *See Hawker*, 198 F.R.D. at 631; *Heit v. Van Ochten*, 126 F. Supp. 2d 487, 491 (W.D. Mich. 2001) (finding the "parties arrived at a compromise based on their full understanding of both the factual and legal issues surrounding [inmate's class action]" when the case was settled shortly before trial and after the close of discovery); *Adoma*, 913 F. Supp. 2d at 977 ("A court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case.") (citations omitted).

Given the long history of this case, fully litigated to the eve of trial, this factor weighs strongly in favor of preliminary approval of May 14 Agreement.

6. Experience/Views of Counsel

Recommendation of experienced counsel in favor of settlement may carry a "great deal of weight" in a court's determination of the reasonableness of a settlement. *See In re Immune Response Securities Litig.*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007) (citations omitted). "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enters. Sec. Litig*., 47 F.3d 373, 378 (9th Cir. 1995).

Here, this Court has found that Class counsel "would provide adequate representation to any class or subclass certified in this case," (Doc. 644 at 38), noting Plaintiffs are represented by the "only law firm in the country that

specializes in cases involving Native Hawaiian rights" and that co-counsel for Plaintiffs have "an established class action practice." (Id. at 36.) In addition, Defendants' counsel has considerable experience in defending civil rights class actions brought by prisoners. Defendants' counsel have litigated and settled inmate civil rights class actions that were approved by federal courts in Arizona, *see Parsons v. Ryan*, 2:12-cv-00601-NVW-DKD (D. Ariz. 2014),[7] and California, *see Kiniti v. Myers et al.*, 3:05-cv-01013-DMS-PCL (S.D. Cal. 2008); *Woods et al. v. Myers et al.*, 3:07-cv-01078-DMS-PCL- (S.D. Cal. 2007). *See also Casey v. Lewis*, 43 F.3d 1261, 1264 (9th Cir. 1994) *rev'd*, 518 U.S. 343 (1996) (Arizona Department of Corrections represented by Daniel P. Struck and Kathleen L. Wieneke in civil rights class action).

That parties are represented by experienced counsel, who specialize in the law in this area, know all of the relevant facts, understand the strengths and weaknesses of their respective positions, and were able to come to an agreement further supports the reasonableness of the May 14 Agreement. *See In re Immune Response Sec. Litig.*, 497 F. Supp. 2d at 1174 ("Both Parties are represented by experienced counsel and their mutual desire to adopt the terms of the proposed settlement, while not conclusive, is entitled to great deal of weight."). All counsel agreed to all of the material terms of the settlement, with the Agreement memorialized on the record (Plaintiffs' counsel provided the opportunity to correct any misstatements), and agreement that the settlement would proceed for Court approval pursuant to Rule 23. Exh. 1 at 13:22-25; 14:1-10, 23-25; 15:1-4; 4:8-16. Plaintiffs' counsel and Magistrate Judge Kurren found the agreement to be "clearly in the best interest of all of the parties." (Exh. 1 at 16:22-17:1.)

[7] *See Parsons v. Ryan*, 784 F.3d 571, 572 fn.1 (9th Cir. 2015) (Ikuta, J., dissenting from denial of rehearing en banc) (noting district court approved class settlement).

If Class counsel did not believe the agreed terms were fair, reasonable, and adequate, did not have the authority to enter into such an agreement by the Class representative Plaintiffs, and/or did not believe the Agreement would pass Rule 23 approval, certainly Class counsel would not have made the agreement to begin with.

7. Governmental Participant

As this Court previously recognized, the DPS Director is "responsible for the formulation and implementation of state goals and objectives for correctional and law enforcement programs, including ensuring that correctional facilities and correctional services meet the present and future needs of persons committed to the correctional facilities." (Doc. 596 at 8 (quoting Haw. Rev. Stat. § 353C-2(a)). The Director has reviewed and approved the terms of the May 14 Agreement and concurs it is fair, reasonable, and adequate. This factor therefore weighs in favor of preliminary approval of the Agreement. *See, e.g.*, *California v. eBay, Inc.*, 5:12-CV-05874-EJD, 2015 WL 5168666, at *5 (N.D. Cal. Sept. 3, 2015) ("Additionally, that government lawyers negotiated the settlement gives this factor considerable weight, as the State is charged with the trust of protecting the state and its citizens.").

8. Duty of Class Counsel/Reaction of Class Members

A certified class cannot request injunctive relief that exceeds the scope of the certified class or the claims. *See Coleman v. Schwarzenegger*, 922 F. Supp.2d 882, 963 (E.D. Cal. 2009) (in analyzing a prisoner class action's request for statewide injunctive relief, holding that "'[t]he scope of injunctive relief is dictated by the extent of the violation established'") (citation omitted).[8] Here, the nine-

[8] *Barfield v. Sho-Me Power Elec. Coop.*, 10 F. Supp. 3d 997, 1006 (W.D. Mo. 2014) (noting that recovery by certified class is limited by the operative

month undue delay in reducing the May 14 Agreement to writing has been caused by Class Counsel's insistence on adding terms that exceed not only the terms of the May 14 Agreement, but also the scope of relief to which the Class would be entitled based on the scope of the certified Class, the remaining claims, and the existing parties to the lawsuit.

To the extent that Class counsel is making unreasonable additional demands and holding up settlement because of objections of one or two Class representative Plaintiffs, she may not do so. Appointed class counsel's obligation is "to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members." Fed.R.Civ.P. 23(g)(1) advisory committee's note. It is not to serve the special desires of a few class members who may disagree. *See In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("Class counsel are duty bound to represent the best interest of class members.") (citation omitted); *Rodrigues v. W. Publ'g Corp.*, 563 F.3d 948, 968 (9th Cir. 2009) ("[C]lass counsel's fiduciary duty is to the class as a whole . . . ."); *Adoma*, 913 F. Supp. 2d at 979 ("[T]he duty owed by class counsel is to the entire class and not dependent on the special desires of the named plaintiffs . . . .").

Class counsel represents the class as a whole, not solely the named plaintiffs, who may have their own agenda. *Staton*, 327 F.3d at 959-60 . Thus, the Court determines what is a fair, reasonable, and adequate settlement for the entire class.

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complaint); *cf. Blackman v. D.C.*, 454 F. Supp.2d 1, 14 (D.D.C. 2006) (noting that consent decree provided class with "substantial benefits that never could have been obtained at trial because they either were outside the scope of the original class complaints, or would have been beyond the scope of appropriate, court-ordered injunctive relief") (citation omitted); *and Hargis v. Access Capital Funding, LLC*, 674 F.3d 783, 789-90 (8th Cir. 2012) (considering scope of damages to nationwide class where operative complaint did not restrict class to certain state because operative complaint "controls this determination").

Class counsel cannot derail the settlement process based on the unreasonable demands of one or two plaintiffs. *Id.* at 959-60; *see also Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 n.19 (4th Cir. 1975) (approval from class plaintiffs is not essential to the settlement, provided the trial court finds it fair and reasonable); *see also, e.g.*, *Linney v. Cellular Alaska P''ship*, 151 F.3d 1234, 1241 (9th Cir. 1998) ("merely pointing out that there were some class members who objected to the settlement is not enough to show that the representatives were inadequate"); *Hanlon*, 150 F.3d at 1026 (affirming class settlement upon objectors' appeal); *Churchill Village LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming class settlement with 45 objections and 500 opt-outs in 90,000-person class).[9]

Here, the May 14 Agreement negotiated and agreed to by Class counsel is fair, reasonable, and adequate as required by Rule 23(e)(2). Class counsel may not deprive the class members of a fair and reasonable settlement by serving the interests and objections of only a few. If some Class representative Plaintiffs wish to state an objection, the proper procedure for them to do so is provided by Rule 23(e)(5). They may not deprive other members of the Class of their right to notice and an opportunity to voice their positions regarding the May 14 Agreement. *Officers of Justice*, 688 F.2d at 624. For these reasons, the Court should preliminarily approve it the May 14 Agreement.

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[9] *See also In re S. Ohio Corr. Facility*, 173 F.R.D. 205, 214 (S.D. Ohio 1997); *Heit*, 126 F. Supp.2d at 491 ("Even a majority opposition to a proposed settlement does not automatically bar court-approval of a proposed settlement.") (citing *Thomas v. Albright*, 139 F.3d 227, 232 (D.C. Cir. 1998) (court approved a settlement despite fact that 15% of class opposed it)); *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th Cir. 1982) (approving class settlement, even though 10 out of 11 class representatives rejected it, because "agreement of the named plaintiff is not essential to approval of a settlement which the trial court finds to be fair and reasonable."); *Watson v. Ray*, 90 F.R.D. 143, 146 (S.D. Iowa 1981) ("The named plaintiffs do not have the final say as to what is in the best interest of the class.").

B. Notice of the Class Settlement and Fairness Hearing

A proposed Notice is attached as Exh. 2 for the Court's consideration. The Notice informs Class members of the terms of the May 14 Agreement and explains how they can read the transcript of the Agreement. The Notice also informs class members that if there are questions regarding the Agreement, they may contact Class counsel. The Notice clearly states that inmates may object to the terms of the Agreement and explains the process for making written objections. The Notice further informs class members of the date, time and location of the fairness hearing where the Court will consider all objections and decide whether or not to approve the May 14 Agreement.

Similar to the Class Action Notice previously posted and distributed to class members at SCC, Defendant CCA will post the Notice on the bulletin boards in the facility chapel, library, law library and dayrooms of each housing pod for GP, PC and SHIP II/III inmates; will make copies of the transcript of the May 14 Agreement (Exh. 1) available for review in the in the law library; provide a copy of the Notice to class members in segregation/SHIP I; and allow check-out, upon written request, the May 14 Agreement transcript for review and return. Providing notice in this manner is sufficient in litigation involving inmates in a correctional facility. (Doc. 690.) *See, e.g., Ruiz v. McKaskle,* 724 F.2d 1149, 1152-53 (5th Cir. 1984) (notice placed in each housing unit's "Writ Room," published in prison's newspaper, and posted in housing units); *Diaz v. Romer,* 801 F. Supp. 405, 408 (D. Colo. 1992) (notice posted in prison living units and law libraries).

IV. ALTERNATIVELY, THE COURT SHOULD REINSTATE THE PROCEEDINGS, RULE ON THE MOTION TO DECERTIFY, AND SANCTION CLASS COUNSEL FOR VEXATIOUS DELAY

If the Court does not preliminarily approve the May 14 Agreement, it should reinstate the proceedings. As noted above, Defendants' motion to decertify the

class has been fully briefed and is pending in the Court. (Doc. 696.) A ruling on that Motion is requested.

Defendants also request that the Court sanction Class counsel for her conduct. A federal district court has the inherent authority to sanction a party in response to "abusive litigation practices." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006); *see also Roadway v. Piper*, 447 U.S. 752, 765 (1980). This includes an award of fees against a party *or their counsel* for acting in bad faith, vexatiously, wantonly, or for oppressive reasons. *Leon*, 464 F.3d at 961. A party acts in bad faith by "delaying or disrupting the litigation." *Id*. (quoting *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997)). Similarly, 28 U.S.C. § 1927 permits the imposition of attorneys' fees and costs against counsel for "unreasonably and vexatiously" multiplying the proceedings.

Class counsel represented to the Court and Defendants' counsel that they agreed to settle this case under the terms outlined in the May 14 Agreement. The Court and Defendants' counsel relied on those representations, halted the proceedings, and vacated the scheduled trial so that the parties could reduce their agreement to writing. But once out of the court room, Class counsel no longer honored that commitment and instead embarked on a nine month trek of delay and additional unreasonable settlement demands that exceed the scope of what was already agreed to and further exceeded the scope of injunctive relief the Court could award even in the event of a verdict in favor of the Class Plaintiffs. Defendants' counsel spent countless hours over the course of the last nine months defending the original Agreement and imploring Class counsel to finalize the Agreement, stop making increased demands, and allow the one or few objecting Class representative Plaintiffs to air their concerns as already provided by Rule 23(e)(5)'s objection provision. Meanwhile, Defendants have been denied finality in this five-year litigation, as have the class members Class counsel represents.

The Court should sanction Class counsel for unreasonably and vexatiously prolonging this lawsuit, and require payment of fees and costs incurred by Defendants in having to work to finalize an Agreement made nine months ago to no avail. This includes fees for all time spent to prepare for, travel to and participate in the May 14, 2015 and October 16 Settlement Conferences (where again Agreement was reached only for counsel to backtrack and demand more again), all time billed to finalize what the parties had agreed to, and all time billed in preparing this Motion and forthcoming Reply.

V. CONCLUSION

For the above reasons and pursuant to Fed.R.Civ.P 23(e)(1), (2), (3), and (5), Defendants respectfully request this Court to preliminarily approve the May 14 Agreement reached by the parties on May 14, 2015, and set a fairness hearing. Defendants also request that the Court approve the proposed Notice of Class Action Settlement attached as Exh. 2, and order its distribution according to the same process used to distribute the initial Class Action Notices at SCC. (Doc. 690.)

Defendants alternatively request the Court to reinstate the proceedings, issue a ruling on their Motion for Decertification (Doc. 696), and award Defendants their attorneys' fees and costs caused by Class counsel's vexatious litigation conduct in prolonging this case and leading Defendants and this Court on seemingly endless road to promised settlement.

This Motion is supported by the separate Memorandum of Points and Authorities, attached exhibits, and all pleadings on file with this Court.

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DATED: Chandler, Arizona, February 24, 2016.

/s/ Rachel Love

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