IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

HAWAIIAN KINGOM,

Plaintiff,

vs.

JOSEPH ROBINETTE BIDEN JR., in his official capacity as President of the United States; KAMALA HARRIS, in her official capacity as Vice-President and President of the United States Senate; et al,

Defendants.

CIVIL NO. 21-00243 LEK-RT

MEMORANDUM IN SUPPORT OF MOTION

TABLE OF CONTENTS

I. INTRODUCTION 1

II. LEGAL STANDARD 4

III. ARGUMENT 4
A. Culpable Conduct 6
B. Meritorious Defense 7
1. This Case Raises Nonjusticiable Political Questions 8
2. The Court Lacks Jurisdiction Over the State Defendants 9
C. Prejudice 11

IV. CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Bancoult v. McNamara, 445 F.3d 427 (D.C.Cir. 2006) 9

Bator v. State of Hawaii, 910 F. Supp. 479 (D. Haw. 1995)..................................10

Douglass v. District of Columbia, 605 F.Supp.2d 156 (D.C.D.C. 2009)...............8

Franchise Holding II, LLC. v. Huntington Restaurants Grp.,
375 F.3d 922 (9th Cir. 2004) 6

Fruean v. Bank of New York Mellon, No. CV 10-00762 DAE-BMK,
2011 WL 3021224, at *4 (D. Haw. July 22, 2011) 8

Green v. Mansour, 474 U.S. 64 (1985) 10

J.E. v. Wong, 2016 WL 4275590, at *8 (D. Haw. Aug. 12, 2016).........................10

Kentucky v. Graham, 473 U.S. 159 (1985)..10

Kokkonen v. Guardian Life Insurance Company of America,
511 U.S. 375, 114 S.Ct. 1673 (1994) 8

Lojas v. Washington, 347 Fed. Appx. 288 (9th Cir. 2009)....................................10

Office of Hawaiian Affairs v. Department of Educ.,
951 F. Supp. 1484 (D. Haw. 1996)..9

Papasan v. Allain, 478 U.S. 265, 106 S.Ct. 2932 (1986).......................................9

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89,
104 S.Ct. 900 (1984)...10

Prop. Reserve, Inc. v. Wasson, No. CV 12-00649 SOM-KSC,
2013 WL 12177523, at *2 (D. Haw. Aug. 6, 2013)………………5, 6, 11, 12

Shaw v. California Dep't of Alcoholic Beverage Control,
788 F.2d 600 (9th Cir. 1986) 9

U.S. v. Signed Personal Check No. 730 of Yubran S. Mesle,
615 F.3d 1085 (9th Cir. 2010)……………………………………………4,6,7

Will v. Mich. Dep't of State Police, 491 U.S. 58, 109 S.Ct. 2304 (1989) 10

Constitutional Provisions

Eleventh Amendment..9,10

Fourteenth Amendment 10

Court Rules

Federal Rules of Civil Procedure, Rule 4(d)..3

Federal Rules of Civil Procedure, Rule 55(c)...5

MEMORANDUM IN SUPPORT OF MOTION

Defendants, DAVID YUTAKA IGE, in his official capacity as Governor of the State of Hawaiʻi, TY NOHARA, in her official capacity as Commissioner of Securities, ISAAC W. CHOY, in his official capacity as the director of the Department of Taxation of the State of Hawaiʻi, and STATE OF HAWAIʻI (hereinafter "State Defendants"), by and through their attorneys, Attorney General Holly T. Shikada, and Deputy Attorney General Amanda J. Weston, herein submit their memorandum in support of their motion to vacate defaults, entered on January 19, 2022.

I. INTRODUCTION

On May 20, 2021, Plaintiff, Hawaiian Kingdom ("Plaintiff"), filed its Complaint seeking an order from this Court granting declaratory and injunctive relief. Relevant to the State Defendants, Plaintiff sought, among other relief, an order (1) declaring that all laws of the United States and the State of Hawaiʻi, and the maintenance of the United States' military installations are unauthorized and contrary to the constitution and treaties of the United States; and (2) enjoining the Defendants from implementing or enforcing all laws of the United States and the State of Hawaiʻi, and enjoining the maintenance of the United States' military installations across the territory of the "Hawaiian Kingdom."

The State Defendants waived service of the Complaint and Summons and therefore, their response to the Complaint was due on July 23, 2021.[1] However, Plaintiff's counsel indicated that Plaintiff would be filing an Amended Complaint, thus it was agreed that the State Defendants would not respond to the Complaint, but would instead respond to the Amended Complaint after that was served on the State Defendants. *See*, Declaration of Marie Manuele Gavigan ("Dec. Gavigan"), page 2, paragraph 4.

Plaintiff filed its Amended Complaint on August 11, 2021. Relevant to the State Defendants, the relief requested in the Amended Complaint was an order (1) declaring that all laws of the United States and the State of Hawai‘i, and the maintenance of the United States' military installations are unauthorized and contrary to the constitution and treaties of the United States; (2) declaring that the *Supremacy* Clause prohibits the State of Hawai‘i from interfering with the United States' "explicit recognition of the Council of Regency as the government of the HAWAIIAN KINGDOM;" and (3) enjoining the Defendants from implementing or enforcing all laws of the United States and the State of Hawai‘i, and enjoining

[1] Isaac Choy was not a named defendant in the original Complaint, rather Damien Elefante, as acting Director of the Department of Taxation was a named defendant. Mr. Elefante was not served with the original Complaint as he was not the acting Director of the Department of Taxation. Director Choy was made a named defendant in the Amended Complaint.

the maintenance of the United States' military installations across the territory of the "Hawaiian Kingdom."

Service of the Amended Complaint on the State Defendants was effected by waiver pursuant to Rule 4(d) of the Federal Rules of Civil Procedure. The State Defendants' response to the Amended Complaint was then due on November 2, 2021. [ECF Doc. Nos. 131, 132, 133, and 167]

The State Defendants' plan was to file a motion to dismiss the Amended Complaint for various reasons, including the lack of jurisdiction. Both before and after the Amended Complaint was filed, Plaintiff indicated that it wanted to "continue the dialogue in further attempts to reach a resolution to the dispute with [the State Defendants]." Thus, Plaintiff and the State Defendants scheduled a "meet and confer" about this case. This "meet and confer" was also for the purpose of the State Defendants' intended motion to dismiss. Counsel had several conferrals, both by phone and by email. See Declaration of Gavigan, page 2, paragraph 5-6.

On October 20, 2021, due to their counsel's calendar, the State Defendants requested additional time to respond to the Amended Complaint. Plaintiff's counsel agreed to an extension of time for the State Defendants to respond to the Amended Complaint to November 29, 2021. See Declaration of Gavigan, page 2, paragraph 7. In that regard, another "meet and confer" between Plaintiff's counsel

and State Defendants' counsel occurred on November 24, 2021. During that conference, the parties agreed that the State Defendants' response to the Amended Complaint was again extended to January 10, 2022. Also, during this "meet and confer," Plaintiff's counsel expressed Plaintiff's desire to settle this case, and expressed a desire to "keep the lines of communication open." See Declaration of Gavigan, page 3, paragraph 8.

Finally, during the November 24, 2021 conferral, State Defendants' counsel requested another "meet and confer" and the parties discussed a date around mid-December, 2021. In an email to Plaintiff's counsel on November 24, 2021, State Defendants' counsel confirmed the extension to respond, reiterated the request for another "meet and confer" and asked for Plaintiff's counsel's availability on December 16, 17, 20, or 21 for another conference. Plaintiff's counsel did not respond to this request. See Declaration of Gavigan, page 3, paragraph 8.

Due to inadvertence, the January 10, 2022, date to file the State Defendants' response in this case was not calendared. In addition, State Defendants' counsel became ill during mid-December, 2021, and missed several days of work during the last half of December, compounding the issue of the response date not being calendared. See Declaration of Gavigan, page 3, paragraph 8-9.

II. LEGAL STANDARD

The decision to vacate a default is within the court's discretion and is reviewed for an abuse of that discretion. *U.S. v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1090 (9th Cir. 2010). There is a two-step process to determine abuse of discretion in this situation: (1) to "determine de novo whether the trial court identified the correct legal rule to apply to the relief requested;" and, (2) to "determine whether the trial court's application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record'." The courts' policy is generally to favor judgment on the merits; thus, no "glaring abuse of discretion" is required for reversal of a denial of a motion to vacate a default. [citations omitted] *Id.*

III. ARGUMENT

Pursuant to Rule 55(c) of the Federal Rules of Civil Procedure, a court "may set aside an entry of default for good cause[.]" "Courts generally disfavor defaults because the interests of justice are best served by obtaining a judgment on the merits whenever reasonably possible." *Prop. Reserve, Inc. v. Wasson*, No. CV 12-00649 SOM-KSC, 2013 WL 12177523, at *2 (D. Haw. Aug. 6, 2013). Therefore, "Rule 55(c) motions are liberally construed in favor of the movant." *Id.* District courts have broad discretion to decide whether to set aside default, and the

"discretion of the court is especially broad when a party seeks to set aside an entry of default as opposed to a default judgment." *Id.*

In determining whether good cause exists to set aside default, courts consider whether (1) the defendant "engaged in culpable conduct that led to the default"; (2) the defendant "had a meritorious defense"; and (3) whether reopening the default would prejudice the plaintiff. *Franchise Holding II, LLC. v. Huntington Restaurants Grp.*, 375 F.3d 922, 926 (9th Cir. 2004). These factors are disjunctive, and a court may deny the motion if it finds against the defendant with respect to any of the three factors. *Prop. Reserve, Inc.*, 2013 WL 12177523, at *2.

A. Culpable Conduct

A defendant's conduct is culpable "if he has received actual or constructive notice of the filing of the action and intentionally failed to answer." *United States v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d at 1092 (emphasis in original). "[I]n this context the term 'intentionally' means that a movant cannot be treated as culpable simply for having made a conscious choice not to answer; rather, to treat a failure to answer as culpable, the movant must have acted with bad faith, such as an 'intention to take advantage of the opposing party, interfere with judicial decisionmaking, or otherwise manipulate the legal process.'" *Id.* "Intentional" conduct in this context typically includes "a devious, deliberate,

willful, or bad faith failure to respond." *Id.* "Simple carelessness" is "not sufficient to treat a negligent failure to reply as inexcusable[.]" *Id.*

The failure to respond to the Amended Complaint was inadvertent on the part of the State Defendants' counsel. The inadvertence was the failure to calendar the response to the Amended Complaint. However, during that time, counsel was having some health issues as well as needed to keep up with the normal press of other work. In addition, State Defendants' counsel was under the impression that the parties would have another conference about this case prior to filing a response to the Amended Complaint, since the State Defendants planned to file a motion to dismiss, and had communicated with Plaintiff's counsel the intent to file the motion. State Defendants' inaction was not in bad faith, did not show any intention to take advantage of Plaintiff, and did not interfere with judicial decisionmaking or otherwise manipulate the legal process. Consequently, this factor favors setting aside the defaults.

B. Meritorious Defense

A defendant seeking to set aside entry of default "must present specific facts that would constitute a defense". *United States v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d at 1094. The burden "is not extraordinarily heavy." *Id.* "All that is necessary to satisfy the 'meritorious defense' requirement is to allege sufficient facts that, if true, would constitute a defense: the question whether the

factual allegation is true is not to be determined by the court when it decides the motion to set aside the default." *Id.* "[T]he only requirement is that 'a sufficient defense is assertable' and that litigation of the claims would not be 'a wholly empty exercise.'" *Fruean v. Bank of New York Mellon*, No. CV 10-00762 DAE-BMK, 2011 WL 3021224, at *4 (D. Haw. July 22, 2011).

In this case, the State Defendants have a meritorious defense in that Plaintiff's claims raise non-justiciable political questions over which this Court does not have jurisdiction. In addition, even if this Court otherwise had jurisdiction, which State Defendants do not concede, this Court does not have jurisdiction over them pursuant to the Eleventh Amendment. These defenses are discussed more fully below.

1. <u>This Case Raises Nonjusticiable Political Questions</u>

Plaintiff's Amended Complaint challenges the legality of Hawaii's admission to, and continued existence as a state of, the United States. As such, Plaintiff presents a nonjusticiable political question to this Court for determination.

Federal courts are courts of limited jurisdiction and have only the power authorized by the Constitution or statutes. *Kokkonen v. Guardian Life Insurance Company of America,* 511 U.S. 375, 377, 114 S.Ct. 1673, 1675 (1994). In the event that the parties do not raise the issue of jurisdiction, courts may raise the issue *sua sponte*. *Douglass v. District of Columbia,* 605 F.Supp.2d 156, 169

(D.C.D.C. 2009) ("…while arguments in favor of subject matter jurisdiction can be waived by inattention or deliberate choice, we are forbidden—as a court of limited jurisdiction—from acting beyond our authority, and 'no action of the parties can confer subject-matter jurisdiction upon a federal court.' " [citations omitted]). Jurisdiction to decide a case is the "first and fundamental question" that the court is "bound to ask and answer." *Bancoult v. McNamara,* 445 F.3d 427, 432 (D.C.Cir. 2006).

Federal courts lack jurisdiction over political decisions that are by their nature committed to the political branches of government and to the exclusion of the judiciary. *Id.* This Court has already ruled that the Amended Complaint in this case presents a political question and therefore, the court lacks jurisdiction over this matter. *See*, Order Granting the Federal Defendants' Cross-Motion to Dismiss the First Amended Complaint, filed on June 9, 2022, ECF 234, at page 6 of 8.

2. The Court Lacks Jurisdiction Over the State Defendants

Setting aside the political question issue, the Eleventh Amendment to the Constitution bars lawsuits against the States that are brought in federal court. Sovereign immunity is an absolute bar to suits in federal court against a state, whether brought by its own citizens or citizens of another state. *Papasan v. Allain*, 478 U.S. 265, 276, 106 S.Ct. 2932 (1986); *Shaw v. California Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 603 (9th Cir. 1986); *Office of Hawaiian Affairs v.*

Department of Educ., 951 F. Supp. 1484, 1490 (D. Haw. 1996). The doctrine of sovereign immunity therefore precludes a plaintiff from obtaining retrospective relief or damages against the State. *See*, *e.g.*, *Green v. Mansour*, 474 U.S. 64, 73 (1985); *Lojas v. Washington*, 347 Fed. Appx. 288, 290 (9th Cir. 2009); *J.E. v. Wong*, 2016 WL 4275590, at *8 (D. Haw. Aug. 12, 2016) (holding that plaintiffs could not obtain declaratory relief because it was "retrospective in nature"). Thus, this lawsuit against the State is precluded by the Eleventh Amendment to the United States Constitution.

The United States Supreme Court has also held that a suit against state officials in their official capacities is no different than a suit against the state itself and, therefore, is barred by the Eleventh Amendment. *See*, *Kentucky v. Graham*, 473 U.S. 159, 165-167 (1985); *Bator v. State of Hawaii*, 910 F. Supp. 479, 484 (D. Haw. 1995) ("A suit against an official in his official capacity is a suit against the official's office and not against the official. As such, it is a suit against the state."). Unless a state unequivocally waives sovereign immunity or Congress exercises its power under the Fourteenth Amendment to override the immunity, the state, its agencies and its officials acting in their official capacity are immune from suit under the Eleventh Amendment. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304 (1989); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99, 104 S.Ct. 900 (1984).

In this case, Plaintiffs have sued the individual State Defendants in their official capacities only. Because these "official capacity" suits are the same as suing the State itself, the Eleventh Amendment principles apply, and this court does not have jurisdiction to hear this matter.

Because this court does not have jurisdiction to hear this case, the State Defendants have a meritorious defense to this lawsuit. Consequently, this factor favors setting aside the defaults.

C. Prejudice

"Prejudice exists if a party's ability to pursue its claims is hindered." *Prop. Reserve, Inc.*, 2013 WL 12177523, at *4. To be prejudicial, the setting aside of a judgment "must result in greater harm than simply delaying resolution of the case." *Id.* Only where a delay results in "tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunities for fraud or collusion" is the delay considered prejudicial. *Id.* "No prejudice exists simply because a party is compelled to litigate its claims on the merits." *Id.*

Plaintiff will suffer no prejudice if the defaults in this case are set aside. The setting aside of default will not delay the case, nor will it impact discovery or invite fraud or collusion. *Id.* In fact, because this case has already been dismissed as to other defendants, it could be a benefit to Plaintiff to vacate the default and have this case proceed so that final judgment can be entered, allowing Plaintiff to

take whatever other further legal action it believes is necessary. Given that a case should be decided on the merits and because Plaintiff will not be prejudiced, this factor favors setting aside the entry of the defaults. *Id.* at *2.

IV. CONCLUSION

Defaults and default judgments are not favored by the Courts, and any doubt should be resolved in favor of the party seeking relief, so that, in the interests of justice, there can be a full resolution on the merits. For this reason and all the foregoing reasons, good cause exists to set aside the entry of default against the State Defendants. Therefore, the State Defendants respectfully request that the Court set aside the entry of the defaults against them.

DATED: Honolulu, Hawai‘i, August 12, 2022.

HOLLY T. SHIKADA
Attorney General

By: /s/ Amanda J. Weston
AMANDA J. WESTON
Deputy Attorney General

Attorneys for Defendants
DAVID YUTAKA IGE, in his official capacity as Governor of the State of Hawai‘i, TY NOHARA, in her official capacity as Commissioner of Securities, ISAAC W. CHOY, in his official capacity as the director of the Department of Taxation of the State of Hawai‘i, and STATE OF HAWAI‘I