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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

N.D.,

Plaintiff,

vs.

MAKAHA, HAWAII CONGREGATION OF
JEHOVAH'S WITNESSES, a Hawaii non-profit
unincorporated religious organization, a.k.a.
MAKAHA CONGREGATION OF
JEHOVAH'S WITNESSES and KINGDOM
HALL, MAKAHA CONGREGATION OF
JEHOVAH'S WITNESSES; WATCHTOWER
BIBLE AND TRACT SOCIETY OF NEW
YORK, INC., a New York corporation;
CHRISTIAN CONGREGATION OF
JEHOVAH'S WITNESSES, a New York
non-profit corporation; KENNETH L. APANA,
Individually; and Does 1 through 100, inclusive,

CIVIL NO. 1CCV-20-0000390
(Non-Motor Vehicle Tort)

PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANTS
MAKAHA CONGREGATION OF
JEHOVAH'S WITNESSES, HAWAII;
WATCHTOWER BIBLE AND TRACT
SOCIETY OF NEW YORK, INC.; and
CHRISTIAN CONGREGATION OF
JEHOVAH'S WITNESSES' MOTION TO
DISMISS THE COMPLAINT FOR
FAILURE TO STATE A CLAIM, FILED
MAY 26, 2020; DECLARATION OF
MATTHEW C. WINTER; EXHIBITS 1-2;
CERTIFICATE OF SERVICE

[Caption continued on next page]

Defendants.

Hearing:

DATE: June 22, 2020

TIME: 10:30 a.m.

JUDGE: Honorable Dean E. Ochiai

No Trial Date Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
FACTS	2
STANDARD	5
ARGUMENT	6
1. Controlling Statute and Legislative Intent	6
2. Apana’s Status as an Agent or Employee of Moving Defendants Falls Squarely Within the Statute	7
3. Moving Defendants Owed a Special Relationship Duty to Plaintiff and the Harm to Plaintiff Was Foreseeable	9
a. Apana’s Conduct was Foreseeable	13
b. Defendants Maintained a Degree of Responsibility or Control	15
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

<i>Bank of Am., N.A. v. Reyes-Toledo</i> 143 Haw. 249, 428 P.3d 761 764 (2018)	1, 5
<i>Berry v. Watchtower Bible & Tract Soc’y</i> 879 A. 2d 1124 (N.H. 2005)	13
<i>Bertelmann v. Taas Assocs.</i> 69 Haw. 95, 735 P.2d 930 (1987)	1, 5
<i>Brown v. USA Taekwondo</i> 40 Cal. App. 5 th 1077 (2019)	13
<i>Bryan R. v. Watchtower Bible & Tract Soc’y</i> 738 A. 2d 839 (Me. 1999).....	13
<i>C.J.C. v. Corporation of Catholic Bishop of Yakima</i> 138 Wn.2d 699, 985 P.2d 262 (1999).....	12
<i>Conti v. Watchtower Bible & Tract Soc’y of N.Y., Inc.</i> 235 Cal. App. 4 th 1214 (2015)	12
<i>Croyle v. Theatine Father</i> No. 19-00421, 2019 WL 7340501 (D. Haw. Dec. 30, 2019).....	7
<i>Delk v. Columbia/HCA Healthcare Corp.</i> 259 Va. 125, 523 S.E.2d 826 (2000).....	12
<i>Doe Parent No. 1 v. State</i> 100 Haw. 34, 58 P. 3d 545 (2002)	7, 11
<i>Doe v. Corp. of the President of The Church of Jesus Christ of Latter-Day Saints</i> 98 P. 3d 429 (Utah App. 2004).....	13
<i>Doe v. Hartz</i> 52 F.Supp.2d 1027 (N.D. Iowa 1999).....	12
<i>Fochtman v. Honolulu Police and Fire Departments</i> 65 Haw. 180, 648 P.2d 1114 (1982)	9, 11
<i>Funkhouser v. Wilson</i> 89 Wn. App. 644 (1998)	12

<i>In re Jane Doe, Born on June 20, 1995</i> 95 Haw. 183, 20 P.3d 616 (2001)	8
<i>Kealoha v. Machado</i> 131 Haw. 62, 315 P.3d 213 (2013)	5
<i>Knodle v. Waikiki Gateway Hotel, Inc.</i> 69 Hawai‘i 376, 742 P.2d 377 (1987)	14
<i>Lee v. Corregedore</i> 83 Haw. 154, 925 P.2d 324 (1996)	10
<i>Meyer v. Lindala</i> 675 N.W.2d 635 (Minn. App. 2004)	13
<i>N.K. v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints</i> 175 Wn. App. 517 (2013)	14
<i>N.L. v. Bethel School District</i> 186 Wn. 2d 422 (2016)	13
<i>Roe v. Ram</i> 2014 WL 10474393 (D. Haw. Nov. 26, 2014)	10
<i>Swanson v. Roman Catholic Bishop of Portland</i> 692 A. 2d 441 (Me. 1997)	13
<i>Wada v. Aloha King, LLC</i> 154 F. Supp. 3d 981 (D. Haw. 2015)	12
<i>Wagner v. Church</i> 208 F. Supp. 3d 1138 (D. Haw. 2016)	7
 Statutes	
HRS § 1–15(2) (1993)	8
HRS § 657-1.8	6
 Rules	
HRCP 12(b)(6)	1

Other Authorities

H.B. 1232 (2013)	7
Restatement (Second) of Torts § 315 (1965).....	9
Restatement (Second) of Torts § 319.....	12
Restatement (Second) of Torts § 324A (1965).....	9

PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANTS
MAKAHA CONGREGATION OF JEHOVAH’S WITNESSES, HAWAII;
WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; and
CHRISTIAN CONGREGATION OF JEHOVAH’S WITNESSES’ MOTION TO DISMISS
THE COMPLAINT FOR FAILURE TO STATE A CLAIM, FILED MAY 26, 2020

Now comes Plaintiff, by and through her undersigned counsel, and submits the following response in opposition to Defendants Makaha Congregation of Jehovah’s Witnesses, Hawaii; Watchtower Bible and Tract Society of New York, Inc.; and Christian Congregation of Jehovah’s Witnesses (“Defendants”) Motion to Dismiss. In support of this opposition, Plaintiff proffers the following for the Court’s consideration.

INTRODUCTION

Defendants’ motion grossly mischaracterizes Plaintiff’s Complaint in an attempt to recast it as one devoid of allegations that support a claim under a HRCP 12(b)(6) standard. Defendants make this mischaracterization about a Complaint that alleges – over the course of twenty-three pages – that Defendants knew one if its church Elders was a pedophile who had been sexually molesting the children of its congregation during sleepovers at his home. Armed with this knowledge, Defendants did nothing, kept the information secret, continued to elevate his status as a trusted and respected Elder of the congregation, and allowed this pedophile to continue to associate with other children in its congregation and continue his pattern which resulted in the sexual assault of plaintiff.

Hawai’i courts apply a simple “notice pleading” standard. *See Bank of Am., N.A. v. Reyes-Toledo*, 143 Haw. 249, 252, 428 P.3d 761, 764 (2018). Under this standard, a complaint must be liberally construed and a motion to dismiss should rarely be granted. *See Bertelmann v. Taas Assocs.*, 69 Haw. 95, 99, 735 P.2d 930, 933 (1987). As is outlined in the facts and argument below, Plaintiff has more than met her burden, and Defendants’ motion must be denied.

FACTS

This is an action brought by Plaintiff N.D. to recover for lifelong injuries sustained as a result of repeated instances of childhood sexual abuse perpetrated by Kenneth L. Apana. Apana is an Elder associated with, supervised, directed and controlled by Defendants Makaha Kingdom Hall, Watchtower Bible and Tract Society of New York, Inc., and Christian Congregation of Jehovah's Witnesses.¹ Complaint, Dkt. #1 ("Compl.") ¶¶9, 34 (a copy of the Complaint is attached as Exhibit 1). At all times material, Apana was acting within the scope and course of his role within Makaha Kingdom Hall and Watchtower. *Id.* at ¶¶5, 6, 9. As an Elder, Apana was in a position of authority with Makaha Kingdom Hall and Watchtower. *Id.* Elders are the highest authority at the congregational level. *Id.* at ¶21. Elders are responsible for the daily operations and governance of the local church, and Elders must submit to Watchtower's control over all aspects of their lives, including their personal life. *Id.* at ¶¶21, 28. Apana's position as a church Elder conferred authority and trustworthiness which provided him with unquestioned access to Plaintiff and other minors. *Id.* at ¶¶36, 46.

Prior to Plaintiff's abuse, allegations of sexual abuse against a minor child were lodged against Defendant Apana in or around 1991 or 1992. *Id.* at ¶46-47. Specifically, the mother of a minor child who attended the church reported to Defendant Makaha Kingdom Hall that her daughter had been sexually abused during sleepovers at Apana's house. *Id.* Additionally, it was reported that Apana was sexually abusing his own daughter. *Id.* at ¶47. This resulted in an internal inquiry conducted by Makaha Kingdom Hall. *Id.* at ¶46. Defendant Watchtower had previously sent a letter to all Bodies of Elders in the United States, instructing them that while many states

¹ Defendants Watchtower Bible and Tract Society of New York, Inc. and Christian Congregation of Jehovah's Witnesses will be collectively referred to as "Watchtower."

have mandatory reporting laws, should an allegation of child abuse be made in a congregation, they were to contact Watchtower's legal department immediately. *Id.* at ¶31.

Under this shroud of secrecy, Defendants refused to accept or take action with regard to these allegations, instead insisting that the Jehovah's Witness Church rules required two witnesses in order to substantiate a claim of sexual abuse. *Id.* at ¶48. Rather than take any steps to prevent Apana from sexually abusing other children, Defendants instead issued a "silent reproof" regarding Apana's criminal behavior, and never informed the congregation that a sexual predator was lurking in its midst. *Id.* at ¶¶49-51.

While retaining this accused pedophile in a position of trust and authority, and while failing to warn others in the congregation of these allegations, Apana was free to prey on other unsuspecting families in the congregation. Tragically, but not surprisingly, Apana did not cease his abusive behavior after the silent and confidential reproof. Shortly after these earlier allegations, in or around 1992, and while Plaintiff was just 12-13 years of age, he sexually abused her during sleepovers at his home. *Id.* at ¶¶41-45. But for Apana's elevated status in the Makaha Kingdom Hall, Plaintiff's parents would not have permitted these sleepovers to occur. *Id.* at ¶40.

Plaintiff's sexual abuse was subsequently reported to Defendant Makaha Kingdom Hall. *Id.* at ¶57. A church judicial committee hearing was held, and Apana admitted to the sexual assaults. *Id.* at ¶¶57-59. Defendant Makaha Kingdom Hall Elders told Plaintiff that the church would not support Plaintiff if her family reported Apana's conduct to local law enforcement. *Id.* at ¶61. Due to this statement, Plaintiff did not tell others about Apana's sexual abuse or report Apana's sexual abuse to authorities, nor did she immediately seek medical treatment or counseling. *Id.* at ¶67. Instead, Plaintiff was forced to take part in worship services in the presence of the very man who sexually abused her. *Id.* at ¶62-63.

Importantly, for purposes of responding to Defendants’ motion, Plaintiff specifically alleged “[e]ach Defendant is the agent, servant, and/or employee of the other Defendants, and each Defendant was acting within the course and scope of his, her, or its authority as an agent, servant, and/or employee of the other Defendants.” *Id.* at ¶11.² The trust, respect, and authority engendered by Apana's position as a church Elder aided and abetted Apana’s sexual abuse of Plaintiff, and Defendant Makaha Kingdom Hall kept his previous sexual assaults of minor congregants a secret. *Id.* at ¶¶70-71. Plaintiff has described at length the duty Defendants’ owed to her throughout her Complaint. See §§ 76, 77, 78.

Tacitly requesting the Court to ignore the allegations of Plaintiff’s Complaint, Defendants have moved for dismissal arguing, “(i) Apana was not an employee of Religious Defendants, (ii) the Religious Defendants owed no duty of care to Plaintiff, and (iii) the alleged misconduct occurred outside of any activity over which Religious Defendants had a degree of responsibility or control.” Def. Mtn. p. 2. This argument is being made despite unequivocally stated allegations in the Complaint that (i) Apana was acting as an employee of the Defendants (Compl. at ¶11), (ii) moving Defendants owed a duty of care to Plaintiff (*id.* at ¶¶76, 77 and 78), and (iii) that the sexual abuse of a minor occurred within activity over which moving Defendants had a degree of responsibility and control (*id.* at ¶28).

On June 29, 2018, Act 098 was signed into law by the Governor of Hawai‘i extending the statute of limitations for victims of childhood sexual abuse. This extension allowed victims to bring suit against the perpetrator as well as entities having a degree of responsibility or control. The new cut-off for such claims was April 24, 2020. Plaintiff timely filed her Complaint in this matter on March 10, 2020.

² Defendants fail to acknowledge these allegations in their Motion.

STANDARD

“[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. The [court] must therefore view a plaintiff’s complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory. For this reason, in reviewing a circuit court’s order dismissing a complaint ... the appellate court’s consideration is strictly limited to the allegations of the complaint, and the appellate court must deem those allegations to be true.” *Kealoha v. Machado*, 131 Haw. 62, 74, 315 P.3d 213, 225 (2013) (citations and original brackets omitted).

Hawai‘i courts apply a simple “notice pleading” standard. *See Bank of Am., N.A. v. Reyes-Toledo*, 143 Haw. 249, 252, 428 P.3d 761, 764 (2018). Under this standard, a complaint must be “construed liberally and not technically[,] and a motion to dismiss for failure to state a claim should rarely be granted.” *Bertelmann v. Taas Assocs.*, 69 Haw. 95, 99, 735 P.2d 930, 933 (1987). In championing Hawaii’s notice pleading standard, our Supreme Court specifically rejected the fact pleading or plausibility standard (notably used in federal court), by stating that the plausibility standard is “contrary to our well-established historical tradition of liberal notice pleading and undermines citizen access to the courts and to justice.” *See Bank of Am.*, 143 Haw. at 262, 428 P.3d at 774.

Plaintiff has more than met this simple burden, and therefore Defendants’ motion must be Denied.

ARGUMENT

1. Controlling Statute and Legislative Intent

It appears all parties to this motion agree that the controlling statute imposing liability on moving Defendants is found at HRS § 657-1.8. This statute provides two separate avenues for a victim of childhood sexual abuse to recover against an entity as is the case here. A claim may be brought against a legal entity where:

(1) The person who committed the act of sexual abuse against the victim was employed by an institution, agency, firm, business, corporation, or other public or private entity that owed a duty of care to the victim;

or

(2) The person who committed the act of sexual abuse and the victim were engaged in an activity over which the legal entity had a degree of responsibility or control.

Id. at §b (emphasis added). As stressed, liability is imposed under this statute on legal entities in the disjunctive – meaning Plaintiff must allege either of these two provisions and is not required to allege or prove both. Plaintiff has pled facts sufficient to proceed with her cause of action under either of those provisions.

Defendants open their argument asserting that the Complaint “impermissibly seeks to hold the Religious Defendants liable for Defendant Apana’s intentional tortious misconduct.” Def. Mem. p. 3. They argue that the legislature did not intend to hold religious entities responsible in these matters. However, moving Defendants make no showing or provide any authority to support their argument of this supposed legislative intent. Indeed, reading the statute in its entirety, there is no indication that the legislature intended anything but to ensure broad recovery for victims of childhood sexual abuse. Legislative history of the previous iteration of HRS § 657-1.8 specifically took note that “[t]he laws have the unintended effect of creating different classes of minor aged victims of sexual abuse: one class has more opportunities to pursue justice, while the other is

deprived of such opportunities . . . ***This change in the law will have the effect of ensuring that the voices of all persons who suffered sexual abuse as minors will be equally heard.***” H.B. 1232 (2013) (emphasis supplied).³ Thus, a complete reading of the statute, and the history thereof, reveals a clear legislative intent **not** to draw arbitrary distinctions based on the structure of an entity, but rather to allow **all victims** to be equally heard.

Going a step further, Defendants’ overly restrictive interpretation of the controlling statute has been heard and rejected by **at least** two other federal courts sitting in Hawai‘i. In *Croyle v. Theatine Father*, No. 19-00421, 2019 WL 7340501 (D. Haw. Dec. 30, 2019), District Court Judge Otake recognized and expanded an earlier Judge Gillmor opinion discussing this statute in *Wagner v. Church*, 208 F. Supp. 3d 1138 (D. Haw. 2016). Both courts agreed, a “plain reading” of the statute “permit[ed] broader claims against entities” and “comports with the purpose of the statute and the intent of the legislature” to hold entities responsible for placing a child in a position where he or she may be abused.” *Croyle* at *9, citing *Wagner*, 208 F. Supp. at 1143. “Hawaii has recognized that organizations that place adults in positions of trust and in close proximity to children bear an expansive legal burden to protect children under their custody and care . . .” *Id.* (citing *Doe Parent No. 1 v. State*, 100 Haw. 34, 70, 58 P. 3d 545, 579-93 (2002)). With this framework in mind, Defendants’ overly restrictive interpretation of the statute must be rejected.

2. Apana’s Status as an Agent or Employee of Moving Defendants Falls Squarely Within the Statute

Despite Defendants’ argument to the contrary, as noted above, Plaintiff has alleged Apana was acting as an employee of the Defendants. (Compl. at ¶11). The inquiry should thus end. Instead, moving Defendants ignore this allegation in favor of a tortured comparison of the

³ While the Legislature was facing the discrepancy of preventing claims to go forward against the State in this iteration, the language nonetheless reveals the broad recovery intended by the statute.

definition of the “employee” contained in the workers’ compensation statutes. (Def. Mem. pp. 3-4). Unfortunately for Defendants, borrowing this definition from a completely inapplicable chapter has no relevance here. In the workers’ compensation arena, one must be a paid employee of an employer in order to take part in the workers’ compensation system in order to file a claim for benefits. This makes sense given that an employer’s contributions into the workers’ compensation fund is directly tied to the payment and salary provided to employees. That certainly has no relevance here.⁴

Indeed, Defendants readily admit that borrowing the definition of employment from the workers’ compensation statutes would insulate all religious entities and volunteer organizations. In interpreting a statute, a court “may also consider ‘[t]he spirit of the law, and the cause which induced the legislature to enact it ... to discover its true meaning.’” *In re Jane Doe, Born on June 20, 1995*, 95 Haw. 183, 190, 20 P.3d 616, 623 (2001) (quoting HRS § 1–15(2) (1993) (additional citation omitted)). Given the widespread acknowledgement regarding cover-ups of sexual abuse dating back decades in schools, churches, and volunteer organizations such as the Boy Scouts and youth sports, it is clear the legislature intended to extend the class of plaintiff’s entitled to recover for childhood sexual abuse. Thus, Defendants’ argument ignores the societal woes meant to be addressed by extending the statute.

Defendants also attempt to borrow from Merriam-Webster’s definition of “employ,” yet only furnish the Court with cherry-picked portions of the definitions. (Def Mem. fn.3). A complete reading of Merriam-Webster’s definitions also defines “employ” to includes the definition, “to use or engage the services of” without any reference to payment. See Merriam-Webster.com, definition of employ at <https://www.merriam-webster.com/dictionary/employ> (last

⁴ Defendants also ignore the fact that the definition of “employee” in the workers’ compensation statutes is confined to an “employee under the chapter.” (Def. Mem. pp. 3-4).

visited June 11, 2020). This definition certainly applies to Apana's services on behalf of moving Defendants. For these reasons, Defendants' premise regarding the use of definitions found in the workers compensation laws or based on incomplete citations contained in secondary resources to unreasonably restrict the application of the statute should be rejected.

3. Moving Defendants Owed a Special Relationship Duty to Plaintiff and the Harm to Plaintiff Was Foreseeable

Defendants owed a duty to Plaintiff by virtue of a Special Relationship as recognized in the Restatement (Second) of Torts.⁵ The Restatement test for existence of a Special Relationship Duty is found at § 315 (1965) which provides:

There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless:

- (a) A special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
- (b) A special relationship exists between the actor and the other which gives to the other a right of protection.

Factors relevant to a court's determination of duty include:

whether a special relationship exists ..., the foreseeability of harm to the injured party, the degree of certainty that the injured party suffered injury, the closeness of the connection between the defendants' conduct and the

⁵ Although not recognized by Defendants, the Restatement also imposes an Affirmative Action Duty. For example, Restatement (Second) of Torts § 324A (1965) provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) His failure to exercise such care increases the risk of such harm, or
- (b) He has undertaken to perform a duty owed by the other to the third person, or
- (c) The harm is suffered because of reliance of the other or the third person upon the undertaking.

Notice the Restatement contains no restriction on liability dependent upon whether the actor was paid or not, conflicting with Defendants' arguments in this regard. Again, although not acknowledged by Defendants, the Restatement also recognized a duty applicable to Plaintiff's Complaint under this section. As was eloquently stated by the court in *Fochtman v. Honolulu Police and Fire Departments*, 65 Haw. 180, 183, 648 P.2d 1114, 1116 (1982), "If there is no duty to come to the assistance of a person in difficulty or peril, there is at least a duty to avoid any affirmative acts which makes his situation worse." As noted, moving Defendants held Apana out as an elevated member and leader of its congregation. But for these actions and the acquiescence by silence of his prior instances of abuse, Plaintiff never would have been in a position to be assaulted.

injury suffered, the moral blame attached to the defendants, the policy of preventing harm, the extent of the burden to the defendants and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Lee v. Corregedore, 83 Haw. 154, 164, 925 P.2d 324, 334 (1996). Once again, Defendants simply ignore the allegations of Plaintiff's Complaint to argue that it owed no duty. As noted *supra*, Plaintiff has described the duty owed by Defendants throughout her Complaint, and the inquiry on a Rule 12 motion is limited to the allegations contained therein.

Judge Gillmor sitting in Hawai'i Federal District Court succinctly demonstrated the proper disposition of a motion such as the one brought by Defendants where it is argued that no duty arises despite contrary allegations in the complaint. *Roe v. Ram*, 2014 WL 10474393 (D. Haw. Nov. 26, 2014) (unpublished opinion) (copy attached as Exhibit 2). In *Roe*, the Catholic Church and Catholic Charities had argued for dismissal based on lack of duty where it had placed a child into a foster care home with knowledge that the foster parent had a history of pedophilia and while assuring the child's mother that the perpetrator was a fit foster parent. *Id.* at *2. Based on the allegations of duty in the Complaint, Judge Gillmor found that the *Roe* Defendant did "not meet his heavy burden of establishing that Plaintiff has failed to state a claim against Defendants Catholic Charities and the Catholic Church." *Id.* at *6. On a similar basis, Defendants' motion here should also be denied. Nonetheless, Plaintiff will examine the pertinent Restatement.

Moving Defendants owed a duty of care under subsection (a) of the Restatement to Plaintiff to protect her from foreseeable risks of harm because Makaha Kingdom Hall had entered a special relationship with Apana as it, through Watchtower, appointed him as an Elder and provided him with the title, responsibilities and authority of a church Elder, a position which caused the parents of minor female children in the congregation to view Apana as a person of authority and

trustworthiness, and shielded him from investigations by authorities. The special status and protection which Defendants accorded Apana facilitated Apana's pedophilic attacks on Plaintiff and others.

Similarly, Defendants had a special relationship duty of care to Plaintiff under subsection (b) because they undertook an investigation and adjudication of Apana's pedophilic attacks on minor female congregants prior to the abuse perpetrated upon Plaintiff. Defendants knew or should have known that an investigation by the authorities would reduce the risk of physical harm to the congregation's minor female congregants, including Plaintiff. See *Fochtman v. Honolulu*, 65 Haw. 180 (1982) (sufficient claim stated because of evidence that the statements of two police officers to a man who had seen what he believed to be distress signals from Hahaione Ridge, that they [the police officers] would "check it out," worsened the situation because it discouraged the witness from taking further steps to render aid and assistance). Defendants breached their duty to Plaintiff because their investigation and adjudication in fact created a safe harbor for Apana to continue his pedophilic attacks on minor female congregants, including Plaintiff. Defendants' investigation and adjudication:

- (a) shielded Apana from investigation, arrest, prosecution, and consequences in the criminal justice system;
- (b) hid from the congregation the facts of Apana's pedophilia, and;
- (c) silenced the members of the congregation who knew of Apana's pedophilic attacks on minor female congregation members, and thus increased the risk of harm to its minor female congregants beyond that which existed without this cover-up.

Compl. at ¶78.

Given these affirmative actions and concealments, Defendants owed a duty to Plaintiff under controlling Hawai'i law. *Doe Parents No. 1*, 100 Haw. at 72 (it is axiomatic that any person,

whether in a special relationship or not, is required to exercise ordinary care in the activities it affirmatively undertakes to prevent foreseeable harm to others).

This sound logic has also been applied in *Wada v. Aloha King, LLC*, 154 F. Supp. 3d 981, 997 (D. Haw. 2015). “A special relationship exists between Defendant Abso and Dale McShane as they agreed to assess his criminal background in order to evaluate any threat he may pose to patrons of the storage facility. There are allegations that Defendant Abso knew or should have known that Dale McShane posed a risk to the patrons of the storage facility based on his felony conviction and registered sex offender status.” *Id.* Other state courts have issued similar rulings.⁶

Cases cited by Defendants to the contrary are non-binding and readily distinguishable. *Conti v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 235 Cal. App. 4th 1214 (2015) involved allegations of one member of a congregation molesting another member. The perpetrator in that case was not a church Elder entrusted with the increased respect and elevated status enjoyed by Apana here when he sexually abused Plaintiff. Moreover, the court in *Conti* specifically allowed recovery for the church’s failure to limit and supervise the perpetrator’s “field service,” a church-sponsored activity where members go door to door preaching in the community. The perpetrator had unsupervised access to the plaintiff during field service that he used as opportunities to molest

⁶ See also, *Doe v. Hartz*, 52 F.Supp.2d 1027, 1074 (N.D. Iowa 1999). The plaintiff filed a negligence claim against the church that employed a priest she alleged had molested her. The District Court for the Northern District of Iowa held that the church had a duty of care to the plaintiff pursuant to Restatement (Second) of Torts § 319. *Id.* at 1073–74. The District Court ruled that there were sufficient allegations for plaintiff to state a claim for negligence based on her assertion that the church defendants knew of the priest’s mental defect that rendered him unable to control his sexual behavior toward women and girls such that he posed a threat to parishioners; *C.J.C. v. Corporation of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262, 273, 276 (1999) (en banc) (finding plaintiff stated a negligence claim against church elders who knew the priest had sexually abused children in the past and did not prevent his contact with children); *Funkhouser v. Wilson*, 89 Wn. App. 644 (1998) (summary judgment reversed where plaintiffs were sexually abused by a deacon. The abuse did not take place on church premises or during church-sponsored activities, but the church had received a report of a previous molestation by the perpetrator before they decided to make him a deacon). *Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125, 523 S.E.2d 826, 832 (2000) (finding plaintiff stated a claim against a hospital for failure to protect her from sexual assault committed by another patient).”

her. Similarly, in *Berry v. Watchtower Bible & Tract Soc’y*, 879 A. 2d 1124 (N.H. 2005), the perpetrator was not a church Elder, he was rather the father of the abused child.⁷

In any event, this inquiry is not necessary at this time given the Rule 12 standards. Plaintiff has made good faith allegations regarding Apana’s employment, duty, and breach of Defendants’ duty in the Complaint, and thus Defendants’ motion must be Denied.

a. Apana’s Conduct was Foreseeable

There is no question that repeated instances of sexual abuse against minors were foreseeable after moving Defendants had received previous complaints of similar sexual abuse but took no action to prevent it in the future. The Complaint alleges Defendants knew that Apana had sexually assaulted another minor female member of their congregation at his home, and also that he sexually assaulted his own minor daughter. Does the danger only have to exist at the church? Defendants suggest the answer is “yes,” but the history of Apana’s sexual abuse and case law do not support that argument.

There is a rich history of legal entities bearing responsibility for acts of sexual abuse perpetrated by an employee or agency thereof even where the abuse occurred somewhere other than the entities’ premises. See *N.L. v. Bethel School District*, 186 Wn. 2d 422 (2016) (the fact that a rape occurred off school grounds was not determinative in a claim against the school district); *Brown v. USA Taekwondo*, 40 Cal. App. 5th 1077 (2019) (Possibility of coaches committing sexual abuse against youth athletes while attending high-level competitions or while alone with

⁷ The additional out-of-State cases relied on by Defendants are similarly distinguishable. *Meyer v. Lindala*, 675 N.W.2d 635 (Minn. App. 2004) did not involve an Elder committing sexual abuse, but rather a parishioner. Additionally, the *Meyer* court was deciding a Rule 56 motion, not a Rule 12 motion. Not only did the court in *Bryan R. v. Watchtower Bible & Tract Soc’y*, 738 A. 2d 839 (Me. 1999) not involve abuse committed by an Elder, but it also recognized that claims against a church may proceed where the perpetrator of sexual abuse occupied any clerical position such as priest, minister, or pastor (citing *Swanson v. Roman Catholic Bishop of Portland*, 692 A. 2d 441 (Me. 1997)). Finally, in *Doe v. Corp. of the President of The Church of Jesus Christ of Latter-Day Saints*, 98 P. 3d 429 (Utah App. 2004), the plaintiff did not allege that the perpetrator was a member of the church’s clergy. The *Doe* court was also reviewing a unique Utah statute that has no application here.

athletes on overnight trips was reasonably foreseeable, and, thus, foreseeability factor of inquiry into whether to limit or excuse duty of care of national governing body for Olympic sport of taekwondo to prevent coach from harming athletes weighed against excusing duty, even if governing body did not know of prior sexual misconduct by that specific coach; sexual abuse of minors by authority figures was well-known in society, national team coach for same martial art was previously caught having sex with young athlete, and sexual abuse of youth athletes by credentialed coaches was so rampant that national Olympic committee required governing bodies to have insurance for coach sexual abuse); *N.K. v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 522 (2013) (Award of summary judgment in favor of church reversed. Church had a duty to use “reasonable precautions to protect children in the church’s care from foreseeable hazards, a category that may include the risk of child sex abuse by scout leaders. This duty does not depend on the church having prior knowledge that its volunteer scout leader was a molester.”). As these cases illustrate, the location of the harm is not determinative of whether or not Defendant has a duty or Plaintiff’s injuries were foreseeable.

In addition, Hawai‘i law recognizes that when analyzing foreseeability, the potential gravity of a harm corresponds to one’s responsibility to mitigate that harm. See *Knodle v. Waikiki Gateway Hotel, Inc.*, 69 Hawai‘i 376, 386, 742 P.2d 377, 388 (1987) (“[a]s the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.” (citation omitted)). Applied here, Defendants not only knew of the gravity of the harm posed to minor children, but that this harm was perpetrated by one of their Elders against their congregants. As is illustrated in the Complaint, Plaintiff has alleged sufficient facts demonstrating her abuse was foreseeable, Defendants’ motion should be Denied.

b. Defendants Maintained a Degree of Responsibility or Control

Finally, moving Defendants argue entitlement to dismissal under the second avenue of recovery found in the statute. As discussed *supra*, Plaintiff has met her burden to proceed under the first provision of the statute. Nonetheless, it is telling that Defendants cite to absolutely no authority for their final argument. Instead, Defendants simply mischaracterize Plaintiff's Complaint stating "[t]he Complaint does not allege that Religious Defendants were responsible for, or even were aware of that situation...." (Def. Mem. p. 7).

This however completely ignores the allegations noted above and in Plaintiff's Complaint demonstrating that the moving Defendants not only supervised, directed, and controlled Apana, but also that Defendants had been informed of previous instances where Apana had sexually abused young female congregants in his home. Yet knowing this, Defendants hid this abuse and continued to hold Apana up as a respected Elder and trusted authority figure. Defendants did nothing to stop Apana or to protect the children of their congregation – in fact they took steps that compounded the danger.⁸ These allegations are detailed throughout Plaintiff's Complaint, and under Hawai'i law, Plaintiff has more than met the pleading standard required.

⁸ See also fn 5, *supra*, discussing a duty for one who undertakes an affirmative action or service to another.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court enter an Order Denying moving Defendants' Motion to Dismiss.

DATED: Honolulu, Hawai'i. June 12, 2020.

/s/ Matthew C. Winter
MARK S. DAVIS
LORETTA A. SHEEHAN
MATTHEW C. WINTER
JAMES S. ROGERS [*Pro Hac Vice Pending*]

Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

N.D.,

Plaintiff,

vs.

MAKAHA, HAWAII CONGREGATION OF
JEHOVAH'S WITNESSES, a Hawaii non-profit
unincorporated religious organization, a.k.a.
MAKAHA CONGREGATION OF
JEHOVAH'S WITNESSES and KINGDOM
HALL, MAKAHA CONGREGATION OF
JEHOVAH'S WITNESSES; WATCHTOWER
BIBLE AND TRACT SOCIETY OF NEW
YORK, INC., a New York corporation;
CHRISTIAN CONGREGATION OF
JEHOVAH'S WITNESSES, a New York
non-profit corporation; KENNETH L. APANA,
Individually; and Does 1 through 100, inclusive,

Defendants.

CIVIL NO. 1CCV-20-0000390
(Non-Motor Vehicle Tort)

DECLARATION OF MATTHEW C.
WINTER

DECLARATION OF MATTHEW C. WINTER

I, MATTHEW C. WINTER, do attest and declare that:

1. I am an attorney duly licensed to practice law in the State of Hawaii and one of the attorneys for Plaintiff in the above-captioned matter.

2. I make this declaration based on my personal knowledge, and I am competent to testify as to the matters set forth herein.

3. Attached hereto as Exhibit 1 is a true and correct copy of the Complaint filed on March 10, 2020.

4. Attached hereto as Exhibit 2 is a true and correct copy of a printout of an unpublished opinion in *Roe v. Ram*, 2014 WL 10474393 (D. Haw. Nov. 26, 2014).

I declare under penalty of perjury that the foregoing statements are true and accurate.

Executed in Honolulu, Hawai'i, on June 12, 2020.

/s/ Matthew C. Winter
MATTHEW C. WINTER

OF COUNSEL:
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

N.D.,

Plaintiff,

vs.

MAKAHA, HAWAII CONGREGATION OF
JEHOVAH'S WITNESSES, a Hawaii non-
profit unincorporated religious organization,
a.k.a. MAKAHA CONGREGATION OF
JEHOVAH'S WITNESSES and KINGDOM
HALL, MAKAHA CONGREGATION OF
JEHOVAH'S WITNESSES; WATCHTOWER
BIBLE AND TRACT SOCIETY OF NEW
YORK, INC., a New York corporation;
CHRISTIAN CONGREGATION OF
JEHOVAH'S WITNESSES, a New York non-
profit corporation; KENNETH L. APANA,
Individually; and Does 1 through 100,
inclusive,

Defendants.

CIVIL NO.

(Other Non-Vehicle Tort)

**COMPLAINT, DEMAND FOR JURY
TRIAL; AND SUMMONS**



COMPLAINT

Plaintiff N.D., by and through her attorneys, DAVIS LEVIN LIVINGSTON and the LAW OFFICES OF JAMES S. ROGERS (*pro hac vice* petition pending) hereby submits this Complaint against the above-named Defendants, alleges and avers as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to Hawaii Revised Statutes (“HRS”) §§603-21.5 and 634-35 because the relevant events occurred in the City and County of Honolulu, State of Hawaii.

2. Venue is proper before this Court under HRS § 603-36.

3. The requirements set forth under HRS §657-1.8, extending the statute of limitations, have been met by Plaintiff, for whom a Certificate of Merit will be filed separately under seal.

PLAINTIFF

4. N.D. is proceeding by initials only because (1) this case involves sensitive matters that are of a personal nature, (2) Plaintiff is particularly vulnerable to the harms of disclosure, (3) identification or disclosure poses a risk of retaliation of mental, physical, reputational, and/or economic harm to the Plaintiff, (4) identification or disclosure will subject Plaintiff to intense humiliation, embarrassment, ridicule, stigmatization, scrutiny, and/or isolation due to the sexual abuse and molestation she was subjected to as a child, (5) identification or disclosure poses a risk of irreparable harm to her career, employment, reputation, and/or standing in the community, (6) identification or disclosure will aggravate, amplify, and/or exacerbate her condition, injury, and/or loss that are at issue in this litigation, (7) Defendants are not prejudiced by allowing Plaintiff to proceed using only her initials and any prejudice can be mitigated by the court, (8) her identity has

been kept confidential thus far, (9) the public interest in disclosure of Plaintiffs' identity is minimal, (10) the public has an interest in allowing Plaintiff to proceed using her initials only so that injustices, such as the one the Plaintiff has suffered, are rectified and the parties responsible for perpetrating the harm are held liable, and (11) Defendants are not prejudiced by allowing the Plaintiff to proceed using her initials as the Plaintiff's true identity will be disclosed to Defendants' counsel confidentially by way of a protective order.

PARTIES

4. Plaintiff is a resident of Snohomish County, State of Washington. During the acts and omissions alleged within this Complaint, Plaintiff was a resident of the City and County of Honolulu, State of Hawaii.

5. Upon information and belief, Defendant Makaha, Hawaii Congregation of Jehovah's Witnesses is a Hawaii non-profit unincorporated religious organization, a.k.a. Makaha Congregation of Jehovah's Witnesses and Kingdom Hall, Makaha Congregation of Jehovah's Witnesses ("Makaha Kingdom Hall") located in Waianae, Hawaii and conducts its church business operations in the State of Hawaii, including, but not limited to, Waianae, O'ahu, and other cities in the County of Honolulu. In addition, Defendant Makaha Kingdom Hall is vicariously liable under the doctrine of *respondeat superior* for the grossly negligent acts and omissions of individuals who were acting within the course and scope of their role within Makaha Kingdom Hall, and/or their actual or apparent agency with Makaha Kingdom Hall.

6. Defendant Watchtower Bible and Tract Society of New York, Inc. ("Watchtower") is a New York corporation, with its principal place of business in the State of New York. Upon information, Watchtower is authorized to conduct, and does, business in the State of Hawaii, County of Honolulu. Upon information and belief, at all times prior to April of 2001, Watchtower

organized, administered, and directed the affairs of Jehovah's Witnesses in the United States and in Hawaii. In addition, Watchtower is vicariously liable under the doctrine of *respondeat superior* for the grossly negligent acts and omissions of individuals who were acting within the course and scope of their role within Watchtower and/or Makaha Kingdom Hall, and/or their actual or apparent agency with Watchtower or Makaha Kingdom Hall.

7. Christian Congregation of Jehovah's Witnesses is a non-profit religious corporation with its principal place of business in the State of New York. Upon information and belief, in or about April of 2001, Christian Congregation of Jehovah's Witnesses assumed from Watchtower the obligation to operate the Service Department of the United States Branch of Jehovah's Witnesses, and became Watchtower's successor-in-interest. For purposes of this Complaint, Christian Congregation of Jehovah's Witnesses and Watchtower will be referred to collectively as "Watchtower."

8. At all times Defendants Makaha Kingdom Hall, Watchtower and Does 1 through 100 exercised a degree of responsibility or control over the Perpetrator's interactions with minor female congregants, including Plaintiff, in that at all times Defendants Makaha Kingdom Hall, Watchtower and Does 1 through 100 chose to confer upon Perpetrator the special status and authority of an Elder, and by choosing to cover-up Perpetrator's pedophilic attacks on minor female members of its congregation, rather than to protect its minor female congregants, including Plaintiff. Defendants Makaha Kingdom Hall, Watchtower and Does 1 through 100 decided to protect Perpetrator by failing to report Perpetrator to Child Protective Services and/or the Honolulu Police Department, by conducting an internal investigations under its own standards, by imposing minimal consequences for the commission of pedophilic attacks on minor females in the congregation, by shrouding Perpetrator's sexual abuse in confidentiality, by intimidating witnesses

into secrecy, and by forcing Plaintiff to practice her faith in the presence of the man who had sexually assaulted her on numerous occasions.

9. Upon information and belief, Defendant Kenneth L. Apana (“Perpetrator”) is an individual who, at all times relevant, was an Elder associated with, and supervised, directed and controlled by Defendants Makaha Kingdom Hall and Watchtower. While in his position of authority within Makaha Kingdom Hall and Watchtower, Perpetrator committed acts of child sexual abuse against N.D. alleged herein.

10. Defendants Does 1 through 100, inclusive, are individuals and/or businesses or corporate entities incorporated in and/or doing business in Hawaii whose true names and capacities are unknown to Plaintiff who therefore sues each defendant by such fictitious names, and who will amend the Complaint to show the true names and capacities of each such Defendant Doe when ascertained. Each such Defendant Doe is legally responsible in some manner for the events, happenings, and/or tortious and unlawful conduct that caused the injuries and damages alleged in this Complaint.

11. Each Defendant is the agent, servant, and/or employee of the other Defendants, and each Defendant was acting within the course and scope of his, her, or its authority as an agent, servant, and/or employee of the other Defendants. Defendants are individuals, corporations, partnerships, and other entities or associations which engaged in, joined in, and conspired with other wrongdoers in carrying out the tortious and unlawful activity described in this Complaint.

FACTUAL ALLEGATIONS APPLICABLE TO ALL COUNTS

12. The organizational structure of the Jehovah’s Witnesses is hierarchical in nature. The organizational head of the religion is Watchtower. Authority flows downward from Watchtower to the local level of the church, which is made up of Congregations.

13. Watchtower is the head of the Jehovah's Witness Hierarchical structure. Watchtower is directed by the Governing Body of Jehovah's Witnesses, a business or religious entity of unknown legal status (hereinafter the "Governing Body"), which is comprised of a fluctuating number of members. Watchtower exercises control of the organization and running of local congregations. Watchtower has published a series of handbooks that are distributed to Elders and are kept secret from other Jehovah's Witnesses and the public. These handbooks provide instructions to the Elders regarding the day-to-day administration of the religion such as the scheduling of congregation meetings, as well as more specific instructions regarding how to respond to allegations of wrongdoing, when to convene a judicial committee, and how to handle certain procedures.

14. Watchtower also provides periodic instructions to local Congregations through letters addressed to All Bodies of Elders. These letters have covered a broad spectrum of topics ranging from standardizing the recordkeeping practices of all Congregations, establishing procedures for ordering literature from Watchtower or remitting payments, to responding to complaints of childhood sexual abuse.

15. Watchtower researches, writes, approves, publishes and distributes its own materials for distribution to actual and prospective Jehovah's Witnesses and for recruitment purposes. Prior to 2001, Watchtower also reviewed and approved or rejected recommendations of prospective Elders of Ministerial Servants. Watchtower directly appoints Circuit and District Overseers.

16. After 2001, some of the responsibilities of Watchtower were assumed by Defendant Christian Congregation of Jehovah's Witnesses, including the appointment of Elders, the

nominating, appointing, supervising, and discipline of publishers, ministerial servants, pioneers, elders and circuit overseers. All claims relevant here occurred prior to 2001.

17. Watchtower also establishes processes for the discipline of members accused of wrongdoing, and receives and keeps records of determinations of disfellowship, or of reproof of individuals appointed by Watchtower as Ministerial Servants or Elders.

18. Above the local congregation level is the circuit. Circuits are generally comprised of 20 to 22 congregations, though this number is variable. Each circuit is staffed by a Circuit Overseer and/or a Substitute Circuit Overseer. Circuit Overseers are directly appointed by Watchtower. Circuit Overseers are sometimes referred to as Traveling Overseers because they travel from one congregation within their circuit to another. The Circuit Overseer generally visits each congregation within his circuit twice yearly. During the Circuit Overseer's visit to a congregation, the Circuit Overseer meets with the Elders of that congregation, conferences about the overall function of the congregation and problems occurring in that congregation generally, and specific issues of importance, such as allegations of child molestation by a congregant. The Circuit Overseers also participate in Field Service and observe the functioning of the congregations.

19. The Circuit Overseer meets with the Elders for the purpose of discussing the men in each congregation, and whether they meet the requirements for appointment as Ministerial Servants or Elders. Prior to 2001, the Circuit Overseer helped the Elders arrive at recommendations to Watchtower for appointments as Ministerial Servants and Elders in Congregations. Prior to 2001, the Circuit Overseer prepared a report of his time at each Congregation and submitted that to Watchtower. Watchtower has the ultimate authority as to whether a candidate is elevated to a Ministerial Servant.

20. At the local level members of the church are divided into congregations. Congregations are run on a daily basis by a Body of Elders. The number of Elders in a given congregation fluctuates depending on the size and needs of that particular congregation, as well as the number of qualified men in that congregation.

21. Elders are responsible for the daily operations and governance of the local church, in this case Makaha Kingdom Hall. The Elders are the highest authority at the congregational level and direct door-to-door preaching activities (e.g., city streets or airports) select potential candidates for becoming Ministerial Servants and Elders, organize weekly church meetings, determine whether an individual is suitable for representing the congregation and Watchtower in the community by becoming a Publisher, handle finances for the local congregation, and determine the guilt, repentance and punishment of congregation members who commit serious sins.

22. To be appointed as an Elder, a person must be a Ministerial Servant in good standing, or have served as an Elder in another congregation within the Jehovah's Witness organization. The Body of Elders of the local congregation, in concert with the Circuit Overseer, identifies potential candidates and determines whether they are suitable for an Elder, and, if they live their life in accordance with appropriate morals. Prior to 2001, once a candidate had been identified by the local authority, a recommendation was made to Watchtower, who had ultimate authority as to whether a candidate was approved and became an Elder.

23. Male baptized Publishers who meet certain requirements may be appointed as "Ministerial Servants." Ministerial Servants serve each of their congregations and aid the Elders in their responsibilities. To be appointed as a Ministerial Servant, a person must be a Publisher in good standing. The Body of Elders of the local church identifies potential candidates, and in concert with the Circuit Overseer, determines whether they are suitable, and if they live their life

in accordance with appropriate morals. Prior to 2001, once a candidate was identified by the local church, a recommendation was made to Watchtower, who had ultimate authority as to whether a candidate was approved and became a Ministerial Servant.

24. Membership in the Jehovah's Witness organization is strictly regulated and monitored. A person can attend open meetings at a congregation for years and not be a member of that congregation. When a person expresses interest in becoming a member of the Jehovah's Witness church, he or she begins a period of Bible Study with a Baptized member of the congregation. The aspirant also engages in self-study during this period of time. After months of study, a person may become an unbaptized publisher. To become an unbaptized publisher, the aspirant must make an application to the congregation's Body of Elders. Such a person must be approved by the Body of Elders, who will consider whether the aspirant exhibits sufficient knowledge of the beliefs and organization of the Jehovah's Witness church for approval as a publisher.

25. Once a person is approved as an unbaptized publisher, he or she is authorized to represent the Jehovah's Witness organization, Watchtower, and the specific congregation, in the community. An unbaptized publisher is authorized to engage in field service, which is the centerpiece of Jehovah's Witness marketing, fundraising, and recruiting activities. Field Service involves, but is not limited to, door-to-door ministry.

26. By participating in Field Service, an unbaptized publisher is authorized by his or her congregation and by Watchtower to distribute Jehovah's Witness literature within the community, to accept donations on behalf of the congregation and Watchtower, and to invite prospective members to attend open congregation meetings as a means of recruitment. The literature distributed during Field Service is written, printed, and published by Watchtower.

27. After several months of study, an unbaptized publisher may seek to become a baptized publisher. Baptism as a Jehovah's Witness is considered an ordination as a minister of the Jehovah's Witness organization. To be approved for baptism, an applicant must be tested and approved by Elders of the local congregation. During the testing, the applicant is asked a series of oral questions relating to the teachings of the Jehovah's Witness organization, as well as questions about the organizational structure of the Jehovah's Witness church, which the applicant must adequately answer prior to being approved for baptism.

28. As stated above, in order to become an Elder, one must have been a baptized publisher, then a Ministerial Servant. In addition to regulating all aspects of an Elder's participation in congregation events, Elders submit to the congregation and Watchtower's control in all other aspects of their lives. An Elder is subject to church discipline for any misdeeds that occurred in church or in the Elder's personal life.

29. Congregants are encouraged to bring problems to the Elders to be resolved rather than seek outside intervention. In practice, when a congregant makes an allegation of sexual abuse, policies of Jehovah's Witnesses and Watchtower require Elders to investigate such a claim. If there are two witnesses to the wrongdoing, or if the accused confesses his wrongdoing, a Judicial Committee within the congregation will be convened. Even in cases of child molestation, if there are not at least two eyewitnesses to the abuse and the accused denies the wrongdoing, then no action will be taken by the congregation, despite the fact that there are rarely eyewitnesses to sexual abuse.

30. If a Judicial Committee is convened, the two original Elders that investigated the wrongdoing will be joined by a third, who will hear the case and impose punishment on the wrongdoer. Possible punishment ranges from a private reproof to disfellowship. Private reproof

is a private censorship of the wrongdoer that generally results in a limitation of the wrongdoer's privileges to engage in Field Service for a short period of time. No announcement is made to the congregation when a wrongdoer is privately reproofed. Disfellowship is expulsion from the congregation. When a wrongdoer is disfellowshipped, an announcement is made to the congregation that the wrongdoer is no longer a Jehovah's Witness, but no details are given regarding the nature of the wrongdoing. A person who is disfellowshipped can seek reinstatement into the congregation by written request to the Elders.

31. In 1989, Watchtower sent a letter to all Bodies of Elders in the United States, instructing them that while many states have mandatory reporting laws, should an allegation of child abuse be made in a congregation, they were to contact Watchtower's legal department immediately.

SEXUAL ABUSE OF PLAINTIFF

32. Plaintiff was born on March 8, 1979. She was raised in a Jehovah's Witness family. From birth until adulthood, she was a member of the Makaha Kingdom Hall Congregation.

33. At the time of the sexual abuse alleged herein, Plaintiff and Perpetrator both belonged to Defendant Makaha Kingdom Hall and regularly attended Jehovah's Witness events and meetings as part of the Congregation.

34. Plaintiff is informed and believes and on that basis alleges that prior to the sexual abuse of Plaintiff, the Perpetrator had been appointed and confirmed as an Elder in the Makaha Kingdom Hall Congregation.

35. Plaintiff is informed and believes and on that basis alleges that Perpetrator was in charge of delegating all field research for Defendant Makaha Kingdom Hall.

36. Perpetrator enjoyed a position of status and authority within the Makaha Kingdom Hall Congregation. His position as church Elder conferred authority and trustworthiness which provided him with unquestioned access to Plaintiff.

37. In or about 1992, Perpetrator had a residence approximately two miles from Defendant Makaha Kingdom Hall.

38. During all relevant times herein, Plaintiff resided approximately one block away from Perpetrator's residence.

39. Perpetrator had a daughter that was of similar age to the Plaintiff. Plaintiff was friends with Perpetrator's daughter.

40. Plaintiff's parents permitted the Plaintiff to attend sleepovers at Perpetrator's home due to Perpetrator's elevated status as a church Elder in Makaha Kingdom Hall.

41. Plaintiff attended numerous sleepovers at the Perpetrator's home in 1992, when she was 12-13 years of age.

42. During these sleepovers, Perpetrator would enter the room in which Plaintiff was sleeping. He would slide his hands down her belly and place his hand on her vulva. This occurred multiple times. Perpetrator would insert his finger into the Plaintiff's vagina. This occurred numerous times.

43. In or about 1992, Plaintiff spent ten (10) days residing in the Perpetrator's home because the Plaintiff's mother was about to have a baby and Plaintiff had been exposed to chicken pox while staying at Perpetrator's home.

44. During this particular 10-day sleepover, Perpetrator committed criminal acts of sexual abuse against the Plaintiff every night, to include fondling the Plaintiff's vulva and digitally penetrating the Plaintiff's vagina.

45. Plaintiff is informed and believes and on that basis alleges that sexual abuse occurred approximately 30 times in or around 1992. To prevent further abuse, Plaintiff began to wrap herself tightly in blankets. In this way, Plaintiff believes that she may have successfully prevented additional acts of sexual abuse on several occasions.

46. Plaintiff is informed and believes and on that basis alleges that in approximately 1991 or 1992, before Plaintiff disclosed her abuse, N.M, a parent and female member of Makaha Kingdom Hall, reported to church officials at Makaha Kingdom Hall that her minor daughter L.M. had been sexually abused by Perpetrator during sleepovers at Perpetrator's home. This resulted in an internal inquiry which was done by Makaha Kingdom Hall.

47. L.M. reported Perpetrator's sexual abuse in the internal investigation performed by Makaha Kingdom Hall. Parent N.M. further reported that the Perpetrator was sexually abusing his own biological daughters.

48. Defendants refused to accept L.M.'s account of the abuse, and told N.M. and L.M. that the Jehovah's Witness Church rules required two witnesses in order to substantiate a claim of sexual abuse.

49. As part of the internal process, the Perpetrator confessed to Makaha Kingdom Hall Elders that he had sexually abused L.M.

50. Due to the sexual abuse of L.M., Perpetrator was "reproved" by the Defendants, meaning that he had been disciplined by the local church.

51. Plaintiff is informed and believes and on that basis alleges that the Perpetrator's "reproval" was a "silent reproval" meaning that no announcement was made to the congregation and Plaintiff's parents, therefore, were unaware that a punishment had been imposed.

52. After Plaintiff had suffered multiple attacks of sexual abuse, Plaintiff's mother contacted Parent N.M., because she knew that L.M. and Perpetrator's daughter were friends. N.M. told Plaintiff's mother that she could not discuss the situation because Makaha Kingdom Hall Elders had told her to keep the matter "confidential."

53. Plaintiff's mother then met one of Perpetrator's daughters and confronted her. Perpetrator's daughter also disclosed sexual abuse to her by her father, i.e., Perpetrator, and stated that it had been occurring for three years.

54. Armed with this information from Perpetrator's daughter, Plaintiff's mother called Parent N.M. again. This time Parent N.M. admitted that L.M. had been the victim of sexual abuse by Perpetrator and revealed that L.M.'s abuse had been reported to Makaha Kingdom Hall in 1991 or 1992 by Parent N.M. and L.M.

55. After learning that the Perpetrator's daughters and L.M. were both victims of sexual abuse by Perpetrator, Plaintiff's mother then confronted Plaintiff, who disclosed that Perpetrator had sexually abused her repeatedly.

56. After learning of Plaintiff's sexual abuse, Plaintiff was not permitted to attend sleepovers at Perpetrator's home.

57. Plaintiff's sexual abuse was reported to Defendant Makaha Kingdom Hall, who convened a Judicial Committee regarding the Perpetrator's sexual molestation of Plaintiff.

58. Plaintiff is informed and believes and on that basis alleges that Defendant Makaha Kingdom Hall was again told that the Perpetrator was sexually abusing his own daughter.

59. During the Judicial Committee meeting, Perpetrator admitted that he had sexually abused Plaintiff.

60. Following the Judicial Committee meeting, Perpetrator was disfellowshipped from Makaha Kingdom Hall for approximately a one-year period.

61. Defendant Makaha Kingdom Hall Elders told Plaintiff that the Church would not support her if she reported Perpetrator's conduct to local law enforcement.

62. Following the period of disfellowship, Perpetrator was required to apologize to Plaintiff, and thereafter Perpetrator was permitted to return to the Makaha Kingdom Hall church.

63. Thereafter, Plaintiff and Perpetrator attended the same church services.

64. After Perpetrator was reinstated at Makaha Kingdom Hall, two Elders from the Church conducted a "sheparding call" at Plaintiff's grandmother's house. This occurred three to six months after Plaintiff had disclosed Perpetrator's sexual abuse.

65. During this "sheparding call" Elders met with Plaintiff and members of her family and attempted to dissuade Plaintiff from reporting the sexual abuse to local law enforcement and encouraged her to "move on."

66. In or about 1991 and 1992, the Perpetrator repeatedly committed the crimes of Sexual Assault in the First Degree in violation of Section 707-730, and Sexual Assault in the Third Degree in violation of Section 707-732, H.R.S. against Plaintiff.

67. Due to the hierarchy of the Jehovah's Witness Church, and the Jehovah's Witness Church's role in her life and community, and the intimidation imposed in "sheparding call" and threats to remove her from the church, Plaintiff did not tell others about Perpetrator's sexual abuse or report Perpetrator's sexual abuse to CPS or HPD, nor did she immediately seek medical treatment or counseling.

FIRST CLAIM FOR RELIEF
SEXUAL ASSAULT/AIDING & ABETTING SEXUAL ASSAULT

68. Plaintiff re-alleges and incorporates all paragraphs of this Complaint as though fully alleged herein.

69. In or about 1992, Perpetrator victimized Plaintiff, a minor, by committing numerous criminal acts of sexual abuse against a minor.

70. Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100 aided and abetted in Perpetrator's numerous acts of sexual abuse of a minor against Plaintiff via his status as an agent of the Church. The trust, respect, and authority engendered by Perpetrator's position as Church Elder aided and abetted Perpetrator's sexual abuse of Plaintiff.

71. Perpetrator was aided in the commission of numerous acts of sexual abuse of a minor against Plaintiff via the protection accorded him by Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100. The decisions by Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100 to decline to report Perpetrator to CPS and HPD, to conduct confidential internal investigations into Perpetrator's pedophilic assaults of minor female congregants, to provide minimal consequences as a result of its investigations, and to intimidate witnesses into secrecy, aided and abetted Perpetrator's sexual abuse of Plaintiff.

72. Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100's acts and omissions were intentional, willful, wanton, oppressive, and malicious, and reflected a callous disregard of and a callous indifference to the rights and safety of Plaintiff.

73. As a direct and proximate result of Defendants' wrongful conduct, actions, inactions, and/or failures, Plaintiff has suffered and will continue to suffer pain and suffering, mental anguish, emotional distress, loss of quality of life, loss of enjoyment of life, temporary and/or partial impairment and/or disability, emotional disfigurement and/or scarring, loss of

income, economic loss, medical expenses, and other expenses, and is therefore entitled to recover special, general, and/or punitive damages in such amounts as to be shown a trial or hearing hereof.

**SECOND CLAIM FOR RELIEF
GROSS NEGLIGENCE**

74. Plaintiff re-alleges and incorporates all paragraphs of this Complaint as though fully alleged herein.

75. At all relevant times, Perpetrator held a position of authority as an agent of Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100 in his role as an Elder within the Jehovah's Witness church.

76. At all relevant times, the Church had adopted a duty to protect Plaintiff from the foreseeable risk of harm of sexual abuse when it:

- (a) conferred upon Perpetrator the special status of "Elder";
- (b) learned of Perpetrator's pedophilic attacks on minor female members of its congregation;
- (c) failed to transmit reports of Perpetrator's pedophilic attacks on minor female members of its congregation to Child Protective Services and/or to the Honolulu Police Department;
- (d) conducted an internal investigation under its own investigation standards;
- (e) required only a "silent reproval" for the commission of Class A and Class C felonies;
- (f) kept the results of its internal investigation confidential;
- (g) protected Perpetrator from consequences by the criminal and civil justice systems;
- (h) instructed the members of its congregation not to reveal any information regarding Perpetrator or his pedophilic attacks on minor female congregants;
- (i) reinstated Perpetrator in the congregation;
- (j) forced Plaintiff to practice her faith in the presence of the man who had sexually assaulted her on numerous occasions, and;
- (k) dissuaded members of the congregation, including Plaintiff, from reporting Perpetrator for pedophilic attacks on minor female congregants.

77. At all relevant times, the Church owed a duty of care to Plaintiff to protect her from foreseeable risks of harm because the Church had entered a special relationship with Perpetrator as it provided him with the title, responsibilities and authority of a church Elder, a position which

caused the parents of minor female children in the congregation to view Perpetrator as a person of authority and trustworthiness, and shielded him from investigations by CPS and HPD. The special status and protection which the Church accorded Perpetrator facilitated Perpetrator's pedophilic attacks on Plaintiff.

78. At all relevant times, the Church owed a duty of care to Plaintiff because the Church undertook an investigation and adjudication of Perpetrator's pedophilic attacks on minor female congregants. The Church knew or should have known that an investigation by CPS and/or HPD and prosecution by the Office of the Prosecuting Attorney ("OPA") would reduce the risk of physical harm to its minor female congregants, including Plaintiff. The Church breached its duty to Plaintiff, because the Church's investigation and adjudication in fact created a safe harbor for Perpetrator to continue his pedophilic attacks on minor female congregants, including Plaintiff. The Church's investigation and adjudication:

- (a) shielded Perpetrator from investigation, arrest, prosecution, and consequences in the criminal justice system;
- (b) hid from the congregation the facts of Perpetrator's pedophilia, and;
- (c) silenced the members of the congregation who knew of Perpetrator's pedophilic attacks on minor female congregation members,

and thus increased the risk of harm to its minor female congregants beyond that which existed without the investigation and adjudication.

79. By attempting to dissuade Plaintiff from reporting Perpetrator's sexual abuse to law enforcement, Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100 created a circumstance in which Plaintiff was far less likely to receive medical/mental health care and treatment, thus exacerbating the harm to Plaintiff.

80. Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100 breached the above-listed duties of care in a manner that was intentional, willful, wanton, oppressive,

malicious, or grossly negligent and which reflect a callous disregard of and a callous indifference to the rights and safety of Plaintiff. Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100's acts and omissions have caused and continue to cause Plaintiff pain, suffering, mental anguish, emotional distress, loss of quality of life, loss of enjoyment of life, temporary and/or partial impairment and/or disability, emotional disfigurement and/or scarring, loss of income, economic loss, medical expenses, and other expenses and are therefore liable in special, general and punitive damages.

THIRD CLAIM FOR RELIEF HINDERING PROSECUTION

81. At all relevant times, Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100 had a duty to follow the law of the State of Hawaii, to wit, to avoid committing the offense of Hindering Prosecution in the First Degree, a violation of Section 710-1029, H.R.S. and Hindering Prosecution in the Second Degree, a violation of Section 710-1030, H.R.S.

82. Starting in about 1991 and thereafter Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100 collectively committed, and aided and abetted in committing the offenses of Hindering Prosecution in the First Degree, a violation of Section 710-1029, H.R.S. and Hindering Prosecution in the Second Degree, a violation of Section 710-1030, H.R.S. by preventing or obstructing by means of intimidation, anyone from performing an act that might aid in the discovery, apprehension, prosecution or conviction of such person and by rendering assistance to Perpetrator in the cover-up of his crimes.

83. Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100's breach of the law was gross and egregious, reflecting a callous disregard of and a callous indifference to the rights and safety of Plaintiff.

84. As a direct and proximate result of Defendants' intentional and knowing commission of Hindering Prosecution in the First Degree and/or Hindering Prosecution in the Second Degree, an intentional and knowing breach of aforesaid duties, Plaintiff has suffered and will continue to suffer pain and suffering, mental anguish, emotional distress, loss of quality of life, loss of enjoyment of life, temporary and/or partial impairment and/or disability, emotional disfigurement and/or scarring, loss of income, economic loss, medical expenses, and other expenses, and is therefore entitled to recover special, general, and punitive damages.

**FOURTH CLAIM FOR RELIEF
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

85. Plaintiff re-alleges and incorporates all paragraphs of this Complaint as though fully alleged herein.

86. Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100 were aware of the Perpetrator's commission of acts of sexual abuse against minor females, and yet intentionally chose to protect Perpetrator, not its minor female members of its congregation. Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100 did so by declining to contact CPS and HPD with reports of sexual abuse against minor females in the congregation, by choosing instead to conduct an internal investigation under its own standards, by imposing minimal consequences for the commission of Class A and Class C felonies, by choosing not to warn of Perpetrator's pedophilic attacks on minor female members of the congregation, by failing to restrict Perpetrator's activities within the Church, by discouraging victims and witnesses from reporting Perpetrator's sexual abuse, by imposing requirements of confidentiality amongst victims and witnesses, by intimidating Plaintiff and her family from reporting Perpetrator's sexual abuse, and by forcing Plaintiff to practice her faith in the presence of the man who had sexually abused her on multiple occasions. These acts and omissions by Defendants Makaha Kingdom Hall,

Watchtower, and Does 1 through 100 in fact promoted the commission of sexual offenses against minor females, including Plaintiff, and proximately caused further acts of sexual abuse by Perpetrator. These acts and omissions by Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100 were outrageous and caused extreme emotional distress to Plaintiff.

87. After being allowed back to the Makaha Kingdom Hall Church by the Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100, the Perpetrator would sit directly in front of Plaintiff during church services causing her additional distress. These actions and inactions by Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100 were outrageous, and caused extreme emotional distress to Plaintiff.

88. Accordingly, the Defendants' acts and omissions, as aforesaid, were intentional, willful, wanton, oppressive, and malicious, and reflected a callous disregard of and a callous indifference to the rights and safety of Plaintiff.

89. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff has suffered and will continue to suffer pain and suffering, mental anguish, emotional distress, loss of quality of life, loss of enjoyment of life, temporary and/or partial impairment and/or disability, emotional disfigurement and/or scarring, loss of income, economic loss, medical expenses, and other expenses, and are therefore entitled to recover special, general, and punitive damages in such amounts as shall be shown at a trial or hearing hereof.

FIFTH CLAIM FOR RELIEF
GROSSLY NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

90. Plaintiff re-alleges and incorporates all paragraphs of this Complaint as though fully alleged herein.

91. Defendants' wrongful conduct constitutes gross negligence infliction of emotional distress.

92. Defendants' wrongful conduct described herein was grossly negligent and done for the purpose of causing or with substantial certainty that Plaintiff would suffer humiliation, mental anguish, and emotional and physical distress. Accordingly, the Defendants' acts and omissions, as aforesaid, were intentional, willful, wanton, oppressive, and malicious, and reflected a callous disregard of and a callous indifference to the rights and safety of Plaintiff.

93. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff has suffered and will continue to suffer pain and suffering, mental anguish, emotional distress, loss of quality of life, loss of enjoyment of life, temporary and/or partial impairment and/or disability, emotional disfigurement and/or scarring, loss of income, economic loss, medical expenses, and other expenses, and are therefore entitled to recover special, general, and punitive damages in such amounts as shall be shown at a trial.

**SIXTH CLAIM FOR RELIEF
GROSS NEGLIGENCE SUPERVISION OF PERPETRATOR**

94. Plaintiff re-alleges and incorporates all paragraphs of this Complaint as though fully alleged herein.

95. At all relevant times, Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100 owed a duty of care to Plaintiff to exercise reasonable care in connection with the training, monitoring, and supervision of Jehovah's Witness Elders, including the Perpetrator, and the protection of Plaintiff.

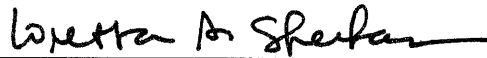
96. The Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100 breached the aforesaid duties by their failure to exercise reasonable care to train, monitor, and supervise the Perpetrator.

97. At all relevant times, the Defendants Makaha Kingdom Hall, Watchtower, and Does 1 through 100 knew that the Perpetrator was having sexual contact with minors. Accordingly, the Defendants' acts and omissions, as aforesaid, were intentional, willful, wanton, oppressive, and malicious, and reflected a callous disregard of and a callous indifference to the rights and safety of Plaintiff.

98. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff has suffered and will continue to suffer pain and suffering, mental anguish, emotional distress, loss of quality of life, loss of enjoyment of life, temporary and/or partial impairment and/or disability, emotional disfigurement and/or scarring, loss of income, economic loss, medical expenses, and other expenses, and are therefore entitled to recover special, general, and/or punitive damages in such amounts as shall be shown at a trial or hearing hereof.

WHEREFORE, Plaintiff prays for judgement in her favor and against Defendants, jointly and severally, for special, general, economic, pecuniary, compensatory, consequential, and/or punitive damages, together with costs of suit, reasonable attorneys' fees, pre-and post-judgment interest, and any other relief deemed just and equitable by the Court.

Dated: Honolulu, Hawaii, March 10, 2020.



MARK S. DAVIS
LORETTA A. SHEEHAN
MATTHEW WINTER

JAMES S. ROGERS
HEATHER M. COVER
MICHELLE HYER
(PRO HAC VICE PENDING)
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

N.D.,

Plaintiff,

vs.

MAKAHA, HAWAII CONGREGATION OF
JEHOVAH'S WITNESSES, a Hawaii non-
profit unincorporated religious organization,
a.k.a. MAKAHA CONGREGATION OF
JEHOVAH'S WITNESSES and KINGDOM
HALL, MAKAHA CONGREGATION OF
JEHOVAH'S WITNESSES; WATCHTOWER
BIBLE AND TRACT SOCIETY OF NEW
YORK, INC., a New York corporation;
CHRISTIAN CONGREGATION OF
JEHOVAH'S WITNESSES, a New York non-
profit corporation; KENNETH L. APANA,
individually; and Does 1 through 100,
inclusive,

Defendants.

CIVIL NO.

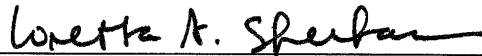
(Other Non-Vehicle Tort)

DEMAND FOR JURY TRIAL

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues triable of right by jury in this
case pursuant to Rule 38 of the Hawaii Rules of Civil Procedure.

Dated: Honolulu, Hawaii, March 10, 2020.



MARK S. DAVIS
LORETTA A. SHEEHAN
MATTHEW WINTER

LAW OFFICES OF JAMES S. ROGERS
JAMES S. ROGERS
HEATHER M. COVER
MICHELLE HYER
(PRO HAC VICE PENDING)

STATE OF HAWAII CIRCUIT COURT OF THE FIRST CIRCUIT	SUMMONS TO ANSWER CIVIL COMPLAINT	CASE NUMBER CIV. NO.
PLAINTIFF N.D.	VS.	DEFENDANT(S) MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVA'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVA'S WITNESSES; WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., et al.
PLAINTIFF'S NAME & ADDRESS, TEL. NO. N.D. c/o MARK S. DAVIS (1442) DAVIS LEVIN LIVINGSTON 851 FORT STREET, SUITE 400 HONOLULU, HI 96813 808 524-7500		
TO THE ABOVE-NAMED DEFENDANT(S) You are hereby summoned and required to file with the court and serve upon MARK S. DAVIS, DAVIS LEVIN LIVINGSTON 851 FORT STREET, SUITE 400, HONOLULU, HI 96813 808 524-7500		
plaintiff's attorney, whose address is stated above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.		
THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS. A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.		
The original document is filed in the Judiciary's electronic case management system which is accessible via eCourt Kokua at: http://www.courts.state.hi.us	Effective Date of 28-Oct-2019 Signed by: /s/ Patsy Nakamoto Clerk, 1st Circuit, State of Hawai'i 	
 In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the Circuit Court Administration Office on OAHU- Phone No. 808-539-4400, TTY 808-539-4853, FAX 539-4402, at least ten (10) working days prior to your hearing or appointment date.		

2014 WL 10474393

Only the Westlaw citation is currently available.

United States District Court, D. Hawai'i.

John ROE No. 43, Plaintiff,

v.

Jay RAM, also known as Gary Winnick, also known as Jay Mizraha; The Roman Catholic Church in the State of Hawaii; Catholic Charities Hawaii; John Does 1–10; Jane Does 1–10; Doe Corporations 1–10; Doe Partnerships 1–10; Doe Non–Profit Entities 1–10; Doe Governmental Entities 1–10, Defendants.

Civ. No. 14–00397 HG–RLP

|

Signed November 26, 2014

Attorneys and Law Firms

Benjamin R.C. Ignacio, Honolulu, HI, Mark F. Gallagher, Law Offices of Mark Gallagher, Kailua, HI, for Plaintiff.

Samuel P. King, Jr., King & King, Attorneys at-Law, Stephen G. Dyer, Ayabe Chong Nishimoto Sia & Nakamura LLLP, Honolulu, HI, for Defendants.

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND (ECF No. 10) and DISMISSING DEFENDANT JAY RAM'S MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM AS MOOT (ECF No. 8)

Helen Gillmor, United States District Judge

*1 Plaintiff John Roe No. 43 filed a Complaint in Hawaii state court alleging state law causes of action against Defendants Jay Ram, Catholic Charities Hawaii, and the Roman Catholic Church in the State of Hawaii. Plaintiff claims Defendant Ram sexually abused him in 1989.

Defendant Jay Ram removed the action to federal court alleging diversity jurisdiction. Plaintiff has filed a Motion to Remand the action to state court. Defendant Ram opposes the Motion to Remand. Defendant Ram has filed a Motion to Dismiss. (ECF No. 8).

Plaintiff's MOTION TO REMAND (ECF No. 10) is **GRANTED**. Defendant Jay Ram's MOTION TO DISMISS

COMPLAINT FOR FAILURE TO STATE A CLAIM (ECF No. 8) is **DISMISSED AS MOOT**.

PROCEDURAL HISTORY

On April 23, 2014, Plaintiff John Roe No. 43 filed a Complaint in the Circuit Court of the First Circuit, State of Hawaii. (Complaint, attached as Exh. 1 to Def. Jay Ram's Notice of Removal, ECF No. 1–1).

On September 4, 2014, Defendant Jay Ram removed the action to the United States District Court, District of Hawaii. (ECF No. 1).

On September 10, 2014, Defendant Ram filed MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM. (ECF No. 7).

On September 12, 2014, Defendant Ram inadvertently re-filed the MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM. (ECF No. 8).

On September 17, 2014, Plaintiff filed a MOTION TO REMAND. (ECF No. 10).

On September 24, 2014, the Court held a Status Conference. (ECF No. 14). The Court determined that Plaintiff may proceed under a pseudonym pursuant to the State Court Order issued before the case was removed. (*Id.*)

At the Status Conference, Defendant Ram made an oral Motion to Withdraw the Motion to Dismiss filed on September 10, 2014 (ECF No. 7) and the Court granted the Motion. (ECF No. 14). A briefing schedule on Plaintiff's Motion to Remand was issued. (*Id.*) The Court held in abeyance Defendant Ram's Motion to Dismiss filed on September 12, 2014 (ECF No. 8), pending the resolution of Plaintiff's Motion to Remand (ECF No. 10). (ECF No. 14).

On October 18, 2014, Defendant Ram filed MOTION TO RESET DATE FOR HEARING ON PLAINTIFF'S MOTION TO REMAND AND TO RESET DEADLINES FOR FILING MEMORANDA. (ECF No. 15).

On October 22, 2014, the Court issued a Minute Order Denying Defendant Ram's Motion to Reset Deadlines (ECF No. 15). (ECF No. 17). The Court extended the briefing

schedule to allow Defendant Ram time to file his Opposition and for the Plaintiff to file his Reply. (*Id.*)

On October 24, 2014, Defendant Ram filed MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND. (ECF No. 18).

On November 7, 2014, Plaintiff filed PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO REMAND. (ECF No. 22).

On November 10, 2014, Plaintiff filed PLAINTIFF'S EX PARTE MOTION FOR LEAVE OF COURT TO FILE DECLARATION IN SUPPORT OF MOTION TO REMAND AND REPLY TO DEFENDANT RAM'S OPPOSITION UNDER SEAL. (ECF No. 23). On the same date, the Court issued a Minute Order granting Plaintiff's MOTION (ECF No. 23) and permitting it to be filed under Seal. (ECF No. 24).

*2 On November 14, 2014, Plaintiff filed a Declaration in Support of his Motion to Remand and Reply. (ECF No. 25).

On November 18, 2014, the Court held a hearing on Plaintiff's Motion to Remand (ECF No. 10).

BACKGROUND

Plaintiff John Roe No. 43 claims that in 1989, when he was around ten or eleven years old, his mother contacted Defendant Catholic Charities Hawaii ("Defendant Catholic Charities") to inquire about placing him in foster care. (Complaint, attached as Exh. 1 to Def. Jay Ram's Notice of Removal, ECF No. 1–1 at ¶¶ 1, 5).

The Complaint asserts that Plaintiff's mother placed him in foster care with Defendant Jay Ram, also known as Gary Winnick, also known as Jay Mizraha, ("Defendant Ram"), upon the recommendation of Defendant Catholic Charities. (*Id.* at ¶¶ 2, 5, 14–18, 27). Plaintiff claims Catholic Charities was and continues to be owned by the Roman Catholic Church in the State of Hawaii ("Defendant the Catholic Church"). (*Id.* at ¶ c).

The Complaint alleges that after Plaintiff was placed in foster care Defendant Ram sexually abused him. (*Id.* at ¶ 6).

The Complaint asserts that Defendant Ram had a history of sexually abusing children that was known to Defendants

Catholic Charities and the Catholic Church. (*Id.* at ¶¶ 6–7, 10–13, 15, 21). Plaintiff claims that Defendants Catholic Charities and the Catholic Church endorsed Defendant Ram as a fit foster parent to his mother, despite their knowledge of Defendant Ram's previous instances of child molestation. (*Id.* at ¶¶ 29–32).

The Complaint asserts that Plaintiff has suffered and continues to suffer injuries and emotional distress as a result of the sexual abuse that occurred in 1989. (*Id.* at ¶ 34).

STANDARD OF REVIEW

A motion to remand may be brought to challenge the removal of an action from state to federal court. 28 U.S.C. § 1447(c); *Moore–Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir.2009). Removal of a civil action is permissible if the district courts of the United States have original jurisdiction over the action. 28 U.S.C. § 1441. There is a "strong presumption" against removal, and "[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992) (internal citations omitted). The "strong presumption" against removal jurisdiction "means that the defendant always has the burden of establishing that removal is proper." *Id.*

Subject matter jurisdiction is conferred on federal courts either through federal question jurisdiction under 28 U.S.C. § 1331, or through diversity jurisdiction under 28 U.S.C. § 1332. *Peralta v. Hispanic Bus., Inc.*, 419 F.3d 1064, 1068 (9th Cir.2005).

Diversity jurisdiction exists when there is complete diversity of citizenship between the parties, and the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332(a); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996). The burden of establishing that diversity jurisdiction exists rests on the party asserting it. *Hertz Corp. v. Friend*, 559 U.S. 77, 96–97 (2010).

ANALYSIS

I. Fraudulent Joinder

Plaintiff moves to remand on the ground that the Court lacks subject-matter jurisdiction. There is no federal question

presented in this case. Plaintiff argues there is no diversity jurisdiction because complete diversity does not exist.

*3 Defendant Jay Ram, also known as Gary Winnick, also known as Jay Mizraha, (“Defendant Ram”) contends that diversity jurisdiction exists because he is a citizen of Florida and Plaintiff is a citizen of Hawaii. Defendant Ram asserts that the non-diverse defendants, Defendants Catholic Charities Hawaii (“Defendant Catholic Charities”) and the Roman Catholic Church in the State of Hawaii (“Defendant the Catholic Church”), were fraudulently joined.

“Fraudulent joinder” is a term of art. *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir.2001). “Joinder of a non-diverse defendant is deemed fraudulent, and the defendant's presence in the lawsuit is ignored for purposes of determining diversity, ‘[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state.’ ” *Id.* (quoting *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir.1987)). There is a general presumption against fraudulent joinder, and the removing defendant carries a heavy burden to prove fraudulent joinder by clear and convincing evidence. *Hamilton Materials, Inc. v. Dow Chemical Corp.*, 494 F.3d 1203, 1206 (9th Cir.2007).

Joinder is not fraudulent if there is any possibility that the plaintiff will be able to establish liability against the non-diverse defendant. *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1046 (9th Cir.2009); *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir.1998) (finding that the defendant must show “that there is no possibility, based on the pleadings, that plaintiff can state a cause of action against the non-diverse defendant in state court”).

Courts “do not decide whether the plaintiff will actually or even probably prevail on the merits, but look only for a possibility that [plaintiff] may do so.” *Dodson v. Spilada Maritime Corp.*, 951 F.2d 40, 42–43 (5th Cir.1992); see *Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329, 1333 (11th Cir.2011) (per curiam) (explaining that the standard is not whether the claim is “plausible” but whether there is “a possibility” the complaint stated a cause of action). Courts ordinarily do not consider a non-diverse defendant's defenses on the merits in determining whether that defendant's joinder was “fraudulent.” *Hunter*, 582 F.3d at 1044.

The allegations of the complaint and facts presented by the defendant in its notice of removal are considered in

determining whether a defendant's joinder is fraudulent. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir.1998). The Court may also consider affidavits presented by either party on the issue of whether a particular defendant's joinder is fraudulent. *West America Corp. v. Vaughan-Bassett Furniture Co., Inc.*, 765 F.2d 932, 936 n.6 (9th Cir.1985).

All disputed questions of fact and ambiguities in the law must be resolved in favor of the plaintiff seeking remand. See *Medow v. Tower Ins. Co. Of New York*, 2011 WL 2678875, *3 (C.D.Cal.2011) (citing *Dodson*, 951 F.2d at 42–43); Schwarzer, et al. Fed. Civ. P. Before Trial § 2:2458 (The Rutter Group 2014).

II. Plaintiff's Complaint States Possible Causes of Action Against Defendants Catholic Charities and the Catholic Church

The fraudulent joinder inquiry in this case is whether there is any possibility that the Complaint has stated a cause of action against the non-diverse defendants, Defendants Catholic Charities and the Catholic Church. *Hunter*, 582 F.3d at 1044.

*4 Plaintiff contends that in 1989 he was sexually abused by Defendant Jay Ram. Plaintiff asserts he has stated possible causes of action against Defendants Catholic Charities and the Catholic Church for recommending Defendant Ram as a fit foster parent.

A. Common Law Gross Negligence

Count II in the Complaint is brought against the Defendants Catholic Charities and the Catholic Church for gross negligence. (Complaint at ¶¶ 40–47, ECF No. 1–1). A successful negligence claim must satisfy the following four elements:

- (1) a duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks;
- (2) a failure on the actor's part to conform to the standard required;
- (3) a reasonably close causal connection between the conduct and the resulting injury; and,
- (4) actual loss or damage resulting to the interests of another.

Ono v. Applegate, 612 P.2d 533, 538–39 (Haw.1980).

Gross negligence requires indifference to a legal duty and a degree of culpability that is higher than ordinary negligence but something less than willful, wanton and reckless conduct. *Pancakes of Hawaii, Inc. v. Pomare Properties Corp.*, 944 P.2d 83, 90 (Haw.App.1997); *Cape Flattery Ltd. v. Titan Maritime LLC*, Civ. No. 08–0462JMS–KSC, 607 F.Supp.2d 1179, 1189 (D.Haw.2009).

1. Duty of Care

The Complaint contains numerous allegations that the Defendants Catholic Charities and the Catholic Church owed Plaintiff a duty of care. (Complaint at ¶¶ 16–24, ECF No. 1–1). The Complaint asserts that Defendants Catholic Charities and the Catholic Church owed Plaintiff a duty to act in good faith and with the highest degree of trust and confidence. (*Id.* at ¶ 19). Plaintiff alleges that the Defendants Catholic Charities and the Catholic Church owed him a duty to disclose information about Defendant Ram and a duty to protect Plaintiff from sexual abuse. (*Id.* at ¶¶ 19–20, 23–24).

Plaintiff asserts that Defendants Catholic Charities and the Catholic Church owed a duty to exercise care in monitoring Defendant Ram and his responsibilities as a foster parent. (*Id.* at ¶ 42). The Complaint asserts that the Defendants Catholic Charities and the Catholic Church assumed a duty to Plaintiff when it held Defendant Ram out as a competent and trustworthy foster parent and endorsed him to Plaintiff's mother. (*Id.* at ¶¶ 41(a)-(d)).

2. Breach of Duty

The Complaint alleges that Defendants Catholic Charities and the Catholic Church breached the duties of care owed to Plaintiff. (*Id.* at ¶¶ 25–26). Plaintiff alleges the duties of care were breached when Plaintiff was exposed to Defendant Ram who was an unfit foster parent with dangerous propensities. (*Id.* at ¶ 43).

The Complaint also asserts the Defendants Catholic Charities and the Catholic Church breached their duty when they failed to warn Plaintiff and his family about the risks that Defendant Ram posed. (*Id.* at ¶ 26). The Complaint alleges that Defendants Catholic Charities and the Catholic

Church breached their duty to Plaintiff by affirmatively misrepresenting that Defendant Ram did not have a history of molesting children. (*Id.* at ¶¶ 27–29, 31–32).

3. Causation

The Complaint alleges that the sexual abuse Plaintiff suffered was caused by the failure of Defendants Catholic Charities and the Catholic Church to conform to their legal duties. (*Id.* at ¶ 45). Plaintiff alleges that he was placed in foster care with Defendant Ram upon the recommendation of Defendants Catholic Charities and the Catholic Church. (*Id.* at ¶¶ 2, 27). Plaintiff asserts that Defendants Catholic Charities and the Catholic Church made misrepresentations about Defendant Ram's fitness as a foster parent to Plaintiff's mother that influenced her to place Plaintiff with Defendant Ram. (*Id.* at ¶ 29).

4. Injury

*5 The Complaint asserts that in 1989, when Plaintiff was a minor, he was placed in foster care with Defendant Ram and subjected to sexual abuse. (*Id.* at ¶ 6). Plaintiff claims Defendant Ram intentionally touched and manipulated his body and genitals in a sexual manner. (*Id.* at ¶¶ 6, 36). The Complaint asserts that Plaintiff has suffered and continues to suffer injuries as a result of the sexual abuse that occurred in 1989. (*Id.* at ¶ 34).

5. Allegations of Gross Negligence

The Complaint also contains allegations that the Defendants Catholic Charities and the Catholic Church acted with gross negligence when they recommended Defendant Ram as a fit foster parent. (*Id.* at ¶¶ 14, 44, 46–47). Plaintiff's Complaint claims the Defendants Catholic Charities and the Catholic Church concealed information and affirmatively misrepresented to Plaintiff and his mother that Defendant Ram did not have a history of molesting children, despite their knowledge that Defendant Ram had previously molested children. (*Id.* at ¶¶ 12–13, 27–28, 32).

Gross negligence is a common law cause of action.

B. Gross Negligence Pursuant to Haw. Rev. Stat. § 657–1.8

Plaintiff's claim for gross negligence is also filed pursuant to the statutory requirements found in section 657–1.8 of the Hawaii Revised Statutes for civil claims relating to the sexual abuse of a minor.

Haw. Rev. Stat. § 657–1.8 extended the statute of limitations for bringing a cause of action relating to the sexual abuse of a minor. Haw. Rev. Stat. § 657–1.8 was enacted in 2012. 2012 Haw. Sess. Laws 68. The statute was amended in June 2014 to allow civil claims of sexual abuse of a minor to be filed until April 24, 2016. 2014 Haw. Sess. Laws 112.

Haw. Rev. Stat. § 657–1.8 also provides a basis for a cause of action against a legal entity for sexual abuse of a minor that occurred under its control. Haw. Rev. Stat. § 657–1.8(b)(2) provides that a plaintiff may recover for damages against a legal entity when the abuser and the victim were engaged in an activity over which the legal entity had a degree of responsibility or control if there is a finding of gross negligence against the legal entity. *Id.*

Haw. Rev. Stat. § 657–1.8 states:

(b) ...

A claim may also be brought under this subsection against a legal entity if:

- (1) The person who committed the act of sexual abuse against the victim was employed by the institution, agency, firm, business, corporation, or other public or private legal entity that owed a duty of care to the victim; or
- (2) The person who committed the act of sexual abuse and the victim were engaged in an activity over which the legal entity had a degree of responsibility or control.

Damages against the legal entity shall be awarded under this subsection only if there is a finding of gross negligence on the part of the legal entity.

Haw. Rev. Stat. § 657–1.8(b).

The federal District Court for the District of Hawaii in *Roe v. Ram*, 14–0027LEK–RLP, 2014 WL 4276647, *10 (D.Haw.2014), upheld Haw. Rev. Stat. § 657–1.8 as constitutional.

Plaintiff states in the Complaint that he complied with the requirements of filing a claim pursuant to Haw. Rev. Stat. § 657–1.8. (Complaint at ¶ f, ECF No. 1–1). Plaintiff filed his Complaint on April 23, 2014, within the statute of limitations provided in Haw. Rev. Stat. § 657–1.8(b). Plaintiff alleges that the sexual abuse that he suffered is based on acts that would have constituted a criminal offense under part V or VI of chapter 707 of the Hawaii Revised Statutes pursuant to Haw. Rev. Stat. § 657–1.8(a). (Complaint at ¶ 6, ECF No. 1–1). Plaintiff submitted a certificate of merit from a licensed psychologist in support of his Complaint pursuant to Haw. Rev. Stat. § 1.8(d)(1). (Transmittal of Documents from State Court, ECF No. 12).

*6 Here, there is a possibility based on the allegations in the Complaint that a Hawaii state court may find that Plaintiff has stated a cause of action against Defendants Catholic Charities and the Catholic Church. The Complaint contains facts to state a gross negligence cause of action against Defendants Catholic Charities and the Catholic Church. Plaintiff has also complied with the requirements of Haw. Rev. Stat. § 657–1.8 in bringing a civil cause of action against a legal entity relating to sexual abuse of a minor.

Other states have passed similar statutes that provide for extended statutes of limitations and liability against legal entities for claims relating to the sexual abuse of a minor. The Delaware legislature enacted the Child Victim's Act, Del. Code Ann. 10 § 8145, which uses language that is nearly identical to language found in Haw. Rev. Stat. § 657–1.8. The Delaware Child Victim's Act, just as the Hawaii statute, allows for civil suits against legal entities when the person who committed the act of sexual abuse and the victim were engaged in an activity over which the legal entity had a degree of responsibility or control. Delaware's Child Victim's Act provides:

If the person committing the act of sexual abuse against a minor was employed by ... [a] legal entity that owed a duty of care to the victim, or the accused and the minor were engaged in some activity over which the legal entity had some degree of responsibility or control, damages against the legal entity shall be awarded under this subsection only if

there is a finding of gross negligence on the part of the legal entity.

Del. Code Ann. 10 § 8145(b). The Delaware Supreme Court has found that the statute provides a basis for negligence and intentional tort claims against the Catholic Church for sexual abuse that was committed against a minor while under its control. *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1256 (Del.2011).

California has also passed legislation that allows for tort claims to be made against legal entities for sexual abuse of a minor when the abuse was committed by the entity's employee, volunteer, representative, or agent. Cal. Civ. Proc. § 340.1 (2002)); *Doe v. Doe I*, 208 Cal.App.4th 1185, 1189 (Cal.Ct.App.2012).

Other state and federal courts in the Ninth Circuit have allowed negligence claims to proceed against the Catholic Church for sexual abuse that was committed by individuals who had a special relationship with the Catholic Church. *M.H. v. Corporation of the Catholic Archbishop of Seattle*, 252 P.3d 914, 920 (Wash.App.2011) (finding the plaintiff stated negligence claims against the Catholic Church for sexual abuse committed by a third-party because the Church had a special relationship with the third-party); *Jane Doe 130 v. Archdiocese of Portland in Oregon*, 717 F.Supp.2d 1120, 1137–39 (D.Or.2010) (holding that the allegations in the complaint were sufficient to state claims for sexual battery and negligence against the Catholic Church).

III. Defendant Ram's Argument

Defendant Ram claims that Plaintiff has failed to state possible claims against the Defendants Catholic Charities and the Catholic Church. Defendant Ram disputes the allegations in the Complaint and submitted his own Declaration in support of his Opposition to the Motion to Remand. (Declaration of Jay Ram, Ex. 1, attached to Memorandum in Opposition to Plaintiff's Motion to Remand, ECF No. 18–1). Defendant Ram denies that he sexually abused Plaintiff and claims he never had contact with the Defendants Catholic Charities and the Catholic Church about taking Plaintiff into his home for foster care. (*Id.* at pp. 1–2).

*7 Defendant Ram requests that the Court find Plaintiff has not stated a possible claim against the Defendants Catholic Charities and the Catholic Church based on his Declaration.

Defendant Ram effectively asks the Court to make credibility determinations and address the underlying merits of Plaintiff's claims against Defendants Catholic Charities and the Catholic Church. *Dodson*, 951 F.2d at 42–43 (explaining that courts “do not decide whether the plaintiff will actually or even probably prevail on the merits” on a motion for remand). Such an inquiry is inappropriate at this stage. The sole inquiry before the Court is whether Plaintiff has stated any possible cause of action against Defendants Catholic Charities and the Catholic Church. *Hunter*, 582 F.3d at 1044–45.

The Court must resolve all disputed questions of fact in favor of the plaintiff when performing the evaluation for the motion to remand. *See Medow*, 2011 WL 2678875, at *3; *Dodson*, 951 F.2d at 42–43. Plaintiff disputes Defendant Ram's contentions in his Declaration and has submitted a Declaration from his mother in support of the allegations in the Complaint. (ECF No. 25). Plaintiff's mother states that she called Catholic Charities in 1989 for information about placing Plaintiff in foster care. (*Id.* at ¶ 4). Plaintiff's mother states that Catholic Charities specifically recommended Defendant Ram as a foster parent and provided her with information endorsing Defendant Ram. (*Id.* at ¶ 7).

Defendant Ram has not met his heavy burden of establishing that Plaintiff has failed to state a claim against Defendants Catholic Charities and the Catholic Church. *See Lizari v. CVS Pharmacy, Inc.*, 2011 WL 223806, at *2 (C.D.Cal.2011) (“[F]ederal courts in this circuit have applied the fraudulent joinder rule only in cases where it is undisputably clear (or ‘obvious,’ in the language in *McCabe*, 811 F.2d at 1339) that the plaintiff states no cause of action against the non-diverse defendant.”).

Plaintiff has stated a possible cause of action against Defendants Catholic Charities and the Catholic Church. The Court need not consider whether Plaintiff has stated additional causes of action against Defendants Catholic Charities and the Catholic Church for either intentional or negligent infliction of emotional distress as alleged in the Complaint.

The Court lacks subject-matter jurisdiction as there is no federal question presented and there is not complete diversity between the parties. Plaintiff's Motion to Remand is **GRANTED**.

CONCLUSION

Plaintiff's MOTION TO REMAND (EOF No. 10) is **GRANTED**.

Defendant Jay Ram's MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM (ECF No. 8) is **DISMISSED AS MOOT**.

The case and all files herein are **REMANDED** to the Circuit Court of the First Circuit, State of Hawaii for further proceedings.

IT IS SO ORDERED.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

N.D.,

Plaintiff,

vs.

MAKAHA, HAWAII CONGREGATION OF
JEHOVAH'S WITNESSES, a Hawaii non-profit
unincorporated religious organization, a.k.a.
MAKAHA CONGREGATION OF
JEHOVAH'S WITNESSES and KINGDOM
HALL, MAKAHA CONGREGATION OF
JEHOVAH'S WITNESSES; WATCHTOWER
BIBLE AND TRACT SOCIETY OF NEW
YORK, INC., a New York corporation;
CHRISTIAN CONGREGATION OF
JEHOVAH'S WITNESSES, a New York
non-profit corporation; KENNETH L. APANA,
Individually; and Does 1 through 100, inclusive,

Defendants.

CIVIL NO. 1CCV-20-0000390
(Non-Motor Vehicle Tort)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that, on the date below, a true and correct copy of the foregoing
document was duly served on the following persons electronically through the Judiciary
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and CHRISTIAN CONGREGATION OF
JEHOVAH'S WITNESSES

DATED: Honolulu, Hawai'i. June 12, 2020.

/s/ Matthew C. Winter
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