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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DIANE CERVELLI and TAEKO BUFFORD, Plaintiffs, WILLIAM D. HOSHIJO, as Executive Director of the Hawai'i Civil Rights Commission, Plaintiff-Intervenor, vs. ALOHA BED & BREAKFAST, a Hawaii sole proprietorship, Defendant.	CIVIL NO. 11-1-3103-12 ECN (Other Civil Action) **PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS** *HEARING MOTION* JUDGE: Edwin C. Nacino HEARING DATE: February 8, 2012 HEARING TIME: 10:00 a.m. TRIAL: None

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I. INTRODUCTION

Defendant's motion to dismiss should be denied for two independent reasons. *First*, although Defendant asserts that the statute of limitations for personal injuries should apply, the statutory scheme governing discrimination claims filed with the Hawai'i Civil Rights Commission ("HCRC") already provides its own statute of limitations: an individual must complain to the HCRC within 180 days of the discriminatory act and then, after receiving a notice of right to sue, may bring a civil action under that chapter within 90 days,[1] as Plaintiffs did here. As the more specific statute, this limitations period applies whenever a discrimination lawsuit is commenced after the filing of a complaint with the HCRC. Defendant's attempt to graft onto that an *additional* requirement that a right to sue letter be obtained and suit commenced within two years of the discriminatory act, finds no support in the plain language of HRS § 368-12, which unqualifiedly states that a complainant "may bring" a civil action "[w]ithin ninety days after receipt of a notice of right to sue." Tellingly, no court has ever applied the two-year personal injury statute of limitations to public accommodations discrimination in the quarter century that Hawaii has outlawed such discrimination, and its application now, even where an administrative complaint was timely filed, would undermine the HCRC's enforcement of state antidiscrimination laws and jeopardize valid discrimination claims.

Even if HRS § 368-12's authorization of suit within ninety days after receipt of the right to sue were not controlling, Defendant's motion should be denied for a *second* and independent reason. Defendant cites two pages of cases holding that the filing of an administrative complaint tolls the statute of limitations while it proceeds. (Mot. at 7-8). Defendant argues that such tolling, however, does not apply where administrative proceedings are optional. But the Hawai'i

[1] *See* Haw. Rev. Stat. ("HRS") § 368-12 ("Within ninety days after receipt of a notice to sue, the complainant may bring a civil action under this chapter.").

Supreme Court and nine federal courts have already held that administrative proceedings for claims under chapter 368 are *not* optional. Otherwise, the Legislature's decision to give the HCRC the power to issue the "right to sue" would be meaningless.

II. FACTUAL ALLEGATIONS

Defendant is a for-profit commercial business establishment located in Hawaii Kai that offers bed and breakfast services to the general public. (Compl. ¶¶ 2-3). On November 5, 2007, Plaintiff Diane Cervelli called Defendant to book a room and spoke with its business owner, who inquired if someone else would be staying in the room with Ms. Cervelli and then asked for the second person's name. (*Id.* ¶ 10). When Ms. Cervelli responded, "her name is Taeko Bufford," the business owner asked pointedly, "Are you lesbians?" (*Id.*). Although Ms. Cervelli was shocked by the question, she answered truthfully that they were. (*Id.* ¶ 11). Based on the business owner's belief that homosexuality is "detestable" and that it "defiles our land," (*id.* ¶ 18), the business owner refused to rent Plaintiffs a room, explaining that she would be very uncomfortable having lesbians in her house. (*Id.* ¶ 11).

Plaintiffs timely complained about Defendant's unlawful discriminatory conduct within 180 days to the HCRC, the state agency charged with enforcement of state antidiscrimination laws.[2] (*Id.* ¶ 17). During the HCRC's investigation, Defendant's business owner admitted that she told Plaintiffs she would not rent them a room because they were lesbians. (*Id.* ¶ 18). On March 3, 2010, the HCRC issued a Notice of Reasonable Cause to Believe That Unlawful Discriminatory Practices Have Been Committed. (*Id.* ¶ 21).

Throughout the administrative proceedings and continuing to this day, Defendant has

[2] Indeed, although the law only requires that individuals complain to the HCRC within 180 days of the discriminatory practice, HRS § 368-11, Ms. Cervelli contacted the HCRC a mere nineteen days after Defendant discriminated against Plaintiffs and Ms. Bufford did so shortly thereafter.

insisted that it need not comply with Hawaii's public accommodation antidiscrimination law, thereby permitting Defendant to reject Plaintiffs because they are lesbians or, for that matter, other customers because of their race, sex, ancestry, or religion. (*Id.* ¶ 16). This recalcitrant position did not aid the HCRC's statutorily mandated conciliation efforts, which, as evidenced by this suit, were unsuccessful.[3] Plaintiffs subsequently requested from the HCRC notices of their right to sue, which Plaintiffs received on November 21, 2011 and which authorized suit within 90 days. (*Id.* ¶ 22). On December 19, 2011, only 28 days after receiving their notices of right to sue, Plaintiffs commenced this action.

III. LEGAL STANDARD

On a motion to dismiss, the plaintiff's allegations are taken as true and viewed in the light most favorable to plaintiff. *AFL Hotel & Restaurant Workers Health & Welfare Trust Fund v. Bosque*, 110 Hawai'i 318, 321, 132 P.3d 1229, 1232 (2006). "[D]ismissal is only proper if 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." *Id.* (internal quotation marks omitted).

IV. ARGUMENT

A. Defendant's Motion Should Be Denied Because The Statute of Limitations Provided for Within The Antidiscrimination Law—Not a Personal Injury Statute of Limitations—Governs Plaintiffs' Discrimination Claims Under Chapter 368.

1. Plaintiffs Satisfied the Statute of Limitations by Timely Complaining to The HCRC Within 180 Days and Timely Filing Suit Within 90 Days After Receiving The Right to Sue.

Plaintiffs' discrimination claims are brought pursuant to chapter 368, which provides the

[3] Defendant's assertion that "November 5, 2007, was the last date that Plaintiffs interacted with the Defendant" (Mot. at 1) is untrue, as Plaintiffs and Defendant, who was represented by counsel, continued to interact through administrative proceedings, including at an attempted conciliation on July 29, 2010 where Defendant's counsel continued to assert that Defendant could exclude Plaintiffs from its facilities.

limitations period for claims brought under it. (Compl. ¶ 37) (explaining that this suit was filed "pursuant to HRS § 368-12"). Chapter 368 created the HCRC, which accepts complaints from individuals injured by unlawful discrimination, HRS § 368-11(a), and is empowered "[t]o issue the right to sue to a complainant," HRS § 368-3. The two-step procedure for obtaining and exercising this right to sue dictates the relevant statute of limitations for Plaintiffs' claims.

First, as Plaintiffs did here, a complaint must be filed with the HCRC within 180 days. HRS § 368-11(c) (prohibiting any complaint "filed after the expiration of one hundred eighty days" of the alleged discrimination). The Hawai'i Supreme Court has made clear that this 180-day period set forth in the statutory scheme governing discrimination is "the applicable statute of limitations period" for discrimination claims under chapter 368. *Sam Teague, Ltd. v. HCRC*, 89 Hawai'i 269, 275-76, 971 P.2d 1104, 1110 (1999); *accord Reyes v. HMA, Inc.*, No. CV07-00229 SOM/KSC, 2008 U.S. Dist. LEXIS 34640, at *6 (D. Haw. Apr. 28, 2008) (noting that the Hawai'i Supreme Court has characterized the 180-day period as "a 'statute of limitations period'"). That also makes sense: had Plaintiffs failed to file their complaints with the HCRC within 180 days, they would have lost all future ability to pursue their claims under chapter 368. But, by filing these complaints, Plaintiffs commenced a legal proceeding to ascertain whether Defendant had violated the law, which also immediately put Defendant on notice of its potential liability and the need to preserve relevant evidence.

Defendant asserts that *sexual harassment* claims "'do not contain limitations periods'" and argues that, by supposed analogy, the same is true for public accommodation claims. (Mot. at 4-5) (quoting *Linville v. State*, 874 F. Supp. 1095, 1104 (D. Haw. 1994)). However, plaintiffs alleging sexual harassment need not complain to the HCRC at all before commencing suit—let alone within 180 days of the harassment—because of a harassment-specific statutory exception,

HRS § 378-3(10); and the very existence of that exception, as discussed below, illustrates that other discrimination claims cannot bypass the HCRC. Furthermore, to the extent there was ever any doubt, the Hawai'i Supreme Court made clear, subsequent to *Linville*, that claims brought pursuant to chapter 368 *do* contain their own limitations periods. *Sam Teague*, 89 Hawai'i at 275-76, 971 P.2d at 1110; *accord Reyes*, 2008 U.S. Dist. LEXIS 34640, at *6.

Second, complainants who request and receive a notice of right to sue from the HCRC also face a subsequent deadline: if they fail to commence a civil action within 90 days of receipt, their right to sue extinguishes. HRS § 368-12. Plaintiffs asserting claims under chapter 368 must satisfy both the initial 180-day statute of limitations as well as this subsequent 90-day deadline. *See Weaver v. A-American Storage Mgmt. Co.*, No. 10-00600 JMS-KSC, 2011 U.S. Dist. LEXIS 3519, at *13 (D. Haw. Jan. 12, 2011).

2. The Statute of Limitations in The Antidiscrimination Law Precludes Application of The Statute of Limitations in The Personal Injury Law.

Defendant's attempt to graft the personal injury statute of limitations onto Plaintiffs' claims fails for several reasons. First, it would violate the plain language of HRS § 368-12 and its implementing regulation: "Within ninety days after receipt of a notice of right to sue, the complainant *may bring a civil action* under this chapter." HRS § 368-12 (emphasis added). "A notice of right to sue *shall authorize* . . . [a] complainant . . . to bring a civil suit . . . within ninety days." Haw. Admin. R. § 12-46-20. Defendant urges the Court to disregard these express statutory and administrative authorizations for suit, by imposing an additional restriction that is not referenced in these provisions and is inconsistent with their plain language. Second, HRS § 368-12 controls because it specifically addresses discrimination claims, whereas Defendant's two-year statute, HRS § 657-7, addresses a wide swath of personal injury claims. *See In re Smart*, 54 Haw. 250, 252, 505 P.2d 1179, 1181 (1973) ("The settled law in this State favors a

specific statute over a general one.").

Many individuals who complain to the HCRC are unrepresented by counsel (as was true for Plaintiffs until 2011, well after the supposed two-year limitation would have run if it applied). But Defendant claims that, even where these individuals have managed to diligently follow every time limitation specified in the antidiscrimination statutes and agency regulations, the Legislature intended for them also to comply with yet another statute of limitations—the one governing slip-and-falls—that not even the civil rights agency believed or believes has any application here.

Defendant's characterization of this position as presenting "a question of first impression," (Mot. at 5), speaks to the dearth of case law to support it. Defendant reaches for a life vest by citing cases where courts applied the two-year personal injury statute of limitations to 42 U.S.C. § 1983 claims[4] and to claims that lacked independent statutes of limitations, often because they were non-statutory in nature. (Mot. at 5) (citing *Pele Def. Fund*, 73 Haw. at 591, 837 P.2d at 1256 (§ 1983); *Pascual v. Matsumura*, 165 F. Supp. 2d 1149, 1150 (D. Haw. 2001) (false arrest); *Kersh v. Manulife Fin. Corp.*, 792 F. Supp. 2d 1111, 1123 (D. Haw. 2011) (intentional infliction of emotional distress); *Thomas v. Colonial Penn Ins. Co.*, 26 Fed. App'x. 687, 689 (9th Cir. 2002) (privacy)). In contrast, the statutory discrimination claims at issue here provide their own limitations period. HRS §§ 368-11 & 368-12.

[4] Claims pursuant to § 1983 are inapposite because a state's general personal injury limitations period controls for § 1983 purposes, even where state law supplies a more specific statute of limitations for particular personal injury actions (e.g., for libel or medical torts) that would govern outside the § 1983 context. *Owens v. Okure*, 488 U.S. 235, 243 & 245 (1989) (explaining need for a clear rule that can be applied to all 50 states and noting that all states have a general or residual personal injury statute of limitations); *Pele Def. Fund v. Paty*, 73 Haw. 578, 593, 837 P.2d 1247, 1259 (1992) (following *Owens*).

3. Application of The Personal Injury Statute of Limitations Would Jeopardize Discrimination Claims and Undermine the HCRC's Enforcement of Antidiscrimination Laws.

As demonstrated by the facts here, the HCRC routinely issues notices of right to sue where, although an administrative complaint was timely filed within 180 days, more than two years have passed since the discrimination occurred. If accepted, Defendant's position would render those notices worthless, depriving victims of redress and allowing discrimination to continue unabated. It would also turn the HCRC's interpretation of chapter 368, as reflected through agency regulations, on its head. *See, e.g.*, Haw. Admin. R. 12-46-20 (stating the request for a right to sue "may be made . . . *[a]t any time after the filing of a complaint*"—that is, even after the passage of two years—so long as not more than three days have passed after a conference to schedule the case for hearing[5]) (emphasis added). In contrast to an agency's mere litigating position, this statutory interpretation is reflected in the agency's regulations and is entitled to judicial deference and "persuasive weight." *Nelson v. Univ. of Hawaii*, 97 Hawai'i 376, 393-94, 38 P.2d 95, 110 (2001) (deferring to the HCRC's administrative construction of a statute). For claims in which the HCRC finds no reasonable cause to believe that discrimination occurred, the HCRC would terminate its proceedings and issue a right to sue that Defendant claims is useless where issued more than two years from the discrimination, thereby precluding relief in both the agency and court. HRS § 368-13(c).

Defendant's position would also needlessly encourage litigation. Future victims of discrimination who complain to the HCRC would face a dilemma: at the two year mark from when the discrimination occurred, they would be forced to decide whether to continue proceeding before the HCRC but at the cost of losing their right to sue. Invariably, more

[5] No such conference occurred before the filing of the instant action.

individuals would move their claims to court—even though their claims might have been administratively resolved had they remained before the agency[6] and even though premature escalation of a dispute to Circuit Court may poison conciliation efforts. Putting victims of discrimination to this choice would needlessly compromise administrative efficiency and judicial and party economy, with no countervailing benefit to defendants.

Notably, Defendant does not claim that it has been prejudiced by Plaintiffs' decision to request a right to sue and commence this action. Nor could it do so in good faith. In all likelihood, commencement of this suit has *accelerated* the day on which a final decision will be achieved in this case. Had Plaintiffs remained before the HCRC, the case would have ultimately proceeded to a contested case hearing and resulted in a decision by the Commission as to whether unlawful discrimination occurred. HRS § 368-14(a). Contrary to Defendant's assertion, this would not have been a "binding decision." (Mot. at 1, 4). Either Plaintiffs or Defendant could have (and no doubt would have) appealed the decision directly to the Circuit Court. HRS § 368-16. Such an appeal to the Circuit Court would have been reviewed *de novo*, HRS § 368-16, and Defendant would have also been entitled to demand a trial with respect to claims on which Plaintiffs were awarded compensatory damages. *See SCI Mgmt. Corp. v. Sims*, 101 Hawai'i 438, 451, 71 P.3d 389, 402 (2003). Thus, no matter which path Plaintiffs traveled, proceedings before this Court would have been inevitable (unless the case had settled). By filing this action, Plaintiffs have merely accelerated the date on which each side is able to present its claims or defenses to this Court.

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[6] For example, whether an agency finds reasonable cause to believe that discrimination occurred may prompt some parties to settle. But that finding may occur after two years from when the discrimination occurred. Here, for example, the HCRC did not issue its Notice of Reasonable Cause to Believe That Unlawful Discriminatory Practices Have Been Committed until March 3, 2010—approximately four months after Defendant claims that the statute of limitation expired. (Compl. ¶ 22).

B. Defendant's Motion Also Should Be Denied Because Plaintiffs Asserting Discrimination Claims Under Chapter 368 May Not File Suit Unless They First Proceed Before the HCRC.

1. Victims of Discrimination Must Timely Complain to the HCRC and Obtain Their "Right to Sue" or Else Lose Their Claims Under Chapter 368.

Even if a two-year limitations period could be imposed, Defendant concedes that many, many courts have concluded that this period "'must be tolled'" during the pendency of agency proceedings, particularly if complaining to the HCRC was a precondition to pursuing Plaintiffs' claims under chapter 368 in court. (Mot. at 7); *Pele Def. Fund v. Puna Geothermal Venture*, 9 Haw. App. 143, 151, 827 P.3d 1149, 1154 (1992) (holding that courts will not act to afford relief "where a remedy is available from an administrative agency"). That provides a second and independent reason[7] for denying the motion: Plaintiffs could not have filed their claims under chapter 368 without first complaining to the HCRC, because the Legislature has given and reserved the power to issue "right to sue" notices to the agency. HRS § 368-12.

In *Ross*, the Hawai'i Supreme Court interpreted language identical to the right to sue provision at issue here, HRS § 368-12, as mandating that individuals must first obtain the right to sue from the relevant agency before they can commence civil suit. *Ross v. Stouffer Hotel Co.*, 76 Hawai'i 454, 460, 879 P.2d 1037, 1043 (1994). The statute at issue in *Ross* empowered the state agency[8] "to 'issue a right to sue upon written request of the complainant' and required a 'complainant' to bring his or her civil action within ninety days of receiving a notice of right to sue." *Id.* (quoting HRS § 378-5 (1985)). The Hawai'i Supreme Court interpreted this language

[7] The Court need not even reach this second issue, if it concludes that the two-year limitations period urged by Defendant is inapplicable for the reasons discussed *supra*.

[8] In *Ross*, the relevant agency was the Department of Labor and Industrial Relations, under which the HCRC exists and which directly received complaints prior to the creation of the HCRC. *See* 1989 Haw. Sess. L. Act 386, § 11.

as mandating that individuals must first complain to the relevant agency:

> The logical implication of the legislature's decision to authorize the DLIR to issue a right to sue is that it was a precondition to bringing a civil action for violation of HRS § 378-2; if it were not, the power to issue a right to sue would have been meaningless. Because only a "complainant" could request a right to sue, and because HRS § 378-4(c) prohibited the filing of a complaint more than ninety days [subsequently extended to 180 days] after the alleged unlawful discriminatory practice occurred, it necessarily follows that the timely filing of an administrative complaint was a precondition to a civil suit.

Ross, 76 Haw. at 460, 879 P.2d at 1043.[9]

This likewise has been the conclusion of virtually every federal court to consider whether proceeding before the HCRC is a precondition to suit. *See Correa v. Hawaiian Airlines*, No. 01-17347, 52 Fed. App'x. 82, 2002 U.S. App. LEXIS 25170, at *3 (9th Cir. Dec. 5, 2002) (affirming dismissal of state law discrimination claim because, under *Ross*, "Hawaiian law require[s] administrative-remedy exhaustion as a condition precedent to suit"); *Johnson v. Kahi Mohala Hosp., Inc.*, No. 98-15662, 1999 U.S. App. LEXIS 11256, at *6 (9th Cir. May 28, 1999) (holding that "[a]ny claim of a direct violation of HRS ch. 378 [prohibiting employment discrimination] fails because [Plaintiff] has not received a right-to-sue letter from the Hawaii Civil Rights Commission as required under HRS § 368-12"); *Weaver*, 2011 U.S. Dist. LEXIS 3519, at *12 n.1 (noting that, under *Ross*, the timely filing of an administrative complaint is a precondition to suit); *Rezentes v. Sears, Roebuck, & Co.*, No. 10-00054 SOM/KSC, 2010 U.S. Dist. LEXIS 45315, at *10 (D. Haw. May 10, 2010) ("The Hawaii Supreme Court has held that

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[9] The Legislature retained this same language when creating the HCRC in 1989, *see* 1989 Haw. Sess. L. Act 386, § 1 (codified in relevant part at HRS § 378-12), and the Hawai'i Supreme Court has affirmed that obtaining a right to sue from the HCRC is a precondition to filing a civil suit. *Schefke v. Reliable Collection Agency*, 96 Hawai'i 408, 416, 32 P.3d 52, 60 n.5 (2001) (noting that, under HRS § 368-12, "Plaintiff could not bring his compensation discrimination claim until he received a notice of right to sue"); *French v. Hawaii Pizza Hut*, 105 Hawai'i 462, 477, 99 P.3d 1046, 1061 (2004) (holding that plaintiff was precluded from pursuing a gender discrimination claim because she had failed to include it in her HCRC complaint).

the legislature's decision to authorize the HCRC to issue a Right-To-Sue notice implies that the receipt of such a notice is a precondition to the bringing of a civil action."); *Larson v. Ching*, No. 08-537 SOM/KSC, 2009 U.S. Dist. LEXIS 92372, at *13-16 (D. Haw. Oct. 5, 2009) (dismissing state law discrimination claim and holding that "the receipt of such a [right-to-sue] notice is a precondition to the bringing of a civil action"); *Reyes*, 2008 U.S. Dist. LEXIS 34640, at *5-8 (D. Haw. Apr. 28, 2008) (holding that plaintiff's age discrimination claim under state law was barred to the extent that she failed to file an administrative complaint with the HCRC within 180 days of last discriminatory act); *Kaulia v. County of Maui*, 504 F. Supp. 2d 969, 997 n.38 (D. Haw. 2007) ("the HCRC has a 180-day statute of limitations for filing HCRC Complaints; as such, many of Plaintiff's claims would be time-barred"); *Finazzo v. Hawaiian Airlines*, No. 05-00524 JMS/LEK, 2007 U.S. Dist. LEXIS 66858, at *33 n.11 (D. Haw. Sept. 7, 2007) ("Plaintiff also failed to exhaust her administrative remedies by filing a charge with the Hawaii Civil Rights Commission ('HCRC') and receive a right-to-sue letter"); *Hale v. Hawaii Publications, Inc.*, 468 F. Supp. 2d 1210, 1230 (D. Haw. 2006) ("When Plaintiff filed her complaint with the HCRC . . . she ensured that conduct that occurred within 180 days . . . is actionable."). Indeed, in light of *Ross* and its progeny, had Plaintiffs attempted to bypass the HCRC, Defendant could have and likely would have moved to dismiss or for summary judgment on the grounds that Plaintiffs had failed to exhaust administrative remedies.

2. Mandatory Proceedings Before the HCRC Promote the Efficient Resolution of Discrimination Claims Under Chapter 368.

Allowing discrimination claims under chapter 368 to bypass the HCRC would undermine the Legislature's chosen method for achieving the efficient and orderly resolution of discrimination claims. Requiring individuals to file complaints with the HCRC increases the chances that claims will be resolved administratively, thereby promoting both judicial and party

economy. *See Williams v. Aona*, 121 Hawai'i 1, 9, 210 P.3d 501, 509 (2009) ("In general, the doctrine of exhaustion of remedies is a policy of judicial economy."). One of the HCRC's core functions is to investigate and conciliate complaints of unlawful discrimination, HRS § 368-3(1); but the HCRC can only perform this function when it receives complaints in the first place. This arrangement is not unique: multiple agencies, including the EEOC, require individuals to file administrative complaints and obtain a right to sue before they may commence suit.

Indeed, even where an individual subsequently requests a right to sue from the HCRC, requiring individuals to start at the HCRC may still streamline Circuit Court proceedings because of prior fact investigation, identification of potential issues in dispute, and disclosure of party positions. *See, e.g.*, Haw. Admin. R. § 12-46-12 (detailing the HCRC's role in these areas). For example, Defendant's business owner admitted to HCRC staff that she told Plaintiffs that she would not rent them a room because they were lesbians and explained to HCRC staff her view that homosexuality is "detestable" and "defiles our land." (Compl. ¶ 18). That critical factual admission will undoubtedly simplify the issues that remain for litigation in this proceeding.

3. Where The Legislature Wished to Make Administrative Proceedings Optional, It Expressly Created An Exception.

In sharp contrast to public accommodations claims brought under chapter 368, the Legislature *has* carved out an express exception to the requirement of HCRC proceedings in another context. In 1992, the Legislature chose to exempt sexual harassment claims from HRS § 368-12, which otherwise mandates that individuals first proceed through the HCRC. *See* 1992 Haw. Sess. L. Act 275, § 1 (codified at HRS § 378-3(10)); *Hale*, 468 F. Supp. 2d at 1229 ("Generally, complaints alleging discrimination under state law must be filed with the HCRC within 180 days . . . . However, the Hawaii legislature carved out an exception to the filing requirement for sexual harassment claims."). The exemption provides that "'notwithstanding

section 368-12, the commission shall issue a right to sue on a complaint filed with the commission if it determines that a civil action alleging similar facts has been filed in circuit court.'"[10] *Nelson*, 97 Hawai'i at 394 n.16, 38 P.3d at 113 n.16 (quoting HRS § 378-3(10)). The exception for sexual harassment was prompted by concern that victims of sexual harassment are often so traumatized that they might fail to file with the HCRC within 180 days. *Nelson*, 97 Hawai'i at 394, 38 P.3d at 113; *Furukawa v. Honolulu Zoological Soc'y*, 85 Hawai'i 7, 19, 936 P.2d 643, 655 (1997).

Nothing in the public accommodations law, including HRS § 489-7.5, comes even remotely close to approximating the sexual harassment exception. Defendant attempts to lump together sexual harassment claims and public accommodation claims for statute of limitations purposes, (Mot. at 4-5), but the two are distinct. Prior to the creation of the exception for sexual harassment in 1992, and as remains true for forms of discrimination apart from sexual harassment, "if [victims of discrimination] fail to file with the Commission, *they lose all subsequent right of action.*" Stand. Comm. Rep. No. 2588, in 1992 Senate Journal, at 1155 (emphasis added; describing law prior to creation of 1992 exception). This alone shows that filing with the HCRC is mandatory.

4. HRS § 489-7.5 Did Not Exempt Plaintiffs From Their Obligation to Obtain Their Right to Sue From the HCRC.

HRS § 489-7.5,[11] on which Defendant relies, does not change either the holding in *Ross*

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[10] Significantly, this language suggests that the HCRC is not excluded altogether from sexual harassment claims, but merely that the right to sue can be obtained *after* a plaintiff has commenced suit asserting such claims.

[11] HRS § 489-7.5 provides in relevant part:

"(a) Any person who is injured by an unlawful discriminatory practice, other than an unlawful discriminatory practice under part II of this chapter, may:

that resort to the HCRC is mandatory, or the application of that rule here. First, there is no relevant distinction between the (non-sexual harassment) employment discrimination claim at issue in *Ross* and the public accommodation claims at issue here. *See* HRS §§ 368-11 & 368-12 (creating no distinction between procedures for obtaining right to sue for public accommodation and for non-sexual harassment employment discrimination); *see also* (Mot. at 5) (arguing that employment discrimination and public accommodation discrimination are "quite similar" for statute of limitation purposes). With respect to both types of claims, permitting individuals to sue without obtaining a notice of right to sue would, as explained in *Ross*, render "meaningless" the HCRC's statutory power to issue the "right to sue," as well as the language that "complainants" before the agency may be issued such a right and that these "complainants" may bring a civil action based on their administrative complaint within 90 days of receipt of the right to sue notice. 76 Haw. at 760.

Second, HRS § 489-7.5—added through the same 1989 legislation creating the HCRC—did not create a *new*, freestanding private right of action divorced from the HCRC and the requirement to pursue administrative remedies. 1989 Haw. Sess. L. Act 386. Rather, the purpose of HRS § 489-7.5 was to enumerate the specific remedies (*e.g.*, minimum statutory damages) available to victims of discrimination when they had commenced a civil action—but not to create a separate private right of action. HRS § 489-7.5(a)(1) & (2). This provision functions similarly to the remedies provision in the employment discrimination law, which sets forth the relief available in a "civil action brought under this part" but which no court has

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(1) Sue for damages sustained, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than $1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorneys' fees together with the costs of suit; and

(2) Bring proceedings to enjoin the unlawful discriminatory practices, and if the decree is for the plaintiff, the plaintiff shall be awarded reasonable attorneys' fees together with the cost of suit."

interpreted as creating a freestanding private right of action that can bypass the HCRC. HRS § 378-5 ("Remedies"). In contrast, where the Legislature wanted to eliminate the HCRC's role in the enforcement of public accommodation law, it made that intention crystal clear. *Cf.* HRS § 489-23 ("Exclusion from civil rights commission"; instructing that violations of law governing breast feeding in public accommodations "shall not be enforced by the civil rights commission").

Third, HRS § 489-7.5 did not create a separate private right of action because the Legislature had already detailed elsewhere, in the same 1989 legislation, how an individual could obtain the "right to sue."[12] 1989 Haw. Sess. L. Act 386, § 1 (codified in relevant part at HRS § 368-12).

Defendant attempts to overcome these defects by relying upon a footnote in a 2003 federal district court order. (Mot. at 3) (citing *Epileptic Found. v. City & County of Maui*, 300 F. Supp. 2d 1003, 1017 n.35 (D. Haw. 2003)). The plaintiffs in that case were preparing for an event at a public park and, upon discovering the park in disarray and inquiring as to its condition, were allegedly told by a defendant official "You niggers are dirty anyhow. Clean the park yourself." *Id.* at 1008. In a footnote, the district court declined to dismiss Plaintiffs' public accommodation race discrimination claim despite the fact that they had failed to obtain a right to sue from the HCRC. *Id.* at 1017 n.35.

The footnote in *Epileptic Foundation* is inapposite. First, the district court did not cite—

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[12] Defendant argues that the right to sue derives from HRS § 489-7.5. But that section is part of a larger scheme, chapter 489, that is inextricably intertwined with chapter 368 and that must be read together. *See State v. Davis*, 63 Haw. 191, 196, 624 P.2d 376, 380 (1981) (holding that statutes must be read as a "harmonious whole"). HRS § 489-7.5 follows HRS § 489-6, which directs the HCRC to receive complaints of discrimination "in public accommodations in accordance with the procedures established under chapter 368" (which details the HCRC's powers). Chapter 368, in turn, sets forth the uniform procedures for obtaining the "right to sue." HRS § 368-12. This makes clear that all HRS § 489-7.5 is intended to do is to set forth the remedies available where suit has been properly commenced.

nor is there any indication that the parties even briefed—the Hawai'i Supreme Court's holding in *Ross* that, in order to give any meaning to the words "right to sue," individuals must obtain a "right to sue" from the HCRC before commencing suit. 76 Haw. at 760. In any event, on matters of state law, federal courts are bound by the decisions of the state's highest court. *Trishan Air v. Fed. Ins. Co.*, 635 F.3d 422, 427 (9th Cir. 2011); *Roes v. FHP, Inc.*, 91 Hawai'i 470, 475 n.7, 985 P.2d 661, 666 n.7 (1999). To the extent that the federal district court's footnote in *Epileptic Foundation* is inconsistent with the Hawai'i Supreme Court's holding in *Ross*, the latter controls. Indeed, apart from *Epileptic Foundation* and as noted *supra*, there is nearly unanimous federal court authority that proceeding before the HCRC is mandatory. Even in *Linville*, 874 F. Supp. 1095, which Defendant attempts to rely upon, (Mot. at 4-5), the court dismissed all state law claims on Eleventh Amendment grounds but noted that the plaintiff would have nevertheless been required to "obtain a right-to-sue from the administrative body before proceeding with a claim under the statute in a court of law." *Id.* at 1104 n.4.

Second, regardless of whether an individual may choose between filing first with the HCRC or filing directly in court—the only issue discussed in *Epileptic Foundation*—at the point an individual *has* opted to complain to the HCRC, obtaining the notice of right to sue is both necessary and sufficient to commence suit thereafter. Even if one accepted *Epileptic Foundation*'s legal formulation, there would be (in that case's language) two "separate and distinct" methods for pursuing public accommodation claims in Circuit Court: one under HRS § 489-7.5 (the public accommodation damages provision), which does not require resort to the HCRC, and one under HRS § 368-12 (the HCRC right to sue provision), which *does* require resort to the HCRC. *Epileptic Found.*, 300 F. Supp. 2d at 1017 n.35. The statement that "Plaintiffs need not rely on chapter 368 for authorization to bring suit," *id.*, does not negate that

Plaintiffs who *do* rely on chapter 368 for authorization to bring suit must file administrative complaints with the HCRC. Stated differently, administrative proceedings were mandatory for the claims asserted here, if for no other reason than the fact that these claims were brought pursuant to chapter 368. (Compl. ¶¶ 22, 37).

V. CONCLUSION

Plaintiffs respectfully request that this Court deny Defendant's motion to dismiss in all respects.

Dated: Honolulu, Hawai'i, January 31, 2012

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing motion will be served by U.S. mail, postage prepaid, on this date, to the following:

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