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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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 Hawai'i sole proprietorship,

Defendant.

CIVIL NO. 11-1-3103-12 ECN
(Other Civil Action)

PLAINTIFFS AND PLAINTIFF-INTERVENOR'S OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO TAKE INTERLOCUTORY APPEAL OF ORDER DENYING MOTION TO DISMISS AND FOR A STAY PENDING APPEAL; CERTIFICATE OF SERVICE

OPPOSITION TO MOTION FOR INTERLOCUTORY APPEAL AND STAY

This Court correctly denied Defendant's motion to dismiss as meritless, ruling that the statute of limitations applicable to claims brought after filing a public accommodations discrimination complaint with the Hawai'i Civil Rights Commission is the specific one set forth in the statutory chapter governing claims filed with the Commission—rather than the general personal injury statute of limitations, applicable to slip-and-falls and the like, urged by Defendant. Disrupting these proceedings to obtain interlocutory appellate confirmation that this Court's ruling was indeed correct—as it plainly was—serves no valid purpose. Nor would permitting an appeal now speed the termination of this case. Even in the remote, theoretical event that this Court were reversed on appeal and Plaintiffs' claims were dismissed, there is an independent basis of jurisdiction for Plaintiff-Intervenor (the Commission) to continue litigating this case. The only effects that an interlocutory appeal and stay of these proceedings will have are to prolong the time during which Defendant will be free to continue engaging in unlawful discrimination, increase the risk that relevant evidence will become stale, burden the courts with multiple, piecemeal appeals, and add months or even years to the time when finality will be achieved for all parties and the public—defeating the very objective Defendant purported to seek through its statute of limitations argument.

I. BACKGROUND

As alleged in the Complaint, Defendant is a for-profit commercial business establishment that discriminated against Plaintiffs, a lesbian couple, based on the business owner's belief that same-sex relationships are "detestable" and "defile[] our land." Compl. ¶¶ 2-3, 11. Defendant filed a motion to dismiss on statute of limitations grounds. This Court denied that motion with

prejudice from the bench during the February 8, 2012 hearing and directed Plaintiffs' counsel to prepare a general order of denial.

On February 21, 2012, Defendant filed its answer, which admits key facts that will likely streamline the rest of the Circuit Court proceedings. *See, e.g.*, Answer ¶ 1 ("admits . . . that [Defendant] declined to rent a room to Plaintiffs based on Plaintiffs' representation that they intended [to] share the room . . . as a lesbian couple"); Answer ¶ 18 ("Aloha admits the allegation in the first sentence of this paragraph," which states that "[d]uring the course of HCRC's investigation, Phyllis [the business owner] admitted that she told [Plaintiffs] Diane and Taeko that she would not rent them a room because they were lesbians."). Rather than contest the fact of discrimination, Defendant asserts various legal defenses, such as the assertion that the business owner's personal religious beliefs permit Defendant to disobey the state's antidiscrimination law. Answer, Second Aff. Defense.

II. LEGAL STANDARD

A. The Standard Governing Interlocutory Appeals

Appeals are ordinarily limited to "final judgments, orders, and decrees of circuit and district courts." Haw. Rev. Stat. ("HRS") § 641-1(a). However, in exceptional circumstances that warrant immediate appellate review, a circuit court may depart from this general rule and permit an interlocutory appeal when it is "advisable for the speedy termination of litigation." HRS § 641-1(b).

"The burdensome expense in pursuing premature appeals as well as the inherent waste of both attorney and judicial time is a serious problem and is clearly contrary to the purpose and statutory requirements of interlocutory appeals." *Stafford v. MTL, Inc.*, 71 Haw. 644, 646, 802 P.2d 480, 481 (1990). Accordingly, "[t]he discretion of the lower court to authorize

interlocutory appeals is limited." *Jacober v. Sunn*, 5 Haw. App. 20, 25 n.6, 674 P.2d 1024, 1028 n.6 (1984); *accord Mason v. Water Resources Int'l*, 67 Haw. 510, 512, 694 P.2d 388, 389 (1985) (interlocutory appeals must "be strictly limited to those situations where they are allowable"). "The saving of time and litigation expenses, without more, do not meet the requirement of speedy termination." *Lui v. City & County of Honolulu*, 63 Haw. 668, 672 (1981).

B. The Standard Governing Stays Pending Interlocutory Appeal

Although the precise standard for determining whether to grant a stay pending *interlocutory* appeal does not appear to be well-defined under Hawai'i law, the general standard for a stay pending appeal is well-established and should apply equally here. The movant bears the burden of showing a stay is warranted, based on the following factors: (1) there is a likelihood of success on the merits of the appeal; (2) the movant will be irreparably injured absent a stay; (3) issuance of the stay will not substantially injure the other parties; and (4) the public interest weighs in favor of a stay. *See County of Hawai'i v. UniDev, LLC*, Nos. CAAP-10-0000188 & CAAP-11-0000019, 2012 Haw. App. LEXIS 189, at *2 (App. Feb. 23, 2012) (holding that the four-factor standard applies to stay motions); *id.*, 2011 Haw. App. LEXIS 525, at *4 (App. May 27, 2011) ("the considerations for granting a stay are similar to the considerations for granting injunctive relief"); *see also Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cr. 1989) (noting that trial court proceedings may be stayed pending interlocutory appeal where a movant "satisfies the traditional criteria for obtaining a stay—including demonstrating probability of success on the merits").

III. ARGUMENT

A. An Interlocutory Appeal Will Delay—Not Speed—the Efficient Resolution of This Litigation.

This Court's denial of Defendant's motion to dismiss is highly likely to be affirmed on appeal. Therefore, permitting an interlocutory appeal will only delay and disrupt these trial court proceedings with no countervailing benefit. There must be some minimum threshold of likelihood that a Circuit Court's decision will be overturned before an interlocutory appeal is permitted. *Cf.* 28 U.S.C. § 1298(b) (permitting interlocutory appeal only where there is "a controlling question of law as to which there is substantial ground for difference of opinion"). Otherwise, the denial of *every* motion to dismiss could be immediately appealed—even if the appeal is meritless and has little or no chance of success—because reversal, no matter how unlikely, would necessarily result in the speedy termination of the litigation under HRS § 641-1(b). The Hawai'i Supreme Court has long cautioned against the dangers of such a permissive approach to interlocutory appeals. *See Barthrop v. Kona Coffee Co.*, 10 Haw. 398, 401 (1896) ("if appeals were allowed from all such rulings it would be in the power of a defendant, even in a very clear case against him, to keep the case oscillating between the original and appellate courts almost indefinitely, to the great expense and annoyance and perhaps even practical denial of justice to the plaintiff, to say nothing of the annoyance to the courts and the occupation of their time with trivial matters").

Here, the motion to dismiss did not present a close or difficult issue: the plain language of the statute at issue here provides that a complainant "may bring" a civil action "[w]ithin ninety days after receipt of a notice of right to sue." HRS § 368-12. Plaintiffs satisfied that requirement and, accordingly, the Court denied the motion without hesitation. Defendant has made no showing whatsoever, and has offered absolutely no authority to support the possibility—much

less a likelihood—that any reviewing court will reach a different conclusion. Where, as here, there is no substantial ground for difference of opinion, interlocutory appeal is inappropriate. *See Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, 807 F. Supp. 2d 699, 706-07 (N.D. Ill. 2011) (denying interlocutory appeal as to statute of limitations argument where there was no substantial ground for difference of opinion).

Second, an interlocutory appeal is inappropriate where the necessity of resolving the issues presented by the interlocutory appeal might be avoided by subsequent case developments. *See Stafford*, 71 Haw. at 646, 802 P.2d at 481 (holding that it was an abuse of discretion to permit interlocutory appeal where the issue of liability had not yet been determined, and a finding of non-liability could avoid the necessity of resolving issues raised on interlocutory appeal). Here, as well, there has been no finding on the issue of liability, and a finding of non-liability would obviate the need to resolve Defendant's statute of limitations argument. An interlocutory appeal on the denial of the motion to dismiss, however, will preclude that possibility by forcing the parties and court to address issues piecemeal. *See Brown v. Wong*, 71 Haw. 519, 522, 795 P.2d 283, 285 (1990) ("We have a long standing policy against piecemeal appeals."). Indeed, since it is likely that whichever side loses this case in the trial court will appeal, granting Defendant's current motion will do nothing but multiply the burden on the parties and the courts by subjecting this case to multiple unnecessary appeals.

Third, an interlocutory appeal will not speed the termination of this case because—regardless how that appeal is resolved—Plaintiff-Intervenor may press forward with litigation. "[A]n intervenor can continue to litigate after dismissal of the party who originated the action." *Benavides v. Eu*, 34 F.3d 825, 830 (9th Cir. 1994) (collecting cases and noting that "all have reached the same conclusion") (internal quotation marks omitted). Where (a) the plaintiff-

intervenor possesses a separate and independent basis for jurisdiction and (b) the failure to adjudicate the claim will only result in unnecessary delay, the litigation can proceed, even without the initial plaintiff. *Id.* In the unlikely event Defendant prevailed on appeal, intervention would not breathe any new life into Plaintiffs' claims vis-à-vis Defendant; but litigation could continue between the HCRC and Defendant.

Here, Plaintiff-Intervenor possesses a separate and independent basis for jurisdiction. The Executive Director of the HCRC has the authority to file an administrative complaint against Defendant, Haw. Admin. R. 12-46-5(b), which would first reach disposition at the Commission level and then be appealed to the Circuit Court, HRS § 368-16. If legal damages are awarded by the Commission, Defendant would be entitled to demand a jury trial (as it has done here). *See SCI Mgmt. Corp. v. Sims*, 101 Hawai'i 438, 451, 71 P.3d 389, 402 (2003). Furthermore, "refusing to allow the intervenor[] to continue [litigating the case] would lead to senseless delay, because a new suit would inevitably bring the parties, at a much later date, to the point where they are now." *Benavides*, 34 F.3d at 830. Because an interlocutory appeal would not affect Plaintiff-Intervenor's ability to prosecute this action whatsoever, an interlocutory appeal also will not speed the termination of this action.

B. Even If an Interlocutory Appeal Were Granted, a Stay of This Action Would Be Inappropriate Because the Appeal Is Highly Unlikely to Succeed, Defendant Would Not Suffer Irreparable Harm by Answering Limited Discovery, and Such a Stay Would Prejudice Plaintiffs and Harm the Public Interest.

A stay is an "intrusion into the ordinary processes of administration and judicial review," and accordingly "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder,* 556 U.S. 418, ---, 129 S. Ct. 1769, 1757 (2009) (internal quotation marks omitted). Contrary to Defendant's suggestion, a stay does not automatically attach when a court grants a motion for interlocutory appeal, and courts routinely deny stay requests even when

permitting interlocutory appeals. *See, e.g.*, *Haw. Ventures, LLC v. Otaka, Inc.*, 114 Hawai'i 438, 448, 164 P.3d 696, 706 (2007) (court granted interlocutory appeal but denied stay); *Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp.*, 820 F. Supp. 503, 512 (C.D. Cal. 1992) (same); *Holder Corp. v. Main St. Distrib.*, No. CIV 86-1285 PHX RCB, 1987 WL 14340, at *2 (D. Ariz. Apr. 21, 1987) (same). Instead, the appropriateness of a stay must be evaluated in each particular case, independent of whether an interlocutory appeal is permitted.

Defendant has failed to show why a stay is appropriate under *any* of the factors relevant to motions for stay pending appeal. First, Defendant has no likelihood of success on the merits of the interlocutory appeal, having failed to find even a single case to support its extraordinary proposition that a victim of discrimination who complies with every time limitation set forth in the discrimination statutes and regulations should be tossed out of court on statute of limitations grounds.

Second, Defendant can point to no conceivable irreparable injury it would suffer absent a stay. The best it can muster is that a stay would spare it "the expense of defending a lawsuit." Mot. at 3. Mere participation in litigation, however, does not constitute irreparable harm justifying a stay. *See Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995) ("[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to justify a stay) (internal quotation marks omitted); *Hammerman v. Peacock*, 623 F. Supp. 719, 721 (D.D.C. 1985) ("litigation costs do not rise to the level of irreparable injury"). And, as a factual matter, Defendant's protest that it would have to shoulder the "expense" of defending this litigation rings hollow, as defense counsel has previously indicated that Defendant is receiving legal services free of charge. Plaintiffs also do not anticipate that this will be a factually complex case: the conduct giving rise to the Complaint

involved a handful of conversations that took place over one day and involved the three party witnesses; and Defendant has already admitted having discriminated. Similarly, Defendant's defenses include questions of law that Plaintiffs currently anticipate may be resolved upon summary judgment.

Third, issuance of the requested stay would injure Plaintiffs and Plaintiff-Intervenor by introducing significant additional delay. *See* Rebecca Copeland, *Hawaii Appellate Statistics 2011 in Review*, Hawaii Bar J. 4, 6-7 (Feb. 2012) (noting that it took, on average, 30 months from the filing of a notice of appeal for the Intermediate Court of Appeal to issue a published decision). All victims of discrimination have a substantial interest in the expeditious vindication of their statutory rights. *See McDonald v. Piedmont Aviation*, 625 F. Supp. 762, 767 (S.D.N.Y. 1986) (denying stay and noting plaintiff's efforts "to vindicate his statutory rights").

Fourth, the public interest weighs against a stay. If this Court's denial of the motion to dismiss is affirmed, a stay will have needlessly prolonged the time in which Defendant will have been permitted to disobey Hawai'i's antidiscrimination law, to discriminate against more individuals based on their sexual orientation, and to cast a misleading cloud of doubt over whether the state may constitutionally prohibit discrimination in circumstances like those here. "The public interest in eradicating . . . discrimination clearly weighs in favor of denying a stay." *Knutson v. A.G. Processing, Inc.*, 302 F. Supp. 2d 1023, 1038 (N.D. Iowa 2004), *rev'd on other grounds*, 394 F.3d 1047 (8th Cir. 2005). The HCRC sought to intervene, and this Court granted intervention, precisely because this case is of general importance to the public. HRS § 368-12 ("The commission may intervene in a civil action brought pursuant to this chapter if the case is of general importance."). Indeed, even if Defendant were to prevail on the merits of this case,

the public interest is better served by acquiring knowledge of that ruling expeditiously, rather than at the end of a protracted dispute interrupted by unnecessary interlocutory appeals and stays.

IV. CONCLUSION

Plaintiffs and Plaintiff-Intervenor respectfully request that this Court deny Defendant's motion in all respects.

DATED: Honolulu, Hawai'i, March 9, 2012.

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CERTIFICATE OF SERVICE

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

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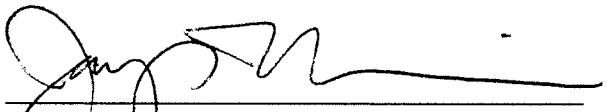

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