

ALEXANDRA R. ROSENBLATT 9996-0
CHUN KERR LLP
A LIMITED LIABILITY LAW PARTNERSHIP
745 Fort Street Mall, 9th Floor
Honolulu, HI 96813
Telephone: (808) 528-8200
E-mail: arosenblatt@chunkerr.com

LOIS K. PERRIN 8065
DANIEL M. GLUCK 7959
ACLU OF HAWAII FOUNDATION
P.O. Box 3410,
Honolulu, HI 96801
Telephone: (808) 522-5908
Fax: (808) 522-5909
E-mail: dgluck@acluhawaii.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

AMERICAN CIVIL LIBERTIES
UNION OF HAWAII and PAMELA
G. LICHTY,

Plaintiffs,

vs.

DEAN H. SEKI, Comptroller,
Department of Accounting and
General Services, State of Hawaii, in
his official capacity,

Defendant.

CIV. NO. 14-00150 JMS-RLP
[Civil Rights Action]

**STIPULATION FOR DISMISSAL
WITH PREJUDICE PURSUANT
TO FED. R. CIV. P.
41(a)(1)(A)(ii) AND 41(a)(2) AND
[PROPOSED] ORDER**

IT IS HEREBY STIPULATED AND AGREED by and between the parties to this action, through their respective attorneys, that pursuant to Rule 41(a)(1)(A)(ii) and 41(a)(2) of the Federal Rules of Civil Procedure, this action, and all claims asserted herein by Plaintiffs against Defendant, be and is hereby dismissed with prejudice, each party to bear any remaining costs and attorneys' fees other than the amounts to be paid pursuant to the Settlement Agreement ("Settlement Agreement").

The parties stipulate to dismiss this action with prejudice upon the Court's approval of this stipulation and order expressly incorporating herein the terms of the executed Settlement Agreement as follows:

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement (hereinafter, “Agreement”) is by and between Plaintiffs THE AMERICAN CIVIL LIBERTIES UNION OF HAWAII (“ACLU of Hawaii”) and PAMELA LICHTY (hereinafter collectively, “Releasers” or “Plaintiffs”), their heirs, representatives, successors, and assigns, and Defendant DEAN H. SEKI (hereinafter, “Releasee” or “Defendant”). ACLU of Hawaii, Lichty and Seki are sometimes referred to herein collectively as the “Undersigned Parties.”

WHEREAS, Releasers, through their attorneys, filed a Complaint in *American Civil Liberties Union of Hawaii and Pamela Lichty v. Dean H. Seki*, Civil No. 14-00150 JMS/RLP (hereinafter “Lawsuit”) on March 27, 2014 in the United States District Court for the District of Hawaii; and

WHEREAS, in order to avoid the further expense and risk of litigation, the Releasers and Releasee now desire to mutually and finally resolve and compromise all issues and claims related to the Lawsuit;

NOW, THEREFORE, in consideration for the mutual promises, covenants and conditions contained herein, Releasers and Releasee hereby agree as follows:

1. DEFINITIONS

- a. Expressive Activity: The term “Expressive Activity,” as used in this document, means speech or conduct, the principal object of which is the expression, dissemination, or communication by verbal, visual, literary, or auditory means of political, religious, philosophical, or ideological opinions, views, or ideas. Expressive Activity includes, but is not limited to, public oratory and the distribution of literature.

- b. State: The term “State” as used in this document means and includes the State of Hawaii, and its respective departments, employees, insurers, reinsurers, administrators, trustees, past, present and future officers, directors, partners, shareholders, attorneys, members, predecessors, agents, successors in interest, trustees, subrogees, and assigns, including but not limited to Defendant Dean H. Seki and/or his successor(s).
- c. DAGS Attorneys: Unless otherwise specified, the term “DAGS Attorneys” shall refer to the deputy attorneys general within the Department of the Attorney General assigned to represent the Department of Accounting and General Services (“DAGS”).
- d. DAGS Property: Unless otherwise specified, the term “DAGS Property” shall include all land, facilities, buildings, grounds, parks, and/or other places under the control or jurisdiction of DAGS, State of Hawaii.

2. CONSIDERATION The full, sufficient and complete consideration for the promises, covenants and conditions contained in this Agreement includes the following:

- a. Payment: Defendant shall pay the sum of \$12,401.00 via one check payable to “ACLU of Hawaii Foundation Clients’ Trust Account” to be distributed as follows: \$1.00 (one dollar) in damages to Plaintiff Pamela Lichty; \$6,000.00 (six thousand dollars) to be paid as attorneys’ fees to the American Civil Liberties Union of Hawaii Foundation (a tax exempt organization) (“ACLU”); \$400.00 (four hundred dollars) in costs to the ACLU; \$6,000.00 (six thousand dollars) to be paid as attorneys’ fees to Chun Kerr LLP. With respect to the above-listed sums, the Releasers and their attorneys have represented, and for purposes of this

Agreement, Defendant does not dispute, these sums constitute statutory attorneys' fees and costs under 42 U.S.C. Sections 1983 and 1988. This allocation or characterization of the fees and costs shall have no bearing on any future request for fees and costs in the event of further action(s) arising out of or involving the interpretation of this Agreement. With regard to the sums set forth above, the State will issue an IRS Form 1099 to the ACLU and/or Chun Kerr, if that is consistent with the standard practice of the State. Plaintiffs' counsel has represented that these fees and costs are paid pursuant to statutory authority, thus no IRS Form 1099 shall be issued by the Defendant or the State to either of the Plaintiffs for these fees and/or costs. Counsel for the Defendant express no opinion as to the tax consequences of the terms of this Agreement.

b. Revisions to Hawaii Administrative Rules and DAGS policies/procedures:

DAGS and/or DAGS Attorneys shall:

- i. Within ten business days of the Effective Date of this Agreement, cease enforcement of those provisions of Hawaii Administrative Rules ("HAR") chapter 3-111 referenced herein for any individual or group engaged in Expressive Activity.
- ii. Within twenty business days of the Effective Date of this Agreement:
 1. Clarify on the DAGS website that no permit is required to use DAGS Property for Expressive Activity.
 2. Place a notice on the current DAGS Special Use Permit form that no permit is necessary for expressive activity on DAGS property.

3. Revise the Permit Provisions sheet that accompanies the DAGS Special Use Permit form to clarify that individuals/organizations are not required to obtain a permit for Expressive Activities or to use a table (with a maximum size of 10 square feet) for the distribution of literature on DAGS property, but that individuals/organizations may use the current DAGS Special Use Permit form to reserve space for an Expressive Activity at a DAGS facility and/or to erect temporary structures, shelters, and/or place equipment.
4. The applicant for a permit for Expressive Activity need not indemnify the State for harm arising out of that activity. (Permit forms, rules, memoranda, and the like need not expressly state that no indemnification is required – instead, permit forms, etc. may simply remain silent as to indemnification.)
5. If an individual or organization chooses to submit a Special Use Permit for Expressive Activity, DAGS shall allow for an exception to any advance-notice requirement; however, DAGS reserves the right to deny the permit application if a prior application for the same time and place was made and approved, and the activities authorized by that prior approved permit do not reasonably allow multiple occupancy of that particular location. DAGS also reserves the right to deny the permit application if the applicant seeks to erect structures or shelters, or place equipment on the site

that would 1) impede State employees from performing their duties; 2) impede the general public from obtaining the public services available at that facility; 3) cause damage or injury to the facility; or 4) present a clear and present danger to the State employees and the general public at the facility.

6. Insurance

- a. DAGS shall allow for a waiver of the insurance requirement in the Special Use Permit for Expressive Activity provided that the applicant certifies that the applicant (1) cannot afford the insurance, or (2) has made reasonable, good-faith efforts to procure insurance and is unable to secure insurance.
- b. DAGS may otherwise waive the insurance requirement for applicants engaged in Expressive Activities, but must set guidelines in advance to ensure that DAGS officials may not exercise discretion based on the viewpoint or content of the applicant's speech/conduct.

7. DAGS shall provide a notice on the DAGS website that HAR chapter 3-111 is being amended and that the Expressive Activities on DAGS property do not require a permit, and will also advise any applicant seeking a permit for Expressive Activities with questions about the current process to contact James Kurata,

Acting Administrator, Central Services Division, Department of Accounting and General Services;

8. DAGS shall issue an internal memorandum to all State personnel whose job functions include management, oversight, review, approval, issuance, and/or enforcement of permits for the use of DAGS Property pursuant to HAR chapter 3-111, describing the new permitting policies and proposed changes to the HAR as set forth herein.
- iii. Within 40 days of the Effective Date of this Agreement:
 1. DAGS Attorneys shall provide Plaintiffs' Counsel with a draft of proposed amendments to the HAR to include, at a minimum, the following revisions:
 - a. HAR §§ 3-111-23 shall be amended to allow for solicitation for non-commercial purposes;
 - b. HAR §§ 3-111-24 shall be amended to allow specifically for the use of a table for Expressive Activity without a permit, provided that the table shall not unreasonably block access or create a safety hazard and that no table shall be larger than 10 square feet for each person engaging in the Expressive Activity;
 - c. HAR § 3-111-25 shall be repealed in its entirety. The State shall not thereafter enact any rule or policy that shall

require individuals or groups to obtain permits for Expressive Activities.

- d. A new HAR provision shall be created to allow for an optional Special Use Permit for Expressive Activities that 1) allows an applicant to reserve certain space in a DAGS facility, provided that the requested space has not already been requested and approved in an earlier permit for the same date and time; and 2) allows for an exception to the advance-notice requirement. This HAR provision shall state, explicitly, that a Special Use Permit for Expressive Activities is optional.
 - e. HAR § 3-111-26 shall be amended to state that this section does not apply to Special Use Permits for Expressive Activities.
2. Plaintiffs' counsel shall be given an opportunity to provide comments on the proposed rules.
- iv. DAGS shall make reasonable best efforts to have revised HAR (which rules shall incorporate all of the policy changes set forth herein) take effect no later than December 31, 2014. Failure to implement revised HAR (which shall incorporate all of the policy changes set forth herein) by April 1, 2015 shall constitute a breach of this Agreement.
 - v. With regard to any DAGS websites that post information about statutes, administrative rules, or internal policies which concern permitting for

DAGS properties, DAGS will use its best efforts to ensure that any change to such information be reflected on the respective website(s) within ten (10) business days after any such change takes effect. DAGS also agrees to use its reasonable best efforts to promptly revise permitting forms and other publications to reflect changes in its administrative rules, internal policies or to the Hawaii Revised Statutes with respect to Expressive Activities.

- vi. No later than forty-five days after the Effective Date of this Agreement, the DAGS Attorneys shall inform Plaintiffs' counsel as to what actions have been taken to fulfill the above-referenced conditions. No earlier than January 1, 2015, and no later than January 15, 2015, DAGS Attorneys shall provide Plaintiffs' counsel with an update as to what further actions have been taken to fulfill the above-referenced conditions. Thereafter, DAGS Attorneys shall provide Plaintiffs' counsel with updates every 90 days as to the progress of fulfilling the above-referenced conditions until all said conditions have been fulfilled.
- vii. Between the Effective Date of this Agreement and all other relevant dates set forth herein, DAGS shall make reasonable good-faith efforts to communicate the proposed new policies and rules to the general public and to process any applications for permits for Expressive Activities as though the new Special Use Permit for Expressive Activities set forth herein were already in place. DAGS shall also make reasonable, good-faith efforts to inform the general public that no permit is necessary to

engage in Expressive Activity, and to inform the general public about the requirements for obtaining a permit should an individual or organization want to obtain a permit.

3. PURPOSE AND INTENT The purpose of this Agreement is, *inter alia*, to ensure that individuals and/or groups are able to engage in Expressive Activity on DAGS Property with constitutional time, manner and place restrictions.. This Agreement shall be interpreted accordingly.
4. RELEASE Except as provided in paragraph six (¶ 6) herein, Releasors hereby release and forever discharge Releasee, the State, its departments, successors, present and former employees, officers, agents and assigns from and on account of any and all claims, actions, causes of action, claims for relief, liability, liabilities, demands, injuries, losses, treble damages, exemplary damages, punitive damages and damages of whatever name or nature, whether known or unknown, which may now exist or which may in any manner arise or grow out of any act, omission, event or circumstances alleged in the Lawsuit.
5. DISMISSAL At the time this Agreement is fully and finally executed, the parties to the Lawsuit will execute and lodge a Stipulation of Dismissal With Prejudice and Order, pursuant to Federal Rule of Civil Procedure, Rule 41(a)(1)(ii), which will set forth this Agreement verbatim so that the Court shall retain jurisdiction for purposes of any enforcement action arising from non-compliance with this Agreement.
6. EFFECT OF BREACH
 - a. In the event that the Hawaii State Legislature, during (or prior to) the 2015 Regular Legislative Session, fails to appropriate funds for the payment required under Section 2(a) herein and/or those funds are not paid to the Releasors or their

representatives within a reasonable time after such appropriation and/or the State fails to comply with Section 2(b)(iv) herein, Releasors may, at their election, either (1) terminate the Agreement and proceed with the Lawsuit, or (2) bring claims against Releasee to enforce the Agreement.

- b. In the event that either party breaches any other provision of the Agreement, the non-breaching party may bring a claim to enforce this Agreement. In the event of any litigation arising out of this Agreement or involving the interpretation of this Agreement, the prevailing party shall be entitled to recover its costs including reasonable attorneys' fees.

7. UNDERSTANDINGS AND AGREEMENTS The Undersigned Parties acknowledge, agree and understand that:

- a. No Admission of Liability: It is understood and agreed that this is a compromise settlement of the matters described herein and that neither this Agreement nor the furnishing of the consideration for this Agreement shall be deemed or construed as an admission of liability or wrongdoing of any kind by any of the Undersigned Parties.
- b. Complete and Voluntary Agreement: This Agreement constitutes the entire understanding of the Undersigned Parties on the subjects covered. The Undersigned Parties acknowledge that neither of them, nor their agents or attorneys, have made any promise, representation or warranty whatsoever, either express or implied, written or oral, which is not contained in this Agreement, for the purpose of inducing the other Undersigned Party to execute this Agreement, and the Undersigned Parties acknowledge that they have executed this Agreement in reliance only upon such

promises, representations and warranties as are contained herein, and are executing this Agreement voluntarily and free of any duress or coercion.

- c. Modification: This Agreement may not be modified in whole or in part except by an agreement in writing signed by the Undersigned Parties.
- d. Knowledge: The Undersigned Parties make this compromise with full knowledge of the facts, are represented by counsel, and are fully informed as to the terms, content and effect of this Agreement.
- e. Expenses, Fees and Costs: Except as otherwise provided in Section 2(a) of this Agreement, each of the parties shall bear all of its own costs, expenses, and fees, including attorneys' fees, incurred by the party up to and including the date of execution of this Agreement.
- f. Hawaii Law: This Agreement shall be construed and the rights of the parties determined in accordance with the laws of the State of Hawaii.
- g. Severability: If any term, provision or covenant of this Agreement is held by a court of competent jurisdiction to be invalid, void or otherwise unenforceable, the remaining terms, provisions, and covenants of this Agreement shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.
- h. Effective Date: The releases and other provisions of this Agreement shall become effective only upon the mutual execution of this document by and between the Undersigned Parties.
- i. Additional Documents and Actions: The Undersigned Parties agree to cooperate fully and execute any and all supplementary documents and to take all additional

actions which may be necessary or appropriate to give full force and effect to the basic terms and intent of this Agreement.

- j. No Party Deemed Drafter: In the event of any future action or proceedings relating to this Agreement neither of the Undersigned Parties shall be considered to have drafted this Agreement for purposes of construing the intent of this Agreement.
- k. Counterparts: This Agreement may be executed and delivered by way of electronic signature and transmission or facsimile transmission, and may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. In making proof of this Agreement, it shall not be necessary to produce or account for more than a single counterpart containing the respective signatures of each of the Undersigned parties.
- l. Authority to agree to and to execute provisions herein: The Undersigned Parties represent and warrant that they have the authority to agree to, and to execute, all the terms specified herein.

This stipulation is signed by counsel for all parties in this action. This Court shall retain jurisdiction to consider any claim by either/both of the Plaintiffs or the Defendant for breach of the terms of the Settlement Agreement. This Order does not vest this Court with jurisdiction over a claim by anyone not a party herein for any alleged harm arising out of the newly created and/or amended rules and/or policies.

Dated: 9/4/14

By: /s/ Stella M.L. Kam
Stella M.L. Kam
Attorney for Defendant
DEAN H. SEKI

Dated: 9/4/14

By: /s/ Daniel M. Gluck
Daniel M. Gluck
Attorney for Plaintiffs
AMERICAN CIVIL LIBERTIES
UNION OF HAWAII and
PAMELA LICHTY

APPROVED AND SO ORDERED.

DATED: Honolulu, Hawaii, September 5, 2014.



/s/ J. Michael Seabright
J. Michael Seabright
United States District Judge

ACLU v. Seki, Civ 14-00150 JMS/RLP; STIPULATION FOR DISMISSAL WITH PREJUDICE PURSUANT TO FED. R. CIV. P. 41(a)(i)(A)(2) AND 41(a)(2) AND ORDER