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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

)	No. CV 09-00336 SOM-BMK
OKLEVUEHA NATIVE AMERICAN)	DEFENDANTS’ REPLY IN
CHURCH OF HAWAII, INC.,)	SUPPORT OF MOTION TO
MICHAEL REX “RAGING BEAR”)	DISMISS AND FOR JUDGMENT
MOONEY,)	ON THE PLEADINGS
)	
Plaintiffs)	Hearing: October 25, 2010, 9:00 a.m.
)	
v.)	Judge: Hon. Susan Oki Mollway
)	
ERIC H. HOLDER, JR., U.S. Attorney)	Trial: March 8, 2011, 9:00 a.m.
General;)	
MICHELE LEONHART, Acting)	Related document: dkt. no. 40
Administrator, U.S. Drug Enforcement)	
Administration;)	
FLORENCE T. NAKAKUNI, U.S.)	
Attorney for the District of Hawaii,)	
)	

Defendants)
_____)

**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS AND
FOR JUDGMENT ON THE PLEADINGS**

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT..... 1

 I. The Ninth Circuit’s decision in Holley v. California Department of Corrections strongly suggests that RFRA does not provide a basis for seeking monetary compensation from the Federal Government..... 1

 II. The sovereign immunity of the United States bars a claim seeking compensation in the form of marijuana just as it bars a claim seeking compensation in the form of money..... 4

 III. Return of or compensation for seized property is not appropriate relief under RFRA in this case, because it would address only material or financial harms, not religious harms. 6

CONCLUSION..... 7

TABLE OF AUTHORITIES

CASES

Clow v. U.S. Dep’t of Hous. & Urban Dev.,
948 F.2d 614 (9th Cir. 1991)..... 5

Dep’t of the Army v. Blue Fox, Inc.,
525 U.S. 255 (1999) 4, 5

Franklin v. Gwinnett County Pub. Schs.,
503 U.S. 60 (1992) 3, 4

Holley v. Cal. Dep’t of Corrs.,
599 F.3d 1108 (9th Cir. 2010)..... 1, 3

Lane v. Pena,
518 U.S. 187 (1996) 2, 3

Oklevueha Native Am. Church of Haw., Inc. v. Holder,
No. 09-00336, 2010 WL 649753 (D. Haw. Feb. 23, 2010) 4

FEDERAL STATUTES

Administrative Procedure Act, 5 U.S.C. § 702 4, 5

Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb
to 2000bb-4 passim

Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C.
§ 2000cc-2(a) 2, 3

PRELIMINARY STATEMENT

The plaintiffs' remaining claims in this action must be dismissed for lack of jurisdiction for the reasons explained in the defendants' initial memorandum. The Ninth Circuit's reasoning in Holley v. California Department of Corrections, 599 F.3d 1108 (9th Cir. 2010), compels the conclusion that the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, does not provide a basis for seeking compensation for property seized by the Federal Government. Claims of this kind are barred by the sovereign immunity of the United States, and they remain barred even if the plaintiffs ask for compensation in the form of an equivalent quantity of marijuana rather than in the form of monetary damages. Furthermore, material interests in religious property are not the kind of interests that RFRA was designed to protect, so relief aimed at compensating property losses would not be appropriate in the circumstances of this case. Accordingly, the Court should dismiss this action.

ARGUMENT

I. The Ninth Circuit's decision in Holley v. California Department of Corrections strongly suggests that RFRA does not provide a basis for seeking monetary compensation from the Federal Government.

The reasoning that the Ninth Circuit followed in Holley v. California Department of Corrections, 599 F.3d 1108 (9th Cir. 2010), compels the conclusion

that RFRA does not provide a basis for seeking damages or other monetary compensation from the Federal Government.

As the defendants explained in their initial memorandum, the sovereign immunity of the United States prevents the plaintiffs from seeking monetary compensation for the marijuana seized by the Federal Government. See Defs.’ Mem. at 8–11. The Supreme Court made clear in Lane v. Pena, 518 U.S. 187 (1996), that “a waiver of the Government’s sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign. To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims.” Id. at 192 (citations omitted). The provision of RFRA authorizing suits for “appropriate relief,” 42 U.S.C. § 2000bb-1(c), does not unambiguously authorize monetary compensation, so the provision cannot be interpreted as authorizing suits for monetary compensation. See Defs.’ Mem. at 8–11.

The plaintiffs argue that in evaluating the scope of the RFRA provision that authorizes suits for “appropriate relief,” the Court should consider the analogous “appropriate relief” provision in the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-2(a). See Pls.’ Mem. at 4 (“The RLUIPA case-law analyzing the term ‘appropriate relief’ is . . . persuasive and informative for this Court.”). But the case law interpreting RLUIPA in fact favors

the defendants. The Ninth Circuit held in Holley that the provision of RLUIPA authorizing suits for “appropriate relief” does not abrogate state sovereign immunity and therefore does not expose states to actions for money damages. See Holley, 599 F.3d at 1112–13. Holley involved claims against a state government, not the Federal Government, but the Ninth Circuit in Holley nevertheless relied on Supreme Court case law regarding the Federal Government’s sovereign immunity, recognizing that state sovereign immunity and federal sovereign immunity implicate similar issues. See id. (discussing Lane, 518 U.S. at 192, 196–67). Given that this case involves claims against the Federal Government, the reasoning that the Ninth Circuit followed in Holley is even more relevant in this case than it was in Holley itself. Following Holley compels the conclusion that RFRA does not authorize suits for monetary relief.

The plaintiffs also argue that the Supreme Court’s decision in Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992), suggests that all conceivable remedies are permissible under RFRA. See Pls.’ Mem. at 3–4. But as the Ninth Circuit observed in Holley, Franklin did not involve a claim of sovereign immunity. See Holley, 599 F.3d at 1113. The Supreme Court clarified Franklin in Lane v. Pena, noting that “[w]here a cause of action is authorized against the federal government, the available remedies are not those that are “appropriate,” but only those for which sovereign immunity has been expressly waived.” Lane, 518

U.S. at 197 (quoting Brief for Respondents at 28, Lane v. Pena, 518 U.S. 187 (1996) (No. 95-365)) (alteration in original), quoted in Holley, 599 F.3d at 1113. Franklin therefore provides no support for the plaintiffs' position.

II. The sovereign immunity of the United States bars a claim seeking compensation in the form of marijuana just as it bars a claim seeking compensation in the form of money.

As the defendants explained in their initial memorandum, the Court cannot compel the Government to return the marijuana seized by the Government, because the marijuana was destroyed before the plaintiffs filed their amended complaint seeking return of the marijuana.¹ The Court also cannot compel the Government to purchase an equivalent quantity of marijuana to substitute for the seized marijuana. The sovereign immunity of the United States bars a claim for compensation in the form of marijuana just as it bars a claim for compensation in the form of money.

In Department of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999), the Supreme Court considered whether a subcontractor could seek an equitable lien against the Federal Government based on the Administrative Procedure Act, 5

¹ As the defendants noted in their initial memorandum, and as this Court recognized in its opinion dismissing the plaintiffs' initial complaint, the plaintiffs' initial complaint did not seek return of the marijuana. See Defs.' Mem. at 7; Oklevueha Native Am. Church of Haw., Inc. v. Holder, No. 09-00336, 2010 WL 649753 at *7 (D. Haw. Feb. 23, 2010) ("Notably, while the Complaint seeks to prevent future seizures of cannabis, it does not pray for the return of the seized cannabis.").

U.S.C. § 702, which waives the Federal Government’s sovereign immunity in suits seeking relief “other than money damages.” 5 U.S.C. § 702. The Court’s analysis again began from the principle that “a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign,” and must be “‘unequivocally expressed’ in the statutory text.” Blue Fox, 525 U.S. at 261 (quoting Lane, 518 U.S. at 192). The Court drew a distinction between specific relief, which “attempt[s] to give the plaintiff the very thing to which he [is] entitled,” and compensatory or substitute relief such as damages, which are designed to “substitute for a suffered loss.” Id. at 261–62 (quoting Bowen v. Massachusetts, 487 U.S. 879, 895 (1988)). The Court reasoned that the respondent’s request for an equitable lien was essentially a request for compensation and therefore should be treated as the equivalent of a request for money damages. See id. at 263. Consequently, the Court found the respondent’s claim barred by the United States’ sovereign immunity. See id.

In this case, for the purpose of sovereign immunity analysis, requiring the Government to purchase an equivalent quantity of marijuana to replace the seized marijuana would be no different from ordering the Government to compensate the plaintiffs for the monetary value of the seized marijuana. The United States’ sovereign immunity bars both forms of relief equally. Cf. Clow v. U.S. Dep’t of Hous. & Urban Dev., 948 F.2d 614, 623–25 (9th Cir. 1991) (O’Scannlain, J.,

dissenting) (reasoning that, for the purpose of sovereign immunity analysis, a claim seeking a replacement home was equivalent to a claim for money damages, and noting that the panel majority had not directly disagreed with that conclusion). The plaintiffs cannot seek compensation in marijuana any more than they can seek compensation in dollars, gold, or some other commodity.

III. Return of or compensation for seized property is not appropriate relief under RFRA in this case, because it would address only material or financial harms, not religious harms.

As the defendants explained in their initial memorandum, the plaintiffs' claims for return of or compensation for the marijuana should also be dismissed for failure to state a claim, because these forms of relief would only address financial or material harms that resulted from the seizure of the marijuana; they would do nothing to remedy any spiritual loss the plaintiffs suffered from the seizure. Return of or compensation for the marijuana therefore would not be "appropriate relief" authorized by RFRA, which was designed to protect religious interests, not property interests.

The defendants supported their request for dismissal for failure to state a claim with five pages of argument and citations to relevant and binding authorities. See Defs.' Mem. at 12–16. The plaintiffs assert that the defendants' arguments are "utter frivolity," Pls.' Mem. at 6, but the plaintiffs present absolutely no explanation of why they believe the defendants' arguments are incorrect. The

Court should dismiss the plaintiffs' claims for the reasons the defendants explained at length in their memorandum. See Defs.' Mem. at 12–16.

CONCLUSION

The plaintiffs' requests for monetary compensation or compensation in the form of marijuana are barred by the United States' sovereign immunity, so the plaintiffs' remaining claims must be dismissed for lack of subject matter jurisdiction. Moreover, these claims do not request "appropriate relief" under RFRA, so the claims should be dismissed for failure to state a claim.

Date: October 8, 2010

Respectfully submitted,

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