SAMUEL P. KING, JR. 1396
735 Bishop Street, Suite 304
Honolulu, Hawaii 96813
Tel. No. 521-6937

Attorney for Defendant JAY RAM

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JOHN ROE NO. 8, JOHN ROE NO. 16, JOHN ROE NO. 17, JOHN ROE NO. 18, AND JOHN ROE NO. 19	) Civ. No. 14-00027-LEK-RLP
Plaintiffs,	) MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR
vs.	) FAILURE TO STATE A CLAIM, AND) MOTION FOR DETERMINATION
JAY RAM aka GARY WINNICK; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; DOE NON-PROFIT ENTITIES 1-10; and DOE GOVERNMENTAL ENTITIES 1-10,	) OF INSUFFICIENCY OF SERVICE) OF PROCESS; DECLARATION) OF PRAHLAD JAMIESON;) MEMORANDUM IN SUPPORT OF) MOTION
Defendants.	)

MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM, AND MOTION FOR DETERMINATION OF INSUFFICIENCY OF SERVICE OF PROCESS

Defendant JAY RAM ("RAM") hereby moves through undersigned counsel

pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure that the First Amended Complaint filed by Plaintiffs in Hawaii state court and removed by RAM to federal court on diversity of citizenship grounds be dismissed for failure to state claim against RAM upon which relief can be granted. In the alternative, if the Complaint is not dismissed, RAM moves pursuant to Rule 12(b)(4) that this Court determine that service of process was insufficient. RAM's 12(b)(6) motion is based on the attached Memorandum in Support of Motion and the file in this case. RAM's 12(b)(4) is based on the attached Declaration of Prahlad Jamieson, the Memorandum in Support of Motion, and the file in this case.

DATED: Honolulu, Hawaii, February 12, 2014.

/s/ Samuel P. King, Jr.
SAMUEL P. KING, JR.
Attorney for Plaintiff JAY RAM

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JOHN ROE NO. 8, JOHN ROE NO. 16, JOHN ROE NO. 17, JOHN ROE NO. 18, AND JOHN ROE NO. 19 Plaintiffs, vs. JAY RAM aka GARY WINNICK; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; DOE NON-PROFIT ENTITIES 1-10; and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	) Civ. No. 14-00027-LEK-RLP))))))) MEMORANDUM IN SUPPORT OF MOTION)))))))

MEMORANDUM IN SUPPORT OF MOTION

I. Introduction

On March 1, 2013, Plaintiff JOHN ROE NO. 8 ("NO. 8") filed a Complaint against RAM in the First Circuit of the State of Hawaii in Civ. No. 13-1-0609-03 VLC ("Hawaii civil case") alleging sex abuse by RAM against NO. 8 which occurred during the period 1984 to 1989. NO. 8 alleged that he was 5 years old in 1978 (born in1973). Counts of "Sexual Assault and Battery," "Intentional Infliction of Emotional Distress," "Grossly Negligent Infliction of Emotional Distress," and "Punitive Damages" were made in the Complaint.

On October 1, 2013, Plaintiffs NO. 8 and JOHN ROE NO. 16 ("NO. 16"), JOHN ROE NO. 17 ("NO. 17"), JOHN ROE NO. 18 ("NO. 18"), and JOHN ROE NO. 19 ("NO. 19") filed the First Amended Complaint in the Hawaii civil case. All Plaintiffs alleged sexual abuse against them by RAM. NO. 8 made the same allegations of abuse as in the original Complaint. NO. 16 alleged abuse against him by RAM during the period 1984 to 1993. NO. 16 alleged that he was 5 years old in 1982 (born in 1978). NO. 17 alleged abuse against him by RAM during the period 1987 to 1991. NO. 17 alleged that he was 10 years old in 1983 (born in 1973). NO. 18 alleged abuse against him by RAM during the period 1986 to 1991. NO. 18 alleged that he was 13 years old in 1986 (born in 1973). NO. 19 alleged abuse against him by RAM during the period from 1987 to 1990. NO. 19 alleged that he was 13 years old in 1987 (born in 1974). All Plaintiffs alleged the same counts against RAM as NO. 8 had alleged in the original Complaint.

During the period 1984 to 1993 (which encompasses all the alleged periods of abuse by all Plaintiffs), the statute of limitations for torts in Hawaii for "Damage to persons or property," HRS 657-7, provided that such action "shall be instituted within two years after the cause of action accrued, and not after, except as provided in section 657-13." HRS 657-13 provided that a cause of action could be instituted by a person who was "within the age of eighteen years" up to two years after the person attained the age of 18. NO. 8 claimed abuse ending in 1989, and he was 18 in 1991.

NO. 16 claimed abuse ending in 1993, and he was 18 in 1996. NO. 17 claimed abuse ending in 1991, and he was 18 in 1991. NO. 18 claimed abuse ending in 1991, and he was 18 in 1991. NO. 19 claimed abuse ending in 1990, and he was 18 in 1992. HRS 657-7 and 657-13 have not been amended since 1993 and are still the same today. Under these statutes, the claims of NO. 8 were extinguished by the Hawaii statutes of limitations in 1993, the claims of NO. 16 in 1998, the claims of NO. 17 in 1993, the claims of NO. 18 in 1993, and the claims of NO. 19 in 1994.

Under Hawaii caselaw, if a person is sexually abused but has no recollection of the abuse and then becomes aware of the abuse, that person has up to two years after the "discovery" of the damage from the abuse to file suit against the alleged perpetrator. *Dunlea v. Dappen*, 83 Haw. 28, 924 P.2d 196 (1996). None of the Plaintiffs in this case claim that they failed to discover alleged abuse by RAM against them within two years of filing the Complaint or First Amended Complaint in this case.

In 2012, the Hawaii Legislature enacted HRS 657-1.8 (Act 68) which took effect on April 24, 2012. Subsection (a) extended the statute of limitations for a minor claiming "damages based on physical, psychological, or other injury or condition suffered by a minor arising from the sexual abuse of the minor by any person" for up to 8 years after the minor attained his or her 18th birthday or for up to 3 years after the minor "discovers or reasonably should have discovered that

psychological injury or illness occurring after the age of minor's eighteenth birthday was caused by the sexual abuse" [a *Dunlea*-type claim]. Even assuming this portion of the statute could retroactively apply to the claims of all Plaintiffs in this case, this portion of the statute does not "revive" any of the claims which were all extinguished prior to 2000 at the latest for NO. 19.

Subsection (b) of HRS 657-1.8 states:

> For a period of two years after [April 24, 2012], a victim of child sexual abuse that occurred in this State who had been barred from filing a claim against the victim's abuser due to the expiration of the applicable civil statute of limitations that was in effect prior to [April 24, 2012], may file a claim in a circuit court of this State against the person who committed the act of sexual abuse.

If a person is sued under subsection (b) and the court determines that "a false accusation was made with no basis in fact and with malicious intent," then the person sued may recover attorney's fees (subsection (c)). In order to be allowed to file an action for sexual abuse under subsection (b), subsection (d) requires that a plaintiff must obtain a "certification of merit" which includes a notarized statement from a licensed psychologist, licensed marriage and family therapist, licensed mental health counselor, or licensed social worker "who is knowledgeable in the relevant facts and issues involved in the action, who is not a party to the action." The notarized statement included in the certificate of merit "shall set forth in reasonable detail the facts and opinions relied upon to conclude that there is a reasonable basis to believe

that the plaintiff was subject to one or more acts that would result in an injury or condition specified in subsection (a)."

When Plaintiffs filed their First Amended Complaint in this case in Hawaii state court, certifications of merit were filed. HRS 657-1.8(d) states that the certifications are to "be sealed and remain confidential." The First Amended Complaint states at paragraph h on page 3, "Plaintiffs have satisfied the requirements of Hawaii Revised Statutes, Section 657, specifically Act 68 enacted in 2012." This is a nonsense statement because there is no "Section 657." Presumably, Plaintiffs are referring to "Chapter 657," but they do not cite which section of Chapter 657 to which they refer. Again, presumably, Plaintiffs refer to HRS 657-1.8(b) and (d). Based on these presumptions, all Plaintiffs appear to be claiming that their otherwise extinguished allegations of sexual abuse against RAM have been resurrected by HRS 657-1.8(b).

II. HRS 657-1.8(b) is unconstitutional on its face because it violates RAM's federal right to Due Process of law.

A. Introduction There are two possible Due Process attacks which RAM could raise against HRS 657-1.8(b) under two possible constitutions. RAM could claim that HRS 657-1.8(b) violates his right to Due Process of law "as applied," or he could claim that HRS 657-1.8(b) violates his right to Due Process of law "on its face." In

this motion, RAM raises the latter consideration. RAM could also refer to the Due Process Clauses of the Constitution of the United States of America or the Constitution of the State of Hawaii. In this motion, RAM particularly raises the Due Process issue under the United States Constitution. RAM suggests that if this Court rejects this motion as a matter of constitutional law under the Due Process Clause of the United States Constitution, that the question of whether there is a violation of constitutional law under the Due Process Clause of the Hawaii State Constitution be referred to the Hawaii Supreme Court pursuant to Hawaii Rules of Appellate Procedure (HRAP), Rule 13. If this Court refuses to refer the state constitutional issue to the Hawaii Supreme Court under HRAP Rule 13, then RAM asks that this Court rule on the state constitutional issue if it rejects the federal constitutional issue. If this Court (and the Hawaii Supreme Court, if applicable) reject RAM's claims of Due Process violations "on the face" of the statute, then RAM reserves his right to raise at a latter time after substantial discovery in this case whether there may be a Due Process violation "as applied" under either the United States or Hawaii State Constitutions.

B. United States Supreme Court cases regarding revived statutes of limitations

The United States Supreme Court has addressed revived statutes of limitations in four cases, none of which is comparable to the situation at bar.

1. *Campbell v. Holt*. In *Campbell v. Holt*, 115 U.S. 620 29 L.Ed. 483,

6 S.Ct. 209 (1885), a Texas minor female inherited property from her mother who died in 1857. The statute of limitations ("S/L") did not run against the girl as a minor, and the S/L was suspended by the Texas Legislature during the Civil War. The S/L commenced to run again by legislative act in 1866 at which time the Texas female was an adult. The two year S/L bar ran in 1868. In 1869, Texas adopted a new Constitution to go into effect when Congress accepted the Constitution. This Constitution stated that all S/Ls which were suspended during the War would not take effect until the Texas Constitution was accepted by the United States Congress. The Constitution was accepted in 1876. The lawsuit in this case was filed in 1874 by the Texas female's husband (Holt) as the heir of the Texas female who had died some time between 1868 and 1974. The lawsuit filed by Holt was not barred by the S/L because, although the S/L had run in 1868, the S/L was revived in 1869 (by declaring it suspended retroactive to the beginning of the War and declaring the S/L to stay suspended to the adoption of the new Constitution (which occurred in 1876)). The administrator of the mother's estate (Campbell) claimed that the estate had a vested right in the previous running of the S/L in 1868 and that the Fourteenth Amendment's Due Process clause barred the taking of this vested right. The Supreme Court, per Miller, J., held that there was no "vested right" in the running of a S/L so no "property" was "appropriated" by the revival of the S/L. Bradley, J., dissented and stated his opinion that "[m]y property is as much imperiled by an action against me

for money as it is by an action against me for my land or my goods." 115 U.S., at 630. Note that this case involved an issue for which evidence was readily available, unlike sex abuse charges as will be discussed further below. Also, no single category of cause of action, like "alleged sex abuse," or people, like "alleged sex abuser," was singled out for special treatment. Only a general suspension of all S/Ls in Texas during a very unusual period of time was involved.

2. <u>*Chase Securities Corporation v. Donaldson*.</u> In *Chase Securities Corporation v. Donaldson*, 325 U. 304, 89 L.Ed. 1628, 65 S.Ct. 1137 (1945), Chase sold securities to Donaldson in Minnesota in 1929 in violation of Minnesota law because the securities were not properly registered under state law. Donaldson did not discover the problem and possible fraud by Chase until shortly before he filed suit in 1937. Donaldson sued on a theory of recovery for violation of the Minnesota Blue Sky Law and on theories of recovery for common law fraud and deceit. The Blue Sky Law at the time had a six year S/L, but the trial court held that the S/L had been tolled because Chase withdrew from operation in Minnesota in 1931. Donaldson obtained a judgment, but the Minnesota Supreme Court reversed holding that the S/L was not tolled after 1931 because Chase still maintained a designated agent to receive service of process in Minnesota after 1931. The case was remanded without prejudice to any issues "other than that of the tolling of the statute of limitations."

While the case was pending on remand, in 1941, the Minnesota

Legislature amended the Blue Sky Law to provide for a six year statute of repose (no lawsuit could be brought on a Blue Sky claim more than six years after delivery of the securities). Under the old S/L, the limitation of actions did not start to run until the "discovery" of the fraud. Under the new statute of repose, there was a six year cut-off regardless of when the "discovery" of the fraud occurred. The new statute provided for an exception - any action which arose more than five years prior to the enactment of the 1941 new statute could be filed for up to one year after the enactment of the new statute. Because Donaldson's cause of action arose in 1929, more than five years before the new 1941 statute was enacted, Donaldson's 1937 lawsuit was within the new time period allowed by the 1941 law even if it was barred by the old six year statute. Donaldson obtained a new judgment based on the statutory violation and based on common law fraud and deceit, and the Minnesota Supreme Court held that the new statute was applicable and "had the effect of lifting any pre-existing bar of the general limitation statute and that in so doing it did not violate the due process clause of the Fourteenth Amendment." 325 U.S., at 309. Note that the Minnesota Supreme Court relied on the new statute, so it didn't address whether Donaldson's fraud and deceit actions were not time-barred under the old statute.

The federal issue before the United States Supreme Court was whether it was unconstitutional for the new statute to have revived Donaldson's cause of action which arguably was barred in 1935 (six years after the 1929 sale of securities

from Chase to Donaldson). The Supreme Court, per Jackson, J., reaffirmed *Campbell v. Holt*. In passing, the Court noted that many state appellate courts had taken the opposite position from *Campbell* under the various state constitutions which the Court noted that the various state appellate courts had every right to provide greater protection under the various state constitutions. The Court stated that

> [s]tatutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.

325 U.S., at 314. The Court went on to say:

> The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. . . . Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment. Nor has the appellant pointed out special hardships or oppressive effects which result from lifting the bar in this class of cases with retrospective force. [Emphasis added.]

325 U.S., at 315-316. Defendant RAM takes his stand in this motion on the last emphasized portion of the *Chase* decision. He does, as more fully set forth below, point out "special hardships or oppressive effects which result from lifting the bar in this class of cases (alleged sexual abuse of minors) with retrospective force." In

Chase, the Court could see no "hardship or oppressive effect" on Chase. In this case, there is massive "hardship and oppressive effect" on RAM as discussed below.

3. *International Union of Electrical, Radio and Machine Workers v. Robbins & Meyer, Inc.* In *International Union of Electrical, Radio and Machine Workers v. Robbins & Meyer, Inc.*, 429 U.S. 229, 50 L.Ed.2d 427, 97 S.Ct. 441 (1976), Guy, "a Negro," was discharged by Robbins & Meyer on October 25, 1971. Two days later, Guy filed a grievance through her union per the collective-bargaining agreement. On November 18, 1971, Guy's grievance was denied at the third and final step of the grievance procedure. On February 10, 1972, 84 days after the denial of the grievance, but 108 days after the date of the discharge, Guy filed a charge of racial discrimination with the EEOC which was untimely at the time the charge was filed because it was supposed to have been submitted within 90 days of the discharge. While the EEOC action was pending, Congress extended the time to file an EEOC grievance from 90 days to 180 days "after the alleged unlawful practice occurred" for "all charges pending with the Commission on the date of enactment of this Act." The EEOC granted Guy a "right to sue" letter but found that there was "no reason to believe that race was a factor in the decision to discharge" her. When Guy filed suit in the District Court, Robbins filed a motion to dismiss because Guy had not filed a timely action with the EEOC. The District Court held that the extension enacted by Congress while Guy's case was pending before the EEOC could not apply to a case

that had been untimely filed before the EEOC to begin with and dismissed Guy's action. The Court of Appeals affirmed.

The United Stated Supreme Court, per Brennan, J., reversed the Court of Appeals. The Court held that as long as Guy's complaint with EEOC had not been rejected by the EEOC when Congress enacted the filing extension, the extension applied to Guy. Because Guy filed with the EEOC less than 180 days after her dismissal, her filing with the EEOC had been timely. The Court then addressed Robbins' claim "that Congress was without constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of a limitations period." The Court cited to *Chase* quoting the same passage as that quoted above from 325 U.S., at 315-316, except that the Court did not go on to quote the passage which we have included and emphasized above. In other words, the Court did not address the situation where there are "special hardships or oppressive effects" to the revival of a statute of limitations.

4. *Plaut v. Spendthrift Farm, Inc.* In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 131 L.Ed.2d 328, 115 S.Ct. 1447 (1995), Plaut sued Spendthrift in 1987 in federal District Court for securities violations based on fraud which allegedly occurred in 1983 and 1984. The case was "mired in pretrial proceedings" when the U.S. Supreme Court decided the *Lampf* case which held that cases alleging securities violations had to be filed within one year of discovery of the violation (S/L) and in

no case later than three years after the violation occurred (a statue of repose). Based on *Lampf*, Plaut's case was dismissed. Plaut did not appeal. On December 19, 1991, a new federal law went into effect negating the effect of *Lampf* The new law provided that a securities damage case filed before June 19, 1991, which was dismissed as time-barred before that date could be reinstated by motion filed not later than 60 days after December 19, 1991, if the local law would not have time-barred the case. Plaut filed a timely motion to reinstate on February 11, 1992. Plaut's motion was denied because the District Court found the statute allowing reinstatement after dismissal to be unconstitutional. The Court of Appeals affirmed.

The United States Supreme Court, per Scalia, J., reversed the Court of Appeals. The Court held that a dismissal based on a statute of limitations is an adjudication on the merits, and Congress exceeds its legislative authority when it attempts by legislation to require an Article III court to set aside a final judgment. The Court found this to be a separation of powers issue. *Chase* is mentioned in passing because Plaut argued that S/Ls can be extended even on extinguished claims without violating due process. Without commenting on the holding in *Chase*, the Court held that there's a difference between an extinguished claim because of a S/L and an claim that was adjudicated because of a S/L. In the latter case, as was the situation in *Plaut*, there is a final judgment which the Legislative Branch cannot overturn by legislation.

As far as RAM is aware, these are the only U.S. Supreme Court cases regarding the issue of unconstitutional extension of S/Ls.

C. Ninth Circuit In *Campanelli v. Allstate Life Insurance Company*, 322 F.3d 1086 (9th Cir. 2003), Plaintiffs sued Allstate on September 2, 1998, alleging a RICO violation (18 USC, Secs. 1961-1968), negligence, negligent misrepresentation, intentional misrepresentation, breach of the covenant of good faith and fair dealing, and breach of contract. Allstate had processed all of the Plaintiffs' claims for damages to their homes from the Northridge earthquake of January 17, 1994. The claims were made under the Plaintiffs' homeowners' policies, and all the claims were settled by 1997. In May 1998, the Plaintiffs discovered that much of the information they received from Allstate about damage to their homes was probably not authentic. Allstate had claimed that it had hired engineers to look at the Plaintiffs' homes, but the people hired were not engineers. Allstate filed motions for summary judgment against all Plaintiffs "asserting that their claims were barred by the one-year limitations period of their insurance contracts." These one-year limitations provisions were mandated by California state law to be in all of these types of insurance contracts. The District Court granted all motions for summary judgment in 2000.

While the dismissals were on appeal to the Ninth Circuit, on January 1, 2001, a new law passed by the California Legislature took effect which revived "insurance claim[s] for damages arising out of the Northridge earthquake" that were time-barred

"solely because the applicable statute of limitations has or had expired." This new law also revived claims that were barred by statutorily-mandated contractual limitations like those involved in the Plaintiffs' contracts with Allstate.

On appeal, the Ninth Circuit, per Tashima, J., reversed the District Court. Regarding the constitutional issues raised by reviving time-barred claims, Allstate raised Contract Clause and Due Process Clause arguments. Regarding the Contract Clause argument, Allstate claimed that the new law violated the Contracts Clauses of the United States and California Constitutions (no law shall be passed impairing the obligation of contracts). First, the Court considered whether there was a substantial impairment of the contractual relationship. The Court held that there was because the new statute overrode the one-year limitation period in the insurance contract. Second, the Court mitigated the severity of the impairment because the insurance industry is heavily regulated. Third, the Court mitigated the severity even further noting that the limitation period was mandated by statute and not bargained for by the contracting parties. Fourth, the Court stated that the State of California had a "significant and legitimate public purpose" for enacting the new law - "to bring needed relief to the victims of the Northridge earthquake." The purpose of the law was to protect the rights of victims whose claims had been barred "after they had been misled about the extent of their losses." Fifth, the Court held that the new law was "of a character appropriate to the public purpose justifying the legislation's

adoption." The Court said:

> Although Sec. 340.9 is undeniably broad in its scope, reviving Northridge earthquake claims regardless of whether the insurance company has been shown to have acted wrongly, it is not so broad as to be unconstitutional. Despite its breadth, Sec. 340.9 is not without limits. Sec. 340.9 revives only claims that resulted from the Northridge earthquake, a one-time event with a discrete, albeit large, number of victims. Additionally only plaintiffs who had contacted an insurer prior to January 1, 2000, have their claims revived. Sec. 340.9(b). This helps to exclude fraudulent claims that were invented just to take advantage of Sec. 340.9's passage. Nor are insurance companies subjected to ongoing liability, because the claims were revived for only one year. Given the substantial deference to legislature judgment as to the necessity and reasonableness of economic statutes, Sec. 340.9 is "of a character appropriate to the public purpose justifying [the legislation's] adoption. *Energy Reserves*, 459 U.S. at 412, 103 S.Ct. 697.

322 F.3d, at 1099.

Regarding the Due Process argument, Allstate claimed that the new law violated the Due Process Clauses of both the United States and California Constitutions. Regarding the U.S. Constitution, the Court stated, "Under the federal Constitution, retrospective economic legislation must only pass rational basis review: the statue must be based on 'a legitimate legislative purpose furthered by rational means.' *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992). For the reasons discussed above [with respect to the Contracts Clause issue], Sec. 340.9 passes this test." 322 F.3d, at 1100. Regarding the California Constitution, the Court stated:

> In determining whether a retroactive law violates the California due

> process clause, California courts consider: (1) the significance of the state interest served by the law; (2) the importance of retroactive application of the law to the effectuation of the interest; (3) the extent and legitimacy of the reliance on the former law; (4) the extent of actions taken on the basis of that reliance; and (5) the extent to which the retroactive application of the new law would disrupt those actions.
>
> Applying these factors demonstrates that Sec. 340.9 "reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment." . . . The statue was passed to serve the significant state interest of ensuring that those injured by the Northridge earthquake are fully compensated for their losses. The California legislature determined that the claims procedures employed after the Northridge earthquake were not fair to all homeowners. The retroactive application of Sec. 3409 was essential to protecting the rights of those injured by the earthquake because most, if not all, of their claims were barred by the statutorily-imposed contractual limitations clause. Allstate, and other insurers, could not legitimately rely to any great extent on the one-year limitations period because it was mandated by statute and the insurance industry as a whole is heavily regulated. Finally, although Sec. 340.9 significantly disrupts the insurer's actions, the legislature could have reasonably believed that Sec. 340.9 was necessary to the public welfare because of the magnitude of the harm caused by the earthquake and the perceived problems of insurer malfeasance.

Id.

D. The First Amended Complaint filed against RAM should be dismissed.

Based on the above-cited cases, HRS 657-1.8(b) cannot pass federal constitutional muster. The statute applies to "sex abuse claims of a minor" and revives all such claims no matter how old the claims are as long as they are filed within a two year period beginning April 24, 2012. The First Amended Complaint filed against RAM in this case was filed by the five Plaintiffs within this two year window of opportunity

on October 1, 2013. This is an incredibly unfair statute to any person against whom sex abuse allegations are made. Sex abuse allegations are easily made and difficult to refute. All that is required is a mere claim, based on no substantial evidence at all but the claim itself. Such allegations make the defendant out to be a "monster" and put the defendant in the position of having to run around trying to secure potential witnesses from decades past. In this case, all of the sex abuse allegations are claimed to have occurred between 1984 and 1993. RAM is now required on the mere claims of the Plaintiffs to seek out evidence and witnesses from 21 to 30 years ago. The claims of NO. 8, 17, & 18 were time-barred in 1993 prior to the enactment of HRS 657-1.8(b). The claim of NO. 16 was time-barred in 1998. The claim of NO. 18 was time-barred in 2006. Under Hawaii law prior to HRS 657-1.8(b), all of the claims against RAM were time-barred from 16 to 21 years ago. Meanwhile (at least for now), all of the Plaintiffs are allowed to sue under fictitious names - their names are not made public, but RAM and other similar defendants are subjected to the public charge of being "sex abusers." There is no protection for RAM and other similar defendant from the filing of fraudulent claims except the requirement that the plaintiff obtain a "certificate" which is easily done from any number of different "profession-als" (even a "social worker" will do under HRS 657-1.8(d)). Fraudulent sex abuse allegations abound - especially where claims for money are involved. A quick Google search regarding false sex abuse allegations yields a world of false sex abuse

allegation cases and numerous groups that have been formed to combat false sex abuse allegations. Many of the web sites warn potential target victims especially of a group called SNAP (Survivors Network of those Abuse by Priests) which "supports" "victims" of sex abuse in filing suit for money. SNAP has been actively involved in trying to whip the public up into a frenzy against RAM in this case (*see* article by Tom Callis of the Hilo Tribune-Herald dated October 23, 2013 (available on the web)). Joelle Casteix, the western regional director of SNAP, was passing out fliers to people in Hilo at the time (SNAP was in Hilo because RAM used to live on the Big Island when the alleged abuse occurred).

In all of the U.S. Supreme Court cases which have addressed the constitutionality of amended S/Ls which revive time-barred claims, none of those cases involve the problems faced by defendants against whom stale sex abuse claims are made. In *Campbell*, there was ample undisputed evidence available to both sides regarding the claim of misappropriation by the Texas girl's father. In *Chase*, again there was ample evidence, documentary and otherwise, available to both sides regarding the claim of improper sales of securities. In finding no due process violation, the Court expressly stated, "Nor has the appellant pointed out special hardships or oppressive effects which result from lifting the bar in this class of cases with retrospective force." This statement cannot be applied to the class of cases involving allegations of sex abuse. This class of cases is subject to abuse, false allegations, lack of evidence, and

extremely stale claims. Claims are easy to make - merely based on verbal claims often decades old with no other evidentiary support whatsoever - and hard to refute while the alleged sex abusers are publically humiliated and assumed to be guilty. This is where the due process violation comes in. In *International Union*, the extension of time was a matter of months not decades. Also, again, there was ample fresh evidence available to both sides. *International Union* merely relied on *Chase*, and cited the "test" in *Chase* which is quoted above at p. 12, but failed to refer to the caveat in *Chase* regarding "special hardships or oppressive effects." "Special hardships and oppressive effects" are definitely involved in sex abuse allegation cases such as this one against RAM. *Plaut* was another securities case which involved ample documentary and other evidence available to both sides, much more than the mere verbal claims with no substantiation made against RAM.

The Ninth Circuit's *Campanelli* case is particularly interesting. It cites numerous reasons why it was OK and not a due process violation to make Allstate fight stale insurance claims. First, Allstate was in a highly regulated industry. Second, the public policy to protect victims of the Northridge earthquake was limited by a number of factors which restricted its breadth - restrictions which saved the constitutionality of the California statute which revived the stale insurance claims: the revived claims were based on a one-time event, the Northridge earthquake; only claims that were presented to insurers prior to January 1, 2000, were revived (as the

Court stated: "This helps to exclude fraudulent claims that were invented just to take advantage of Sec. 340.9's passage."). This quotation from *Campanelli* is reminiscent of the quotation from *Chase* at p. 12 above, "[Statutes of limitation] are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." Based on these restrictions, the Court stated that the California law was "not so broad as to be unconstitutional." None of the protections or reasons for saving the constitutionality of the California statute in *Campanelli* are present in this case with respect to HRS 657-1.8(b). RAM is not in a "heavily regulated industry." He is merely a citizen like any other citizen against whom false sex abuse allegations can be made. Hawaii's statute does not refer to a "one-time event" but instead opens up sex abuse allegations for all time prior to the enactment of the statute. The statute is not limited, for example, to claims that were somehow made at some prior time and now resurrected. There is no protection whatsoever against fraudulent claims being made to collect money against citizens like RAM. Also, note that in *Campanelli* again there was ample evidence available to both sides regarding the litigation instead of the sex abuse claims that are made in this case against RAM on mere verbal statements about events which occurred 21 to 30 years ago with no corroboration whatsoever.

The Hawaii statute is unconstitutional on its face as violative of the Due

Process Clause of the Fourteenth Amendment of the United States Constitution. RAM asks that this Court declare HRS 657-1.8(b) to be unconstitutional and dismiss all of the Plaintiffs' claims as time-barred.

III. HRS 657-1.8(b) is unconstitutional on its face because it violates RAM's state right to Due Process of law.

As stated in the Introduction above, if this Court denies RAM's motion to dismiss the First Amended Complaint as violative of the federal Due Process Clause of the Fourteenth Amendment, then RAM asks that this Court refer the matter of the unconstitutionality of HRS 657-1.8(b) under the Hawaii State Constitution to the Hawaii Supreme Court pursuant to HRAP Rule 13. The constitutionality of a statute like HRS 657-1.8(b) is an issue of first impression in Hawaii and is most appropriately referred to the Hawaii Supreme Court for decision if this Court rejects RAM's federal challenge to HRS 657-1.8(b). As mentioned in the discussion of *Chase* at p. 12 above, the United States Supreme Court point out that the various state appellate courts were free to interpret their state constitutions to provide more protection than the U.S. Constitution.

RAM is aware of two Hawaii cases which have addressed the constitutionality of a S/L: *Roe v. Doe*, 59 Haw. 259, 581 P.2d 310 (1978), and *Doe v. Roe*, 67 Haw. 63, 677 P.2d 468 (1984). In *Roe v. Doe*, two women filed different paternity actions in different proceedings. The first woman filed two actions for two children on

February 27, 1976. Under Hawaii law prior to 1976, a paternity action was barred if not filed within two years of the date of birth of the child. One child had been born on July 31, 1970, and the other on September 16, 1971. On January 1, 1976, Hawaii enacted its Uniform Parentage Act which provided for a three year S/L for filing paternity actions from the date of birth of the child, but it also provided for the filing of any paternity action regardless of the date of birth of the child within three years of the effective date of the Act. The Act thus revived the first woman's two time-barred paternity claims - the claims had been barred in 1972 and 1973 and revived in 1976. The second woman filed her paternity action on March 3, 1977, for a child born on November 30 1973. The Act likewise revived the second woman's time-barred paternity claim. The Family Court denied the alleged father's motion to dismiss the paternity actions of the first woman, and the Family Court granted the alleged father's motion to dismiss the paternity action of the second woman. Both cases were consolidated for appeal to the Hawaii Supreme Court. The Court, per Ogata, J., held that S/Ls which revive time-barred claims are not unconstitutional per se, but the Court made this determination in the context of the consideration of a S/L applicable to paternity actions. The Court said:

> Furthermore, we are especially persuaded by the public purpose underlying all paternity proceedings. The purpose of paternity actions "is not to impose a penalty, but to convert a father's moral obligation to support his illegitimate children into a legal obligation." . . . Paternity proceedings serve the valid purpose of "relieving the public of the

> burden of supporting an illegitimate child and to provide the mother with assistance in carrying out her obligation of support." . . . Therefore, we believe that in order to foster these just and humane objectives, the legislature intended that for purposes of determining the applicable period of limitations, it should be immaterial whether the child was born before or after the effective date of the new paternity statute.

59 Haw., at 314-315. Regarding the due process issue, the Court stated:

> In our opinion, the legislative revival of claims that are even decades old is not, of itself, unconstitutional per se. Rather, bearing in mind that statutes of limitation exist "only by legislative grace and are subject to a relatively large degree of legislative control," *Chase Securities*, *supra*, 325 U.S. at 314, 65 S.Ct. at 1142, a court must look to whether the actual retrospective effects of the statute will offend the Federal or State Constitutions. *See Robbins & Meyers, supra*. Therefore, while statutes of limitation "probably could not be changed retroactively without some legislative hardship or oppression," *Chase Securities, supra*, 325 U.S. at 315, 65 S.Ct. at 1143, we are of the view that where a defendant has not acted in reliance upon the bar of a statute of limitations, he may not translate his prior statutory immunity from suit into a constitutional right *See id.* at 315-16, 65 S.Ct. 1137. By enacting HRS 584-7 in its current form, the legislature effected a change in public policy regarding the prosecution of stale claims. However, this new policy, which greatly extends the applicable period of limitations, can be sustained only so long as the putative father's right to due process is not violated by the retrospective application of the statute. *See Chase Securities, supra*. Therefore, we prefer to adopt a case-by-case approach to the question of the constitutional permissibility of the revival of paternity claims barred by the former statue of limitations. If a putative father, named in a paternity proceeding, were able to demonstrate that he had acted in specific reliance on the bar of the statute of limitations and that special hardships or oppressive results wold follow from the lifting of the bar, retrospective application of HRS 584-7 might not be constitutionally permissible. Absent such a demonstration of direct reliance and resultant hardship, it would not be possible to say that the defendant was deprived of any constitutional right.

59 Haw., at 317-318. Again, the issue of "special hardships or oppressive effects" raised in *Chase* as discussed above is an extremely relevant factor to the Hawaii Supreme Court just as it was to the U.S. Supreme Court. In the context of paternity actions with the strong public policy reason for requiring fathers and not the public to support their children, the Hawaii Supreme Court passed Hawaii's statute against a claim of the statute's being unconstitutional "on its face." The Court still warned that the statute could be unconstitutional "as applied" (an issue not raised in this motion because this would require a great deal of discovery in this case).

The Hawaii Supreme Court again considered Hawaii's paternity statute in *Roe v. Doe*. In this case, mother filed a paternity petition on December 1, 1980, regarding her child who was born on August 30, 1971. On June 19, 1982, the court granted leave to substitute the child as the petitioner. The paternity S/L at the time set a three year period for bringing a paternity action. The family court dismissed the petition. While the appeal of the dismissal was pending, the S/L was amended by the Hawaii Legislature extending the S/L for up to three years after the child attains the age of majority. Father argued that the amendment extension of the S/L should only apply to children who had not attained the age of three at the time the amendment was passed. The Court rejected this argument on statutory construction grounds citing to the purpose of the new statute:

> Hawaii Revised Statutes Chapter 584 is remedial in nature and

> must be construed liberally in order to accomplish the purpose for which it was enacted. *Roe v. Doe*, 59 Haw. 259, 581 P.2d 310 (1978). That purpose is to provide substantive legal equality for all children regardless of the marital status of their parents. . . . Obviously, permitting an illegitimate child the opportunity to establish the support obligation of his or her natural father throughout the child's minority satisfies the purpose of the statute.

67 Haw., at 65. The Court observed that the Legislature was not concerned about reviving old claims because of the scientific advances in blood testing to prove paternity:

> The legislature, in the committee reports attached to Act 288, cited the problems of proof surrounding paternity actions as justification for a short limitations period to protect alleged fathers from stale and fraudulent claims. The legislature went on to recognize, however, that scientific advances in blood testing reduced the evidentiary problems of older claims. . . . These scientifically conducted blood tests were deemed highly probative in proving paternity. Their effectiveness has already been recognized by the United State Supreme Court. . . . It is apparent that the legislature determined that the problems of proof which justify a short limitations period no longer existed.

67 Haw., at 65-66.

Regarding the father's claim that the new statute violated his due process rights by reviving a claim that had already been barred, the Court again cited to *Roe v. Doe*, saying, "Although we conclude that the legislature intended that previously barred claims under HRS 584-7 (1975) can be revived by Act 288, its application in this particular case is permissible only if it does not offend the State or Federal constitutional guarantees of due process." 67 Haw., at 471. The Court then referred

to the "case-by-case" approach to paternity actions taken in *Roe v. Doe* to determine if the new S/L was unconstitutional as applied. The Court concluded:

> There is nothing in the record to indicate that Defendant was in any way induced or prompted by the expiration of the three-year statute of limitations "into reliance of a kind that would make its retroactive extension so oppressive as to violate due process." . . . We recognize, however, Defendant is not precluded from showing reliance on remand.

Again, it is clear that the Hawaii Supreme Court is concerned with "special hardships or oppressive results." Considering the strong policy arguments for extending S/Ls in paternity cases, especially considering the availability of reliable proof of paternity, the Court analyzed the due process concerns on a "case-by-case" "as applied" basis. This does not mean that the Hawaii Supreme Court will treat all due process issues with respect to extensions of S/Ls on a "case-by-case" basis. As shown above, the extension of a S/L for sexual abuse cases is so oppressive on defendants as to be unconstitutional "on its face." RAM's case here is a classic example of why an extended S/L is unconstitutional on its face. RAM is required to deal with matters which allegedly occurred 21 to 30 years ago. Unlike paternity cases which can rest on the reliability of DNA testing, there is no reliable evidence for mere claims of sex abuse which occurred decades ago. It is highly unlikely that the Hawaii Supreme Court will uphold the constitutionality of HRS 657-1.8(b) against RAM's due process challenge that the statute is unconstitutional "on its face." None of the policy concerns or evidentiary protections which saved HRS 584-7 are present for HRS 657-

1.8(b).

Based on these arguments, RAM again urges this Court to refer the state constitutional issue to the Hawaii Supreme Court under HRAP Rule 13. If this Court decides not to make such a referral, then RAM urges this Court to find that HRS 657-1.8(b) is unconstitutional on its face under the Hawaii State Constitution's Due Process Clause.

IV. There was insufficient service of process in this case.

As the Declaration of Prahlad Jamieson which accompanies this motion shows, there was insufficient service of process in this case. Plaintiffs appear to be claiming, per the Affidavit of Service submitted by Lynn A. Anderson in this case on February 5, 2014, that service of process was made on RAM on January 2, 2014, by leaving Plaintiffs' First Amended Complaint with "a person of suitable age and discretion then and there residing at the usual above of said, Jay Ram aka Gary Winnick." Apparently, the "person of suitable age and discretion" to whom Ms. Anderson refers was Prahlad Jamieson. Jamieson's Declaration states that he did not know who approached him or why, that he was not handed any documents and that no documents were left with him, and that he was not authorized to receive any documents on behalf of RAM and would not have received any documents if they had been offered to him. This was not proper service of process under Hawaii Rules of Civil Procedure, Rule 4(d)(1)(A). RAM makes his proper motion under FRCP Rule

12(b)(4) for determination by this Court that there was insufficient service of process in this case.

DATE: Honolulu, Hawaii, February 12. 2014.

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SAMUEL P. KING, JR.
Attorney for Defendant RAM