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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEONA KALIMA, DIANE BONER AND
RAYNETTE NALANI AH CHONG, ET AL.,
Plaintiffs,

vs.

STATE OF HAWAI'I, STATE OF HAWAI'I
DEPARTMENT OF HAWAIIAN HOME
LANDS; ET AL.,

Defendants.

CIVIL NO. 99-4771-12 LWC
(Class Action)

PLAINTIFFS' MOTION FOR AWARD OF
ATTORNEYS' FEES; MEMORANDUM IN
SUPPORT OF MOTION; DECLARATION OF
GOV. JOHN D. WAIHE'E, III;
DECLARATION OF MELODY K.
MACKENZIE; DECLARATION OF PAUL
ALSTON; DECLARATION OF MARK S.
DAVIS; DECLARATION OF JOSEPH
KAMELAMELA; DECLARATION OF ERIC S.
SEITZ; DECLARATION OF THOMAS R.
GRANDE; DECLARATION OF CARL M.
VARADY & EXHIBITS 1-14; NOTICE OF
HEARING; CERTIFICATE OF SERVICE

PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES

Pursuant to Haw. R. Civ. Pro. 7, 10, and 54(d), Plaintiffs hereby move



this honorable Court to award Plaintiffs' attorneys' fees in the amount of \$40 million. This motion is based on the Settlement Agreement approved by the Court on June 9, 2022, attached to the Declaration of Carl M. Varady at Exhibit 1. The motion is further based on records and files herein, including declarations of support from Class Members, arguments of counsel and such other matters as may be adduced by the Court.

This motion should be unopposed by Defendants to the extent it seeks an award of no more than \$40 million and Defendants have been provided the opportunity to review, comment and concur, and, in no event should Defendants be permitted to oppose a fee award of up to and including \$28 million.

Respectfully submitted, June 19, 2022, Honolulu, Hawai'i.

/s/ Carl M. Varady

Carl M. Varady

Thomas R. Grande

CLASS COUNSEL

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MEMORANDUM IN SUPPORT OF MOTION

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TABLE OF CONTENTS

I. HISTORICAL FACTS IN SUPPORT OF THE MOTION. -1-

 A. HRS Chapter 674 as a Unique “Remedy” for Breaches of Trust. -1-

 B. More than Two Decades of Hard Fought Litigation Followed the Panel’s Demise. -4-

 C. Remand after *Kalima II*. -7-

 D. The Range of Fees was not Negotiated until After the Parties Agreed to the Settlement Amount. -9-

III. STANDARDS OF DECISION. -11-

 A. Standard for Fee Awards in Common Fund Cases. -11-

 B. Applicable Principles of Settlement Fee Provisions. -13-

 C. Determining the Reasonableness in Common Fund Cases -15-

 1. The attorneys spend more than two decades litigating this case to a successful settlement. -15-

 2. The risk of not prevailing. -15-

 3. More than two decades have passed since the case was filed -16-

 4. The investment of money and time are exceptional. -17-

 D. Reasonableness of Fees is Solely a Matter for the Court. -17-

 1. Only the Court and the Class Members have an interest in fees. -17-

 2. The Court’s fee award will not cause Defendants any administrative burden, expense or additional payment -18-

 3. The *cy pres* provision does not give Defendants an interest in the fee award. -20-

4.	<u>The Settlement Agreement merely limits fees; it does not give Defendants any voice in the fee award.</u>	-21-
III.	<u>ARGUMENT</u>	-23-
A.	<u>The Recovery for the Class Members is Unprecedented</u>	-24-
1.	<u>The \$328 million common fund settlement vastly exceeds any offer of settlement Defendants made prior to 2022.</u>	-24-
2.	<u>The \$328 million common fund settlement exceeds the gross value of Class Members' claims under the Distribution Rules</u>	-25-
B.	<u>Class Counsel Produced a Huge Recovery for 2,518 Class Members Who Otherwise Would Have Received Nothing</u>	-28-
C.	<u>Class Counsel Produced Average Recovery Greater than the Panel Average.</u>	-31-
D.	<u>Class Counsel Seek Less than Their Retainer or the Presumed Benchmark and Have Waived Post-Settlement Fees and Their Claims for Costs.</u>	-32-
E.	<u>Class Counsel Seek Less than the State Pays Lawyers to Recover Funds in Commercial Litigation.</u>	-32-
F.	<u>Class Counsel Have Committed Themselves to More Than Two Decades of Arduous Litigation Foregoing other Income.</u>	-35-
1.	<u>The professional costs and risks were extreme.</u>	-35-
2.	<u>The value added by Class Counsels' work is apparent.</u>	-37-
3.	<u>Governor Waihe'e, Director MacKenzie attest to the significance of Class Counsels' work and the settlement.</u>	-42-
4.	<u>Other leading members of the legal community attest that the work, dedication and result justify the fee requested.</u>	

..... -43-

G. The Fee Sought has been Fully Disclosed. -44-

H. Class Counsel have Provided Valuable Public Service. -45-

I. The Court Must Consider the Message Sent by Awarding Less Than the Full Fee Sought.
..... -47-

IV. CONCLUSION...... -49-

TABLE OF AUTHORITIES

Cases

Boeing Co. v. Van Gemert, 444 U.S. 472, 100 S. Ct. 745 (1980) -17-, -21-

Benipayo v. Volkswagen Grp. of Am. 975 F.3d 770 (9th Cir. 2020) -14-

Board of Trustees v. Rosewell, 262 Ill. App. 3d 938, 635 N.E.2d 413 (1992), *cert. denied*, 149 Ill. 2d 647, 612 N.E.2d 511 (1993) -17-

Chun v. Bd. of Trs. of the Emples. Ret. Sys., 106 Haw. 416, 106 P.3d 339 (2005)
 -12-, -18-, -19-

Chun v. Bd. of Trs. of the Emples. Ret. Sys., 92 Haw. 432, 992 P.2d 127 (2000 . . -11-,
 -12-, -19-, -20-

Copeland v. Marshall, 641 F.2d 880 (1980) -17-

Evans v. Jeff D., 475 U.S. 717, 106 S. Ct. 1531 (1986). -9-

Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998) -14-

In re Currency Conversion Fee Antitrust Litig., 263 F.R.D. 110 (S.D.N.Y. 2009), *aff'd sub nom. Priceline.com, Inc. v. Silberman*, 405 Fed. Appx. 532 (2d Cir. 2010) . . -17-

In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995)
 -10-

Jones v. Amalgamated Warbasse Houses, Inc., 721 F.2d 881 (2d Cir. 1983) -14-

Kalima v. State, 111 Hawai'i 84, 137 P.3d 990 (2006) -4-, -45-

Kalima v. State, 148 Haw. 129, 468 P.3d 143 (2020) -4-, -7-, -45-

Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Ltd. P'ship, 115 Hawai'i 201, 166 P.3d 961 (2007). -23-

Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012) -14-

Lobatz v. U.S. W. Cellular of Cal., Inc., 222 F.3d 1142 (9th Cir. 2000). -14-

Mills v. Elec. Auto-Lite Co., 396 U.S. 375, (1970) -12-

Officers for Justice v. Civil Serv. Comm'n of San Francisco, 688 F.2d 615 (9th Cir. 1982) -14-

Paul, Johnson, Alston & Hunt v. Grafty, 886 F.2d 268 (9th Cir. 1989) -12-, -13-

Pub. Access Trails Hawai'i v. Haleakala Ranch Co., 153 Haw. 1, 526 P.3d 526 (2023) -46-

Rodman v. Safeway Inc., No. 11-cv-03003-JST, 2018 U.S. Dist. LEXIS 143867, at *12 (N.D. Cal. Aug. 22, 2018) -34-

Sanders v. Los Angeles, 3 Cal. 3d 252, 475 P.2d 201, 90 Cal. Rptr. 169, 475 P.2d 201 (1970) -18-

Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003) -13-, -14-

Torrise v. Tucson Elec. Power Co., 8 F.3d 1370 (9th Cir. 1993) -12-

Town of New Hartford v. Conn. Res. Recovery Auth., 291 Conn. 511, 970 A.2d 583 (2009) -18-

Vincent v. Hughes Air W., Inc., 557, F.2d 759 (9th Cir. 1977).. -12-

Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991). -9-

Other Authorities

Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 811 (2010). -34-

Gov. Msg. No. 241, “Statement of Objections to [H.B.] 1675, in 1999 House Journal, at 882.” -4-

National Consumer Law Center, *Consumer Class Actions* § 19.3 at 397 (10th Ed. 2017) -12-, -15-

Richard A. Posner, *Economic Analysis of the Law* (2d ed. 1984 -15-

I. HISTORICAL FACTS IN SUPPORT OF THE MOTION.

A. HRS Chapter 674 as a Unique “Remedy” for Breaches of Trust.

By any fair assessment, the Hawaiian Home Lands program has failed to meet the needs of its Native Hawaiian beneficiaries. In 1983, problems were of such magnitude that a Federal-State Task Force on the Hawaiian Home Commission Act (“HHCA”) was convened. Declaration of John D. Waihe‘e, III¹ (“Waihe‘e”) ¶ 6. The Task Force submitted a report to the State that identified several areas of concern and made recommendations for improvement to reduce or eliminate delays resulting from mismanagement of the long waiting lists. *Id.* In 1988, the State began its efforts to resolve the issues relating to the Home Lands Trust, including ultimately enacting HRS chapter 674, from which this case arises. *Id.* ¶ 7.

In 1988, the legislature passed “The Native Hawaiian Judicial Trusts Relief Act,” 1988 Haw. Sess. L. Act 395, §§ 1-7 at 942-945 (Act 395), later codified as HRS chapter 673. Act 395 provided a limited waiver of sovereign immunity for beneficiaries of the trust to bring suits, prospectively, for money damages relating to breaches of the State's trust responsibilities occurring after July 1, 1988. *Id.* 8. Section 5 of Act 395 provided an unfettered right to sue for actual damages for past breaches of trust between August 21, 1959 and June 30, 1988. *Id.* ¶ 9. The Act also provided an opportunity for the Governor to present a proposal for resolution of such

1. Governor Waihe‘e is “very aware” of the problems that have plagued the Hawaiian Home Lands Program since statehood, through his service as a delegate to the 1978 Hawai‘i Constitutional Convention, his own family’s experience seeking homestead lands and through his service as Governor. *Id.* ¶ 5

claims. *Id.* In the event that the Governor’s office failed to present such a proposal to the 1991 Legislature, or if the proposal was rejected, the right-to-sue and waiver of sovereign immunity would remain effective. *Id.*

In 1991, Governor Waihe‘e’s administration submitted “An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust” (the “Action Plan”), which proposed the creation of a Board of Individual Claims Resolution to hear claims of losses suffered by individual beneficiaries of the trust as a result of the State’s breaches of fiduciary duties occurring prior to 1988. *Id.* ¶ 10.

The 1991 Legislature passed Act 323, 1991 Haw. Sess. L. Act 323, § 1 at 990 (Act 323), entitled “Individual Claims Resolution Under the Hawaiian Home Lands Trust Act,” which was later codified as HRS chapter 674. *Id.* ¶ 11. Chapter 674 established the Panel and a claims review process in which individual beneficiaries under the Hawaiian home lands trust may resolve claims for actual damages arising out of or resulting from a breach of trust, which occurred between August 21, 1959, and June 30, 1988. *Id.*

In 1992 Melody K. MacKenzie became the Executive Director of the Hawaiian Claims Office (“HCO”), the administrative branch of the Hawaiian Home Lands Trust Individual Claims Review Panel (the “Panel”). Declaration of Melody Kapilialoha MacKenzie (“MacKenzie”) ¶ 10.

Governor Waihe‘e and the members of his administration who

contributed to the Action Plan intended that the Panel would provide a low cost, informal means of resolving decades-old claims for breaches of the Department of Hawaiian Home Lands' fiduciary obligations and allow the legislature to remedy those claims by providing financial compensation and other relief to beneficiaries who presented legitimate grievances. Waihe'e ¶ 12; MacKenzie ¶ 11. They expected that beneficiaries could proceed and expected that, because there was a time limit to file them, claims could be resolved in a matter of a few years. Waihe'e ¶ 12; MacKenzie ¶ 11. Neither the Governor nor his administration expected that the legislature would refuse to fund payments or provide other relief. Waihe'e ¶ 12.

The right to sue and waiver of sovereign immunity were included in Chapter 674 to provide relief if the legislature, as it ultimately did, refused to affirm Panel-recommended award or pay the aggrieved beneficiaries of the Home Lands Trust. Waihe'e ¶ 13; MacKenzie ¶ 11. Neither Governor Waihe'e nor his administration expected that subsequent administrations would continue to litigate these claims, especially given the advanced age and impoverished conditions of many of the beneficiaries and the difficulties they would likely have finding attorneys to represent them in court. Waihe'e ¶ 14.

In 1999, the legislature passed House Bill No. 1675 (H.B. 1675), which extended the notice, filing, and Chapter 674 deadlines by one year, to allow additional time for all claims to be reviewed. Waihe'e ¶ 15. However, the legislation extending the Panel's life and work was vetoed by Governor Cayetano because of his

conclusion it would take more than one year for the Panel to conclude its work,² leaving claims unresolved and leaving the claimants with only the right to sue. Waihe'e ¶ 15; MacKenzie ¶ 15. The informal process envisioned by Governor Waihe'e and his administration to resolve the long-standing legitimate grievances of the Home Lands beneficiaries was eliminated and litigation then became the only means of resolving these claims. Waihe'e ¶ 15; MacKenzie ¶ 19.

B. More than Two Decades of Hard Fought Litigation Followed the Panel's Demise.

In this more-than 23 year-old case, filed December 29, 1999, Class Counsel were tasked with presenting facts and argument which, at the time of appeal in *Kalima v. State*, 148 Haw. 129, 468 P.3d 143 (2020)(*Kalima II*), filled 15 volumes and contained more than 30,000 pages of record, accumulated over two decades of litigation. *Kalima II* followed the initial appeal in *Kalima v. State*, 111 Hawai'i 84, 137 P.3d 990 (2006)(*Kalima I*). The appeal in *Kalima I* was filed in 2000 after the trial court granted Plaintiffs' motion for summary judgment, ruling that Plaintiffs had the right to sue under HRS Chapter 674 for breaches of trust including delays in receiving Hawaiian Home Lands homestead awards.

Twelve years of litigation, bitterly contested by the State, followed the 2006 remand in *Kalima I*. Throughout that litigation, the state steadfastly sought to

2. Gov. Msg. No. 241, "Statement of Objections to [H.B.] 1675, in 1999 House Journal, at 882." Exhibit 14 to Varady. Governor Cayetano also reiterated his opposition to payment of waiting list claims for delays in awards. *Id.*

prevent the State’s Native Hawaiian beneficiaries from receiving the damages to which they were entitled by Chapter 674. After the appeal in *Kalima I* was remanded on June 30, 2006 and up to the appeal in *Kalima II* in 2018, the trial court record included 488 substantive motions, memoranda, submissions by the parties, and rulings made by the trial court. Declaration of Carl M. Varady ¶ 16 and Exhibit 1 (listing the 488 substantive motions, memoranda, submission, and trial court rulings)(hereafter “Varady”). From September 15, 2009, until November 26, 2017 no less than 89 substantive motions, memoranda, and submissions were filed and argued by the parties, and rulings entered by the trial court regarding the methods and proof-individual or class-based-by which beneficiaries could receive damages.³ Since the remand of *Kalima II*, and assignment of this case to the Court, on December 30, 2019 [Dkt. 1288], docket entries and filings now total 1702. Varady ¶ 17.

In a six-week bench trial in 2009, Class Counsel proved liability, causation and the fact Plaintiffs suffered damages as a result of delays in homestead awards. Later in 2013, a damages trial followed, in which the novel Fair Market Rental Value Model (“FMRV”) was adopted by the trial court and applied to claims for delays in residential awards. The FMRV model was later applied to agricultural and

3. Dkt. 536, 539, 540, 549-50, 560, 561, 562, 563, 566, 568, 569, 570, 571, 572, 574, 575, 576, 577, 578, 579, 582, 583, 584, 585, 587-88, 589-90, 596, 603, 610, 629, 630, 634, 635-36, 640, 641, 642-43, 644, 646, 695, 696, 720, 728, 737, 747, 750, 771, 782, 790, 796, 798, 812, 828, 837, 838, 844, 845, 857, 860, 865, 871, 882, 883, 885, 898, 907, 908, 910, 912, 914, 915, 916, 922, 923, 924, 926, 927, 940, 945, 946, 947, 952, 958, 960, 968, 972, 973, 974, 975 & 984.

pastoral claims for delays in homestead awards.

As a result of Class Counsel's work, the Hawai'i Supreme Court rejected the State's demand that Chapter 674 required individualized proof of damages—a burden it clearly understood Plaintiffs would not be able to meet decades after the State's breaches had caused them harm by denying them their birthright of homesteading. *Kalima v. State*, 148 Hawai'i 129, 143, 468 P.3d 143, 157 (2020)(emphasis added) (*Kalima II*).

The court adopted the damages model advocated by Class Counsel, which established individual damages through a review of market values and concluded: (1) the FMRV model was an appropriate method for measuring actual damages under Chapter 674; (2) FMRV was an appropriate statewide measure of residential, agricultural, and pastoral, damages; (3) every trust beneficiary is entitled to damages, pursuant to that model, for the years during which the beneficiary was on the wait list, rejecting the State's contention that every beneficiary was required to prove individual out-of-pocket loss; (4) beneficiaries who deferred from participating in homestead offerings because of poverty did not lose the right to compensation, contrary to the trial court's ruling; (5) the trial court committed legal error by ruling that damages started only six years after the date of application rather than the date of application; (6) every individual who filed a claim with the Panel is a Class Member; and (7) affirmed the Special Master and claims administration process should be implemented on remand.

The consequences of a loss on any one of these issues at trial or on appeal would have been catastrophic to the 2,752 claimants whom the Hawai'i Supreme Court recognized would not have been able to prove their damages by individual methods due to the State's breaches of trust and the decades it has litigated, seeking to avoid the consequences of its actions.

It is undisputed that the State breached its duties to keep and render accounts, to exercise reasonable care and skill, to administer the trust, and to make the trust property productive, to the significant detriment of the Native Hawaiian people for whom the Trust was created. **The State's decision to continue to litigate this case for decades has compounded the challenges resultant from its own failure to keep adequate records.**

148 Hawai'i at 143, 468 P.3d at 157 (emphasis added).

The rights of 2,752 Native Hawaiian Class Members seeking redress under an untested statute in a matter of first impression were completely at risk in the instant case. An adverse decision on liability or the means of proving damages would have ended 20 years of litigation with no redress for these beneficiaries and their rights and the purpose of HRS Chapter 674 would have been completely unfulfilled.

C. Remand after *Kalima II*.

Rehashing Defendants' continued argument of issues that were resolved on appeal or beyond dispute, after remand, is regrettably necessary to underscore what was achieved in settlement.

- Defendants refused to meet as ordered by the trial court, during the pendency of *Kalima II* to identify class members whose claims

were not contested. Exhibit 2 to Varady. Declaration of Thomas R. Grande ¶¶ 20-24 (hereafter “Grande”)

- Defendants asserted discovery was closed and refused to produce documents and information necessary to evaluate claims until the Court ordered them to do so. Even after the Court’s order, Defendants did not complete production of the documents or information for eight months. Exhibit 3 to Varady.
- Defendants asserted Plaintiffs bore the burden of disproving affirmative defenses before their claims could be heard by the Special Master. Exhibit 2 to Varady.
- Defendants refused to update the FMRV matrices, refused to produce scanned copies of the HCO claim files, and refused to provide relevant discovery until ordered to do so by the Court. Exhibit 3 to Varady.
- Defendants asserted Plaintiffs bore the burden of proof and had to prove individual out of pocket loss, notwithstanding the rulings in *Kalima II*. See, Dkt. 1376.
- Defendants reiterated their four-step damages model, rejected multiple times by the trial court and by the *Kalima II* court. *Id.*
- Defendants reiterated their argument that damages did not begin to run on the date of application. *Id.*
- Defendants asserted damages did not extend through the date a claim determination was made and that damages ended after the damages trial in 2013. *Id.*

As with the appeal, any one of these issues, if not successfully opposed, would have been disastrous for the Class Members. In short, after losing on appeal, Defendants demonstrated a renewed commitment to undermining or simply ignoring the 20 years of litigation that led to the *Kalima II* rulings. On March 17, 2022, the Court entered its order [Dkt. 1447] putting an end to the Defendants’ renewed

attempts to defeat the Class Members' claims. Settlement negotiations began immediately thereafter on March 18, 2022.

One month of continuous negotiations later, facilitated by the Hon. Gary W.B. Chang, settlement in principle was placed on the record, in which the State agreed to pay the largest sum ever paid in settlement of any lawsuit-\$328 million. On June 9, 2022, the Court gave preliminary approval to the Settlement Agreement. Dkt. 1496.

D. The Range of Fees was not Negotiated until After the Parties Agreed to the Settlement Amount.

In contested litigation, by contrast, a negotiated lump-sum settlement that resolves Defendants' liability, including attorneys' fee, is often in all parties' interests.

If defendants are not allowed to make lump-sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers. ... [M]any a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff.

Evans v. Jeff D., 475 U.S. 717, 733-34, 106 S. Ct. 1531, 1540 (1986).

By contrast, Courts have noted that in a "settlement-only" class action, where the class is certified only for purposes of settlement, not, as here, for decades of litigation, class counsel "might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *Weinberger*

v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991). Thus, in settlement-only classes, the courts look to whether class counsel: (1) possessed adequate experience; (2) vigorously prosecuted the action; and (3) acted at arm's length from the defendant. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995). The real concern in such quick-flip class cases is the “vigor of counsels’ prosecution of the class claims, specifically the possibility that counsel did not do right by the class.” *Id.* at. 803. Simply stated, courts fear collusion in such cases and that the class attorneys place their economic interests above their clients. *Id.*

This case is not a quick-flip consumer “settlement-class” case; it is a case of more than two decades of litigation in which it was in the parties’ interests to resolve all possible claims for a lump sum that would include fees to be adjudicated by the Court. Class Counsel informed Judge Chang at the start of settlement negotiations that the settlement fund would be negotiated before negotiating fees. Varady ¶ 27; Grande ¶ 51. Ultimately, consistent with the reasoning of *Jeff D.*, the parties agreed upon a lump sum settlement that resolved all claims, that included a range of fees between \$28 million and \$40 million. However, the fee range was resolved only after the settlement payment was agreed to and there is no evidence of collusion. The Court retains full authority to review the instant motion and determine the reasonableness of the request.

III. STANDARDS OF DECISION.

A. Standard for Fee Awards in Common Fund Cases.

Attorneys' fees in the instant case are sought as a percentage of the \$328 million common settlement fund, produced by Class Counsel on behalf of the Settlement Class. The principles for determining attorneys' fees pursuant to "common fund" doctrine are well established.

"The common fund doctrine provides that a private plaintiff, or his attorney, whose efforts create, discover, increase[,] or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his [or her] litigation, including attorneys' fees." *Id.* at 352, 641 P.2d at 1327 (quoting *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977)). Recovery of attorney's fees from a common fund is considered "the most equitable way of securing such contribution." *Id.* at 353, 641 P.2d at 1327 (quoting *Trustees v. Greenough*, 105 U.S. 527, 532, 26 L. Ed. 1157 (1881)).

Chun v. Bd. of Trs. of the Emples. Ret. Sys., 92 Haw. 432, 439-40, 992 P.2d 127, 134-35 (2000)(*Chun III*). The Hawai'i Supreme Court applies the concept of a "common fund" recovery broadly.

The term "common fund" . . . refer[s] not only to the classic case in which a lump sum recovery is effected on behalf of the class and thereafter distributed among the members, but also to the case where the class action produces a common benefit. In such "common benefit" cases, courts have held that a class counsel's reasonable fees may be charged to the beneficiaries despite the absence of a true "common fund." See, e.g., *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 522 n.6 (1st Cir. 1991).

92 Haw. at 439 n.7, 992 P.2d at 134.

The common fund doctrine is “premised on the equitable powers of the court.” National Consumer Law Center, *Consumer Class Actions*, § 19.1.2 at 391 (10th Ed 2017). The doctrine serves to avoid the unjust enrichment of class members who did not actively prosecute the litigation and spread litigation costs proportionately among the class. *Vincent v. Hughes Air W., Inc.*, 557, F.2d 759, 769 (9th Cir. 1977).

The common benefit doctrine permits a court to require the defendant to pay the plaintiff’s attorney fees even if there is no common fund. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392-393 (1970). It allows the Court to consider the non-monetary components of the settlement (such as the probate plan) that provide direct, but financially unmeasurable benefits. National Consumer Law Center, *Consumer Class Actions*, § 19.3.5.2.5 at 409 (10th Ed. 2017)(discussing non-monetary relief).

Chun IV endorsed the twenty-five percent benchmark established by the Ninth Circuit for attorneys’ fees recovered from a common fund. *Chun v. Bd. of Trs. of the Emples. Ret. Sys.*, 106 Haw. 416, 439, 106 P.3d 339, 362 (2005)(*Chun IV*)(citing, *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272-73 (9th Cir. 1989)). *Chun IV* expressly relied on *Torrise* and *Graulty*, in which the Ninth Circuit established a benchmark, stating that, “in common fund cases[,] . . . we have established 25% of the common fund as the ‘benchmark’ award for attorney fees.” *Torrise*, 8 F.3d at 1376; *Graulty*, 886 F.2d at

272-73 (instructing the district court to “take note that 25 percent has been a proper benchmark figure”). The twenty-five percent of recovery benchmark for attorneys’ fees can be adjusted upward or downward to account for any unusual circumstances involved in the case. *Graulity*, 886 F.2d at 272. Finally, the fact that a fee-shifting statute applies does not preclude recovery of common fund fees. *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003).

B. Applicable Principles of Settlement Fee Provisions.

Class Counsel are not pursuing a statutory lodestar fee, which would have been available under HRS § 674-21, nor are they seeking to enforce their progressive retainer agreement. Class Counsel have not sought **the twenty-five percent benchmark** that otherwise would be presumed reasonable. Instead, the Class Counsel and Defendants have agreed, as a material term of the Settlement Agreement, to a limited award of attorneys’ fees not to exceed \$40 million-12.19% of the total settlement amount; less than half the typical 25% common-fund fee. Defendants have expressly waived opposition to an award of less than or equal to \$28 million. The range of possible fees per the Settlement Agreement is 8.5% to 12.19% of the common fund-less than half of what typically would be awarded in a common fund case. Both parties have waived appeal of the Court’s decision regarding attorneys’ fees. *See*, Settlement Agreement § IV. C., Exhibit 4 to Varady.

Attorneys’ fees provisions included in proposed class action settlement agreements are, like every other aspect of such settlement agreements, subject to

the determination whether the settlement is “fundamentally fair, adequate, and reasonable” as a whole. *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003). Where fees are negotiated as part of a settlement, the perceived danger is the “potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class.” *Staton*, 327 F.3d at 965 (quoting, *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000)). “The presence of an arms’ length negotiated agreement among the parties weighs strongly in favor of approval” though such an agreement does not eliminate the need for the Court’s assessment of fairness compared to the settlement as a whole. *Staton*, 327 F.3d at 963 (quoting, *Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 884 (2d Cir. 1983)). And, in assessing the fairness of the common fund fee provision, the Court may not “delete, modify or substitute certain provisions.” The settlement must stand or fall in its entirety. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)(quoting *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 628 & 630 (9th Cir. 1982)).⁴

4. *Hanlon* was overruled on other grounds by *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) as noted by, *Benipayo v. Volkswagen Grp. of Am.* 975 F.3d 770, 778 (9th Cir. 2020), but continues to be cited routinely for its analysis of common fund fee award principles. E.g., Courts “must evaluate the fairness of a settlement as a whole, rather than assessing its individual components. *Lane v. Facebook, Inc.*, 696 F.3d 811, 818-19 (9th Cir. 2012); (citing *Hanlon*, 150 F.3d at 1027).

C. Determining the Reasonableness in Common Fund Cases

“The attorney fee award is compensation for the effort expended to benefit the class. Counsel will not undertake actions of this nature unless they can recover adequate compensation for (1) their time, (2) the risk of not prevailing, (3) the delay in receipt of fees, and (4) the investment (money as well as time) that must be made in a case” National Consumer Law Center, *Consumer Class Actions* § 19.3 at 397 (10th Ed. 2017).

As Judge Richard Posner has said:

A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The interest rate on such a loan is high because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is so much higher than that of conventional loans.

Richard A. Posner, *Economic Analysis of the Law* § 21.9 at 534-35 (2d ed. 1984).

1. The attorneys spend more than two decades litigating this case to a successful settlement.

Class counsel have litigated this case since 1999. The amount of time expended by their firms is in excess of 38,000 firm ours over that time period.

Varady ¶ 18; Grande ¶ 48.

2. The risk of not prevailing.

As noted herein and in the motion for final approval the risk of not prevailing on any of the points of error brought to appeal in *Kalima I or II*, would have

been disastrous to the Class Members' claims. Instead Class Counsel defeated Defendants' argument in *Kalima I* that Class Members did not have the right to sue and, in *Kalima II*, established: (1) the FMRV model as an appropriate method for measuring actual damages under Chapter 674; (2) FMRV as an appropriate statewide measure of residential, agricultural, and pastoral, damages; (3) every trust beneficiary is entitled to damages, pursuant to that model, for the years during which the beneficiary was on the wait list, rejecting the State's contention that every beneficiary was required to prove individual out-of-pocket loss; (4) beneficiaries who deferred from participating in homestead offerings because of poverty did not lose the right to compensation; (5) the trial court committed legal error by ruling that damages started only six years after the date of application rather than the date of application; (6) every individual who filed a claim with the Panel is a Class Member; and (7) that Special Master and claims administration process should be implemented on remand. A loss on one or more of these issues would have been catastrophic for the Class Members, and the decades of time invested by Class Counsel.

3. More than two decades have passed since the case was filed.

The instant case was filed December 29, 1999. The magnitude of the passage of time during which Class Counsel have advanced costs and not been paid for any work, other than the two appeals is self-evident.

4. The investment of money and time are exceptional.

As one Class Representative recently asked, “What attorneys would invest \$500,000 of the own money and more than 23 years of time in a case like this?” Only two are known to have done so in Hawai‘i. Again, the magnitude of the investment of time and money in the case are self-explanatory.

Looking at these four criteria, it is clear that Class Counsels’ work should be fully compensated as requested from the common fund.

D. Reasonableness of Fees is Solely a Matter for the Court.

1. Only the Court and the Class Members have an interest in fees.

The reasonableness of any fee award is solely within the discretion of the Court. Defendants lack standing to challenge the common fund fee motion. “In ‘common fund’ cases, the losing party no longer continues to have an interest in the fund; the contest becomes one between the successful plaintiffs and their attorneys over division of the common fund. *Copeland v. Marshall*, 641 F.2d 880, 905 n.57 (1980)(citing, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 482, 100 S. Ct. 745, 751 (1980)). *Copeland* expresses the rule. *E.g. In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 125 (S.D.N.Y. 2009), *aff’d sub nom. Priceline.com, Inc. v. Silberman*, 405 Fed. Appx. 532 (2d Cir. 2010) (recognizing that because the government is not a member of the class, it lacked standing to object to the amount of requested attorneys’ fees); *Board of Trustees v. Rosewell*, 262 Ill. App. 3d 938, 954, 635 N.E.2d 413 (1992), *cert. denied*, 149 Ill. 2d 647, 612 N.E.2d 511 (1993)(in

cases where a lump sum in a class action suit has been paid to the class and attorney fees are awarded from that fund, the defendant does not have standing to contest the award of fees); *Sanders v. Los Angeles*, 3 Cal. 3d 252, 263, 475 P.2d 201, 90 Cal. Rptr. 169, 176, 475 P.2d 201, 208 (1970)(reasoning the liability of the defendant was not increased in any way by reason of a common fund fee award).

Standing to object to an award of attorney's fees from a common fund is limited to those who have helped create the common fund and to those who will benefit from it, namely, the members of the class. *Town of New Hartford v. Conn. Res. Recovery Auth.*, 291 Conn. 511, 522, 970 A.2d 583, 591 (2009). *Boeing, Copeland* and the other cited cases establish the general rule applicable here. Defendants do not have standing to oppose or otherwise object to this motion. 291 Conn. at 520-21, 970 A.2d at 590.

2. The Court's fee award will not cause Defendants any administrative burden, expense or additional payment.

Chun IV established that Hawai'i courts follow this general rule:

Defendants in common fund cases have no interest and lack standing to argue against the amount of fees or cost beyond the common fund payment awarded, unless the award imposes some additional future administrative burden or cost. *See*, 106 Haw. at 441, 106 P.3d at 364.

In *Chun IV*, ERS asserted it had an interest in the fee motion based on future administrative burdens that would be imposed if plaintiffs' fee order was

granted. *Chun IV*, relying on *Chun III*, affirmed that ERS did not have standing to raise due process claims of the opposing party, but also affirmed the portion of the trial court's order finding that ERS would have standing to contest attorneys' fees because ERS would be burdened with substantial administrative burdens (and undoubtedly costs) in calculating and remitting those fees to retirees on each of their checks over time. 106 Haw. at 425, 106 P.3d at 348.

Defendants' standing to challenge the attorneys' fees in *Chun III* arose from the fact that proposed attorneys' fee payments by class members would occur in the future, through periodic deductions from plaintiffs' retirement checks, and ERS would therefore incur additional future administrative burdens in collecting and remitting the fees and recalculation of amounts due. *Chun III*, 92 Haw. at 440, 992 P.2d at 135. This future administrative burden was a sufficient interest for ERS to have standing to oppose the fee motion. *Id.*

In the present case, the circuit court's March 11, 1996 judgment affirmatively places upon the Board and the ERS the administrative responsibility of deducting attorney's fees from sums to be paid to the Retirees. Khim moved for an award of a percentage of the future payments of the increase in retirement benefits to the Retirees. If the circuit court had granted Khim's motion, the award would have required the Board and the ERS to deduct monies from payments to thousands of the Retirees on a periodic basis. Furthermore, the ERS and the Board periodically would have had to recalculate the amount due to Khim, inasmuch as benefits due to the Retirees would change over time given increases in, inter alia, cost of living and retroactive collective bargaining pay. Therefore, the Board and the ERS would incur a greater administrative burden if

Khim were paid in periodic increments, based on future benefits, than if he were paid in a single lump sum. That being the case, the Board and the ERS had an administrative interest in challenging Khim's suggested method of allocating attorney's fees.

Chun III, 92 Haw. at 440, 992 P.2d at 135. *Chun III* distinguished its holding from the general rule applied in *Boeing* and *Copeland* preventing defendants from interfering in common fund attorneys' fee proceedings. It did so based on the future administrative burden ERS would have in collecting and remitting the fees. 92 Haw. at 440-41, 992 P.2d at 135-36.

Defendants have paid the \$328 million for a release of all claims into a common fund. Attorneys' fees will be paid from that common fund. Defendants will not pay a penny more, regardless of how the Court rules on the instant motion. Defendants do not have any future administrative obligations related to attorneys' fees, regardless of how the Court rules on the instant motion.

3. The *cy pres* provision does not give Defendants an interest in the fee award.

The *cy pres* provision of the Settlement Agreement, which provides for transfer of unclaimed funds to the DHHL revolving loan fund at the end of the case once all identified Class Members receive full payment,⁵ does not change the standing

5. See, Exhibit 4 to Varady ¶ VII.E. "Any remainder of the Class Settlement Amount that cannot be distributed after all authorized payments are made in accordance with this Agreement and applicable orders of the Court shall be paid to the Department of Hawaiian Home Lands loan fund established by section 213(c) of the Hawaiian Homes Commission Act and used exclusively for the purposes

analysis. A putative contingent future interest in such monies does not create standing for Defendants. *Boeing Co.*, 444 U.S. at 482, 100 S. Ct. at 751. The Class Members are the sole equitable owners of the common fund. *Id.* Defendants have no interest in the \$328 million common fund. *Id.* Any claim Defendants might later have to unclaimed funds at the conclusion of the case does not give Defendants standing to challenge the fees awarded by the Court. *Id.* Defendants “latent interest unclaimed money in the judgment fund” does not create standing for Defendants to challenge the fee award. *Id.*

In the instant case, fees will be deducted from the lump sum payment and Defendants will incur no additional future costs or duties regardless of the Court’s ruling on fees. Well settled law applicable to common fund fee motions establishes that Defendants should not be heard in opposition to the instant motion.

4. The Settlement Agreement merely limits fees; it does not give Defendants any voice in the fee award.

The Settlement Agreement contains four provisions that address the attorneys’ fee award.

First, Plaintiffs agreed that Class Counsel would not seek fees by any method in excess of \$40 million. Exhibit 4 to Varady ¶ V.C.1. Class Counsel are not enforcing their 45% retainer (\$147.6 million), or the benchmark 25% fee that would typically apply in a common fund case (\$82 million); and they do not seek fees in

enumerated in section 214(a) of the Hawaiian Homes Commission Act.”

excess of the agreed upon limited fee of \$40 million (12.19%), pursuant to that provision.

Second, Defendants agreed that they “shall not oppose Plaintiffs’ or Plaintiffs’ attorneys’ request for Payment of Plaintiffs’ Attorneys’ Fees” in an amount less than or equal to \$28 million. *Id.* ¶ V.C.2.

Third, if provided an opportunity to review Plaintiffs’ fee motion Defendants may concur that the amount sought is reasonable but, having been given the opportunity to review the motion, “***shall not oppose*** Plaintiffs’ application to the Court for payment of Plaintiffs’ Attorneys’ Fees” (*id.* ¶ VII.A.5.c.) except as set forth in ¶ VII.C. Defendants may “comment on and concur” with the motion prior to its filing. Reading paragraphs ¶¶ VII.C. and VII.A.5.c. together, therefore, Defendants would have standing to oppose a fee motion *after* the opportunity to review, comment and concur has been provided by Plaintiffs, *only* if the request seeks fees in excess of the \$40 million agreed-upon limit. The review opportunity has been provided. Varady ¶ 29 & Exhibit 5 thereto.⁶ Class Counsel do not seek fees in excess of the agreed upon \$40 million limit.

In construing a contract, a court’s principal objective is to ascertain and effectuate the intention of the parties as manifested by the contract in its entirety. If there is any doubt, the interpretation which most reasonably reflects the intent of

6. Defendants have not responded to requests for clarification as to whether they oppose award of *any* fees or some portion. *Id.*

the parties must be chosen. *Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Ltd. P'ship*, 115 Hawai'i 201, 213, 166 P.3d 961, 973 (2007). Construing ¶¶ VII.C. and VII.A.5.c. together, the most reasonable construction here is that Defendants could oppose a fee request in excess of \$28 million, *only* if they had not been provided the opportunity to “review, comment, and concur.” Construing ¶¶ VII.C. and VII.A.5.c. together as allowing Defendants to oppose *any* fee request in excess of \$28 million would render the review, concur and waiver provision of ¶ VII.A.5.c. meaningless. As Defendants have had the opportunity to “review, comment and concur,” and Class Counsel *do not* seek fees in excess of the agreed-upon \$40 million limit, the Settlement Agreement terms do not modify the general standing rule: Defendants to not have standing to challenge the instant fee motion.

III. ARGUMENT.

The result achieved in the instant case is unprecedented. No case has ever provided relief approaching the direct economic benefit achieved for literally thousands of Native Hawaiian beneficiaries that the instant litigation and Settlement Agreement has produced. There is no yardstick against which the economic benefit produced by Class Counsels’ more than two decades of unrelenting struggle, against a State employing its unlimited resources to defeat a class of 2,752 Native Hawaiians, while they aged and died,⁷ can be fully measured based on any comparable

7. Currently, the Claims Administrator reports that 1,346 Class Members, 49% of the Class, are reported to be deceased. Varady ¶ 43.

achievement: there simply are none. Nor is there a means to measure the commitment, dedication, professional and personal sacrifices demonstrated, or public benefit created by this case and its history by reference to any analogous Hawai'i case. Reviewing the metrics of the results achieved, the work demanded over two decades, and with reference to leading members of the legal community-including Gov. John D. Waihe'e, III, whose administration created HRS Chapter 674 and Melody K. MacKenzie, Executive Director of the Hawaiian Claims Office, charged with implementing HRS Chapter 674-the fees sought are reasonable and fair and the relief "adequate," cannot not be disputed.

- A. The Recovery for the Class Members is Unprecedented.
 1. The \$328 million common fund settlement vastly exceeds any offer of settlement Defendants made prior to 2022.

Sixteen years ago, on April 27, 2007, then-Attorney General Mark J. Bennett responded to Plaintiffs' settlement demand in the mediation being conducted by Keith Hunter. In his response Attorney General Bennett informed Mr. Hunter that the State refused to offer one cent in response to Plaintiffs' demand. Varady ¶ 43. Attorney General Bennett dismissively characterized Class Counsels' demand valuation of the Plaintiffs' claims as "wholly unrealistic." *Id.*

On July 7, 2014, after Defendants lost on the issues of breach, liability and the fact of damages following a six-week bench trial in 2009, and the method of valuation-FMRV-had been resolved in a second trial four years after, Defendants made

their first financial offer to settle globally for the total sum of \$17 million. Varady ¶ 44. Until settlement negotiations began in the instant case on March 18, 2022, that was Defendants' final offer. *Id.*

The \$328 million paid by Defendants for release of Class Members' claims exceeds Defendants only prior offer of \$17 million by nearly 20 times-1929.4%.

2. The \$328 million common fund settlement exceeds the gross value of Class Members' claims under the Distribution Rules.

At the time the 2022 settlement negotiations began, Plaintiffs did not have complete data for the Class Members. Varady ¶ 45. Even after *Kalima II*, Defendants resisted discovery and, notwithstanding orders from the Court that they do so, did not produce the critically important complete claims files or award data until September 15 and October 19, 2022, respectively. *Id.* Class Counsel were forced to propose a global settlement of all claims, having only partial or no records for approximately 600 Class Members, Class Counsel were faced with the arduous task of searching these records to obtain claim data while still attempting to maintain the schedule for notice and final approval. *Id.* The data Class Counsel did have had been recorded on 30 spread sheets over a period of approximately eight years, from production of documents and interrogatory responses from Defendants that were contradictory and incomplete. *Id.* Defendants have never been able to produce Class Member data showing homestead application type and award date in a single coherent document. *Id.*

Within a matter of one week of negotiations beginning, Class Counsel, with expert assistance,⁸ were able to aggregate 30 disparate spreadsheets in differing formats, created by different reviewers over a period of more than seven years, to produce a spread sheet of Class Members and claim values that allowed them to estimate the value of all claims, including claims for Class Members with incomplete or no data-*i.e.*, the Master List. *Id.* ¶ 46. Using the data culled from eight years of discovery and literally thousands of hours of review, Class Counsel presented a demand, using data that Defendants had possessed, produced, but had not analyzed at the level necessary to contest the claim values presented in the Master List. *Id.*

The \$328 million settlement payment was the direct product of Class Counsel's compelling data synthesis and presentation in the Master List. *Id.* ¶ 47. While the \$328 million payment was arrived at through a tremendously difficult synthesis of years of analysis of incomplete data, disparately recorded on 30 different spread sheets compiled into a single Master List in a week's time, the estimates and final demand it led to were extraordinary and, ultimately, highly accurate. *Id.*

Applying the Distribution rules approved by the Court [Dkt. 1589], the total value of all valid Class Member claims is \$319,639,581.61. Varady ¶ 48. The

8. That assistance was provided by Ezra A. Varady who holds a degree in computer science and electrical engineering and is conversant in numerous programming languages. Varady ¶ 46. Mr. Varady's work was essential and critical to Class Counsels' ability to analyze data, estimate with reasonable accuracy the class damages and present a Master List coherently presenting these calculations to the Court and to Defendants. *Id.*

\$328 million paid by Defendants exceeds the total value of all valid claims⁹ by \$8,360,418.39 (2.5%). *Id.*

That the gross recovery for all valid claims *exceeds* the total value of those claims by more than \$8.3 million is incontrovertible proof that Class Counsel deserve to be compensated for their work at the highest possible level. The recovery of 102.5% of the total value for all Class Members' claims (\$328 million) means:

- After deducting Epiq's estimated claims administration costs through anticipated conclusion of the case (\$1,728,700.00) and the incentive bonus to class representatives (\$75,000.00), \$326,196,300.00, would remain of the Settlement Fund;
- Subtracting the total value of all valid Class Members' claims from that remainder, there would be an excess of \$6,556,718.39;
- That excess payment applied to the \$40 million attorney fee request reduces the fee to \$33,443,281.61 or 10% of the \$328 million recovered;
- Class Members, therefore, would receive **90% of their individual claim values and 90% of the total claims value** even after the full attorneys' fees sought, estimated claims administration costs

9. "Total value of all valid claims" means the sum of all valid claims of all individual Class Members as determined by the Distribution Rules [Dkt 1589].

and incentive payments are deducted from the \$328 million because of the excess \$8.3 million recovered by Class Counsel.

Varady ¶ 49. a.-d.

The litigation in this case and the settlement it produced have no parallel. The State has never paid an equivalent amount to settle any other lawsuit. Native Hawaiian beneficiaries have never received direct payments of this magnitude from any other lawsuit. There simply is no standard that can be used to characterize this result at this scale, which exceeds the total value of claims, as anything other than a complete victory and fulfillment of the purpose of HRS Chapter 674. Nor is there any basis for paying Class Counsel less than the 12.19%¹⁰ they seek for the work they have done to achieve and exceed the Class's and statute's goals.

B. Class Counsel Produced a Huge Recovery for 2,518 Class Members Who Otherwise Would Have Received Nothing.

Comparing the relief that will be distributed among the Class Members produces a similar picture. In its 1999 "*Final Report to the Governor and the Hawaii State Legislature* (Hawaiian Home Lands Trust Individual Claims Review Panel)" (the *Final Report*), the Panel confirmed it received 4,327 claims from 2,752 individual claimants. Varady ¶ 50 & Exhibit 6 at 6-7 and Table 1 & Exhibit 7 (summary). As of September 30, 1999, the Panel had dismissed 1,709 claims (39.5%) and 2,000 claims

10. Effectively 10% after the excess payment of 8.3% is credited against Epiq's claims administration costs and the \$75,000 incentive bonuses.

were still pending or not yet presented for hearing (46.22%). Thus, a total of 3,709 claims (85.72%) filed by beneficiaries either were deemed not compensable or had not even been reviewed by the Panel or presented to the legislature for compensation when the Panel ended. *Id.*

COMPARISON OF CLAIMS FILED TO DECISIONS, DISMISSALS AND PENDING CLAIMS		PERCENTAGE OF TOTAL CLAIMS FILED
TOTAL CLAIMS FILED	4327	100.00%
Dismissed or Dismissal Pending	1709	39.50%
Pending	2000	46.22%
Total Dismissed, Dismissal Pending or Pending	3709	85.72%
Total Claims Resulting in Recommended Panel Awards	578	13.36%

Class Counsel created a process of claim evaluation designed to maximize recovery by the most Class Members who had valid claims, including recognition of all dismissed claims that were not otherwise barred by the Distribution Rules. Under the Distribution Rules, the Panel’s dismissals of claims for lack of response by claimants, rejection of representative claims by children of deceased parents or spouses, and substantive rulings were not controlling; all claims were reevaluated under the Distribution Rules, and Fair Market Rental Values were used to value all but the 102 construction claims. Varady ¶ 51.

The results of the Distribution Rules created by Class Counsel demonstrate the breadth of the benefit conferred by the litigation and settlement. The numbers of claims now being compensated speak for themselves as shown by this count by category of claim:

CLAIMS PAID UNDER DISTRIBUTION RULES AND SETTLEMENT	Number of Claims	Percent of Total Claims Paid
Residential	2254	61.539%
Agricultural	1074	29.32%
Pastoral	233	6.36%
Construction	102	2.78%
Total	3663	100.00%

Varady ¶ 52.

After seven years of work from 1992 through 1999 **no claims** were compensated by the legislature as a result of the Panel process. As a result of Class Counsels' work 3663 claims are being compensated-634% greater than the number of claims recommended for compensation by the Panel during its seven years of existence. No claimants received compensation from the legislature. As a result of Class Counsels' work, 2,518 Class Members now will receive compensation from the settlement, 571% greater than the 441 claimants the Panel recommended the legislature compensate, but who received **nothing**. Varady ¶ 53.

The actual measure, therefore, by which fees should be assessed is this: but for Class Counsels' work for more than two decades, not one penny would have been paid to any Class Member; through Class Counsels' work over the past two decades, 2,518 Class Members will receive compensation for the State's breaches of trust and their important rights as beneficiaries of the Hawaiian Home Lands Trust will have been fully vindicated and affirmed. The State marshaled 19 attorneys of record and spent more than two decades fighting vainly to avoid the economic consequences of its breaches of trust. The State now has paid for the economic harm

its breaches caused, solely and exclusively through Class Counsels' work.

C. Class Counsel Produced Average Recovery Greater than the Panel Average.

The average value of each of the 2,518 Class Members' total claims¹¹ using the Distribution Rules is \$126,941.85. Varady ¶ 54. While no Panel claims were actually compensated by the legislature, looking at the aggregate \$17,970,822.74 recommended by the Panel for the 441 claimants who received such recommendations, the average recommended award was \$40,750.16. *Id.* Class Counsels' work produced an average total claim value for Class Members that is 312% times the Panels' average unfunded recommendations for claimants. *Id.* Even after an award of attorneys' fees of 12.19% and current costs of claims administration are deducted from the \$328 million settlement, Class Members' average net pro rata recovery will be \$113,660.16, 279% times the \$40,750.16 average unfunded recommendation made by the Panel. *Id.*

Again, it should be beyond debate that the value received by the Class Members from Class Counsels' more than two decades of work warrants full compensation at the 12.19% requested. Class Members would have received nothing without Class Counsels' work.

11. A Class Member's "total claims" means the aggregate value of a Class Members' residential claim (if any) + (agricultural OR pastoral claim)(if any) + construction claim (if any).

D. Class Counsel Seek Less than Their Retainer or the Presumed Benchmark and Have Waived Post-Settlement Fees and Their Claims for Costs.

The 25% benchmark for common fund class settlements was affirmed in *Chun IV*. Class Counsel would be fully justified seeking the full 25%. Furthermore, Class Counsel were retained under a progressive civil rights retainer agreement, providing for 33.33% for of the gross recovery for settlement pre-suit, 40% after litigation is initiated and 45% after any appeal. *Varady* ¶ 55. Recognizing the poverty of many of the Class Members and the important public interest served in resolving their claims for historic ongoing malfeasance by the State in its role as Trustee, Class Counsel agreed to compromise their fee at 73% less than they would receive under the retainer, which would have been \$147 million. *Id.* Class Counsel agreed to compromise their fee at 51% less than they would receive applying the common fund benchmark, which would have been \$82 million. *Id.* Importantly for claims administration purposes, Class Counsel agreed to waive post-settlement fees, a position strongly opposed by experienced practitioners. National Consumer Law Center, *Consumer Class Actions*, § 14.10.5 (Fees for Post Settlement Work)(10th Ed. 2017). Class Counsel also agreed to absorb and waive their costs in excess of \$500,000. *Id.* Grande ¶ 14.

E. Class Counsel Seek Less than the State Pays Lawyers to Recover Funds in Commercial Litigation.

Another point of reference for the fees sought by Class Counsel is the

percentages of recovery paid by the State when it retains firms to represent its interests in class litigation. Reference to those agreements confirms that Class Counsels' request is at the low end of what the State pays firms to recover funds in commercial class actions.

Firm	Matter	Fee	Exhibit
Cronin, Fried, Sekiya, Kekina, Fairbanks, Honolulu HI	National opioid litigation	20% of amount recovered after payment of costs deducted	Exhibit 8 to Varady at 10
Baron & Budd, LLC, Dallas TX	National opioid litigation	17% of first \$75 million recovered after costs and expenses are paid and 14% of any amount recovered in excess of \$75 million	Exhibit 9 to Varady at 12
Lieff, Cabraser, Heimann & Bernstein, San Francisco CA	Suit against e-cigarette manufacturers for marketing to minors	14% from the net recovered after costs and expenses are paid	Exhibit 10 to Varady at 10
Golomb & Honik, Philadelphia PA	Suit against credit card providers to stop illegal practices involved in the marketing of credit card protection plans.	23% from the first \$5 million after costs and expenses are paid, 20% from the excess over \$5 million up to \$10 million, 17% from the excess over \$10 million up to \$25 million and 14% of the amount in excess of \$25 million	Exhibit 11 to Varady at 9

The State's agreements with these firms confirm that the 12.19% sought by Class Counsel is a lower fee than the State pays large firms to sue large corporations in commercial litigation having nothing to do with civil rights or Native Hawaiian trust responsibilities. That the State is willing to pay a higher percentage after expenses are deducted and reimbursed to firms in these commercial matters, affirms that Class Counsel seek an eminently reasonable amount. This fee data is compelling.

Empirical studies of fee awards in class actions confirm the reasonableness of the fee sought here. A 2010 study of 444 settlements in which federal district courts awarded a percentage of the common settlement fund as fees found that, typically, attorneys were paid 19%-28% of the amount recovered. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 811, 837-38 (2010).¹² Exhibit 12 to Varady. Observing that the percentage of fees typically diminished inversely as the amount recovered increased and that resulted in large differences in fees, the study specifically analyzed data from settlements of \$72.5 million and above. *Id.* 838-39. For settlements in the range of \$250 million to \$500 million, the data showed that the

12. According to Lexis, Prof. Fitzpatrick's article has been cited by a least 107 courts. *E.g.*, *Rodman v. Safeway Inc.*, No. 11-cv-03003-JST, 2018 U.S. Dist. LEXIS 143867, at *12 (N.D. Cal. Aug. 22, 2018)(approving a fee of 28% of the common fund, after reviewing data analysis from the Fitzpatrick article, in a case that had produced a \$42.3 million judgment). Varady ¶ 56.

mean¹³ fee award was 17.8% of the recovery, and the median 19.5%; for recoveries in the range of \$500 million to \$1 billion, the mean and median were both 12.9%. *Id.* Class Counsels' request is well below the average awarded in cases producing similar recovery and also lower than fees awarded in cases where recovery ranged from \$500 million to \$1 billion.

Empirical data confirms that the amount sought is reasonable.

F. Class Counsel Have Committed Themselves to More Than Two Decades of Arduous Litigation Foregoing other Income.

1. The professional costs and risks were extreme.

Both Class Counsel are solo practitioners. Varady ¶ 13; Grande ¶ 12.

Class Counsel have taken this case and committed to work until its resolution under progressive contingent fee agreements. Varady ¶ 13; Grande ¶ 18. Since filing on December 29, 1999, the only payment they have received for the work done in this case was payment for work in the two appeals. Varady ¶ 13; Grande ¶ 19. By committing to its resolution, Class Counsel was required to decline other income producing work between 1999 and today, because of the time demands presented by novel and complex issues, extensive record, and extreme risks presented in this case. Varady ¶ 14; Grande ¶ 35-44. A loss on liability or causation of damages, the Fair Market Rental Value damages model, the deferral for poverty mitigation defense

13. The "mean" is the arithmetic average. The "median" is the numeric value separating the higher half of a sample from the lower half.

asserted by the state or class certification issues would have eliminated any chance of meaningful recovery for the now-more-than 23 years of work Class Counsel and their staffs have committed to this case. Varady ¶ 14; Grande ¶ 18. The commitment of work to the instant case severely impacted Class Counsels' income. Varady ¶ 15; Grande ¶ 48.

Through the instant motion, Class Counsel and their staffs have expended thousands of hours of time. Varady ¶ 18; Grande ¶ 48. They have both waived their statutory fees and, instead, rely on a percentage of the common fund as payment. Varady ¶ 18; Grande ¶ 14. They both have waived claims for costs advanced, in excess of \$500,000 and GET tax of 4.712% of any award. Their compensation will be determined solely by the Court's award from the common fund in the instant case. Varady ¶ 16; Grande ¶ 14. As a material term of settlement Defendants agreed not to object to a request for attorneys' fees up to and including \$28 million (8.53% of the gross settlement amount). Class Counsel agreed to seek no more than \$40 million (12.19% of the gross settlement amount) in attorneys' fees. The agreement establishes that the 12.19% fee sought is reasonable.¹⁴ The \$328 million Settlement Agreement payment is 19.3 times the highest amount ever offered by Defendants to settle.

14. The parties to the Settlement Agreement agreed to the range of \$28 to \$40 million. Class Counsel seek no more than the agreed upon range. As required by ¶ VII.A.5.c. of the Settlement Agreement, Defendants have been given the opportunity to review, comment and concur. Any objection is, therefore, waived.

2. The value added by Class Counsels' work is apparent.

In addition to resolving claims from breaches of trust going back to statehood and fulfilling the purpose of HRS Chapter 674 through more than 23 years of work, Class Counsels' work has provided numerous additional benefits:

- The Probate Plan created by Class Counsel, Probate Special Master and Probate Special Counsel, and recently jointly approved by the Court and Probate Court, is also remarkable. Class Counsel were not retained to provide probate services. Instead of abandoning the heirs of the 1,346 known deceased Class Members to fend for themselves and as much as \$150 million undistributed, the Probate Plan is designed to locate them, provide them notice of their deceased family member's claims and will distribute settlement proceeds to heirs and devisees of their estates. *Varady* ¶ 57. The vast majority of Panel claims were either dismissed or unprocessed. *Id.* It is highly probable that a majority of heirs may not know that their relatives' estates had claims from proceedings that occurred 30 years ago ending prematurely or in dismissal, or that those claims will be paid from the Settlement Agreement funds. *Id.*
- The Probate Plan creates a system for delivering streamlined, low-cost probate services designed to utilize Class Member data

obtained in and complied from discovery by Class Counsel. The Probate Plan payment distribution directly fulfills the concept of generational economic rehabilitation and self-sufficiency for which the Hawaiian Homes Commission Act was created and the lofty goals expressed therein. *Hawn. Homes Commn. Act § 101. Varady ¶ 58.* With estimated potential heirs of three to four people per estate, distribution of settlement payments under the Probate Plan is likely to affect 4,000 to more than 5,000 heirs of the Native Hawaiian beneficiary Class Members. *Id.*

- Class Counsels' work proved that disputed breaches of trust by the DHHL, and specifically waiting list delays, are actionable from the date of application. *Kalima II*, 148 Haw. at 147, 468 P.3d at 161.
- Class Counsel created a method of valuing individualized damages, based on fair market rental values between application and award dates, rather than individualized proof. *Varady ¶ 59.* One of the biggest obstacles to recovery before the panel was the difficulty for *pro se* litigants, as well as those represented by counsel, to find and present such proof in the 1990s hearings. *Id.* Their cases were also hampered by the State's inability to produce accurate records regarding their claims. *Id.* Many

claimants also found the hearing process confusing and intimidating to the point of many of them abandoning their claims. *Id.* The State appeared in the remaining cases with Deputy Attorneys General opposing the claims, attacking the claimants' credibility and making evidentiary and legal arguments against them throughout, escalating what was intended to be a simple and informal process into full-bore litigation. *Id.* The Fair Market Rental Value model alleviated the potentially disastrous defense asserted by Defendants that every Class Member would have to prove individual out of pocket loss. *Id.*

- As Class Counsel we have established that the Department of Hawaiian Home Lands' "waiting lists" are a direct and proximate result of DHHL's breaches of trust and that beneficiaries should not be forced to wait for a homestead award for any period of time. 148 Haw. at 149, 468 P.3d at 163.

This case was particularly protracted and contentious, as the facts presented at trial and in pre-trial proceedings below demonstrate. Varady ¶ 60; Grande ¶ 50. The state has nearly unlimited resources for legal representation, through both Deputy Attorneys General and retained private counsel. It uses its resources to delay and force settlements because claimants do not have the means to withstand such tactics. Such circumstances make litigation of civil rights cases

particularly unattractive for the typical small law firm to accept. Varady ¶ 60; Grande ¶ 50. The State’s dilatory tactics have been unyielding and considerable. The adverse consequences arising from the State’s choice to litigate this case for decades was expressly recognized by the Hawai‘i Supreme Court. 148 Haw. at 143, 468 P.3d at 157.

Very few attorneys are willing to undertake civil rights cases such as this, as they are unpopular, costly, are fraught with lengthy contentious delays in relief and payment of fees. Varady ¶ 62. The novelty and complexity of the instant case caused several attorneys to decline representation when they were approached by Native Hawaiian Legal Corporation. *Id.* Several attorneys who once accepted individual beneficiary cases who were asked to participate in the instant case did not do so because they were not willing or able to bear the economic risk that results from the arduous opposition of the state and the resultant delays. *Id.* And few attorneys will agree to appear in appeals Courts where, as in the instant case, the record is two decades long, the issues were both novel and complex and the risk of loss was substantial. *Id.*

Few attorneys in Honolulu will represent plaintiffs in civil rights cases. Varady ¶ 41. To date, other than the instant case, there are no other reported cases seeking relief under the statute at issue, HRS Chapter 674. *Id.* Native Hawaiian Legal Corporation (“NHLC”) approached Class Counsel in 1999 to represent these Class Members, after NHLC was unable to find other attorneys willing to commit to taking

this case. *Id.* Other attorneys declined because of the inevitable delays that result from the state's unlimited financial resources, the size of the class, an understanding that the claims were new and *sui generis*, and the prior history of litigation by the state in the administrative process. *Id.*

Several solicitations were made to other lawyers, some of whom had represented claimants before the Panel. *Id.* ¶ 64. Attorneys declined because they perceived the work as overwhelming and unlikely to succeed. *Id.* Another issue that dissuaded these lawyers was the belief that state sovereign immunity would prohibit or limit any recovery, coupled with the knowledge that the Plaintiffs are mostly poor and could not pay anything in the case of an adverse ruling on immunity or liability, pay fees or costs or where damages were low or nominal. *Id.* These fears of protracted complex litigation were not unfounded. The record on appeal in *Kalima II* was voluminous containing 115 volumes and tens of thousands of pages of pleadings, memoranda, argument, and proof. *Id.*

Nearly three additional years have elapsed since the *Kalima II* appeal concluded and more than a year has passed since settlement was achieved. *Id.* ¶ 65. During that time Class Counsel have continued to work diligently and with the utmost dedication serving the interests of the Class, without payment and without pause, to bring this matter to what must be characterized as a successful conclusion. *Id.*

3. Governor Waihe‘e, Director MacKenzie attest to the significance of Class Counsels’ work and the settlement.

Governor Waihe‘e, whose administration authored the *Governor’s Action Plan* that led to HRS Chapter 674, and former Executive Director of the Hawaiian Claims Office Melody Kapilialoha MacKenzie, whose office was charged with implementing Chapter 674, confirm that the purpose of the statute was to provide low-cost informal resolution of long-standing breaches of trust by the Department of Hawaiian Home Lands. Waihe‘e ¶¶ 7-13; MacKenzie ¶¶ 10-12. Both of them affirm that the promise of a low-cost informal remedy to resolve those breaches was completely unfulfilled and ended with Governor Cayetano’s veto of the bill extending the Panel’s life. Waihe‘e ¶¶ 14-15; MacKenzie ¶¶ 13-20. Both of them attest to the fact the Settlement Agreement fulfills the purpose of Chapter 674 in a way that the legislature refused to do and the Panel could not. Waihe‘e ¶¶ 16-17 & 21; MacKenzie ¶¶ 21-25 & 27-33. Both of them declare that the 12.19% fee sought by Class Counsel is reasonable based on the work done, risks taken, time necessary to resolve the claims and excellent results obtained. Waihe‘e ¶¶ 18-22; MacKenzie ¶¶ 26, 30-34. Both Governor Waihe‘e and Director MacKenzie attest to the non-economic benefits conferred by Class Counsels’ work that extend beyond the economic relief the Class Members will enjoy. Waihe‘e ¶¶ 19-22; MacKenzie ¶¶ 27-28 & 34-35. And, both of them describe the negative impact that would result from paying less than the fees sought, making it more difficult for Native Hawaiians seeking representation in the

future to find attorneys willing to help them pursue important trust and civil rights issues. Waihe'e ¶ 22; MacKenzie ¶ 35.

4. Other leading members of the legal community attest that the work, dedication and result justify the fee requested.

Paul Alston, Managing Partner of Denton's LLC, of one of Hawai'i's premier corporate law firms, who continues to engage in complex civil rights litigation against the State; Mark Davis, director of Davis Levin Livingston, one of Hawai'i's premier personal injury firms whose firm has frequently brought civil rights cases against the State; Eric Seitz, whose firm is a leading Hawai'i civil rights firm that frequently litigates against the State; and Joseph Kamelamela, formerly Chief Corporation Counsel for Hawai'i County, with extensive experience in civil rights cases (and a Class Member), all have submitted declarations in support of the fees sought by Class Counsel.

All of them attest:

- A fee of 25% of the gross settlement amount would be appropriate based on the excellent results, length of time needed for resolution, difficulty and complexity of the work and the risks undertaken by Class Counsel. Declaration of Paul Alston ("Alston") ¶ 11; Declaration of Mark S. Davis ("Davis") ¶¶ 5 & 9-15; Declaration of Eric A. Seitz ("Seitz") ¶¶ 8-14; Declaration of Joseph Kamelamela ("Kamelamela") ¶¶ 9-15.

- The instant case resolved important non-economic issues, establishing principles of law that benefit Native Hawaiian beneficiaries who are not Class Members. Alston ¶ 11.d; Davis ¶ 15; Seitz ¶ 14; Kamelamela ¶ 15.
- A fee of 12.19% of the common fund is reasonable and fully consistent with the principles governing such awards and the excellent results, length of time needed for resolution, difficulty and complexity of the work and the risks undertaken by Class Counsel. Alston ¶¶ 11.e & 16; Davis ¶¶ 16-18; Seitz ¶¶ 15-18; Kamelamela ¶¶ 14-18.

These declarations are made by attorneys expert in the field of civil rights law with decades of experience fighting similar complex issues. The Court is asked to give these statements of experience, analysis and support regarding the reasonableness of the fees requested the full and due consideration they deserve.

G. The Fee Sought has been Fully Disclosed.

Class Counsel have fully disclosed the fees they are seeking in the Third Notice to Class Members, both as a percentage of the total settlement amount (12.19%) and the dollar amount that represents, \$40 million. Exhibit 13 to Varady at 4 (mailed Notice #3).

Furthermore, in a typical class case, fees are resolved *before* distribution calculations are made. In the instant case, Class Counsel have provided

the Class Members with full transparency, giving them notice of their estimated award prior to the Court's ruling on fees, to provide them the fullest notice possible of the mathematical result of Class Counsels' requests. Thus, the Class Members have been fully informed and their rights to due process regarding the fee award has been fully protected.

H. Class Counsel have Provided Valuable Public Service.

That the Hawaiian Home Lands Program has been a tragic failure is beyond debate. Through this litigation Class Counsel have brought to light many of the State's breaches of trust that have compounded that failure. 148 Haw. at 135-36, 468 P.3d at 149-50. Governor Waihe'e and Director MacKenzie described the non-economic benefits conferred by Class Counsels' work that extend beyond the payments 2,518 Class Members (and their heirs) will enjoy, including a ruling that the so-called "waiting lists" are unlawful. Waihe'e ¶¶ 19-22; MacKenzie ¶¶ 27-28 & 34-35. Leading attorneys in the community have similarly recognized that the value of the work in this case extends beyond the boundaries of the Class. Alston ¶ 11.d; Davis ¶ 15; Seitz ¶ 14; Kamelamela ¶ 15.

As the Hawai'i Supreme Court recently explained, where private attorneys take on the burden of enforcing important public rights, they must be fairly compensated.

"[S]ubstantial" attorneys' fees are justified in cases where a private plaintiff assumes the government's enforcement burden because such cases are "of enormous significance

to the society as a whole” and often involve “extremely complex” issues that require “time-consuming and costly” presentation. *Id.* In short, we stated, “the purpose of the [PAG] doctrine is to promote vindication of important public rights.”

Pub. Access Trails Hawai‘i v. Haleakala Ranch Co., 153 Haw. 1, 28, 526 P.3d 526, 553 (2023).

While the *Public Access Trails Hawai‘i* (“PATH”) case was specifically addressing the concept of “private attorneys general” who undertake to enforce important public rights, the same rationale applies here. From 1991 until April 14, 2022, the State could have taken measures on its own to rectify the breaches of trust HRS Chapter 674 was designed to repair. Instead of fulfilling its duty as a trustee—the highest duty imposed by law—it chose to oppose and not resolve a single claim of a single one of its Class Member beneficiaries. Class Counsel undertook the torturous task of forcing the State to live up to its solemn duty and fulfill its obligations as a trustee and its self-imposed duties under Chapter 674. Class Counsel have filled the void left by the Panel’s demise and fulfilled its mission with unceasing effort and unprecedented results. PATH’s analysis supports the fee request as Class Counsel have provided a public service without which no remedy would have been achieved.

The simple question “Would Hawai‘i have paid one cent to any Class Member absent Class Counsels’ more than two decade effort”? must be answered “No.” The same answer should be given to the question “Should Class Counsel be paid less than their work and results justify, and what they seek-12.19%?”

I. The Court Must Consider the Message Sent by Awarding Less Than the Full Fee Sought.

Finally, the Court must consider the potential negative impact a decision awarding less than the 12.19% requested would have for civil rights and environmental litigants seeking representation and Native Hawaiians in particular. Governor Waihe'e and Director MacKenzie describe the negative impact that would result from paying lower fees than those sought by Class Counsel. They conclude doing so would make it more difficult for Native Hawaiians seeking representation in the future to find attorneys willing to help them pursue important trust and civil rights issues. Waihe'e ¶ 22; MacKenzie ¶ 35. This consideration is not limited to Native Hawaiians, but any person or group seeking to enforce important civil or environmental rights against the State or local government. In this era of "alternative facts" and escalating hatred and tolerance of hatred against minorities, strong committed legal representation is more needed than it has been for decades. If the Courts expect attorneys to stand up for Native Hawaiians or any other minorities in protracted struggles, especially those involving the very government that should be protecting rather than abusing their rights, those attorneys must be able to expect fair and reasonable payment for the commitments and sacrifices they make, and which acknowledge the extent of their accomplishments.

The simple question for the Court is what would these Native Hawaiians have recovered for the violations of their Hawaiian Home Lands birthright, if two

lawyers had not committed a large portion of their professional careers to the service of their cause? The answer is simple-not one penny and not a shred of acknowledgement of the harm done to their rights since statehood. Nothing.

Through Class Counsels' work over more than two decades these Native Hawaiian Class Members now will be compensated fully for the harm caused them. Of equal importance, their voices finally have been heard and, through the Settlement, the State has acknowledged its failures to them as their trustee, fulfilling the promise it made on August 21, 1959, as a condition of statehood. That promise was reiterated in the *Governor's Action Plan* 1991 and in HRS Chapter 674, when it again promised to make things *pono*-right. The compensation sought by Class Counsel for their work to push the State to fulfill its duties is fair and reasonable. It is fair and reasonable for the economic social justice produced for these Native Hawaiian beneficiaries after more than two decades of struggle. The justice envisioned in the *Governor's Action Plan* and Chapter 674 would never have manifested and the economic remedy it envisioned would have been lost forever without Class Counsels' work. Class Counsel now respectfully ask for a fee that fairly measures this historic achievement, an achievement that will improve not only the Class Members' lives but will improve the lives of their community and all Native Hawaiian beneficiaries of the Home Lands Trust. The fee requested is fair, it is reasonable, and like the results of Class Counsels' work, it is *pono*-right.

IV. CONCLUSION.

For the reasons set forth herein, Plaintiffs' respectfully request that the instant motion be GRANTED.

Respectfully submitted, June 19, 2022, Honolulu, Hawai'i.

/s/ Carl M. Varady

Carl M. Varady

Thomas R. Grande

CLASS COUNSEL

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEONA KALIMA, DIANE BONER,
RAYNETTE NALANI AH CHONG,
special administrator of the estate of
JOSEPH CHING, deceased, CAROLINE
BRIGHT, DONNA KUEHU, and JAMES

AKIONA, et al.,

Plaintiffs,

vs.

STATE OF HAWAI'I, STATE OF
HAWAI'I DEPARTMENT OF
HAWAIIAN HOME LANDS; et al.,

Defendants.

CIVIL NO. 99-4771-12 LWC

(Class Action)

DECLARATION OF JOHN D. WAIHE'E, III

POST-TRIAL PROCEEDINGS JUDGE:

HON. LISA W. CATALDO

SETTLEMENT JUDGE:

HON. GARY W.B. CHANG

DECLARATION OF JOHN D. WAIHE'E, III

I, JOHN D. WAIHE'E, III declare:

1. I am the former Governor of the State of Hawai'i and make this declaration of my own personal knowledge.
2. I graduated from the William S. Richardson School of Law in 1976.
3. I am the first and only person of Native Hawaiian descent to be elected to serve as Governor of Hawai'i. I was elected to serve in that capacity from 1986 until 1994. After my service as Governor, I engaged in private practice in Washington D.C. and Honolulu, Hawai'i. I retired from the practice of law in January 1, 2021.
4. After my service as Governor, I was actively involved in issues related to Hawaiian civil rights and sovereignty. In 2011, I was appointed by Governor Neil Abercrombie

to the Native Hawaiian Roll Commission, established by Act 195, L 2011. This effort was later renamed *Kana'iolowalu*.

5. Through service as a delegate at the Hawai'i Constitutional Convention of 1978, through my family's experience seeking to obtain homestead lands and through my service as Governor, I am very aware of the problems that have plagued the Hawaiian Home Lands program since before statehood.

6. By 1983, problems were of such magnitude that a Federal-State Task Force on the Hawaiian Home Commission Act ("HHCA") was convened. The Task Force submitted a report to the State that identified several areas of concern and made recommendations for improvement to reduce or eliminate delays resulting from mismanagement of the long waiting lists.

7. In 1988, the State began its efforts to resolve the issues relating to the Home Lands Trust, including ultimately enacting HRS chapter 674, from which this case arises.

8. In 1988, the legislature passed "The Native Hawaiian Judicial Trusts Relief Act," 1988 Haw. Sess. L. Act 395, §§ 1-7 at 942-945 (Act 395), later codified as HRS chapter 673. Act 395 provided a limited waiver of sovereign immunity for beneficiaries of the trust to bring suits, prospectively, for money damages relating to breaches of the State's trust responsibilities occurring *after* July 1, 1988.

9. Section 5 of Act 395 provided an unfettered right to sue for actual damages for past breaches of trust (*i.e.*, between August 21, 1959 and June 30, 1988) ("retroactive claims"). However, the Act also provided an opportunity for the Governor to present a proposal for resolution of such claims. In the event that my office failed to present

such a proposal to the 1991 Legislature, or if the proposal was rejected, the right-to-sue and waiver of sovereign immunity would remain effective.

10. In 1991, my administration submitted “*An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust*” (the “Action Plan”), which proposed the creation of a Board of Individual Claims Resolution to hear claims of losses suffered by individual beneficiaries of the trust as a result of the State's breaches of fiduciary duties occurring prior to 1988.

11. After much debate and several iterations, the 1991 Legislature passed Act 323, 1991 Haw. Sess. L. Act 323, § 1 at 990 (Act 323), entitled “Individual Claims Resolution Under the Hawaiian Home Lands Trust Act,” which was later codified as HRS chapter 674. Chapter 674 established the Panel and a claims review process in which individual beneficiaries under the Hawaiian home lands trust may resolve claims for actual damages arising out of or resulting from a breach of trust, which occurred between August 21, 1959, and June 30, 1988.

12. I and the members of my administration who contributed to the Action Plan intended that the Panel would provide a low cost, informal means of resolving decades-old claims for breaches the Department of Hawaiian Home Lands’ fiduciary obligations and allow the legislature to remedy those claims by providing financial compensation and other relief to beneficiaries who presented legitimate grievances. We expected that beneficiaries could proceed *pro se* and expected that, because there was a time limit to file them, claims could be resolved in a matter of a few years. Neither I nor the members of my administration expected that the legislature would refuse to fund payments or provide other relief.

13. The right to sue and waiver of sovereign immunity were included to provide relief if the legislature, as it did here, refused to provide relief to the aggrieved beneficiaries of the Home Lands Trust.

14. Neither I nor members of my administration expected that subsequent administrations would choose to litigate these claims, especially given the advanced age and impoverished conditions of many of the beneficiaries, and the problems they would likely have finding attorneys to represent them in court.

15. In 1999, the legislature passed House Bill No. 1675 (H.B. 1675), which extended the notice, filing, and Panel report deadlines by one year, to allow additional time for all claims to be reviewed. However, the extension was vetoed by the Governor leaving the claims unresolved and leaving the claimants with only the right to sue. At that point in time, the informal *pro se* process I and my administration had proposed to resolve the long-standing and legitimate grievances of the Home Lands beneficiaries State was eliminated. Litigation then became the only means of resolving these claims.

16. I understand that in the instant case:

- a. Plaintiffs filed suit on December 29, 1999;
- b. Class counsel have represented the 2,752 class members continuously since that time;
- c. The trial record in the instant case contains more than 30,000 pages of record representing 23 years of litigation including a six-week bench trial, a damages trial, voluminous motions practice and two appeals to the Hawai'i Supreme Court;

- d. After prevailing in the second appeal, Plaintiffs' attorneys negotiated an extremely favorable settlement agreement for the Class, obtaining payment for them that: (i) exceeds any amount paid by the State of Hawai'i to settle claims brought against it in court, by any person(s) or entity; (ii) the settlement amount negotiated-\$328 million-fully compensates the Class Members at 100% of the value of their claims; and (iii) the settlement amount negotiated and paid by the State of Hawai'i actually exceeds the nominal value of all Class Members' claims by 2.5%.
- e. As a condition of settlement, Defendants have agreed: (i) to an award of attorneys' fees between 8.5% to 12.19% of the total settlement amount; and (ii) to waive opposition to any award up to 8.5% of the total settlement amount.

17. Class Counsel in this case have shown great determination and commitment to produce a settlement after 23 year of litigation that achieves my administration's objectives in described in the Action Plan and its product, HRS chapter 674, which I signed into law.

18. An attorney fee award in the instant case of 12.19% of the total settlement amount would be reasonable based on:

- a. The exceptional results for the class producing a gross settlement payment that is the largest paid by the State of Hawai'i as a result of litigation;

- b. The exceptional fact that the gross settlement payment and *exceeds* the total nominal value of the claims by 2.5%; and
- c. The extreme risk take by Class Counsel, who both are solo practitioners who, for more than two decades of their professional lives, pursued these important civil rights for a class of underserved, elderly, and in many instances, economically marginalized people;

19. Class Counsels' achievements in this case go beyond the \$328 million settlement fund. Through their work, Class Counsel proved the breaches of trust by the DHHL and created a method of awarding individualized damages, based on fair market rental values between application and award dates, rather than individualized proof. And, they have established that Department of Hawaiian Home Lands' "waiting lists" are the result of its breaches of trust and that beneficiaries should not be forced to wait for a homestead award.

20. The settlement payment in this action undoubtedly is higher than would have been necessary had the Panel process been completed in the early 2000s and had the legislature provided the economic and other relief that HRS chapter 674 was intended to produce.

21. Class Counsel's efforts made the resolution and payment of these beneficiaries' claims possible, as I and my administration envisioned, and as the Legislature envisions in HRS chapter 674. Without the work of Class Counsel in this case, these beneficiaries' claims would not have been paid and the remedies provided by HRS chapter 674 for breaches of trust would have gone unfulfilled. The rights embodied in HRS chapter 674 would have died with the 1999 veto and the claims of the beneficiaries would have died with it.

22. The excellent and dedicated work done by Class Counsel in this case for more than two decades produced a remedy for breaches of trust that is both historic in scale and in rectifying injustices that have existed in the Home Lands Program since statehood. Compensation for Class Counsel should reflect the commitment, effort, and result in this case. A fee of 12.19% of the total settlement amount sought by Class Counsel is reasonable, fair, and fully consistent with the objectives of providing a remedy for the wrongs acknowledged by the Action Plan and which HRS Chapter 674 was intended to resolve. Class Counsel represented Hawaiians asserting important and often neglected civil rights. They should be paid fairly to compensate them fully for their commendable work. They should be paid what they are requesting to ensure that Hawaiians in need of representation in the future will be able to find attorneys willing to commit themselves to doing so, notwithstanding the efforts necessary and inherent risks in cases such as this.

I declare under penalty of law that the foregoing is true and correct.

Dated: Honolulu, Hawai‘i, June 7, 2023.



John D. Waihe'e, III

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEONA KALIMA, DIANE BONER,
RAYNETTE NALANI AH CHONG, special
administrator of the estate of JOSEPH
CHING, deceased, CAROLINE BRIGHT,
DONNA KUEHU, and JAMES

AKIONA, et al.,

Plaintiffs,

vs.

STATE OF HAWAI'I, STATE OF HAWAI'I
DEPARTMENT OF HAWAIIAN HOME
LANDS; et al.,

Defendants.

CIVIL NO. 99-4771-12 LWC

(Class Action)

DECLARATION OF MELODY
KAPILIALOHA MACKENZIE

POST-TRIAL PROCEEDINGS JUDGE:

HON. LISA W. CATALDO

SETTLEMENT JUDGE:

HON. GARY W.B. CHANG

DECLARATION OF MELODY KAPILIALOHA MACKENZIE

I, MELODY KAPILIALOHA MACKENZIE declare:

1. I am the former Executive Director of the Hawaiian Claims Office, the administrative arm of the Hawaiian Home Lands Trust Individual Claims Review Panel, and make this declaration of my own personal knowledge.

2. I graduated from the William S. Richardson School of Law in 1976.

3. After clerking for Chief Justice William S. Richardson of the Hawai'i Supreme Court from 1976 to 1980, I joined the staff of the Native Hawaiian Legal Corporation (NHLC), a public interest law firm protecting and advancing the rights of Native Hawaiians. I served as NHLC's Executive Director from 1982-1986 and as a senior staff attorney from 1986-1992.

4. From 1992-1999, I was the Executive Director of the Hawaiian Claims Office, established pursuant to HRS Chapter 674 to review and make recommendations on claims by Hawaiian Home Lands beneficiaries.

5. I subsequently joined the faculty of the William S. Richardson School of Law to teach Native Hawaiian Rights, the Native Hawaiian Rights Clinic, and in the Legal Writing program. In 2005, I became the Founding Director of the Native Hawaiian Law program, Ka Huli Ao Center for Excellence in Native Hawaiian Law.

6. As a Law Professor focused on Native Hawaiian and Indigenous Rights, I taught courses on Native Hawaiian Legal Issues, Federal Indian Law, the Rights of Indigenous Peoples, and also guided students and led writing courses focused on these topics.

7. In addition to my teaching duties, I served as project coordinator and Editor-in-Chief for *NATIVE HAWAIIAN LAW: A TREATISE* (2015), the second edition of *THE NATIVE HAWAIIAN RIGHTS HANDBOOK*, which I originally edited and helped to write. I also was a contributor to the 2005 Edition of Felix S. Cohen's *HANDBOOK OF FEDERAL INDIAN LAW* and have been responsible since then for continuously updating the section on Native Hawaiians.

8. In addition to my teaching and research and writing activities, I participated as a member of the Office of Hawaiian Affairs' litigation team in *Hawai'i v. Office of Hawaiian Affairs*, 556 U.S. 163, 129 S. Ct. 1436 (2009), a case before the U.S. Supreme Court dealing with alienation of public trust lands, and have worked on cases defending the constitutionality of Native Hawaiian programs. I have also litigated cases related to land issues and land titles as well as traditional and customary rights on behalf of Native Hawaiians. I have published and presented on Hawaiian land issues and cultural rights and their historical origins.

9. In 2020, I retired from full-time teaching and became a Professor of Law Emerita. I continue to support the Law School and Ka Huli Ao by teaching courses as needed and acting as a guest lecturer. I am also currently writing chapters updating NATIVE HAWAIIAN LAW: A TREATISE and working on revisions to COHEN'S HANDBOOK OF FEDERAL INDIAN LAW.

10. As noted earlier, after its creation in 1991, I became the executive director of the Hawaiian Claims Office ("HCO") in 1992, taking on the administration of HRS Chapter 674. The HCO was charged with receiving claims, investigating, evaluating, and making recommendations for relief regarding claims for breaches of trust brought against the state by Hawaiian Home Lands beneficiaries.

11. I understood that HRS Chapter 674 was intended to provide a low cost, informal means of resolving decades-old claims for breaches of the Department of Hawaiian Home Lands' fiduciary obligations and allow the legislature to remedy those claims by providing financial compensation and other relief to beneficiaries who presented legitimate grievances. It was expected that most beneficiaries could proceed *pro se* and, because there was a time limit to file them, it was expected that claims could be resolved in a matter of a few years.

12. The right to sue and waiver of sovereign immunity were included to provide relief if the legislature, as it did here, refused to provide relief to the aggrieved beneficiaries of the Home Lands Trust.

13. In 1997, Act 382 extended: (1) the life of the Panel by two years, mandating a final report to the 1999 Legislature; (2) the deadline for claimant to file a written notice rejecting the legislative action to October 1, 1999; and (3) the time for filing suit in the circuit court until December 31, 1999.

14. In 1999, the HCO submitted to the legislature its “*Report to the Governor and the 1999 Hawaii Legislature.*” The HCO reported that: Despite losing almost a year of productive time due to Act 382 and disputes over whether waiting list claims were included and compensable under HRS Chapter 674, the HCO “made significant progress in reviewing claims. As of December 31, 1998, the Panel and its staff had either closed or issued recommendations on 2,050 claims, representing 47% of the total number of claims filed. The Panel’s cumulative recommended damages awards for all years through that report was \$16,434,675.75. While the claims process ha[d] moved forward, 53% of the claims filed with the Panel still remain to be reviewed.” Consequently, the Panel anticipated asking the 1999 Legislature for another extension of time to complete the review of all claims.

15. The 1999 Legislature rejected proposals from the Attorney General and other State officials to amend chapter 674 to implement the limitations on awards recommended to exclude the waiting list claims. Instead, the Legislature passed House Bill No. 1675 (H.B. 1675), which extended the notice, filing, and Panel report deadlines by one year, to allow additional time for all claims to be reviewed. However, then-Governor Benjamin Cayetano vetoed the bill. Gov. Msg. No. 241, “Statement of Objections to [H.B.] 1675,” in 1999 House Journal, at 882.

16. In late 1999, the Panel submitted a “*Final Report to the Governor and the Hawai‘i State Legislature.*” As a result of the additional decisions and dismissals, the Final Report stated that, by the end of June 1999, the Panel and its staff had either closed or made recommendations on 53% of all claims, thereby reducing the number of pending claims from 53% to 47%. The Final Report also stated that, at a meeting on June 22, 1999, the Panel had decided to cease its investigation and review of claims in light of the veto of H.B. 1675. Instead,

the Panel concentrated its efforts on notifying claimants of the October 1, 1999 notice-filing deadline to provide notice to the legislature of their rejection of the legislature's failure to fund the filed claims.

17. In summary, the Panel's Final Report confirms it received 4,327 claims from 2,752 individual claimants. As of September 30, 1999, the Panel had dismissed 1,709 claims (39.5%) and had 2,000 claims still pending or not yet presented for hearing (46.22%). Thus, a total of 3,709 claims (85.72%) filed by beneficiaries either were deemed not compensable or had not even been reviewed by the Panel or presented to the legislature for compensation when the Panel ended. The Panel officially closed its doors on October 29, 1999 even though the Panel members' terms continued until December 31, 1999.

18. Three staff members remained through October to answer claimant-inquiries and close the claimants' files.

19. Thus, the process created by Chapter 674 to resolve the long-standing and legitimate grievances of the Home Lands Trust beneficiaries against the State was eliminated. Litigation then became the only means of resolving these claims.

20. In summary, the Hawaiian Home Lands Trust Individual Claims Review Panel ("Claims Panel") received 4,327 claims from 2,752 individual claimants. *Report to the Governor and the 1997 Hawai'i Legislature* (Hawaiian Home Lands Trust Individual Claims Review Panel). As of September 30, 1999, the Panel had dismissed 1,709 claims (39%) and had 1,623 claims still under investigation (38%). Thus, a total of 3,332 claims (77%) filed by beneficiaries were either deemed not compensable or had not been reviewed by the Panel or presented to the legislature for compensation.

21. In contrast, the Settlement Agreement and Distribution Plan will provide settlement payments to 2,518 individuals for 3,363 claims, more than five times (500%) more beneficiaries than the number of Class Members who received recommendations for compensation from the Panel. Significantly, the settlement payments include claims for deceased relatives—typically parents—who were listed and identified in Panel claim forms, but whose claims were not recognized as compensable by the Panel.

22. In addition, I understand that the Probate Plan will distribute settlement proceeds to heirs and devisees of the estates of the now-1,346 deceased class member. This result directly accomplishes the generational concept of economic rehabilitation and self-sufficiency for which the Hawaiian Homes Commission Act was created. Hawn. Homes Commn. Act § 101.

23. At its premature conclusion in 1999, the Panel had recommended payment or facilitated non-monetary settlement for only 509 individuals. Therefore, only 18% of the total number of claimants who filed with the Panel were recommended for relief. *Id.*; *Report to the Governor and the 1999 Hawai'i Legislature* (Hawaiian Home Lands Trust Individual Claims Review Panel).

24. I understand that in the instant case:
- a. Plaintiffs filed suit on December 29, 1999;
 - b. Class Counsel have continuously represented the 2,752 class members who filed claims with the Panel since that time;
 - c. The trial record in the instant case contains more than 30,000 pages of record representing 23 years of litigation including a six-week

bench trial, a damages trial, voluminous motions practice and two appeals to the Hawai‘i Supreme Court;

- d. After prevailing in the second appeal, Plaintiffs’ attorneys negotiated an extremely favorable settlement agreement for the Class, obtaining payment for them that: (i) exceeds any amount paid by the State of Hawai‘i to settle claims brought against it in court, by any person(s) or entity; (ii) the settlement amount negotiated – \$328 million – fully compensates the Class Members at 100% of the value of their claims; and (iii) the settlement amount negotiated and paid by the State of Hawai‘i actually exceeds the nominal value of all Class Members’ claims by 2.5%.
- e. As a condition of settlement, Defendants have agreed: (i) to an award of attorneys’ fees between 8.5% to 12.19% of the total settlement amount; and (ii) to waive opposition to any award up to 8.5% of the total settlement amount.

25. Class Counsel in this case have shown great determination and commitment to produce a settlement after 23 year of litigation that achieves the legislature’s purposes and objectives identified in the Governor’s 1991 Action Plan and its product, HRS Chapter 674 – to provide economic justice for Native Hawaiian beneficiaries for economic losses inflicted on them by the state’s breaches of trust reaching back to statehood.

26. An attorney fee award in the instant case of 12.19% of the total settlement amount would be reasonable based on:

- a. The exceptional results for the class producing a gross settlement

payment that is the largest paid by the State of Hawai'i as a result of litigation;

- b. The exceptional fact that the gross settlement payment *exceeds* the total nominal value of the breach of trust claims by 2.5%; and
- c. The extreme risk taken by Class Counsel, both of whom are solo practitioners who, for more than two decades of their professional lives, pursued these important civil rights for a class of underserved, elderly, and in many instances, economically marginalized, people;

27. The achievements of Class Counsel in this case go beyond the \$328 million settlement fund. Through their work, Class Counsel proved that disputed breaches of trust by the DHHL, and specifically waiting list delays, are actionable. They also created a method of awarding individualized damages, based on fair market rental values between application and award dates, rather than individualized proof. One of the biggest obstacles to recovery before the panel was the difficulty for *pro se* litigants, as well as those represented by counsel, to find and present such proof in the 1990s hearings. Their cases were also hampered by the state's inability to produce accurate records regarding their claims. Many claimants also found the hearing process confusing and intimidating to the point of many of them abandoning their claims. The state appeared in the remaining cases with deputy attorneys general opposing the claims, attacking the claimants' credibility and making evidentiary and legal arguments against them throughout, making what was intended to be a simple and informal process into full-on litigation. Class Counsel removed those obstacles, presenting the claims as class claims and convincing the trial and appellate court that a class proceeding, and class remedy, were both

reasonable and just.

28. Finally, Class Counsel in this case have established that the Department of Hawaiian Home Lands' "waiting lists" are the result of DHHL's breaches of trust and that beneficiaries should not be forced to wait for a homestead award for any period of time.

29. The settlement payment in this action undoubtedly is higher than would have been necessary if the Panel process had been completed in the early 2000s and had the legislature provided the economic and other relief that HRS chapter 674 was intended to produce.

30. I understand that as a result of the \$328 million settlement, Class Members will receive 89% of their individual claim value, with an average award of \$113,660, even after an award of attorneys' fees at 12.19% and costs of claims administration are deducted from the gross settlement amount.

31. In contrast, the Panel submitted a total of 578 claims to the legislature, with total recommended awards of \$17.9 million (\$6.7 million through 1998 and \$11.2 million in 1999). *Report to the Governor and the 1997 Hawai'i Legislature (Hawaiian Home Lands Trust Individual Claims Review Panel); Report to the Governor and the 1999 Hawai'i Legislature (Hawaiian Home Lands Trust Individual Claims Review Panel; Final Report to the Governor and the 1999 Hawai'i Legislature (Hawaiian Home Lands Trust Individual Claims Review Panel)*. None of these claims were funded by the legislature.

32. These economic facts demonstrate that the Settlement Agreement is an outstanding result achieved through extraordinary efforts that warrant this Court's approval of the full 12.19% fee requested in Class Counsel's motion.

33. Class Counsel's efforts made the resolution and payment of these

beneficiaries' claims possible, as originally intended by the legislature and Governor Waihe'e. The Settlement Agreement produced the result envisioned in HRS Chapter 674. Without the work of Class Counsel in this case, these Native Hawaiian beneficiaries' claims would not have been paid and the remedies provided by HRS Chapter 674 for breaches of trust would have gone unfulfilled. The Class Members would have received nothing, and the rights created in HRS Chapter 674 would have died with the 1999 veto.

34. The excellent and dedicated work of Class Counsel in this case for more than two decades produced a remedy for breaches of trust that is both historic in scale and in addressing injustices that have existed in the Home Lands Program since statehood. Compensation for Class Counsel should reflect the commitment, effort, and result in this case. A fee of 12.19% of the total settlement amount sought by Class Counsel is reasonable, fair, and fully consistent with the objectives of providing a remedy for the wrongs acknowledged by the Action Plan and which HRS Chapter 674 was intended to resolve.

35. Class Counsel represented Native Hawaiians asserting important and often neglected civil rights. They should be paid what they are requesting for their commendable work. I am especially concerned about the effects that denying Class Counsel's request would have on Native Hawaiians' future needs for representation in important civil rights, traditional cultural access, and Hawaiian Home Lands Trust cases. Granting Class Counsel's requests will help assure that Hawaiians will be able to find attorneys willing to commit themselves to protecting and advancing Hawaiians' rights, notwithstanding the efforts necessary and inherent risks in cases such as this, against a state with unlimited resources and a willingness to commit those unlimited resources decades of opposition was the case here. I urge the Court to grant Class Counsel's request in full.

I declare under penalty of law that the foregoing is true and correct.

Dated: Honolulu, Hawai'i, June 12, 2023.

A handwritten signature in cursive script, reading "Melody Kapilialoha Mackenzie".

MELODY KAPILIALOHA MACKENZIE

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEONA KALIMA, DIANE BONER,
RAYNETTE NALANI AH CHONG,
special administrator of the estate of
JOSEPH CHING, deceased, CAROLINE
BRIGHT, DONNA KUEHU, and JAMES
AKIONA, et al.,

Plaintiffs,

vs.

STATE OF HAWAI'I, STATE OF
HAWAI'I DEPARTMENT OF
HAWAIIAN HOME LANDS; et al.,

Defendants.

CIVIL NO. 99-4771-12 LWC

(Class Action)

DECLARATION OF PAUL ALSTON

POST-TRIAL PROCEEDINGS JUDGE:

HON. LISA W. CATALDO

SETTLEMENT JUDGE:

HON. GARY W.B. CHANG

DECLARATION OF PAUL ALSTON

I, PAUL ALSTON declare:

1. I am licensed to practice law in Hawai'i and am admitted to practice before the Hawai'i courts, United States District Court of the District of Hawai'i, the US Court of Appeals for the Ninth Circuit, US Court of Appeals for the District of Columbia, US Court of Appeals for the Federal Circuit, the US Court of Appeals for the Second Circuit, US Court of Federal Claims, and US Supreme Court.

2. I graduated from the University of Southern California, Gould School of Law in 1971. I was a law clerk for the Honorable Walter Ely, of the Ninth Circuit in 1971-72.

3. From 1972-1975, I worked for the Legal Aid Society of Hawai'i, as one of its staff attorneys in Wai'anae. After that, I served as the co-director of litigation from 1975-77.

I have been in private practice since 1977 as a partner in several law firms. I am now the Hawai'i Managing Partner of Dentons US LLP.

4. Since 1972, I have been representing disadvantaged people in disputes with the State of Hawai'i. In the intervening years, I have been lead counsel in dozens of class actions and public interest test cases involving constitutional and statutory claims that led to attorneys' fee awards. I have also been involved in dozens of commercial contract disputes that led to attorneys' fee awards.

5. Nearly all of my work in private practice has involved earning fees from private clients. As a result of my experience in fee-generating cases and my work with private clients, I am familiar with the market rates for attorneys' fees in Hawai'i in cases brought under attorney fee-shifting statutes, as well as the rules for recovery of attorneys' fees from a common settlement fund. I understand that, as a condition of settlement in the instant, the Plaintiffs waived their right to seek statutory attorneys' fees and costs of litigation under HRS § 674-21 and their right to appeal the Court's ruling on reasonable fees. Therefore, the instant case is one in which the principles of a "common fund" recovery of attorneys' fees apply.

6. My former firm litigated the issue of recovery of attorneys' fees from a common fund in *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268 (9th Cir. 1989). In *Grauly*, my firm appealed the order of the district court awarding it roughly \$855,000 less than the amount of fees it had requested as compensation for creating a "common fund." My firm had requested fees of roughly \$1,600,000, an amount equal to one-third of the gross settlement, plus litigation costs of approximately \$200,000.

7. *Grauly* establishes that: (a) ordinarily common fund fee awards in class actions range from 20 percent to 30 percent of the fund created; and (b) the “bench mark” percentage for the fee award in a common fund should be 25 percent.

8. *Grauly* affirmed the recovery of both the retainer agreement fee of one-third applicable to recovery for bankrupt estate’s claims and recommended that the district court apply the 25% “common fund” fee to the remainder of the recovery.

9. I understand that in the instant case:

- a. Plaintiffs agreed to a progressive contingent fee typical in civil rights cases in which they would pay: (1) one-third of the recovery prior to suit; (2) forty-percent after suit; and (3) forty-five percent if an appeal was necessary, and to pay all litigation costs;
- b. As a condition of settlement Plaintiffs’ attorneys agreed to waive their contingent fee retainer claims for attorneys’ fees and costs;
- c. As a further condition of settlement Plaintiffs’ attorneys’ agreed to limit their common fund fee claims to a range from 8.5% to 12.19% of the total settlement amount.

10. I understand that in the instant case:

- a. Plaintiffs filed suit on December 29, 1999;
- b. Class counsel have represented the 2,752 class members continuously since that time;
- c. The trial record in the instant case contains more than 30,000 pages of record representing 23 years of litigation including a six-week

bench trial, a damages trial, voluminous motions practice and two appeals to the Hawai‘i Supreme Court;

- d. After prevailing in the second appeal, Plaintiffs’ attorneys negotiated and extremely favorable settlement agreement for the Class, obtaining payment for them that: (i) exceeds any amount paid by the State of Hawai‘i to settle claims brought against it in court, by any person(s) or entity; (ii) the settlement amount negotiated--\$328 million—fully compensates the Class Members at 100% of the value of their claims; and (iii) the settlement amount negotiated and paid by the State of Hawai‘i actually exceeds the nominal value of all Class Members’ claims by 2.5%.
- e. As a condition of settlement, Defendants have agreed: (i) to an award of attorneys’ fees between 8.5% to 12.19% of the total settlement amount; and (ii) to waive opposition to any award up to 8.5% of the total settlement amount.

11. Based on my experience and a review of the facts, an attorney fee award in the instant case of standard 25% of the total settlement amount would be reasonable based on:

- a. The exceptional results for the class producing a gross settlement payment that is the largest paid by the State of Hawai‘i as a result of litigation
- b. The exceptional fact that the gross settlement payment and *exceeds* the total nominal value of the claims by 2.5%;

- c. The extreme risk take by Class Counsel, who both are solo practitioners who, for more than two decades of their professional lives, pursued these important civil rights for a class of underserved, elderly, and in many instances, economically marginalized people;
- d. The benefits beyond the \$328 million settlement fund, including, without limitation: (i) establishing the right of individuals to sue under HRS Chapter 674; (ii) proving the breaches of trust by the Department of Hawaiian Home Lands (“DHHL”) by failing to keep proper records or award homesteads timely directly harmed the beneficiary Class Members economically; (iii) establishing a method of awarding individualized damages, based on fair market rental values between application and award dates, rather than individualized proof, which, if required would have catastrophic to the Class Members’ claims as the claims date back decades and proof would be scant; (iv) establishing that DHHL’s “waiting lists” are the result of its breaches of trust and that beneficiaries being forced to wait for a homestead award after they apply for one is a breach of trust; (v) establishing that the methods for calculating damages would apply to all Waiting List Subclass claims on all islands; and, (vi) establishing that the State of Hawai‘i had compounded its breaches of trust by deciding to litigate this case for decades.

- e. Based on my experience in numerous civil rights class actions brought against the State of Hawai'i, this case is an extreme example of State's approach to civil rights claims and a fee of 25% of the common fund would be fully justified. There are few attorneys who litigate civil rights cases because, in part, of the State's tactics and the lengthy delay that invariably results between inception and final resolution of even the most meritorious cases. The instant case exemplifies why the market for civil rights attorneys is so limited. Class Counsel are seeking payment of fees in an amount (12.19%) that is actually below what would be expected of a contingent fee in a civil rights case
- f. The burdens experienced by Class Counsel while litigating the case are self-evident. A loss on liability, which was not resolved until June 30, 2020, would be a loss for all Class Members after 20 years of litigation, including two trials and two appeals. I am informed that at least 18 Deputy Attorneys General have appeared of record in this action in opposition to the Class Members' claims in the trial court and on appeal, and that currently, two Special Deputy Attorneys' general also are appearing in that capacity. The burdens on two solo-practitioners advancing the more than 4,000 claims of the 2,752 Class Members over more than two decades in the face of enduring opposition would be overwhelming to most solo-practitioners and their offices;

g. I have known Mr. Carl Varady professionally for decades and have had opportunities to directly consult with him regarding special education and related cases, directly. My partner, Shelby Floyd and I worked with Mr. Varady as co-counsel in the seminal case that produced a consent decree for all children eligible for special education and related services in Hawai'i, *Felix, et al. v. Lingle*, Civil No. 93-00367 DAE. I have had several opportunities to evaluate his work over the decades.

12. I know Mr. Varady's skill and experience in litigation involving civil rights. I have a high opinion of and respect for his abilities in those areas. Mr. Varady enjoys an excellent reputation as a civil rights attorney and litigator in Hawai'i.

13. Mr. Varady is one of only a handful of lawyers who will take on contingent-fee cases against the State of Hawai'i and prosecute them to conclusion through appeals to this Court. As a matter of policy, since *Felix*, the State fights such cases aggressively and refuses to settle.

14. I have known Thomas Grande for decades and am aware of his skills and expertise in class action matters.

15. I am aware that Mr. Grande has an excellent reputation in class action matters, and I have a high opinion of and respect for his abilities in that field of practice.

16. Given the nature and complexity of this case and the fact that an award of fees was contingent on success, the excellent results, the risks and burdens undertaken, the commitment of more than two decades of professional work, the precedents established for

future cases, an award of 12.19% of the gross settlement amount is reasonable and fully consistent with principles for assessing fee award in common fund class action settlements.

I declare under penalty of law that the foregoing is true and correct.

Dated: Honolulu, Hawai'i, June 19, 2023.

/s/ Paul Alston

PAUL ALSTON

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEONA KALIMA, DIANE BONER,
RAYNETTE NALANI AH CHONG, special
administrator of the estate of JOSEPH CHING,
deceased, CAROLINE BRIGHT, DONNA
KUEHU, and JAMES
AKIONA, et al.,

Plaintiffs,

vs.

STATE OF HAWAI'I, STATE OF HAWAI'I
DEPARTMENT OF HAWAIIAN HOME
LANDS; et al.,

Defendants.

CIVIL NO. 99-4771-12 LWC
(Class Action)

DECLARATION OF MARK S. DAVIS

POST-TRIAL PROCEEDINGS JUDGE:
HON. LISA W. CATALDO

SETTLEMENT JUDGE:
HON. GARY W.B. CHANG

DECLARATION OF MARK S. DAVIS

MARK S. DAVIS declares:

1. I am above the age of 18 years old and make this declaration from my own personal knowledge.
2. I am licensed to practice law in Hawai'i and am admitted to practice before the Hawai'i courts, United States District Court of the District of Hawai'i, the Ninth Circuit and the United States Supreme Court.
3. I graduated from Washington University Law School in 1974 and have been in private practice since 1974.
4. My firm was founded in 1980 with partner Stanley E. Levin. A significant portion of our firm's practice for years involved litigation on behalf of and counseling clients in the area of civil rights. Our firm also is one of the leading plaintiffs' firms in the State of Hawai'i, and has frequently sued the State of Hawai'i for civil rights

violations and serious personal injury claims.

5. I am personally familiar with the complexities and demands of the instant case. My law firm through its partners Stanley E. Levin and Thomas Grande filed this case in approximately 1999. After handling the case and advancing the costs for close to eight years, Mr. Grande withdrew from the firm on December 28, 2007 and agreed to take over the case pursuant to a written cooperation agreement. Frankly, our firm was frustrated with the long battle that seemed to have such an uncertain conclusion. But for the resilience and passion of Mr. Grande and Mr. Varady who battled this case for over twenty years, the case would have simply never been brought to a successful conclusion. It is noteworthy that both Mr. Varady and Mr. Grande devoted a substantial portion of their entire careers to this lengthy but very meritorious legal battle. Mr. Levin, the founding partner who began the battle with Mr. Grande, has retired and moved to the mainland while the case was pending.

6. I have observed first hand Mr. Varady's skills and expertise in litigation involving civil rights. I have had opportunities to directly consult with him regarding employment cases, directly Rehabilitation Act cases. Mr. Varady has been co-counsel with my firm in several matters including *Steven A. et al., v. LeMahieu*, Civil No. CV 01-00680 SOMLEK, and *Alberta S. et al. v. LeMaheiu*, Civil No. CV 0100366 HG/KSC. I have had numerous opportunities to evaluate his experience and counsel, and I have a high opinion of and respect for his abilities in those matters.

7. I have known Thomas Grande for decades and, as a former member of my firm, am aware of his skills and expertise in class action matters.

8. I am aware that Mr. Grande has an excellent reputation in class action matters, and I have a high opinion of and respect for his abilities in that field of practice.

9. I am familiar with this litigation which is based on the State of Hawai‘i’s failure to manage the Hawaiian Home Lands trust in the best interest of its beneficiaries, the Native Hawaiian people. Despite state legislation created in the early 1990’s which allowed beneficiaries to seek compensation for breaches of trust between 1959 and 1988, the State of Hawai‘i has refused to pay on any individual claim awarded, thus forcing beneficiaries to file this lawsuit.

10. I understand that this case involves enormous complex issues of law and fact. Mr. Varady and Mr. Grande produced a very favorable result, and the Hawai‘i Supreme Court’s decision in *Kalima v. State*, 148 Haw. 129, 468 P.3d 143 (2020) has established precedent for those native Hawaiian beneficiaries who have sought to hold the State of Hawai‘i as trustee accountable for its mismanagement of the Home Lands Trust.

11. Two decades have passed since this case was filed. I am aware that, as solo practitioners with limited resources, Mr. Varady’s and Mr. Grande’s commitment to stay with and finish the litigation, against the virtually unlimited resources of his opponents, is something few lawyers are willing to do in cases of such importance.

12. I understand that in the instant case:

- a. Plaintiffs agreed to a progressive contingent fee typical in civil rights cases in which they would pay: (1) one-third of the recovery prior to suit; (2) forty-percent after suit; and (3) forty-five percent if an appeal was necessary, and to pay all litigation costs;

- b. As a condition of settlement Plaintiffs' attorneys agreed to waive their contingent fee retainer claims for attorneys' fees and costs;
- c. As a further condition of settlement Plaintiffs' attorneys' agreed to limit their common fund fee claims to a range from 8.5% to 12.19% of the total settlement amount.

13. I understand that in the instant case:

- a. Plaintiffs filed suit on December 29, 1999;
- b. Class counsel have represented the 2,752 class members continuously since that time;
- c. The trial record in the instant case contains more than 30,000 pages of record representing 23 years of litigation including a six-week bench trial, a damages trial, voluminous motions practice and two appeals to the Hawai'i Supreme Court;
- d. After prevailing in the second appeal, Plaintiffs' attorneys negotiated and extremely favorable settlement agreement for the Class, obtaining payment for them that: (i) exceeds any amount paid by the State of Hawai'i to settle claims brought against it in court, by any person(s) or entity; (ii) the settlement amount negotiated--\$328 million—fully compensates the Class Members at 100% of the value of their claims; and (iii) the settlement amount negotiated and paid by the State of Hawai'i actually exceeds the nominal value of all Class Members' claims by 2.5%.

- e. As a condition of settlement, Defendants have agreed: (i) to an award of attorneys' fees between 8.5% to 12.19% of the total settlement amount; and (ii) to waive opposition to any award up to 8.5% of the total settlement amount.

14. Based on my experience and a review of the facts, an attorney fee award in the instant case of standard 25% of the total settlement amount would be reasonable. The results were exceptional. The cost in effort, commitment, time for any case that lasts 23 years is extraordinary. The reasonableness of the 12.19% fee sought is clearly established by the fact that the gross settlement payment exceeds the total nominal value of the claims by 2.5%.

15. The non-economic benefits of *Kalima v. State*, 148 Haw. 129, 468 P.3d 143 (2020), extend beyond the \$328 million settlement fund. Class Counsel proved the breaches of trust by the Department of Hawaiian Home Lands ("DHHL"), including failure to keep proper records or award homesteads timely directly harmed the beneficiary Class Members economically, establishing a novel method of awarding individualized damages, based on fair market rental values between application and award dates, rather than individualized proof and establishing that DHHL's "waiting lists" are the result of its breaches of trust and that beneficiaries being forced to wait for a homestead award after they apply for one is a breach of trust. These rulings are significant and will benefit all DHHL beneficiaries.

16. Awarding the full 12.19% Class Counsel seek is justified by the excellent results they have produced, the effort that they have demonstrated, the risk they have taken, and the financial compromises they have made to assure settlement and payment to the Class Members for violations of their important civil rights.

17. The nature and complexity of this case, the fact that an award of fees was contingent on success, the excellent results, the risks, and burdens undertaken, the commitment of more than two decades of professional work by two solo practitioners, the precedents established for future cases, merit an award of 12.19% of the gross settlement amount. Such an award is reasonable and fully consistent with principles for assessing fee award in common fund class action settlements.

18. The 12.19% fee also is reasonable and justified based on the significant public interests served by the instant litigation, which advances both civil rights generally and the civil rights and trust rights of Native Hawaiian beneficiaries of the Home Lands Trust.

I declare under penalty of law the foregoing is true.

Dated: Honolulu, Hawai'i, June 19, 2023.

/s/ Mark S. Davis

Mark S. Davis

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEONA KALIMA, DIANE BONER,
RAYNETTE NALANI AH CHONG, special
administrator of the estate of JOSEPH CHING,
deceased, CAROLINE BRIGHT, DONNA
KUEHU, and JAMES
AKIONA, et al.,

Plaintiffs,

vs.

STATE OF HAWAI'I, STATE OF HAWAI'I
DEPARTMENT OF HAWAIIAN HOME
LANDS; et al.,

Defendants.

CIVIL NO. 99-4771-12 LWC
(Class Action)

DECLARATION OF JOSEPH
KAMELAMELA

POST-TRIAL PROCEEDINGS JUDGE:

HON. LISA W. CATALDO

SETTLEMENT JUDGE:

HON. GARY W.B. CHANG

DECLARATION OF JOSEPH KAMELAMELA

JOSEPH KAMELAMELA hereby declares under penalty of perjury as follows:

1. I am an attorney licensed to practice in Hawai'i and am admitted before the United States District Court for the District of Hawai'i, the Ninth Circuit, Court of Appeals, and the Supreme Court of the United States and the Hawai'i Supreme Court.

2. I graduated from the William S. Richardson School of Law in 1979. In my legal career, I have worked as a legal clerk for the Honorable Judge Shunichi Kimura, Third Circuit, Circuit Court of the State of Hawai'i. Later, I worked for the Office of the Prosecuting Attorney, County of Hawai'i, as a Deputy Prosecuting Attorney for six (6) years. I then worked in the Office of the Corporation Counsel, County of Hawai'i, as the Litigation Supervising Division Head (July 2001 through February 1, 2012), Senior Deputy Corporation Counsel (February 1, 2012, through July 15, 2014) and Corporation Counsel (January 25, 2017, through December 30, 2020). I have been in private practice commencing on December 31, 2020);

3. I am a plaintiff in the instant class action.

4. I have known Carl Varady professionally for several decades, both as an adversary in civil rights cases involving Hawai'i County, and as a Class Counsel for Plaintiffs in the instant case.

5. I have observed first hand Mr. Varady's skills and expertise in litigation involving civil rights, and I have a high opinion of and respect for his abilities in those matters.

6. I am aware that Mr. Varady enjoys an excellent reputation as a civil rights attorney and litigator in Hawai'i, and I have a high opinion of and respect for his abilities in those areas.

7. I have known Thomas Grande for decades as Class Counsel in the instant case and am aware of his skills and expertise in class action matters.

8. I am aware that Mr. Grande has an excellent reputation in class action matters, and I have a high opinion of and respect for his abilities in that field of practice.

9. As a Class Member, I am familiar with this litigation which is based on the State of Hawai'i's failure to manage the Hawaiian Home Lands trust in the best interest of its beneficiaries, the Native Hawaiian people. Despite state legislation created in the early 1990's which allowed beneficiaries to seek compensation for breaches of trust between 1959 and 1988, the State of Hawai'i has refused to pay on any individual claim awarded, thus forcing beneficiaries such as myself to file this lawsuit.

10. As both a Class Member and an attorney, I understand that this case involves complex issues of law and fact. Mr. Varady and Mr. Grande produced a very favorable result, and the Hawai'i Supreme Court's decision in *Kalima v. State*, 148 Haw. 129, 468 P.3d 143 (2020) has established precedent for those native Hawaiian beneficiaries such as myself who

have sought to hold the State of Hawai‘i as trustee accountable for its mismanagement of the Home Lands Trust.

11. Two decades have passed since this case was filed. I am aware from my own experience that, as solo practitioners with limited resources, Mr. Varady’s and Mr. Grande’s commitment to stay with and finish the litigation, against the virtually unlimited resources of his opponents, is something few lawyers are willing to do in cases of such importance.

12. I understand that in the instant case:

- a. Plaintiffs agreed to a progressive contingent fee typical in civil rights cases in which they would pay: (1) one-third of the recovery prior to suit; (2) forty-percent after suit; and (3) forty-five percent if an appeal was necessary, and to pay all litigation costs;
- b. As a condition of settlement Plaintiffs’ attorneys agreed to waive their contingent fee retainer claims for attorneys’ fees and costs;
- c. As a further condition of settlement Plaintiffs’ attorneys’ agreed to limit their common fund fee claims to a range from 8.5% to 12.19% of the total settlement amount.

13. I understand that in the instant case:

- a. Plaintiffs filed suit on December 29, 1999;
- b. Class counsel have represented the 2,752 class members continuously since that time;
- c. The trial record in the instant case contains more than 30,000 pages of record representing 23 years of litigation including a six-week

bench trial, a damages trial, voluminous motions practice and two appeals to the Hawai‘i Supreme Court;

- d. After prevailing in the second appeal, Plaintiffs’ attorneys negotiated an extremely favorable settlement agreement for the Class, obtaining payment for them that: (i) exceeds any amount paid by the State of Hawai‘i to settle claims brought against it in court, by any person(s) or entity; (ii) the settlement amount negotiated--\$328 million—fully compensates the Class Members at 100% of the value of their claims; and (iii) the settlement amount negotiated and paid by the State of Hawai‘i actually exceeds the nominal value of all Class Members’ claims by 2.5%.
- e. As a condition of settlement, Defendants have agreed: (i) to an award of attorneys’ fees between 8.5% to 12.19% of the total settlement amount; and (ii) to waive opposition to any award up to 8.5% of the total settlement amount.

14. Based on my experience and a review of the facts, an attorney fee award in the instant case of standard 25% of the total settlement amount would be reasonable. The results were exceptional. The reasonableness of the 12.19% fee sought is clearly established by the fact that the gross settlement payment exceeds the total nominal value of the claims by 2.5%.

15. The benefits of *Kalima v. State*, 148 Haw. 129, 468 P.3d 143 (2020), extend beyond the \$328 million settlement fund proving the breaches of trust by the Department of Hawaiian Home Lands (“DHHL”) by failing to keep proper records or award homesteads timely directly harmed the beneficiary Class Members economically, establishing a novel

method of awarding individualized damages, based on fair market rental values between application and award dates, rather than individualized proof and establishing that DHHL’s “waiting lists” are the result of its breaches of trust and that beneficiaries being forced to wait for a homestead award after they apply for one is a breach of trust. These rulings are significant and will benefit all DHHL beneficiaries.

16. Awarding the full 12.19% Class Counsel seek is justified by the excellent results they have produced, the effort that they have demonstrated, the risk they have taken, and the financial compromises they have made to assure settlement and payment to the Class Members for violations of their important civil rights.

17. The nature and complexity of this case, the fact that an award of fees was contingent on success, the excellent results, the risks, and burdens undertaken, the commitment of more than two decades of professional work by two solo practitioners, the precedents established for future cases, merit an award of 12.19% of the gross settlement amount. Such an award is reasonable and fully consistent with principles for assessing fee award in common fund class action settlements.

18. The 12.19% fee also is reasonable and justified based on the significant public interests served by the instant litigation, which advances both civil rights generally and the civil rights and trust rights of Native Hawaiian beneficiaries of the Home Lands Trust, such as me, specifically.

Dated: Honolulu, Hawai‘i, June 19, 2023.

/s/ Joseph Kamelamela
Joseph Kamelamela

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEONA KALIMA, DIANE BONER,
RAYNETTE NALANI AH CHONG, special
administrator of the estate of JOSEPH CHING,
deceased, CAROLINE BRIGHT, DONNA
KUEHU, and JAMES
AKIONA, et al.,

Plaintiffs,

vs.

STATE OF HAWAI'I, STATE OF HAWAI'I
DEPARTMENT OF HAWAIIAN HOME
LANDS; et al.,

Defendants.

CIVIL NO. 99-4771-12 LWC
(Class Action)

DECLARATION OF ERIC A. SEITZ

POST-TRIAL PROCEEDINGS JUDGE:
HON. LISA W. CATALDO

SETTLEMENT JUDGE:
HON. GARY W.B. CHANG

DECLARATION OF ERIC A. SEITZ

ERIC A. SEITZ hereby declares under penalty of perjury as follows:

1. I am an attorney licensed to practice in the States of California and Hawai'i and the District of Columbia, and I am admitted before the United States District Courts for the Districts of Hawai'i, Northern California, and the District of Columbia, several United States Courts of Appeal, and the United States Supreme Court.

2. I graduated from the University of California at Berkeley School of Law in 1969 and have been in private practice since 1974.

3. I have known Carl Varady professionally for several decades and have had many opportunities to directly consult and work with him on special education cases and other civil rights matters. Mr. Varady served as co-counsel in a class action which produced a consent decree for all children eligible for special education and related services in Hawai'i, *Felix, et al. v. Lingle*, Civil No. 93-00367 [DAE].

4. I have observed first hand Mr. Varady's skills and expertise in litigation involving civil rights.

5. I am aware that Mr. Varady enjoys an excellent reputation as a civil rights attorney and litigator in Hawai'i, and I have a high opinion of and respect for his abilities in those areas.

6. I have known Thomas Grande for decades and am aware of his skills and expertise in class action matters.

7. I am aware that Mr. Grande has an excellent reputation in class action matters, and I have a high opinion of and respect for his abilities in that field of practice.

8. I am familiar with this class action litigation which is based on the State of Hawai'i's failure to manage the Hawaiian Home Lands trust in the best interests of its beneficiaries, the Native Hawaiian people. Despite state legislation created in the early 1990's which allowed beneficiaries to seek compensation for breaches of trust between 1959 and 1988, the State of Hawai'i refused to pay on any individual claim awarded, thus necessitating this lawsuit.

9. I understand that this case involves complex issues of law and fact. Mr. Varady and Mr. Grande produced a very favorable result, and the Hawai'i Supreme Court's decision in *Kalima v. State*, 148 Haw. 129, 468 P.3d 143 (2020) has established precedent for those native Hawaiian beneficiaries who seek to hold the State of Hawai'i as trustee accountable for its mismanagement of the Home Lands Trust.

10. Two decades have passed since this case was filed, and as solo practitioners with limited resources Mr. Varady's and Mr. Grande's commitment to stay with

and finish the litigation, against the virtually unlimited resources of their opponents, is something that too few lawyers are willing to do in cases of such importance.

11. I understand that in the instant case:

- a. Plaintiffs agreed to a progressive contingent fee typical in civil rights cases in which they would pay: (1) one-third of the recovery prior to suit; (2) forty-percent after suit; and (3) forty-five percent if an appeal was necessary, and to pay all litigation costs;
- b. As a condition of settlement Plaintiffs' attorneys agreed to waive their contingent fee retainer claims for attorneys' fees and costs;
- c. As a further condition of settlement Plaintiffs' attorneys' agreed to limit their common fund fee claims to a range from 8.5% to 12.19% of the total settlement amount.

12. I understand that in the instant case:

- a. Plaintiffs filed suit on December 29, 1999;
- b. Class counsel have represented the 2,752 class members continuously since that time;
- c. The trial record in the instant case contains more than 30,000 pages of record representing 23 years of litigation including a six-week bench trial, a damages trial, voluminous motions practice and two appeals to the Hawai'i Supreme Court;
- d. After prevailing in the second appeal, Plaintiffs' attorneys negotiated and extremely favorable settlement agreement for the Class, obtaining payment for them that: (i) exceeds any amount

paid by the State of Hawai‘i to settle claims brought against it in court, by any person(s) or entity; (ii) the settlement amount negotiated--\$328 million—fully compensates the Class Members at 100% of the value of their claims; and (iii) the settlement amount negotiated and paid by the State of Hawai‘i actually exceeds the nominal value of all Class Members’ claims by 2.5%.

- e. As a condition of settlement, Defendants have agreed: (i) to an award of attorneys’ fees between 8.5% to 12.19% of the total settlement amount; and (ii) to waive opposition to any award up to 8.5% of the total settlement amount.

13. Based on my experience and a review of the facts, an attorney fee award in the instant case of standard 25% of the total settlement amount would be reasonable. The results were exceptional, producing a gross settlement payment that is the largest paid by the State of Hawai‘i as a result of litigation. Furthermore, the gross settlement payment *exceeds* the total nominal value of the claims by 2.5%. This recovery for the Class Members is extraordinary.

14. The benefits of *Kalima v. State*, 148 Haw. 129, 468 P.3d 143 (2020), extend beyond the \$328 million settlement fund proving the breaches of trust by the Department of Hawaiian Home Lands (“DHHL”) by failing to keep proper records or award homesteads timely directly harmed the beneficiary Class Members economically, establishing a novel method of awarding individualized damages, based on fair market rental values between application and award dates, rather than individualized proof and establishing that DHHL’s

“waiting lists” are the result of its breaches of trust and that beneficiaries being forced to wait for a homestead award after they apply for one is a breach of trust.

15. Awarding the full 12.19% Class Counsel seek is justified by the excellent results they have produced, the effort that they have demonstrated, the tremendous risk they have taken, and the financial compromises they have made to assure settlement and payment to the Class Members for violations of their important civil rights.

16. Mr. Varady and Mr. Grande are among only a handful of lawyers who will take civil rights cases against the state on contingent-fee cases and prosecute them to conclusion through appeals to this Court. Based on my own experience I understand that the state fights civil rights cases aggressively and refuses to settle as a matter of policy, even when the facts are compelling in favor of plaintiffs as they were in this case.

17. The nature and complexity of this case, the fact that an award of fees was contingent on success, the excellent results, the risks, and burdens undertaken, the commitment of more than two decades of professional work by two solo practitioners, the precedents established for future cases, merit an award of 12.19% of the gross settlement amount. Such an award is reasonable and fully consistent with principles for assessing fee award in common fund class action settlements.

18. The 12.19% fee also is reasonable and justified based on the significant public interests served by the instant litigation which advances both civil rights generally and the civil rights and trust rights of Native Hawaiians specifically.

Dated: Honolulu, Hawai‘i, June 19, 2023.

/s/ Eric A. Seitz
ERIC A. SEITZ

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEONA KALIMA, DIANE BONER,
RAYNETTE NALANI AH CHONG,
special administrator of the estate of
JOSEPH CHING, deceased, CAROLINE
BRIGHT, DONNA KUEHU, and JAMES
AKIONA, et al.,

Plaintiffs,

vs.

STATE OF HAWAI'I, STATE OF
HAWAI'I DEPARTMENT OF
HAWAIIAN HOME LANDS, et al.,

Defendants.

CIVIL NO. 99-4771-12 LWC
(Class Action)

**DECLARATION OF THOMAS R.
GRANDE**

DECLARATION OF THOMAS R. GRANDE

I, THOMAS R. GRANDE, hereby declare:

1. I am an attorney licensed to practice law before all Courts in the State of Hawaii and am co-counsel for the class in this case. I make this Declaration based upon my own personal knowledge.
2. I am the principal of Grande Law Offices, which I started in 2006. Grande Law Offices' mission statement reflects a belief I have held throughout my adult life, "A Commitment to Service in the Public Interest." I am a solo practitioner.
3. I am a 1976 graduate of Bates College and a 1985 graduate of the University of Hawai'i Law School, where I won the Susan McKay Memorial Moot Court Award, was a member of the National Moot Court team, and was an academic selection for the University of Hawai'i Law Review.
4. My background and training is in community organizing. I have lived in Waimanalo since 1976. One of my first jobs in Hawaii was as a VISTA volunteer in my hometown of Waimanalo. During this tenure, I acted as coordinator for the University of Hawaii *Access to Government Project*, creating the first community-based news program on Olelo, *Waimanalo Country*. In addition, I was editor of the

community newspaper, *The 'Nalo News*, and developed the first community recycling center in Windward Oahu. I also worked with the United States Soil Conservation Service (now Natural Resources Conservation Service) to implement a survey of local farmers that resulted in the upgrade of the local irrigation system to help preserve the continuation of farming in Waimanalo.

5. During my work with VISTA and afterward, I have been involved in numerous pro bono community organizing and later legal projects, including environmental efforts to preserve community beach recreation at Bellows Field by preventing a commuter airport from being constructed; to preserve community ocean recreation by preventing the development of a regional boat ramp at Kaiona Beach Park; to preserve residential housing by preventing the use of residential land for a fast food operation; to require appropriate environmental assessments for parceled beach development; and to prevent illegal dumping of construction waste on agricultural land, among other projects.

6. From 1979 to 1982, I was executive director of Common Cause/Hawaii, where I worked locally on issues relating to the implementation of the 1978 constitutional creation of a judicial selection commission, as well as issues relating to campaign finance, lobbyist disclosure, and public access to meetings, records and governmental affairs.

7. From 1985 to 2006, I was a partner at Davis Levin Livingston Grande. Since 1985, one of my primary areas of expertise is in the area of complex, multi-party state and federal litigation. In my 38 years of practice, I have been involved as counsel or co-counsel in more than seventy class action cases, including class actions in Hawai'i state and federal courts and mainland state courts. I have been lead attorney, co-lead attorney and participant in approximately fifty class action settlements. I have consulted on hundreds of other class actions in almost every jurisdiction as a result of my national work with the American Bar Association, American Trial Lawyers Association (now Trial Lawyers for Public Justice), National Consumer Law Center, and National Association of Consumer Advocates.

8. Between 1985 and 1998, my class action work primarily involved Hawaii cases brought either by our firm individually or as a local counsel in association

with a national firm. Significant cases included *Atchison v. Oahu Construction*, First Circuit Court, Hawai'i, a personal injury and construction defect class action on behalf of homeowners for dust inundation due to construction grading. *Atchison* was the first Hawaii personal injury case to be certified as a class action, an extremely rare occurrence. It involved the use of classwide sampling coupled with individual damage assessment to create protocols that allowed for classwide proof of medical claims and damages and a similar construction damage protocol.

9. Starting in the late-1990s, I started working more closely with mainland class action firms and began attending national conferences. As a result, I developed an extensive network of contacts in both the plaintiff's and defense bar through my work with the American Bar Association, the National Consumer Law Center, and the National Association for Consumer Advocates. In 1997, I co-authored "Class Actions Benefit Consumers", published in the national magazine of the Association of Trial Lawyers of America, TRIAL (April 1997).

10. In 1999, I co-founded and became co-editor-in-chief (currently editor-in-chief *emeritus*) of the American Bar Association *Survey of State Class Action Law*, which is now in its twenty-third edition. The ABA Class Action Survey was the first published comprehensive compendium of state class action law. It required recruiting, training, coordinating, and editing the production of fifty separate summaries. In order to make this task manageable, my co-founder and I implemented a regional editor system that resulted in an efficient management system. Because written communication at that time was totally dependent on the U.S. mail, we recognized that the procedures and organization that we perfected had broader applications in coordinating group and class actions.

11. The Survey is published annually as a stand-alone supplement to the multi-volume class action treatise, *Newberg on Class Actions* (4th ed.) and is distributed as a sourcebook at the annual ABA National Class Action Institutes. It is also reprinted in the National Consumer Law Center treatise *Consumer Class Actions* (10th edition).

12. I am a contributing author to both *Newberg on Class Actions* (4th ed.) and *Consumer Class Actions* (10th edition) and am co-author of *Litigating the Class*

Action Lawsuit in Hawai‘i (2000). I am also the author of: “Innovative Class Action Techniques – The Use of Rule 23(b)(2) in Consumer Class Actions”, 14 *Loyola Consumer Law Review* 251 (April 2002); “Coordinated State Court Class Actions – The New Paradigm,” *Consumer Advocate* (June 2000); “Class Actions in State Courts – A Tool for the Trial Advocate”, 23 *American Journal of Trial Advocacy* 491 (Spring 2000) and “Class Actions and Other Multiparty Litigation in a Nutshell” (Book Review), *Association of Trial Lawyers of America, TRIAL* (August 2000). I am the co-author of “Class Actions Benefit Consumers”, *Association of Trial Lawyers of America, TRIAL* (April 1997).

13. I was co-chair of the ABA Section of Litigation Subcommittee on Class Action State Laws from 1999 to 2005. I have been a featured speaker on class action litigation at the National Consumer Law Center/National Association of Consumer Advocates Annual National Class Action Symposium in 2000, 2001, 2002, 2003, and 2005 and the National Business Institute Seminar Hawai‘i Class Actions in 2000. I have served as lead counsel or co-lead counsel in the following class actions in Hawai‘i and on the mainland, which are representative of the cases I have been involved in: *Atchison v. Oahu Construction*, First Circuit Court, Hawai‘i, (personal injury and construction defect class action on behalf of homeowners for dust inundation due to construction grading); *Bougainville v. State Farm*, Civil No. CV03-00312 HG BMK (insurance class action on behalf of real property policy holders for over-insurance of property); *Crandon Capital Partners v. Castle & Cooke, Inc.*, Civil No. 00-1-0146(2) (consolidated with *Soden, et al. v. Castle & Cooke, Inc., et al.*, Civil No. 00-1-0145(1) - securities class action on behalf of shareholders of Castle & Cooke, Inc. for forced sale of stock); *Does v. The Gap, Inc., et al.*, Civil No. 99-00717 DAE-LEK (human rights class action on behalf of foreign garment workers in Saipan); *Helbig v. Interstate Pharmacy Corporation*, Civil No. 02-1-2696-11 (EEH) (consumer class action on behalf of long term care residents who were sold recycled and reused medication); *Hindman v. Microsoft Corporation*, Civil No. 00-1-0945-03 (consumer class action on behalf of software purchasers against Microsoft for anti-trust and unfair competitive activities); *Kalima v. State of Hawai‘i*, Civil No. 99-4771-12 VSM (breach of trust class action on behalf of Hawaiian beneficiaries of the Hawaiian Homelands Trust); *Kaonohi, et al. v.*

Allstate Insurance Company, Civil No. 01-1-002736 (SSM) (insurance class action on behalf of auto policy holders for improper use of credit bureau rating to set insurance rates); *Luke, et al. v. Gentry Realty, Ltd.*, Civil No. 01-1-0848-03 SSM (consolidated with *Luke, et al. v. Gentry Homes, Ltd., et al.*, Civil No. 01-1-1401-05 SSM - construction defect class action for siding design which allowed ground termites to enter houses undetected); *Lum et al. v. Menu Foods et. al.*, Civil No. 07-10-849 (consumer class action on behalf of pet owners for the sale of contaminated pet food); *Mariano v. State Farm Mutual Automobile Insurance Company*, Civil No. 01-1-002713 DDD (insurance class action on behalf of auto policy holders for improper use of credit bureau rating to set insurance rates); *Miller v. Liberty Mutual*, Civil No. 03-1-001199 RWP (insurance class action on behalf of real property policy holders for over-insurance of property); *Schroeder, et al. v. Schuler Homes, Inc.*, Fifth Circuit Court, Hawai'i (construction defect class action for siding and slab defects); *Timmis v. Kaiser*, California Superior Court (2002) (consumer class action to stop HMO policy of splitting patient pills); *Uchimura v. GVC*, Civil No. 02-00826 DAE BMK (consumer class action for violation of the Credit Repair Organization Act); *Uyeda, et al. v. Fletcher Pacific Construction Co., Ltd. Et al.*, Civil No. 00-1-2762-09 EEH (construction defect class action for loss of value of homes); and *Wilson, et al. v. AIG Hawai'i Insurance Company, et al.*, Civil No. 01-1-002740 VLC (insurance class action on behalf of policy holders for using credit bureau rating and age to set insurance rates); *Gross v. University of Hawai'i* First Circuit Civil No 11-1-1217-06 PWB (2012)(100,000 member data breach class action

14. As of June 19, 2023, Grande Law Offices has cost advances of \$298,486.12 for the Kalima litigation. Class Counsel has agreed to waive our costs in this case, including excise tax payment on our fees. The settlement agreement provides that our compensation may be measured by a percentage of the common fund or any other reasonable basis.

15. The Kalima cost advances for selected years are as follows:

2013 - \$56,463.88

2014 - \$53,082.82

2015 - \$30,378.45

16. Grande Law Offices' total income for selected years is as follows:

2014 - \$7,184.86

2015 - \$1,318.32

2016 - \$00.00

17. Attorneys who work on contingency cases exchange the risk of not prevailing against the potential for a higher fee because of the contingency.

18. Counsel took the case on a contingency basis. The fee agreement provides that counsel will not get paid unless the client obtains a recovery; that counsel will advance all costs and the client will not be responsible for repayment if there is no recovery. In agreeing to take this case on as a contingency, I was and am aware of the substantial risk of non-payment through the numerous rulings, which, if adverse, would have meant no recovery of fees and no reimbursement of advanced costs.

19. I have not received any payment for fees or costs advanced for this case. I did receive fee awards and costs for the appeals in this case.

20. Counsel for plaintiffs and the State agreed that during the pendency of the appeal, they would meet and confer to try to reach an agreement on the jurisdictional requirements for individual class members.

21. I emailed Defendants on February 20, 2018, December 22, 30 & 31, 2018 (after briefing was completed), and on January 14, 2019. I also left telephone messages for the State's attorneys. The State's attorneys never responded to Counsel's emails or telephone messages. As a result, the meet and confer mandated by the court did not take place.

22. Resolution of jurisdictional issues was possible for approximately 1,200 -1,500 class members during a meet and confer.

23. Counsel agreed that during the two-year appeals process, they would reach an agreement on these individuals as well as individuals with no claim. Yet despite (1) agreement between counsel, (2) a court order, and (3) denial of a motion to stay, no meet and confer took place.

24. This delaying tactic was intentional.

25. Since this case was filed in 1999, Plaintiffs repeatedly requested, through discovery, information for each class member to establish their jurisdictional requirements – application date, award date and Native Hawaiian Qualifications. Defendants repeatedly insisted that the original paper files for each client contain the only verifiable record of that information.

26. As the State began producing the files in a piecemeal fashion beginning in 2013, it became readily apparent that the “files” were a complete mess, out of date, and with numerous documents missing. This resulted in many hundreds of hours spent for the next several years reviewing incomplete records.

27. Plaintiffs finally discovered that DHHL’s record keeping system intentionally spoliated paper and electronic files even after this court case was filed! These files contained application and award data from earlier years in the class period.

28. Plaintiffs’ Motion for Sanctions and to Adopt Method of Calculating Damages Where Defendants Have Lost Application and Award files [filed June 29, 2016] ROA 214:639, and supplemental and reply memoranda outline in detail the problems with Defendants’ document production.

29. When leases were awarded or transferred, the application files for those beneficiaries were dissembled. This occurred even after this lawsuit was filed in disregard of the attorney general policy to place a PENDING LITIGATION DO NOT REMOVE DOCUMENTS label for records relevant to pending litigation. The attorney general policy was not followed in this case. Not one file reviewed by counsel contained the warning not to remove documents.

30. Between 1999 and 2014, all class members who were awarded leases had their files taken apart and partially discarded.

31. Plaintiffs concluded that files for approximately 611 individuals – over twenty percent of the class members -- were missing in whole or in part. In addition, 197 class members had previously filed Lost Application claims with the Hawaiian Claims Office prior to 1995.

32. In summary, 1173 out of 5,720 files -- more than twenty percent -- were spoliated or had missing documents.

33. Counsel had previously litigated the first issue in the case – the right to sue – in six months at the trial level. After remand from this Court in August 2006, counsel conducted discovery; retained experts; and completed the liability, causation and fact of damage trial in a little over three years, with four judges on the case (Marks; Sakamoto; Ahn; Hifo)

34. In October 2010, Judge Crandall became the fifth judge on the case and within three years, had the method of damages resolved. Reasonably, the case should have been resolved within two or three years after that.

35. I lost specific employment opportunities, especially during the critical 2013-2016 time period. My work on the case during this time period showed a substantial reduction in income in direct correlation with the number of hours worked the previous year on *Kalima*.

36.

Year	Kalima Hours	Kalima Cost Advance	Income
2013	1245.6	\$56,463.88	2014 - \$7,184.86
2014	1145	\$53,082.82	2015 - \$1,318.32
2015	1528.1	\$30,378.45	2016 - \$00.00

37. Delayed payment; large costs advances and years with lower income are part of the risk voluntarily assumed in class action work. In this case, the extreme contumacious conduct of the trustee that unnecessarily aggravated that risk. That risk directly prevented me from working on other class action cases.

38. There is typically a 2-3 year time lag between filing and the ultimate resolution of a typical class action, in my experience.

39. Beginning in 1999, I began to expand my practice to the Mainland and became extensively involved in activities by the American Bar Association and National Association of Consumer Advocates.

40. As a result of those activities, I have worked closely with mainland counsel on a variety of class cases, in Hawaii and on the mainland. Those associations present me with potential class cases almost every week.

41. In particular, I have worked extensively with mainland counsel on coordinated state class actions, a concept I wrote about shortly after the *Amchem*

Products Inc., v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) case raised questions about the future viability of national class actions. See Grande, *Consumer Law* “Coordinated State Court Class Actions: The New Paradigm” (National Consumer Law Center 2000). Declaration of Thomas R. Grande.

42. For example, I was part of a national team that litigated the Microsoft antitrust cases between 2000 and 2008. In that capacity, I traveled to Arizona and California to assist with class certification issues; and I recruited and coordinated the work of attorneys in Rhode Island, Oklahoma, and the District of Columbia.

43. From all of my contacts, between 2013 and 2016, I was offered the opportunity to act as local counsel and/or to work in conjunction with counsel in other states in antitrust cases; data breach cases; bank overdraft cases; automobile insurance cases; automobile total loss cases; and medical records charge cases, among others. During this time period, I did not even seriously evaluate other employment opportunities because he and his staff were underwater with document review in this case.

44. My lack of income was mitigated because my domestic partner, Kathleen Dowd, provided financial support, particularly during the 2013-2016 time period. This included purchasing health insurance. Without this mitigating factor, I would not have been able to devote substantial personal resources to the case.

45. My former office (Davis Levin Livingston Grande) began work on this case in August 1999 with the Law Offices of Carl M. Varady. We were approached by the Native Hawaiian Legal Corporation, which along with Mr. Varady, had represented individual claimants before the HCO. We filed a federal lawsuit to try to extend the Panel’s statutory deadlines. When the federal court did not rule, we filed suit on December 29, 1999, two days before the expiration of the statute of limitations.

46. While our offices were attempting to extend the statutory deadlines, the Native Hawaiian Legal Corporation was soliciting attorneys to represent individual claimants – we were informed that NHLC staff had conducted at least one recruitment meeting to secure individual representation for the claimants. However, only three individual claims were filed out of almost 2,800 claimants.

47. In 2007, I left my former firm but continued as co-counsel in the case. In addition to the difficulty finding counsel, two of the four firms originally

involved withdrew from participating in the case after the 2009 damages trial. The Native Hawaiian Legal Corporation, which had agreed to provide client contact services, declined to participate further. My former firm, Davis Levin Livingston, also withdrew after the 2009 liability trial. As a result, the case has continued since then, with two solo-attorney firms representing the class.

48. My firm's total hours working on this case in the last 24 years approximate 18,500 hours. This includes my working almost every day for the last year on this case.

49. This claims resolution process will require hundreds of hours of attorney and paralegal time in the next few years. Co-counsel have each assembled an attorney/paralegal team to assist them in this process.

50. This case was particularly protracted and contentious, as the facts presented at trial and in pre-trial proceedings. The state has nearly unlimited resources for legal representation through both Deputy Attorneys General and retained private counsel. As recognized by the Hawai'i Supreme Court in Kalima II, the State has used its resources to delay this case. Such tactics make litigation of civil rights cases almost impossible for the typical small law firm to accept.

51. During the settlement negotiations for this case, Class Counsel informed Judge Chang that we would not negotiate fees until we had agreed on a settlement fund.

I, Thomas R. Grande, declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai'i June 19, 2023

/s/ Thomas R. Grande

Thomas R. Grande

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEONA KALIMA, DIANE BONER AND
RAYNETTE NALANI AH CHONG, ET AL.,
Plaintiffs,

vs.

STATE OF HAWAI'I, STATE OF HAWAI'I
DEPARTMENT OF HAWAIIAN HOME
LANDS; ET AL.,

Defendants.

CIVIL NO. 99-4771-12 LWC
(Class Action)

DECLARATION OF CARL M. VARADY;
EXHIBITS 1 TO 14

Electronically Filed
FIRST CIRCUIT

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Dkt. 1715 DEC

DECLARATION OF CARL M. VARADY

Carl M. Varady declares:

1. I am Class Co-Counsel in this case and make this declaration of my own personal knowledge.
2. I am a member of the Hawai'i bar, the Colorado bar (inactive) and am admitted to practice before the courts of Hawai'i, the United States District Courts for the District of Hawai'i, the Ninth Circuit, the courts of Colorado, the United States District Court for the District of Colorado, the Tenth Circuit and the United States Supreme Court.
3. I graduated *cum laude* from law school in 1982 from Wayne State University School of Law, where I served as editor-in-chief of the WAYNE LAW REVIEW.
4. After moving to Hawai'i, I was employed by the American Civil



Liberties Union of Hawai'i ("ACLU") as its Legal Director from 1991 through 1994, I was then employed by the Native Hawaiian Legal Corporation, as a staff attorney, until 1997. Since 1997, I have been in private practice.

5. In my work as an ACLU attorney, Native Hawaiian Legal Corporation attorney and in my private practice, I have been lead attorney in numerous civil rights cases involving constitutional and statutory claims in this Court, other Hawai'i trial and appellate courts, the United States District Court of the District of Hawai'i, the Ninth Circuit, the United States District Court for the District of Colorado, United States Supreme Court (briefs only) and numerous Hawai'i state and county administrative bodies. The substantive issues adjudicated in these cases included rights protected under the First, Fifth, Sixth, Seventh, Eighth, Fourteenth Amendments to the United States constitution, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities and Section 504 of the Rehabilitation Act (29 U.S.C. § 794), the Fair Labor Standards Act (29 U.S.C. § 203), LGBTQ rights including, without limitation, marriage, Historic Preservation, environmental protection and civil service rights guaranteed by the Hawai'i state Constitution and statutes, and employment discrimination and Whistle Blower cases under Hawai'i law, including HRS § 378-2 and § 378-62, Hawai'i wage-hour laws, HRS Chapter 387, and the right to a free appropriate public education under federal (20 U.S.C. § 1400, *et seq.*) and state law.

6. Prior to filing the instant case, as a staff attorney at NHLC, I represented several Class Members individually in their administrative cases under

HRS Chapter 674 before the Hawaiian Claims Office Individual Claims Review Panel.

7. In the instant case I have served as co-lead Class Counsel for the plaintiff class since 1999, representing 2,752 class members, first addressing the state's challenge to the beneficiaries' right to sue, decided by this Court in 2006 in *Kalima v. State*, 111 Hawai'i 84, 137 P.3d 990 (2006). Following that decision, after remand, a six-week trial in 2009 established the State's liability and the fact of damages in favor the beneficiaries.

8. Subsequently, a second trial was held in September and October 2013 to determine the method to be used to calculate damages. As a result of that trial, the beneficiaries obtained Court approval for the formula to be used in calculating damages for delays in homestead awards resulting from breaches of the Hawaiian Home Lands trust on a class basis and a claims administration process that would be implemented following the instant appeal. After briefing and oral argument on August 21, 2019, the Hawai'i Supreme Court considered the cross-appeals and arguments by the state to overturn the trial court's rulings on liability, the fact of and method to calculate damages.

9. On June 30, 2020, the Hawai'i Supreme Court rejected the Defendants' arguments and affirmed the trial court's rulings on liability, the fact of, and method to calculate damages, and the claims administration process. *Kalima v. State*, 148 Haw. 129, 468 P.3d 143 (2020), established precedent for those Native Hawaiian beneficiaries who sought to hold the State of Hawai'i as trustee accountable

for its mismanagement of the Home Lands Trust.

10. Through the instant case and the more than 23 years of litigation, Class Counsel established numerous important and novel principles of law:

- a. Since statehood, DHHL committed numerous breaches of trust that caused the Class Members damages;
- b. Delays between application and homestead awards are actionable;
- c. There is no legally acceptable period for such delays;
- d. HRS Chapter 674 does not require Class Members to provide individualized proof of loss which would have been unlikely after decades of litigation, if not impossible;
- e. Using Fair Market Rental Values (“FMRV”) as a method of awarding individualized damages, based on fair market rental values of the type of homestead applied for-residential, agricultural, or pastoral-for the period between application and award dates, rather than individualized proof, is a proper way to measure claims;
- f. Individualized proof, demanded by the State, was not necessary for Class Members to prove damages. “The State’s decision to continue to litigate this case for decades has compounded the challenges resultant from its own

failure to keep adequate records-many of the beneficiaries have been unable to keep their own records over the years, particularly with respect to the amount that they paid to rent alternative land” (148 Haw. at 143, 468 P.3d at 157).

- g. A Class Member who “defers” from a lease offering meeting because s/he is impoverished and cannot qualify for or obtain a mortgage loan does not interrupt their right to compensation for the State’s breaches of trust. A contrary ruling, which was continuously advocated by the State, would have severely diminished the value of the Class Members’ claims, as most of them are unable to obtain commercial loans and regularly are forced to defer from homestead offering meetings as a result and would have been denied compensation for the period in which they “deferred” from seeking homesteads they could not afford.

11. Other representative examples of civil rights and public interest cases in which I have appeared as counsel include:

- a. *Harris v. The Queen's Medical Center*, CIVIL NO.13-1-1737-06 JPC (First Cir. Haw.), a five-week jury trial that resulted in the largest single plaintiff’s verdict for an employment discrimination case in Hawai’I totaling \$3.83 million,

including a \$3.2 million punitive damages award, and an additional award of attorneys' fees in the amount of \$1,128,817.81. The court applied a contingency multiplier enhancing my firm's fees, based on the complexity and the extreme nature of the opposition, which yielded an effective hourly rate of \$612.50 for my work in that case;

- b. Co-counsel in *Felix, et al. v. Lingle*, Civil No. 93-00367 DAE, from pre-filing in 1992 through the issuance of the consent decree, resulting in state-wide class relief for children entitled to special education and related services under IDEA and Section 504 of the Rehabilitation Act (29 U.S.C. § 794);
- c. *EEOC & Daniels v. Lockheed Martin*, CV 05-0479 DAE/LEK (D. Haw. 2005), which resulted in the largest single settlement in a race discrimination case brought under Title VII of the Civil Rights Act of 1964, in which Mr. Daniels received a settlement payment of \$2.5 million as well as injunctive relief;
- d. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), in which I represented the amicus ACLU of Hawai'i, before this Court, in the case challenging Hawai'i's prohibition of

same-gender marriage;

- e. *EEOC & Lovell v. United Airlines, Inc.*, C 06-01407 TSZ (D.W. Wa. 2007), in which I represented 26 disabled United Airlines employees who successfully challenged United's refusal to accommodate them by providing them with reduced work schedules and, all of whom received settlements from United Airlines, Inc. The amount of the award is confidential;
- f. *Adams v. City and County of Honolulu*, CIVIL NO. 12-00667 BMK, a collective action under the Fair Labor Standards Act, in which I represented 318 employees of the City's Emergency Medical Services Division who sought and recovered unpaid overtime and attorneys' fees totaling in excess of \$1.1 million;
- g. *Estate of McKeown v. State of Hawai'i*, CIVIL NO. 14-1-0323 (2)(Second Cir. Haw.), in which the estate of a four year-old who was killed while in the custody of a parent who had previously severely abused him, after he was returned to parental custody by CPS, recovered \$875,000 from the state for wrongful death;
- h. *"Kimberly" v. State of Hawai'i*, CIVIL NO. 95-0718-03 SSM

(First Cir. Haw.), in which the State was ordered to pay damages for sexual abuse of a partially-transitioned male-to-female prisoner by a male Adult Corrections Officer (“ACO”) while she was housed at OCCC in an all-male housing unit. Then-Judge Sabrina S. McKenna, issued a 94-page opinion, finding that the State and the ACO’s supervisor were responsible for failing to investigate “Kimberly’s” written allegations of abuse and for not taking action to remedy the situation during a 4-month period when the ACO continued a pattern of harassment, degradation and intimidation. The total damage award, including punitive damages against the ACO and his supervisor, was \$310,000. Attorneys' fees and costs were also awarded. Then-Judge McKenna defaulted the State when it became known that the Deputy Attorney General had concealed critical proof in the form of a “Kimberly’s” handwritten note to her Unit Team Manager (“UTM”) telling him “This is a crime!” The UTM denied he had received the note and the Deputy Attorney General asserted “Kimberly” had not written the note his cross-examination, even though the original was in his office. The default and

material findings were sustained on appeal;

- i. *Koanui v. City and County*, CIVIL NO. 09-1-2326 DEO (First Cir. Haw.), in which I represented an HPD police lieutenant against whom the Department retaliated after she reported falsification of police recruit test scores she observed in her role as a training sergeant, and which resolved in settlement payment to her by the City and County in the amount of \$550,000;
- j. *Royal Capitol Plaza, AOA v. Hawaii Community Development Authority, et al .*, Civil No. 14-1-0804-03 KKS (First Cir. Haw), in which residents of a condominium were successful in obtaining an injunction to stop construction of the 801 South Street Phase II tower, after proving that the Hawai'i Community Development Authority issued the development permit in violation of state historic preservation law, Article XI , Sections 1 and 9 of the Hawai'i Constitution , and HRS § 6E-13, HAR §§ 15-272-62 (c), and 13-284.-5(5);
- k. *Spear v. Cayetano*, Civil No. 84-1104 SPK, in which I and my ACLU co- counsel represented the class of prisoners confined at the O'ahu Community Correctional Center and

Women's Community Correctional Center, seeking to improve their conditions of confinement in a class- action lawsuit for Eighth Amendment violations brought under 42 U.S.C. §1983;

- l. *Steven A. et al ., v. LeMahieu*, Civil No. CV 01 -00680 SOM/LE K, and *Alberta S. et al . v. LeMaheiu*, Civil No. CV 0100366 HG/KSC, in which my co- counsel Stanley E. Levin and I, represented parents and their children seeking damages under Section 504 of the Rehabilitation Act (29 U.S.C. § 794) for the State's deliberate indifference to the autistic children's¶ need for special education and related services in both cases;
- m. *Runyon v. Fasi*, 762 F. Supp. 280 (D. Haw. 1991), representing plaintiff successfully challenging the City and County of Honolulu's prohibition on political campaign signs;
- n. *SCI v. Hoshijo*, 101 Haw. 438 (2003), in which I was retained to represent the Hawai'i Civil Rights Commission before this Court in an appeal that sought to eliminate the statutory requirement that employers participate in proceedings before the Hawai'i Civil Rights Commission and

which prohibits them from opting-out of the administrative process prior to proceeding to state court;

- o. *Estate of John Doe v. Paul Revere Insurance Co.*, CIVIL NO. 93-02690-1 (First Cir. Haw.), in which I was lead trial counsel in an insurance bad faith action that produced a \$750,000 verdict in favor of the estate of a dentist whose disability benefits were terminated in violation of contract;
- p. *Kim v. Penarosa*, Civil No. 95-00777 HG/FIY, *Deguzman v. Penarosa*, Civil No. 96-00680 HG/BMK, and *Tupuola v. Penarosa*, Civil No. 97-00647 HG/FIY, which challenged the improper use of force and mechanical restraints on prisoners who were routinely beaten by the prison SWAT team and kept in filthy conditions at the Special Holding Unit at Halawa High Security Facility, without justification. Those cases successfully recovered more than \$500,000 in damages for Eighth Amendment violations from the State;
- q. *State v. Kearns*, 75 Haw. 558, 867 P.2d 903 (1994), in which the Hawai'i Supreme Court ruled that non-custodial police interrogation at the Hawai'i International Airport-*i.e.*, “walk and talk” practice-was seizure without consent or

probable cause and, therefore, unlawful under the Hawai'i constitution;

- r. *Michael P. v. Dep't of Educ.*, 656 F.3d 1057 (9th Cir. 2011), in which the Ninth Circuit ruled that Hawai'i's method of determining eligibility for the category "specific learning disability" under the federal IDEA statute (20 U.S.C. § 1400, et seq.) was unlawful and violated federal standards. Based on this decision, Hawai'i changed its regulations for determining eligibility under IDEA. After remand the Hearings Officer decided that the child in question should have been granted eligibility and had been unlawfully denied special education and related services for dyslexia;
- s. *Breiner v. Takao*, 73 Haw. 499, 835 P.2d 637 (1992), an original proceeding on a writ before the Hawai'i Supreme Court in which the court granted the petition and issued a mandate prohibiting the trial court from enforcing its pre-trial gag-order barring the criminal defense attorney from communicating with members of the news media on matters related to the underlying criminal case.

12. Approximately 90% of my practice consists of representing plaintiffs in civil rights and public interest cases. As in the instant case, I take these

cases on fee contingency; payment of my attorneys' fees is based solely on success and the court's award, with the understanding that my clients typically are not people of means and cannot pay me. These were the circumstances under which I agreed to represent plaintiffs in the instant case. My contingent fee agreement in the instant case is typical of civil rights cases. It provides a fee of 33.33% of the recovery for pre-litigation resolution, 40% in the case of successful trial, and 45% if an appeal is taken, and all costs of litigation. As the fee was contingent on success, I would not be paid if the appeal were not successful.

13. I am a sole practitioner. Taking civil rights cases, such as the instant case, that are arduously contested by the State with siege tactics, and routinely appealed, as occurred here, results in substantial delay between retention and payment. In the instant case, I was retained in October 1999. Other than the limited compensation received for the two appeals in this case, I have not been paid for any other work.

14. By committing to this case, I was required to decline other income producing work between 1999 and today, because of the time demands presented by novel and complex issues, extensive record, and extreme risks presented in this case. A loss on liability or causation of damages, the fair market rental value damages model, the deferral for poverty mitigation defense asserted by the state or class certification issues would have eliminated any chance of meaningful recovery for the now-more-than 23 years of work I and my staff have committed to this case. Other

than the appeals, I which I received payment on an hourly basis under HRS § 674-21, none of work I and my staff have done in this case has been compensated since its inception.

15. A significant percentage of my and my staff's time from 1999 through the instant motion has been dedicated to this case, to the exclusion and refusal of other work. This commitment has substantially impacted my income. For example, in 2016, I earned no taxable income.

16. After the appeal in *Kalima I* was remanded on June 30, 2006 and up to the appeal in *Kalima II* in 2018, the trial court record included 488 substantive motions, memoranda, submissions by the parties, and rulings made by the trial court. These are listed on Exhibit 1, hereto, taken from the declaration submitted on appeal in *Kalima II*.

17. Since the remand of *Kalima II*, and assignment of this case to the Court, on December 30, 2019 [Dkt. 1288], docket entries and filings now total 1702.

18. Through the instant motion, my office has recorded more than 20,000 hours of time for work on this case. As a condition of settlement, I waived all of my statutory fees under HRS § 674-21 and case costs. I also agreed to waive my incurred costs in excess of \$225,000.00 and GET tax of 4.712% on any award. My compensation is determined solely by the agreed-upon fee in this case.

19. Defendants refused to meet as ordered by the trial court, during the pendency of *Kalima II* or to identify class members whose claims were not

contested as ordered by the trial court.

20. Attached hereto as Exhibit 2 is the August 13, 2021 letter from Deputy Attorney General Craig Y. Iha.

21. Attached hereto as Exhibit 3 is the October 5, 2021, letter from Special Deputy Attorney General Donna H. Kalama.

22. As a material term of settlement Defendants agreed not to object to a request for attorneys' fees up to and including \$28 million (8.53% of the gross settlement amount). Class Counsel agreed to seek no more than \$40 million (12.19% of the gross settlement amount) in attorneys' fees.

23. In the instant case:

- a. After months of planning and related litigation filed in the United States District Court that was dismissed, Plaintiffs filed suit on December 29, 1999, and both I and Mr. Grande have continuously served as Class Counsel throughout;
- b. Class Counsel have continuously represented the 2,752 class members who filed claims with the Panel since that time;
- c. The trial record in the instant case prior to the appeal in *Kalima II* contained more than 30,000 pages of record litigation the records and approximately 1,600 exhibits from a six-week bench trial, a damages trial, voluminous

motions practice and two appeals to the Hawai'i Supreme Court;

- d. After prevailing in the second appeal, in a matter of weeks from March 18, to April 14, 2022, Class Counsel negotiated settlement agreement for the Class Members that is extremely favorable. The Settlement Agreement provides for payment to the Class Members on terms that are unprecedented.

24. The total value of all Class Members' claims under the Distribution Rules, as calculated by Epiq, is \$319,639,581.61.

25. As calculated by Epiq, the \$328 million settlement payment negotiated by Class Counsel: (a) fully compensates the Class Members in excess of 100% of the total value of their claims as set forth in the Distribution Rules; (b) exceeds the total value of all Class Members' claims by 2.5% (\$8,360,418.39); and (c) exceeds any amount paid by the State of Hawai'i to settle claims brought against it in court, by any person(s) or entity.

26. The \$328 million gross settlement payment is undoubtedly higher than would have been necessary if the Panel process had been completed in the early 2000s and had the legislature provided the economic and other relief that HRS chapter 674 was intended to produce.

27. Both Mr. Grande and I informed Judge Chang during settlement

discussions that the settlement fund would be negotiated before attorneys' fees were discussed.

28. The Settlement Agreement resolving all claims in this case is attached hereto as Exhibit 4.

29. Defendants were offered the opportunity to review both the motion for final approval and the instant motion for an award of fees. Defendants have stated they intend to oppose the award of attorneys' fees and have not responded to my requests to clarify if they mean some or any award of attorneys' fees. The communications are attached hereto as Exhibit 5.

30. In 1999, the Hawaiian Claims Office Individual Claims Review Panel ("HCO" or "Panel"), which was charged with implementing HRS Chapter 674 and recommending relief to the Hawai'i legislature, submitted to the legislature its *"Report to the Governor and the 1999 Hawaii Legislature."* Exhibit 1 hereto. The HCO reported that: Despite losing almost a year of productive time due to debate over whether waiting list claims were included and compensable under HRS Chapter 674, the Panel "made significant progress in reviewing claims. As of December 31, 1998, the Panel and its staff had either closed or issued recommendations on 2,050 claims, representing 47% of the total number of claims filed. While the claims process ha[d] moved forward, 53% of the claims filed with the Panel still remain to be reviewed." Consequently, the Panel anticipated asking the 1999 legislature for another extension of time to complete the review of all claims. See, Exhibit 1,

hereto.

31. The 1999 legislature passed House Bill No. 1675 (H.B. 1675), which extended the notice, filing, and Panel report deadlines by one year, to allow additional time for all claims to be reviewed. However, then-Governor Benjamin Cayetano vetoed the bill. Gov. Msg. No. 241, “Statement of Objections to [H.B.] 1675, in 1999 House Journal, at 882” stating it would take more than a year for the Panel to finish its process. Exhibit 14 hereto.

32. In 1999, the Panel continued its work and, before closing its doors, and submitted a “*Final Report to the Governor and the Hawai'i State Legislature* (Hawaiian Home Lands Trust Individual Claims Review Panel)” (the *Final Report*). Exhibit 6 hereto.

33. The Panel officially closed its doors on October 29, 1999 even though the Panel members’ terms continued until December 31, 1999.

34. In summary, the Panel’s *Final Report* confirms it received 4,327 claims from 2,752 individual claimants. Exhibit 6 at 6-7. As of September 30, 1999, the Panel had dismissed 1,709 claims (39.5%) and had 2,000 claims still pending or not yet presented for hearing (46.22%). Thus, a total of 3,703 claims (85.72%) filed by beneficiaries either were deemed not compensable or had not even been reviewed by the Panel or presented to the legislature for compensation when the Panel ended.

35. The Panel’s final statistics are reflected in the following table which a summary of Table I from the *Final Report* followed by a simplified cumulative

summary of the statistics using the final 1999 numbers submitted to the legislature by the Panel:

COMPARISON OF CLAIMS FILED TO DECISIONS, DISMISSALS AND PENDING CLAIMS		PERCENTAGE OF TOTAL CLAIMS FILED
TOTAL CLAIMS FILED	4327	100.00%
Dismissed or Dismissal Pending	1709	39.50%
Pending	2000	46.22%
Total Dismissed, Dismissal Pending or Pending	3709	85.72%
Total Claims Resulting in Recommended Panel Awards	578	13.36%

Exhibit 2 at 6-7 & Table I.

36. At its premature conclusion in 1999, the Panel had recommended payment or non-monetary remedies for only 441 individual claimants.¹ Thus, only 16% of the total number of claimants who filed with the Panel were recommended for relief. Exhibit 2 at 6-7.

37. In contrast, the Settlement Agreement and Distribution Plan will provide settlement payments to 2,518 individuals for 3,363 claims: 570% more Class Members than the number of Panel claimants who received recommendations for relief and nearly 581% more claims than the number of claims receiving

1. The count is derived from a physical count of claimants listed in: Table III *Report to the Governor and 1997 Hawai'i Legislature (Hawaiian Home Lands Trust Individual Claims Review Panel)*; Table IV *Report to the Governor and 1999 Hawai'i Legislature (Hawaiian Home Lands Trust Individual Claims Review Panel)*; and Table III *Final Report*. Exhibits 3, 4 & 2. A physical count was necessary as the Reports themselves do not clearly state the number of claimants, focusing more specifically on the number of claims. The tables are filed *in camera* as they contain confidential personal information.

recommendations for compensation from the Panel.

38. Significantly, the Distribution Plan includes settlement payments for claims on behalf of deceased relatives-typically parents-who were listed and identified in Panel claim forms, but whose claims were not recognized as compensable by the Panel. See, Exhibit 5 [Deguir redacted].

39. As a result of the \$328 million settlement, Class Members, including deceased parents' estates, will receive 89% of their individual claim value, with an average award of \$113,660, even after an award of attorneys' fees at 12.19% and current costs of claims administration are deducted from the gross settlement amount.

40. In contrast, the Panel submitted a total of 578 claims to the legislature, with total recommended awards of \$17.9 million (\$6.7 million through 1998 and \$11.2 million in 1999). See, Exhibit 2 at 6-7. The aggregate Panel awards produced an average individual recommended award of \$30,969 - 72.7% less than the Class Members' average settlement payment under the Settlement Agreement.

41. The significance of Settlement Agreement payment of \$328 million is highlighted by the facts that Defendants in 2007 expressly refused to make any financial offer of settlement in mediation and, even after liability, causation and damages were proved, and the FMRV model adopted by the trial court, Defendants offered only \$17 million to settle all claims. See, Exhibits 6 & 7 [sealed](Bennett and Henderson mediation letters).

42. The \$328 million Settlement Agreement payment is 19.3 times greater than the highest amount ever offered by Defendants to settle.

43. Sixteen years ago, on April 27, 2007, then-Attorney General Mark J. Bennett responded to Plaintiffs' settlement demand, refusing to offer one cent in response to Plaintiffs' demand. Attorney General Bennett dismissively characterized Class Counsels' demand valuation of the Plaintiffs' claims as "wholly unrealistic.

44. On July 7, 2014, after Defendants lost on the issues of breach, liability and the fact of damages following a six-week bench trial in 2009, and the method of valuation-FMRV-had been resolved in a second trial four years after, Defendants made their first financial offer to settle globally for the total sum of \$17 million. Until settlement negotiations began in the instant case on March 18, 2022, that was Defendants' final offer.

45. At the time the 2022 settlement negotiations began, Plaintiffs did not have complete data for the Class Members. Even after *Kalima II*, Defendants resisted discovery and, notwithstanding orders from the Court that they do so, did not produce the critically important complete claims files or award data until September 15 and October 19, 2022, respectively. *Id.* Class Counsel were forced to propose a global settlement of all claims, having only partial or no records for approximately 600 Class Members. Class Counsel were faced with the arduous task of searching these records to obtain claim data while still attempting to maintain the schedule for notice and final approval. *Id.* The data Class Counsel did have had been recorded on

30 spread sheets over a period of approximately eight years, from production of documents and interrogatory responses from Defendants that were contradictory and incomplete. *Id.* Defendants have never been able to produce Class Member data showing homestead application type and award date in a single coherent document. *Id.*

46. Class Counsel obtained expert assistance provided by Ezra A. Varady, who holds a degree in computer science and electrical engineering and is conversant in numerous programming languages. Mr. Varady's work was essential and critical to Class Counsels' ability to analyze data, estimate with reasonable accuracy the class damages and present a Master List coherently presenting these calculations to the Court and to Defendants. Within a matter of one week of negotiations beginning, with Mr. Varady's consultation and assistance, Class Counsel were able to aggregate 30 disparate spreadsheets in differing formats, created by different reviewers over a period of more than seven years, to produce a spread sheet of Class Members and claim values that allowed them to estimate the value of all claims, including claims for Class Members with incomplete or no data-*i.e.*, the Master List. Using the data culled from eight years of discovery and literally thousands of hours of review, Class Counsel presented a demand, using data that Defendants had possessed, produced, but had not analyzed at the level necessary to contest the claim values presented in the Master List.

47. The \$328 million settlement payment was the direct product of

Class Counsels' compelling data synthesis and presentation in the Master List. While the \$328 million payment was arrived at through a tremendously difficult synthesis of years of analysis of incomplete data, disparately recorded on 30 different spread sheets compiled into a single Master List in a week's time, the estimates and final demand it led to were extraordinary and highly accurate.

48. Applying the Distribution rules approved by the Court [Dkt. 1589], the total value of all valid Class Member claims is \$319,639,581.61. The \$328 million paid by Defendants exceeds the total value of all valid claims by \$8,360,418.39 (2.5%).

49. The recovery of 102.5% of the total value for all Class Members' claims (\$328 million) means:

- a. After deducting Epiq's estimated claims administration costs through anticipated conclusion of the case (\$1,728,700.00) and the incentive bonus to class representatives (\$75,000.00), \$326,196,300.00, would remain of the Settlement Fund;
- b. Subtracting the total value of all valid Class Members' claims from that remainder, there would be an excess of \$6,556,718.39;
- c. That excess payment applied to the \$40 million attorney fee request reduces the fee to \$33,443,281.61 or 10% of the \$328 million recovered;
- d. Class Members, therefore, would receive **90% of their individual**

claim values even after the full attorneys' fees sought, estimated claims administration costs and incentive payments are deducted from the \$328 million because of the excess \$8.3 million recovered by Class Counsel.

50. In its 1999 "*Final Report to the Governor and the Hawaii State Legislature* (Hawaiian Home Lands Trust Individual Claims Review Panel)" (the *Final Report*), the Panel confirmed it received 4,327 claims from 2,752 individual claimants. Exhibit 6 at 6-7 and Table 1 to Varady. That table and narrative are summarized in Exhibit 7 to Varady. As of September 30, 1999, the Panel had dismissed 1,709 claims (39.5%) and 2,000 claims were still pending or not yet presented for hearing (46.22%). Thus, a total of 3,709 claims (85.72%) filed by beneficiaries either were deemed not compensable or had not even been reviewed by the Panel or presented to the legislature for compensation when the Panel ended.

51. Under the Distribution Rules, the Panel's dismissals of claims for lack of response by claimants, rejection of representative claims by children of deceased parents or spouses, and substantive rulings were discarded; all claims were reevaluated under the Distribution Rules, and Fair Market Rental Values were used to value all but the 102 construction claims.

52. The results of the Distribution Rules created by Class Counsel as most recently calculated by Epiq by are shown by category of claim:

CLAIMS PAID UNDER DISTRIBUTION RULES AND SETTLEMENT	Number of Claims	Percent of Total Claims Paid
Residential	2254	61.539%
Agricultural	1074	29.32%
Pastoral	233	6.36%
Construction	102	2.78%
Total	3663	100.00%

53. After seven years of work from 1992 through 1999 no claims were compensated by the legislature as a result of the Panel process. As a result of Class Counsels' work 3663 claims are being compensated-634% greater than the number of claims recommended for compensation by the Panel during its seven years of existence. No claimants received compensation from the legislature. As a result of Class Counsels' work, 2,518 Class Members now will receive compensation from the settlement, 571% greater than the 44 claimants 1 (derived from *Final Report* and hand count) the Panel recommended the legislature compensate, but who received nothing.

54. The average value of each of the 2,518 Class Members' total claims² using the Distribution Rules is \$126,941.85. While no Panel claims were compensated by the legislature, looking at the aggregate \$17,970,822.74 recommended by the Panel for the 441 claimants who received such recommendations, the average recommended award was \$40,750.16. Class Counsels'

2. A Class Member's "total claims" means the aggregate value of a Class Members' residential claim (if any) + (agricultural OR pastoral claim)(if any) + construction claim (if any).

work produced an average total claim value for Class Members that is 312% times the Panels' average unfunded recommendations for claimants. Even after an award of attorneys' fees of 12.19% and current costs of claims administration are deducted from the \$328 million settlement, Class Members' average net pro rata recovery will be \$113,660.16, 279% times the \$40,750.16 average unfunded recommendation made by the Panel.

55. The 25% benchmark for common fund class settlements was affirmed in *Chun IV*. Class Counsel would be fully justified seeking the full 25%. Furthermore, Class Counsel were retained under a progressive civil rights retainer agreement, providing for 33.33% for of the gross recovery for settlement pre-suit, 40% after litigation is initiated and 45% after any appeal. Recognizing the poverty of many of the Class Members and the important public interest served in resolving their claims for historic ongoing malfeasance by the State in its role as Trustee, Class Counsel agreed to compromise their fee at 73% less than they would receive under the retainer, which would have been \$147 million. Class Counsel agreed to compromise their fee at 51% less than they would receive applying the common fund benchmark, which would have been \$82 million. Importantly for claims administration purposes, Class Counsel agreed to waive post-settlement fees, a position strongly opposed by experienced practitioners. Class Counsel also agreed to absorb and waive their costs in excess of \$500,000.

56. Attached hereto as Exhibit 12 is Fitzpatrick, *An Empirical Study of*

Class Action Settlements and Their Fee Awards, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES

811, 837-38 (2010). According to my search of Lexis on 6/18/2023 Prof. Fitzpatrick's article has been cited by a least 107 courts.

57. The Probate Plan created by Class Counsel, Probate Special Master and Probate Special Counsel, and recently jointly approved by the Court and Probate Court, is also remarkable. Class Counsel were not retained to provide probate services. The Claims Administrator now reports that there are 1,346 Class Members believed to be deceased. Instead of abandoning the heirs of deceased Class Members to fend for themselves and leaving as much as \$150 million undistributed, the Probate Plan is designed to locate heirs, provide them notice of their deceased family member's claims and will distribute settlement proceeds to heirs and devisees of the estates of the 1,346 reported deceased class members. The vast majority of Panel claims were either dismissed or unprocessed. It is highly probable that a majority of heirs may not know that their relatives' estates had claims from proceedings that occurred 30 years ago ending prematurely or in dismissal, or that those claims will be paid from the Settlement Agreement funds.

58. Creating this system for streamlined, low-cost probate services designed to utilize Class Member data obtained and compiled in discovery by Class Counsel, directly fulfills the concept of generational economic rehabilitation and self-sufficiency for which the Hawaiian Homes Commission Act was created. Hawn. Homes Commn. Act § 101. With estimated potential heirs of three to four people per

estate, distribution of settlement payments under the Probate Plan is likely to affect 4,000 to more than 5,000 heirs of the Native Hawaiian beneficiary Class Members.

59. The positive effects of this case go beyond the \$328 million settlement fund that will be shared by the Class Members. Through our work as Class Counsel, Plaintiffs proved that disputed breaches of trust by the DHHL, and specifically waiting list delays, are actionable. We also created a method of valuing individualized damages, based on fair market rental values between application and award dates, rather than individualized proof. One of the biggest obstacles to recovery before the panel was the difficulty for *pro se* litigants, as well as those represented by counsel, to find and present such proof in the 1990s hearings. Their cases were also hampered by the State's inability to produce accurate records regarding their claims. Many claimants also found the hearing process confusing and intimidating to the point of many of them abandoning their claims. The State appeared in the remaining cases with Deputy Attorneys General opposing the claims, attacking the claimants' credibility and making evidentiary and legal arguments against them throughout, escalating what was intended to be a simple and informal process into full-bore litigation. The Fair Market Rental Value model alleviates the potentially disastrous defense asserted by Defendants that every Class Member would have to prove individual out of pocket loss.

60. As Class Counsel we have established that the Department of Hawaiian Home Lands' "waiting lists" are a direct and proximate result of DHHL's

breaches of trust and that beneficiaries should not be forced to wait for a homestead award for any period of time.

61. This case was particularly protracted and contentious, as the facts presented at trial and in pre-trial proceedings below demonstrate. The state has nearly unlimited resources for legal representation and uses its resources to delay and force settlements because claimants do not have the means to withstand such tactics. Such circumstances make litigation of civil rights cases particularly unattractive for the typical small law firm to accept. The State's dilatory tactics have been unyielding and considerable. The adverse consequences arising from the State's choice to litigate this case for decades was expressly recognized by the Hawai'i Supreme Court. 148 Haw. at 143, 468 P.3d at 157.

62. Very few attorneys are willing to undertake civil rights cases such as this, as they are unpopular, costly, are fraught with lengthy contentious delays in relief and payment of fees. The novelty and complexity of the instant case caused several attorneys to decline representation when they were approached by Native Hawaiian Legal Corporation. I am personally aware that several attorneys who once accepted individual beneficiary cases who were asked to participate in the instant case did not do so because they were not willing or able to bear the economic risk that results from the arduous opposition of the state and the resultant delays. And few attorneys will agree to appear in appeals Court where, as in the instant case, the record is two decades long, the issues were both novel and complex and the risk of

loss was substantial.

63. Few attorneys in Honolulu will represent plaintiffs in civil rights cases. To date, other than the instant case, there are no other reported cases seeking relief under the statute at issue, HRS Chapter 674. Native Hawaiian Legal Corporation approached me and Mr. Grande's firm in 1999, after it was unable to find other attorneys willing to commit to taking this case. Other attorneys declined because of the inevitable delays that result from the state's unlimited financial resources, the size of the class, an understanding that the claims were new and sui generis, and the prior history of litigation by the state in the administrative process. The state's opposition in the administrative process had turned what was intended to be a collaborative investigative process into protracted scorched-earth litigation, substantially impeding the Panel's work and preventing its completion.

64. Several solicitations were made to other lawyers, some of whom had represented claimants before the Panel. I am aware that many declined because they perceived the work as overwhelming and unlikely to succeed. Another issue that dissuaded these lawyers was the belief that state sovereign immunity would prohibit or limit any recovery, coupled with the knowledge that the plaintiffs were mostly poor and could not pay anything in the case of an adverse ruling on immunity or liability, or where damages were low or nominal. These fears of protracted complex litigation were not unfounded. The record on appeal in *Kalima II* was voluminous containing 115 volumes and tens of thousands of pages of pleadings, memoranda,

argument, and proof.

65. Nearly three additional years have elapsed since the *Kalima II* appeal concluded and more than a year has passed since settlement was achieved. During that time Class Counsel have continued to work diligently and with the utmost dedication serving the interests of the Class, without payment and without pause.

66. Attached hereto as Exhibits 8 through 11, are copies of contracts by which the State has retained private counsel to represent the State in complex class actions. The contracts were produced by Deputy Attorney General Craig Y. Iha.

67. Attached hereto as Exhibit 13 is a copy of mailed Notice #3 sent to class members who have valid claims.

68. Attached hereto as Exhibit 14 is a copy of Gov. Msg. No. 241, “Statement of Objections to [H.B.] 1675,” in 1999 House Journal, at 882

I declare the foregoing is true.

DATED: Honolulu, Hawai‘i, June 19, 2023.

/s/ Carl M. Varady

Carl M. Varady

JEFS	ORDER	DOCUMENT REFERENCE
115		Pltfs' Motion For Leave To Amend Complaint
119		State Deft's Memorandum In Opposition To Pltf's Motion For Leave To Amend Complaint
124		Pltfs' Reply To State Defts' Memorandum In Opposition To Pltfs' Motion For Leave To Amend Complaint
129		Notice Of Submission (Plaintiffs' Proposed Order)
130	Order	(Denied) Order Granting Pltffs Motion For Leave To Amend Complaint Filed On 12/4/0 (Denying Plaintiffs' Proposed Order)
131	Order	Granting Pltffs Motion For Leave To Amend Complaint Filed On 12/4/06 (Approving State's Form Of The Order)
142		Pltf's Motion For Release Of Confidential Information
145		State Defts' Memorandum In Response To Pltfs' Motion For Release Of Confidential Information
149		Pltfs' Reply Memorandum In Support Of Motion For Release Of Confidential Information

JEFS	ORDER	DOCUMENT REFERENCE
150		State Defendants' Motion To Dismiss Or For Judgment On The Pleadings
151		Plaintiffs' Motion For Class Certification On Liability For Subclasses 1 Through 4 And 6
152		[Plaintiffs'] Motion For Leave To File Second Amended Complaint
157		Plaintiffs Memorandum In Oppositoin [<i>sic</i>] To State Defendants' Motion To Dismiss Or For Judgment On The Pleadings Filed March 20, 2007
158		State Defendants' Memorandum In Opposition To Plaintiff's Motion For Class Certification On Liability For Subclasses 1 Through 4 And 6
159		State Defendants' Memorandum In Opposition To Plaintiffs' Motion For Leave To File Second Amended Complaint
162		State Defendants' Reply Memorandum In Support Of State Defendants' Motion To Dismiss Or For Judgment On The Pleadings
163		Plaintiffs' Reply Memorandum In Support Of Motion For Class Certification On Liability For Subclasses 1 Through 4 And 6
164		Plaintiff's Reply Memorandum In Support Of Motion For Leave To File Second Amended Complaint
165	Order	Granting Plaintiffs' Motion For Leave To File Second Amended Complaint Filed On March 20, 2007
166	Order	Granting Plaintiffs' Motion For Release Of Confidential Information Filed On March 1, 2007
169		Defendants' Objections To Plaintiffs' Proposed Form Of "Order Granting Plaintiffs' Motion For Class Certrification [<i>sic</i>] Of Liability For Subclasses 1 Through 4 And 6 Filed March 20, 2007
183	Order	Granting Pltfs' Motion For Class Certification On Liability For Subclasses 1-4 And 6 Filed 3/20/07
185		State Defts' Motion To Request Sua Sponte Withdrawal, Or In The Alternative, To Disqualify The Honorable Victoria S Marks From Presiding Over This Action
208	Order	Of Case Reassignments (To Judge Karen S S Ahn)
214	Order	Denying State Defts' Motion To Dismiss Or For Judgment On The Pleadings Filed 3/20/07
215		Plaintiffs' Motion For Separate Trial Of Waiting List Subclass And To Stay Discovery For Remaining Subclasses
221		State Defts' Opposition To Pltfs' Motion For Separate Trial Of Waiting List Subclass And To Stay Discovery For Remaining Subclasses Filed 8/21/07

JEFS	ORDER	DOCUMENT REFERENCE
222		Pltfs' Reply Memorandum In Support Of Motion For Separate Trial Of Waiting List Subclass And To Stay Discovery For Remaining Subclasses
231		State Defendants' Motion For Partial Summary Judgment Rejecting, At Minimum, All Claims Based Upon Legislative Appropriations To DHHL, Or, Rejecting Plaintiffs' Entire Waiting List Claim
232		Defendants' Statement Of Objections To Plaintiffs' Proposed Order Granting Plaintiffs' Motion For Separate Trial Of Waiting List Subclass And To Stay Discovery For Remaining Subclasses
235	Order	Granting In Part And Denying In Part Plaintiffs' Motion For Separate Trial Of Waiting List Subclass And To Stay Discovery For Remaining Subclasses
236		Plaintiffs' Memorandum In Opposition To Defendants' Motion For Partial Summary Judgment Rejecting, At A Minimum, All Claims Based Upon Legislative Appropriations To DHHL, Or, Rejecting Plaintiffs' Entire Waiting List Claim
238		State Deft's Reply Memo Regarding Claims Based Upon Legislative Appropriations To DHHL, & Pltfs' Entire Waiting List Claim
240		Plaintiffs' Supplemental Memorandum Regarding Legislative History And Constitutional History
241		State Defendants' Supplemental Memorandum Regarding Legislative Or Constitutional History
248		State Defendants' Notice Of Submission Of Proposed Order
258		Pltfs' Notice Of Submission Of Proposed Order
251		State Defts' Response To Pltfs' Notice Of Submission Of Proposed Order
253	Order	Granting In Part And Denying In Part State Defendants' Motion For Partial Summary Judgment Rejecting, At Minimum, All Claims Based Upon Legislative Appropriations To DHHL
289		Pltfs' Motion For Partial Summary Judgment On Liability For Ultra Vires Subclass Claims
308		State Defts' Memorandum In Opposition To Pltfs' Motion For Partial Summary Judgment On Liability For Ultra Vires Subclass Claims Filed 5/1/09
316		Plt's Reply To Defts' Opposition To Pltfs' Motion For Partial Summary Judgment On Liability For Ultra Vires Subclass Claims
328		[Defendants'] Supplemental Memorandum Regarding Property Ownership And Financial Resources Policies

JEFS	ORDER	DOCUMENT REFERENCE
332		[Defendants'] Supplemental Memorandum In Opposition To Pltfs' Motion for Summary Judgment On Liability For Ultra Vires Blood Quantum Priority System Claim
334		Defts' Motion To Dismiss With Prejudice Pltf Mahealani Wendt, Special Administrator Of The Estate Of Pearl Perry
336		State Deft's Motion For Partial Summary Judgment Rejecting All Claims Based Upon Sugar Rents, Water Licenses, Or "Non DHHL Lands"
337		State Defts' Motion For Partial Summary Judgment Rejecting, At Minimum, All Claims Based Upon Lobbying And "Prompt And Efficient" Clause, And/Or Rejecting Pltfs' Entire Waiting List Claim
338		State Defts' Motion To Dismiss Or In The Alternative For Partial Summary Judgment, And To Amend Class Certification Orders
350		Pltfs' Memorandum In Opposition To State Defts' Motion To Dismiss Or In The Alternative For Partial Summary Judgment, And To Amend Class Certification Orders [File 6/15/09]
353		Pltfs' Memorandum In Opposition To Defts' Motion To Dismiss With Prejudice Pltf Mahealani Wendt, Special Administrator Of The Estate Of Pearl Perry[Filed 6/15/09];
355		Pltfs' Memorandum In Opposition To State Defts' Motion For Partial Summary Judgment Rejecting All Claims Based On Sugar Rents, Water, Leases Or Non-DHHL Lands [Filed [Filed June 15, 2009]
356		Pltfs' Memorandum In Opposition To State Defts' Motion For Partial Summary Judgment Rejecting, At Minimum, All Claims Based Upon Lobbying And Prompt And Efficient Clause, And/Or Rejecting Pltfs Entire Waiting List Claim Filed 6/15/09
358		Defts' Reply To Pltfs' Memorandum In Opposition To Defts' Motion To Dismiss With Prejudice Pltf Mahealani Wendt, Special Administrator Of The Estate Of Pearl Perry Filed On 6/15/09
361		State Defts' Reply Memorandum In Support Of State Defts' Motion For Partial Summary Judgment Reject-Ing All Claims Based Upon Sugar Rents, Water Licenses Or Non-DHHL Lands
362		State Defts' Reply In Support Of State Defts' Motion For Partial Summary Judgment Rejecting, At Minimum, All Claims Based Upon Lobbying And Prompt And Efficient Clause, And/Or Rejecting Pltfs' Entire Waiting List Claim

JEFS	ORDER	DOCUMENT REFERENCE
363		State Defts' Reply Memorandum: Motion To Dismiss Or In The Alternative For Partial Summary Judgment And To Amend Class Certification Orders
370		Pltfs' Motion In Limine No 3 To Exclude Evidence And Argument On The Issue Of Damages
377		State Defts' Opposition To Pltfs' Motion In Limine No 3 To Exclude Evidence And Argument On The Issue Of Damages
389		State Defendants' Notice Of Submission Of Proposed Order Granting In Part And Denying In Part Plaintiffs' Motion For Partial Summary Judgment On Ultra Vires Subclass Claims, And Entering Partial [Summary Judgment In Part In Favor Of Plaintiffs And In Part In Favor Of Defendants]
404		Plaintiffs' Motion For Addition Of Waiting List Subclass Members
410	Order	Denying State Defts' Motion For Partial Summary Judgment Rejecting All Claims Based Upon Sugar Rents, Water Licenses Or Non DHHL Lands Filed On 6/15/09
411		[Plaintiffs'] Proposed Findings Of Fact And Conclusions Of Law
412		Defts' Memorandum In Opposition To Pltfs' Motion For Addition Of Waiting List Subclass Members Filed On 7/17/09
472	Order	Denying State Defts' Motion To Dismiss Or In The Alternative For Partial Summary Judgment And To Amend Class Certification Orders
473		State Defts' Notice Of Submission Of Proposed [Order Granting Plaintiffs' Motion For Addition Of Waiting List Subclass Members]
480	Order	Granting In Part And Denying In Part Pltfs' Motion For Partial Summary Judgment On Liability For Ultra Vires Subclass Claims And Granting In Part And Denying In Part Deft's Motion For Summary [Judgment]
481		State Defendants' Objections To Pltfs Proposed Order Re: Ptlfs Motion In Limine No 3
502		State Defendants' Proposed Findings Of Fact And Conclusions Of Law
503		[Plaintiffs'] Proposed Findings Of Fact And Conclusions Of Law
510		Plaintiffs Memorandum On Judge Ahn's May 22, 2008 Order On Legislative Appropriations
511	Order	Granting Pltfs' Motion For Addition Of Waiting List Subclass Members
516	Order	Granting Pltfs' Motion In Limine No 3 To Exclude Evidence & Argument On The Issue Of Damages

JEFS	ORDER	DOCUMENT REFERENCE
519		State Deft's Trial Memo Re: Court Must Reject Any Claim Based Upon Frivolous Theory That State Had A Trust Obligation To Fund DHHL
521		State Defendants' Notice Of Submission Of Proposed Order Granting In Part And Denying In Part Defendants' Motion To Dismiss With Prejudice Plaintiff Mahealani Wendt, Special Administrator Of The Estate Of Pearl Perry
525		State Defts' Motion For Judgment On Partial Findings
526	Order	Granting In Part & Denying In Part Deft's Motion To Dismiss W/Prejudice Pltf Mahealani Wendt, Special Administrator Of The Estate Of Pearl Perry
536		Pltffs' Motion To Amend Order Granting Pltffs' Motion For Class Certification On Liability For Subclasses 1-4 And 6 To Include Causation And The Fact Of Damage And To Conform Evidence To Proof
537		State Defendants' Trial Memorandum: Defendants Cannot Be Liable For Breach Of Trust And Breach Of Fiduciary Duty For Failure To Retrieve Lands From The United States, And Other Public And Private Entities That Acquired Them From The United States Prior To Statehood
538		Plaintiff's Memorandum In Opposition To State Defendants' Trial Memorandum: Defts Cannot Be Liable For Breach Of Trust And Breach Of Fiduciary Duty For Failure To Retrieve Lands From The United States, And Other Public And Private Entities That Acquired Them From The United States Prior To Statehood
539		State Defendants' Memorandum In Opposition To Plaintiffs' Motion To Amend Subclass Liability Certification Order
540		Pltfs' Reply Memorandum In Support Of Motion To Amend Order Granting Pltfs' Motion For Class Certification On Liability For Subclasses 1 To 4 And 6 To Include Causatoin [<i>sic</i>] And The Fact Of Damage And To Conform Evidence To Proof Filed September 15, 2009
542		Decision Regarding Liability And Legal Causation Following Bifurcated Trial On Aforesaid Issues
547		State Defts' Ex Parte Motion For A 30- Day Extension To File Notice Of Appeal From The Decision Re Liability & Legal Causation Following Bifurcated Trial On Aforesaid Issues Filed November 3, 2009

JEFS	ORDER	DOCUMENT REFERENCE
549-50	Order	Denying Defts' Oral Motion For 1) Leave To File Interlocutory Appeal From Decision Regarding Liability And Legal Causation Following Bifurcated Trial On Aforesaid Issues And From Order Granting Plaintiffs' Motion To Amend Order Granting Pltfs' Motion For Class Certification On Liability For Subclasses 1-4 And 6 To Include Causation And The Fact Of Damage And To Conform Evidence To Proof And 2) Stay Of Further Proceedings In The Circuit Court Pending Disposition Of The Interlocutory Appeal
551-52	Order	Denying Defendants' Ex Parte Motion For A 30-Day Extension To File Notice Of Appeal From The Decision Regarding Liability And Legal Causation Following Bifurcated Trial On Aforesaid Order Granting Plaintiffs' Motion To Amend Order Granting Plaintiffs' Motion For Class Certification On Liability For Subclasses 1 To 4 And 6 To Include Causation And The Fact Of Damage
560		Plaintiffs' Motion To Recertify Waiting List Subclass To Include The Amount Of Damage
561		Defendants Consolidated Memorandum In Opposition To Plaintiffs Motion To Recertify Waiting List Subclass To Include The Amount Of Damage And In Opposition To Plaintiffs Motion To Adopt Case Management Order No 3 To Adjudicate Damages For The Waiting List Subclass
562		Plaintiffs' Reply In Support Of Motion To Recertify Complaint And To Recertify Waiting List Subclass To Include The Amount Of Damage
563		Defts' Supplemental Consolidated Memorandum In Opposition To Pltfs' Motion To Recertify Waiting List Subclass To Include The Among [<i>sic</i>] Of Damage And In Opposition To Pltfs' Motion To Adopt Case Management Order No 3 To Adjudicate Damanges [<i>Sic</i>] For The Waiting List Subclass
566		State Defts' Statement Of Objections To Pltfs' Proposed Order Granting Pltfs' Motion To Recertify Waiting List Sublcass To Include The Amount Of Damage Filed 10/1/10
568		Pltfs' Rule 23(B) Submission Of Order Granting Pltfs' Motion To Recertify Waiting List Sublcass To Include The Amount Of Damage Filed 10/1/10
569		Plaintiffs' Motion To Determine What Model Should Be Used To Establish The Amount Of Damage Class Members Suffered As A Result Of The Breaches Committed By Defendants

JEFS	ORDER	DOCUMENT REFERENCE
570		Defendants' Motion For The Court To Adopt Defendants' Plan Identifying The Issues, And The Order Of Their Resolution, To Determine The Actual Damages, If Any, Suffered By Each Subclass Member As A Result Of Breaches
571		Defts' Opposition To Pltfs' Motino [<i>sic</i>] To Determine What Model Should Be Used To Establish The Amount Of Damage Class Members Suffered As A Result Of The Breaches Committed By Defts
572		Pltfs' Memorandum In Opposition To Defts' Motion For The Court To Adopt Defts' Plan Identifying The Issues, And The Order Of Their Resolution To Determine The Actual Damages, If Any, Suffered By Each Subclass Member As A Result Breaches Filed March 7, 2011
574		Reply Memorandum In Support Of Plaintiffs' Mtn To Determine What Model Should Be Used To Establish The Amount Of Damage Class Members Suffered As A Result Of The Breaches Committed By Defts
575		Defendants' Reply In Support Of Defts' Motion For The Court To Adopt Defts' Plan Identifying The Issues, And The Order Of Their Resolution, To Determine The Actual Damages If Any, Suffered By Each Sublclass Membe [<i>sic</i>] As A Result Of Breaches
576	Order	Granting Pltfs' Motion To Recertify Waiting List Subclass To Include The Amount Of Damage Filed 10/1/10
577	Order	Denying Without Prejudice (1) Pltfs' Mtn To Determine What Model Should Be Used To Establish The Amt Of Damage Class Members Suffered as A Result Of The Breaches Committed By Defts, Filed 3/7/11, & (2) Defts' Mtn For The Court To Adopt Defts' Plan Identifying The Issues, & The Order Of Their Resolution, To Determine The Actual Damages, If Any, Suffered By Each Subclass, Etc
578		Defts' Second Round Mtn For The Court To Adopt Defts' Model For Determining The Actual Damages, If Any, Suffered By Each Subclass Member As A Result Of Breaches
579		Pltf's Second Mtn To Determine What Model Should Be Used To Establish The Amount Of Damage Class Members Suffered As A Result Of The Braches [<i>sic</i>] Committed By Defts
582		Pltffs' Memorandum In Opposition To Defts' Second Round Motion For The Court To Adopt Defts' Model For Determining The Actual Damages, If Any, Suffered By Each Subclass Member As A Result Of Breaches (Filed 7/22/11)

JEFS	ORDER	DOCUMENT REFERENCE
583		Defts' Opposition To Pltffs' Second Motion To Determine What Model Should Be Used To Establish The Amount Of Damage Class Members Suffered As A Result Of The Breaches Committed By Defts
584		Plaintiffs' Reply Memorandum In Support Of Second Motion To Determine What Model Should Be Used To Establish The Amount Of Damage Class Members Suffered As A Result Of The Breaches Committed By Defendants
585		Defendants' Reply Memorandum In Support Of Defendants' Second Round Motion For The Court To Adopt Defendants' Model For Determining The Actual Damages, If Any, Suffered By Each Subclass
586		Defts' Objections To Pltffs' Proposed Order; Defts' Proposed Form Of Order; Track Changes Version Of Defts' Proposed Form Of Order
587-88		Pltf's Submission Of Proposed Order Granting In Part & Denying In Part 1) Pltf's Second Motion To Determine What Model Should Be Used To Establish The Amount Of Damage Class Members Suffered As A Member As A Result Of Breaches Filed 7/22/11
589-90	Order	Granting In Part And Denying In Part (1) Pltffs' Second Motion To Determine What Model Should Be Used To Establish The Amount Jof [<i>Sic</i>] Damage Class Members Suffered As A Result Of The Breaches Committed By Defendants Filed 07/22/11 And (2) Defendants' Second Round Motion For The Court To Adopt Defendants' Model For Determining The Actual Damages, If Any, Suffered By Each Subclass Member As A Result Of Breaches Filed 07/22/11
592		Defendants' Motion For Reconsideration Of The Court's 1/24/12 Order
593		Plaintiffs' Motion For Partial Summary Judgment On Financial Qualification Requirements Imposed On Beneficiaries Seeking Homestead Awards
594		Plaintiffs Motion For Partial Summary Judgment That "Deferred Status" Imposed By DHHL Is Not A Bar To Damages In This Case, Or Alternatively That DHHL Must Prove It Strictly Followed Its Regulations Before It Can Invoke "Deferred Status" As A Defense To Damages
596		Defendants' Motion For Adoption Of Specific Rules To Govern Computation Of Damages (Part 1)
597		Defendants' Motion For Adoption Of Specific Rules To Govern Computation Of Damages II; Memorandum In Support Of Motion (Part 2)

JEFS	ORDER	DOCUMENT REFERENCE
598		[Plaintiffs'] Memorandum In Opposition To Defts' Motion For Reconsideration Of The Court's 1/24/12 Order
602		Pltfs' Memorandum In Opposition To Defts' Motion For Adoption Of Specific Rules To Govern Computation Of Damages II-Defendants' Proposed Rules 10-24 Filed February 10, 2012
603		Pltfs' Memorandum In Opposition To Defedants' [<i>Sic</i>] Motion For Adoption Of Specific Rules To Govern Computation Of Damages (Part 1) Filed February 10, 2012
604		Defts' Opposition To Pltfs' Motion For Partial Summary Judgment On Financial Qualification Requirements Imposed On Beneficiaries Seeking Homestead Awards
605		Defendants' Opposition To Pltfs' Motion For Partial Summary Judgment That "Deferred Status" Imposed By DHHL Is Not A Bar To Damages In This Case, Or Alternatively That DHHL Must Prove It Strictly Followed Its Regulations Before It Can Invoke "Deferred Status" As A Defense To Damages
606		Defendants' Opposition To Plaintiffs' Motion To Direct Notice To Waiting List Subclass And Right To Opt-Out Before Court's Decision On Damages Model
607		Plaintiffs' Reply Memorandum In Support Of Pltfs' Motion For Partial Summary Judgment On Financial Qualification Requirements Imposed On Beneficiaries Seeking Homestead Awards Filed 2/10/12
608		Plaintiffs' Reply Memorandum In Support Of Pltfs' Motion To Direct Notice To Waiting List Subclass & Right To Opt-Out Before Court's Decision On Damages Model Filed 2/10/12
609		Plaintiffs' Reply Memorandum In Support Of Motion For Partial Summary Judgment That "Deferred Status" Imposed By DHHL Must Strictly Follow Its Regulations Before It Can Invoke "Deferred Status" As A Defense To Damages Filed 2/10/12
610		[Defendants'] Reply In Support Of Defts' Motion For Adoption Of Specific Rules To Govern Computation Of Damages (Part 1)
611		State Defendants' Reply Memorandum: Defts' Motion For Adoption Of Specific Rules To Govern Computation Of Damages II
618	Order	Denying Defendants' Motion For Reconsideration Of The Court's January 24, 2012 Order, Filed February 3, 2012
629		Pltfs' Supplemental Brief Regarding Reservation Of Substantive Defenses Raised In Defts' Proposed "Rules"

JEFS	ORDER	DOCUMENT REFERENCE
630		Defts' Supplemental Reply Memorandum In Support Of Defts' Motion For Adoption Of Specific Rules To Govern Computation Of Damages I And II, Filed On February 10, 2012
634		Defendant's Objection To Plaintiffs Proposed Order; Defendants' Proposed Order [(1) Denying Plaintiffs' Motion For Partial Summary Judgment On Financial Qualification Requirements Imposed On Beneficiaries Seeking Homestead Awards; (2) Denying Plaintiffs' Motion For Partial Summary Judgment That "Deferred Status" Imposed By DHHL Is Not A Bar To Damages In This Case, Or Alternatively That DHHL Must Prove It Strictly Followed Its Regulations Before It Can Invoke "Deferred Status" As A Defense To Damages; (3) Granting In Part And Denying In Part Defendants' Motion For Adoption Of Specific Rules To Govern Computation Of Damage (Part 1); And (4) Granting In Part And Denying In Part Defendants' Motion For Adoption Of Specific Rules To Govern Computation Of Damage (Part 2)]
635-36		Pltf's Errata To Objections To Defts' Proposed Order Granting In Part And Denying In Part: (1) Pltf's Motion For Partial Summary Judgment On Financial Qualification [<i>Sic</i>] Requirements Imposed On Beneficiaries Seeking Homestead Awards; Pltf's Motion For Partial Summary Judgment That "Deferred Status" Imposed By DHHL Is Not A Bar To Damages In This Case, Or Alternatively That DHHL Must Prove It Strictly Followed Its Regulations Before In Can Invoke "Deferred Status" As A Defense To Damages; Defendants' Motion For Adoption Of Specific Rules To Govern Computation Of Damage (Part1); Defts' Motion For Adoption Of Specific Rules To Govern Computation Of Damage (Part 2)
640		Defts' Objections To Pltfs' Proposed Order; Defts' Proposed Form [Order Granting In Part And Denying In Part Plaintiffs' Second Motion To Determine What Model Should Be Used To Establish The Amount Of Damage Class Members Suffered As A Result Of The Breaches Committed By Defendants [Filed July 22, 2011]; And Granting In Part And Denying In Part Defendants' Motion For Adoption Of Specific Rules To Govern Computation Of Damages (Part 1) [Filed February 10, 2012]]
641		Plaintiffs' Motion For Certification Of Damages Class, Appointment Of Special Master & Claims Administrator & For Payment Of Special Master, Claims Administrator & Related Costs

JEFS	ORDER	DOCUMENT REFERENCE
642-43	Order	(1) Denying Pltfs' Mtn For Partial Summary Judgmt On Financial Qualification Requirements Imposed On Beneficiaries Seeking Homestead Awards; (2) Denying Pltfs' Mtn For Paratial Summary Judgmt That Deferred Status Imposed By DHHL Is Not A Bar To Damages In This Case, Or Alternatively That DHHL Must Prove It Strictly Followed Its Regulations Before It Can Invoke Deferred Status As A Defense To Damages; (3)Granting In Part & Denying In Part Defts' Mtn For Adoption Of Specific Rules To Govern Computation Of Damage (Part 1); & (4) Granting In Part & Denying In Part Defts' Mtn For Adoption Of Specific Rules To Govern Computation Of Damage (Part 2)
644	Order	Granting In Part & Denying In Part Pltfs' 2nd Mtn To Determnine [<i>sic</i>] What Model Should Be Used To Establish The Amt Of Damage Class Members Suffered As A Result Of The Breaches Committed By Defts Filed 7/22/11; & Granting In Part & Denying In Part Defts' Mtn For Adoption Of Specific Rules To Govern Computation Of Damages (Part 1)Filed 2/10/12
645	Order	Denying State Defts' Mtn For Partial Summary Judgmt Rejecting, At Minimum, All Claims Based Upon Lobbying And Prompt & Efficient Clause, And/Or Rejecting Pltfs' Entire Waiting List Claim
646		State Defts' Memorandum In Opposition To Pltfs' Motion For Certification Of Damages Class, Appt Of Special Master And Claims Administrator & Related Costs Filed 1/8/13
649		Plaintiffs' Reply Memorandum In Support Of Plaintiffs' Motion For Certification Of Damages Class, Appointment Of Special Master And Claims Administrator And For Payment Of Special Master, Claims Administrator And Related Costs Filed 1/8/13
653		Plaintiffs' Motion To For Leave To File Supplemental Complaint Naming Waiting List Damages Class Representatives
654		State Defts' Memo In Opposition To Pltfs' Motion To For Leave To File Supplemental Complaint Naming Waiting List Damages Class Representatives Filed 5/31/13
657		Plaintiffs' Reply To Defts' Opposition To Pltfs' Motion For Leave To File Supplemental Complaint Naming Waiting List Damages Clas [<i>sic</i>] Representatives
658		Plaintiffs' Amended Motion To For Leave To File Supplemental Complaint Naming Waiting List Damages Class Representative

JEFS	ORDER	DOCUMENT REFERENCE
659		State Defts' Objection To Pltfs' Proposed Order Granting Pltfs' Motion For Leave To File Supple- Mental Complaint Naming Waiting List Damages Class Representatives, Filed 5-31-2013
661		State Defts' Objections To Pltfs' Proposed Order Granting In Part And Denying In Part Pltfs' Motion For Certification Of Damages Class, Appointment Of Special Master And Claims Administrator And For Payment Of Special Master, Claims Administrator And Related Costs, Filed 1-7-13
665		Pltfs' Response To State Defts' Objections To Pltfs' Proposed Order Granting Pltfs' Motion For Leave To File Supplemental Complaint Naming Waiting List Damages Class Representatives, Filed 5-31-13
666		Pltfs' Response To State Defts' Objections To Pltfs' Proposed Order Granting In Part & Denying In Part Pltfs' Motion For Certification Of Damages Class, Appt Of Special Master & Claims Administrator And For Payment Of Special Master, Claims Administrator & Related Costs, Filed 1-7-13
667		Defts' Motion In Limine To Preclude Testimony Or Other Evidence Regarding CPI Or Present Value Adjustments,
675		Plaintiffs' Memo In Opposition To Defts' Motion In Limine To Preclude Testimony Or Other Evidence Regarding CPI Or Present Value
677		Defendants' Reply Memorandum In Support Of Motion In Limine To Preclude Testimony Or Other Evidence Regarding CPI Or Present Value Adjustments
681		Plaintiffs' Trial Memorandum
682		State Defendant's Trial Memorandum
690	Order	Granting In Part And Denying In Part Pltfs' Motion For Certification Of Damages Class, Appt Of Special Master And Claims Administrator And For Payment Of Special Master, Claims Administrator And Related Costs
691	Order	Granting Plaintiffs' Motion For Leave To File Supplemental Complaint Naming Waiting List Damages Class Representatives, Filed 5/31/13
695		State Defts' Post-Trial Memo
696		Pltffs' Closing Argument
720		Pltfs' Motion To Adopt Damages Trial Plan For Resolution Of O'ahu Waiting List Subclass Damages Claims & For Appointment Of Discovery Master & Special Master

JEFS	ORDER	DOCUMENT REFERENCE
724		State Defts' Motion To Clarify Order (1) Denying Pltfs' Motion For Summary Jgmt On Financial Qualification Requirements Imposed On Beneficiaries Seeking Homestead Awards (2) Denying Pltfs' Motion For Partial Summary Jgmt That Deferred Status Imposed By DHHL Is Not A Bar To Damages In This Case, Or Alternatively That DHHL Must Prove It Strictly Followed Its; Etc
725		State Defts' Motion To Confirm That Damages For Waiting May Only Be Awarded To Persons Who Submitted Waiting Claims To The Hawaiian Home Lands Trust Individual Claims Review Panel
726		Pltfs' Motion To Clarify Deferral Status Order [Filed 2/4/13];
728		State Defts' Memorandum In Opposition To Pltfs' Mtn To Adopt Damages Trial Plan For Resolution Of Oahu Waiting List Subclass Damages Claims And For Appt Of Discovery Master & Special Master Filed On 07/07/14
729		State Defts' Opposition To Pltfs' Mtn To Clarify Deferral Status Order (Filed 02/04/13)
730		[Defendants'] Notice Of Submission Of Proposed "Trial Order" Re Trial Of 09/30/13 Through 10/03/13
731		Pltfs' Memorandum In Opposition To State Defts' Mtn To Clarify Order (1) Denying Pltfs' Mtn For Summary Judgment On Financial Qualification Requirements Imposed On Beneficiaries Seeking Homestead Awards; (2) Denying Pltfs' Mtn For Partial Summary Judgment That "Deferred Status" Imposed By DHHL Is Not A Bar To Damages In This Case Or Alternatively That DHHL Must Prove It Etc
732		Pltfs' Memorandum In Opposition To State Defts' Mtn To Confirm That Damages For Waiting Only May Be Awarded To Persons Who Submitted Waiting Claims To The Hawaiian Home Lands Individual Claims Review Panel Filed 08/22/14
734		State Defts' Memo In Reply To Pltfs' Memo In Opposition To State Defts' Mtn To Clarify Order 1) Denying Pltfs' Mtn For Summary Jdgmt On Financial Requirements Imposed On Beneficiaries
735		State Defts' Memo In Reply To Pltfs' Memo In Opposition To State Defts' Mtn To Confirm That Damages For Waiting Only May Be Awarded To Persons Who Submitted Waiting Claims To The Hawaiian Home Lands Individual Claims Review Panel Filed 8/22/14
736		Pltfs' Reply To State Defts' Memorandum In Opposition To Pltfs' Motion To Clarify Orders Filed 2/4/2013 [Filed 8/22/2014]

JEFS	ORDER	DOCUMENT REFERENCE
737		Pltfs' Reply Memo In Support Of Motion To Adopt Trial Plan For Resolution Of Oahu Waiting List Subclass Damages Claims & Appointment Of Discovery Master & Special Master Filed 7/7/2014
739	Order	Trial [Adopting "Best Fit" Model]
743		State Defts' Objections To: (A) Pltfs' Proposed Order Denying Pltfs' Motion To Clarify Order Filed 2/4/13, Filed [8/22/14] & Order Denying State Defts' Motion To Clarify Order (1) Denying Pltfs' Motion For Summary Judgment On Financial Qualification Requirements Imposed On Beneficiaries Seeking Homestead Awards; (2) Denying Pltfs' Motion For Partial Summary Etc
745	Order	Denying State Defts' Motion To Confirm That Damages For Waiting May Only Be Awarded To Persons Who Submitted Waiting Claims To The Hawaiian Home Lands Trust Individual Claims Review Panel [<i>sic</i>] Filed 08/22/2014
747	Order	Granting In Part And Denying In Part Pltfs' Motion To Adopt Damages Trial Plan For Resolution Of Oahu Waiting List Subclass Damages Claims And For Appointment Of Discovery Master And Special
750		Plaintiffs' Motion For Summary Judgment To Compute The Amount Of Damage For Waiting List Subclass O'ahu Residential Group A
753	Order	Denying Pltfs Motion To Clarify Order Filed 02/04/13 Filed 08/22/14 & Order Denying State Defts Motion To Clarify Order (1) Denying Pltfs Mtn For Summary Judgment On Financial Qualification Requirements Imposed On Beneficiaries Seeking Homestead Awards; (2) Denying Pltfs Motion For Partial Summary Judgment That Deferred Status Imposed By DHHL Is Not A Etc
771		State Defts' Memorandum In Opposition To Pltfs' Motion For Summary Judgment To Compute The Amount Of Damage For Waiting List Subclass Oahu Residential Group A Filed On 1/20/2015
782		Pltfs' Reply Memorandum In Support Of Motion For Summary Judgment To Compute The Amount Of Damage For Waiting List Subclass Oahu Residential Group A
790		Pltfs' Motion To Adopt Defts' Measure Of Fair Market Value For Neighbor Island Residential, Agricultural, & Pastoral Homesteads Based On DHHL Homestead Development Costs Computed By Defts' Expert Dr Bruce Plasch
792		Pltfs' Motion To Establish Class List

JEFS	ORDER	DOCUMENT REFERENCE
796		State Defts' Memorandum In Opposition To Pltfs' Motion To Adopt Deft's Measure Of Fair Market Value For Neighbor Island Residential, Agricultural, And Pastoral Homesteads Based On DHHL Homestead Development Costs Computed By Deft's Expert Dr Bruce Plasch Filed 8/20/2015
798		Reply Memorandum In Support Of Pltfs' Motion To Adopt Defts' Measure Of Fair Market Value For Neighbor Island Residential, Agricultural, And Pastoral Homesteads Based On DHHL Homestead Evelopment [<i>sic</i>] Costs Computed By Defts' Expert Dr Bruce Plasch
812		Pltfs' Notice Of Submission Of Proposed Order Denying Pltfs' Motion To Adopt Defts' Measure Of Fair Market Value For Neighbor Island Residential Agricultural, And Pastoral Homesteads Based On DHHL Homestead Development Costs Computed By Defts' Expert Dr Bruce Plasch Filed 8/20/15 And Adopting The Best Fit Method Computed By Defts' Expert James E Hallstrom, Jr For All, Etc.
824		Motion For Partial Summary Judgment On Native Hawaiian Blood Quantum For Waiting List Subclass Members Whose Applications Were Accepted By DHHL
828		Motion For Summary Judgment Regarding The Method For Determining Damages Rules For Inter-Island Application Transfers & Intra-Island Application Re-Designations
834		Motion For Reconsideration Of Court's Ruling That Pins 168, 1496, 1309, 530 And 1875 Refused A Homestead Award Verbally Announced On 06/30/2015
835		Motion For Sanctions And To Adopt Method For Calculating Damages In Case Where Defts Have Lost Application And Award Files
836		Pltfs' Motion To Set Commencement Date Of Homestead Lieases [<i>sic</i>] For Unimproved Or Unsubdivided Lots Of Final Subdivision Approval
837		Pltfs' Motion To Adopt The "Best Fit" Damage Method Computed By Defts' Expert James E Hallstrom, Jr For All Waiting List Subclass Agricultural And Pastoral Homestead Applicants
838		Pltfs' Motion To Exclude Proof Of Individual Out Of Pocket Loss In The Claims Administration Process As Judge Hifo Found And Concluded As A Matter Of Law That All Waiting List Subclass Members Had Actual Out Of Pocket Expense
839		Pltfs' Motion To Establish Class List And Waiting List Subclass List

JEFS	ORDER	DOCUMENT REFERENCE
844		State Defts' Cross Motion Regarding Proof Of Individual Out Of Pocket Loss In The Claims Administration Process
845		State Defts' Cross Motion Regarding The Method For Determining Damages For Interisland Transfers And Intra-Island Application Re-Designations
846		State Defts' Cross Motion To Establish Procedures And Legal Evidence For Confirming Native Hawaiian Blood Quantum Of Waiting List Damages Subclass Members
847		Pltfs' Motion To Determine Damages Period For Waiting List Subclass Members In The Even Of Transfer, Succession And Death
854		State Defts' Memorandum In Opposition To Pltfs' Motion For Reconsideration Of Court's Ruling That Pins 168, 1496, 1309, 530 And 1875 Refused A Homestead Award Verbally Announced On 06/30/2015
855		Pltfs' Memorandum In Opposition To State's Defts' Cross Motion Regarding The Method For Determining Damages For Interisland Transfers And Intra- Island Application Redesignations Filed 08/01/2016
856		State Defts' Memorandum In Opposition To Pltfs' Motion For Summary Judgment Regarding The Method For Summary Judgment Regarding The Method For Determining Damages Rules For Inter-Island Application Redesignations Filed 06/06/2016
857		State Defts' Memorandum In Opposition To Pltfs' Motion To Exclude Proof Of Individual Out Of Pocket Loss In The Claims Administration Process As Judge Hifo Found And Concluded As A Matter Of Law That All Waiting List Subclass Members Had Actual Out Of Pocket Expense Filed 07/01/2016
858		State Defts' Memorandum In Opposition To Pltfs' Motion To Set Commencement Date Of Homestead Leases For Unimproved Or Unsubdivided Lots At Final Subdivision Approval Filed 06/30/2016
859		Pltfs' Memorandum In Opposition To State Defts' Cross Motion To Establish Procedures And Legal Evidence For Confirming Native Hawaiian Blood Quantum Of Waiting List Damages Subclass Members
860		Pltf's Memorandum In Opposition To Defts' Cross Motion Regarding Proof Of Individual Out Of Pocket Loss In The Claims Administration Process Filed 08/01/2016

JEFS	ORDER	DOCUMENT REFERENCE
861		State Defts' Memorandum In Opposition To Pltfs' Motion For Partial Summary Judgment On Native Hawaiian Blood Quantum For Waiting List Subclass Members Whose Applications Were Accepted By DHHL
862		State Defts' Memorandum In Opposition To Pltfs' Motion For Sanctions And To Adopt Method For Calculating Damages In Cases Where Defts Have Lost Application And Award Files Filed June 29, 2016
864		State Defts' Memorandum In Reply To Pltfs' Memorandum In Opposition To State Defendants' [<i>sic</i>] Cross Motion Regarding The Method For Determining Damages For Interisland Transfers And Intra-Island Application Re-Designations Filed 08/01/2016
865		State Defts' Memorandum In Reply To Pltfs' Memorandum In Opposition To State Defts' Cross Motion Regarding Proof Of Individual Out Of Pocket Loss In The Claims Administration Process
866		[Plaintiffs'] Reply Memorandum In Support Of Motion For Sanctions & To Adopt Method For Calculating Damages In Cases Where Defts Have Lost Application & Award Files
867		Reply Memorandum In Support Of Pltfs' Motion To Set Commencement Date Of Homestead Leases For Inimproved [<i>sic</i>] Or Unsubdivided Lots At Final Subdivision Approval
868		[Plaintiffs'] Reply Memorandum In Support Of Motion For Reconsideration Of Court's Ruling That Pins 168, 1496, 1309, 530 & 1875 Refused A Homestead Award Verbally Announced On June 30, 2015
869		Pltfs' Reply To Defts' Memorandum In Opposition To Pltfs' Motion For Summary Judgment Regarding The Method For Determining Damages Rules For Inter-Island Application Transfers & Intra-Island Application Re-Designations
870		Pltf's Reply To Defts' Opposition Motion For Partial Summary Judgment On Native Hawaiian Blood Quantum For Waiting List Subclass Members Whose Applications Were Accepted By DHHL
871		Pltfs' Reply To Defts' Opposition To Pltfs' Motion To Exclude Proof Of Individual Out Of Pocket Loss In The Claims Administration Process As Judge Hifo Found And Concluded As A Matter Of Law That All Waiting List Subclass Members Had Actual Out Of Pocket Expense

JEFS	ORDER	DOCUMENT REFERENCE
872		State Defts' Reply To Pltf's Memorandum In Opposition To State Defts' Cross Motion To Establish Procedures And Legal Evidence For Confirming Native Hawaiian Blood Quantum Of Damages Subclass Members Whose Applications Were Accepted By DHHL
876		State Defts' Response To Pltfs' Motion To Establish Class List And Waiting List Subclass List
881		State Defts' Motion For Adoption Of Rules: (1) Barring Damages For Claimants Who Resided On Hawaiian Home Lands While Waiting For A Homestead Lease, And (2) Limiting Damages For Claimants Who Resided Together While Waiting For Homestead Leases
882		Pltfs' Motion To Adopt A Method To Compute Agricultural & Pastoral Damages
883		State Defts' Motion For Discovery Of Waiting List Damages Subclass Members To Obtain Information And Evidence Relevant To Individual Damages Calculations And Defenses
885	Order	Denying Pltfs' Motion To Adopt Defts' Measure Of Fair Market Value For Neighbor Island Residential, Agricultural, & Pastoral Homesteads Based On DHHL Homestead Developoment [<i>sic</i>] Costs Computed By Defts' Expert Dr Bruce Plasch Etc & Adopting The Best Fit Method Computed By Defts' Expert James E Hallstrom Jr For All Residential Homesteads
891		State Defts' Memorandum In Opposition To Pltfs' Motion To Determine Damages Period For Waiting List Subclass Members In The Event Of Transfer, Succession & Death Filed August 3, 2016
892		Pltfs' Memorandum In Opposition To Defts State Of Hawaii Etals Motion For An Order Requiring Substitution For Dceased [<i>sic</i>] Class Members Filed September 16, 2016
893		Pltfs' Memorandum In Opposition To State Defts' Motion For Discovery Of Waiting List Subclass Members To Obtain Information & Evidence Relevant To Individual Damages Calculations & Defenses
894		Pltfs' Opposition To State Defts' Motion For Adoption Of Rules 1) Barring Damages For Claimants Who Resided On Hawaiian Home Lands While Waiting For A Homestead Lease & 2) Limiting Damages For Claimants Who Resided Together While Waiting For Homestead Leases

JEFS	ORDER	DOCUMENT REFERENCE
895		State Defts' Memorandum In Reply To Pltfs' Opposition To State Defts' Motion For Adoption Of Rules 1) Barring Damages For Claimants Who Resided On Hawaiian Home Lands While Waiting For A Homestead Lease & 2) Limiting Damages For Claimants Who Resided Together While Waiting For Homestead Leases Etc
896		Pltfs' Reply To State Defts' Opposition To Pltfs' Motion To Determine Damages Period For Waiting List Subclass Members In The Event Of Transfer, Succession & Death
897		Defts State Of Hawaii Et Al's Reply To Pltfs' Memorandum In Opposition To Defts State Of Hawaii Et Al's Motion For Order Requiring Substitution For Deceased Class Members
898		[Defendants'] Reply To Pltfs' Memorandum In Opposition To State Defts' Motion For Discovery Of Waiting List Damages Subclass Members To Obtain Information & Evidence Relevant To Individual Damages
904		Pltf's Supplemental Opposition To State Defts' Cross Motion To Establish Procedures And Legal Evidence For Confirming Native Hawaiian Blood Quantum Of Waiting List Damages Subclass Members
905		State Deft's Supplemental Brief Re: State Defts' Cross Motion To Establish Procedures And Legal Evidence For Confirming Native Hawaiian Blood Quantum Of Waiting List Damages Subclass Members
907		Pltfs' Motion For Entry Of Judgment For Waiting List Damages Subclass And To Decertify Subclasses 2-9
908		Pltfs' Motion To Establish Claims Administration Process To Resolve All Claims
910		State Defts' Memorandum In Opposition To Pltfs' Motion To Adopt Method To Compute Argicultural [sic] And Pastoral Damages Filed 09/16/2016
911		State Defts' Memorandum In Opposition To Pltfs' Motion For Entry Of Judgment For Waiting List Damages Subclass And To Decertify Subclasses 2-9
912		State Defendants' Memorandum In Opposition To Pltfs' Motion To Establish Claims Administration Process To Resolve All Claims Filed November 9, 2016
914		Pltf's Reply Memorandum In Support Of Motion To Compute Agricultural And Pastorial [sic] Damages, Filed September 16, 2016
915		Reply Memorandum In Support Of Pltfs' Motion For Entry Of Judgment For Waiting List Damages Subclass And To Decertify Subclasses2-9 Filed 11/09/2016

JEFS	ORDER	DOCUMENT REFERENCE
916		Pltfs' Reply Memorandum In Support Of Motion To Establish Claims Administration Process To Resolve All Claims
922		State Defts' Supplemental Memorandum In Opposition To: (1) Pltfs' Motion For Entry Of Jgmt For Waiting List Damages Subclass & To Decertify Subclasses 2-9, Filed 11/9/2016
923		Pltfs' Supplemental Memorandum In Support Of Pltfs' Motion For Entry Of Judgment For Waiting List Damages Subclass And To Decertify Subclasses 2-9, Filed November 9, 2016
924		Pltfs' Supplemental Memorandum In Support Of Motion To Establish Claims Administration Process To Resolve All Claim
925		State Defts' Response To Pltfs' Supplemental Memo/Supp Of Pltfs' Motion For Entry Of Jgmt For Waiting List Damages Subclass & To Decertify Subclasses 2-9, Filed 11/9/2016
926		State Defts Memo/Opp To Pltfs Supplemental Memo/Supp Of Mtn To Establish Claims Administration Process To Resolve All Claims Filed 11/09/2016 Filed On 01/23/2017
927		Pltfs' Memorandum In Opposition To Defts' Supplemental Memorandum In Opposition To (1) Pltfs' Motion For Entry Of Judgment For Waiting List Damages Subclass And To Decertify Subclasses Filed November 9, 2016 And (2) Pltfs' Motion To Establish Claims Administration Process To Resolve All Claims, Filed November 9, 2016
940		State Defts' Objections To Pltfs' [Proposed] Order Granting In Part & Denying In Part State Defts' Cross Motion Regarding Proof Of Individual Out Of Pocket Loss In The Claims Administration Process Filed 08/01/2016
942		State Defts' Objections To Pltfs' (Proposed) Order Granting In Part And Denying In Part State Defts' M/Discovery Of Waiting List Damages Subclass Members To Obtain Information And Evidence Relevant To Individual [sic] Damages Calculations And Defenses (Filed 9/16/2016)
944		State Defts' Objections To Pltfs' (Proposed) Order Granting In Part And Denying In Part Pltfs' M/Partial Summary Judgment On Native Hawn Blood Quantum For Waiting List Subclass Members Whose Applications Were Accepted By DHHL (Filed 6/2/2016)
945		State Defts' Objections To Pltfs' (Proposed) Order Granting Pltfs' M/Establish Claims Administration Process To Resolve All Claims (Filed 11/9/2016)
946		State Defts' Objections To Pltfs' (Proposed) Order Granting In Part And Denying In Part Pltfs'm/Summary Judgment To Compute The Amount Of Damage For Waiting List Subclass Oahu Residential Subgroup A (Filed 1/20/2015)

JEFS	ORDER	DOCUMENT REFERENCE
947		State Defts' Objections To Pltfs' (Proposed) Order Granting In Part And Denying In Part Pltfs M/Reconsideration Of Court's Ruling That Pins 168, 1496, 1309, 530 And 1875 Refused A Homestead Award Verbally Andnounced [<i>sic</i>] On 6/20/2015 (Filed 6/29/2016)
948		State Defts' Objections To Pltfs' (Proposed) Order Denying Defts' State Of Hawaii Etal's Motion For Order Requiring Substitution For Deceased Class Members (Filed 9/16/2016);
949		State Defts' Objections To Pltfs' (Proposed) Order Granting In Part And Denying In Part State Defts' Cross Motion To Establish Procedures And Legal Evidence For Confirming Native Hawaiian Blood Quantum For Waiting List Damages Subclass Members (Filed 8/1/2016)
950		State Defts' Memorandum In Opposition To Pltfs' Motion To Establish Class List & Waiting List Subclass List Filed July 1, 2016
951	Order	Granting In Part And Denying In Part Pltfs' Motion To Determine Damages Period For Waiting List Subclass Members In The Event Of Transfers, Succession And Death (Filed 8-3-16)
952	Order	Denying Pltf's Motion To Exclude Proof Of Inv Out Of Pocket Loss In The Claims Administration Process As Judge Hifo Found And Concluded As A Matter Of Law That All Waiting List Subclass Members Had Actual Out Of Pocket Expenses (Filed 7-1-16)
953	Order	Denying State Defts' Cross Motion Re The Method For Determining Damages For Inter-Iland [<i>sic</i>] Transfers And Intraisland Application Re-Designations (Filed 8-1-16)
954	Order	Granting In Part And Denying In Part Pltf's Motion For Summary Judgment Regarding The Method For Determing [<i>sic</i>] Damages Rules For Inter Island Application Transfers And Intra-Island A-Island Application Re-Designations (Filed 6-6-16)
955	Order	Granting Pltf's Motion To Set Commencement Date Of Homestead Leases For Inimporved [<i>Sic</i>] Or Unsubdivided Lots At Final Subdivision Approval (Filed 6-30-16)
956	Order	Denying State Defts' Motion For Adoption Of Rules: 1) Barring Damages For Claimants Who Resided On Hawaiian Home Lands While Waiting For A Homestead Lease, And 2) Limiting Damages For Claimants Who Resided Together while [<i>Sic</i>] Waitning [<i>sic</i>] For Homestead Leases (Filed 9-16-16)

JEFS	ORDER	DOCUMENT REFERENCE
958	Order	Granting In Part And Denying In Part State Defts Cross Motion Regarding Proof Of Individual Out Of Pocket Loss In The Claims Administration Procee [<i>Sic</i>] (Filed 8-1-16)
959	Order	Denying Defts State Of Hawaii Et Al's Motion For Order Requiring Substitution For Deceased Class Members, Filed September 16, 2016
960	Order	Granting In Part & Denying In Part State Defts' Motion For Discovery Of Waiting List Damages Subclass Members To Obtain Information & Evidence Relevant To Individual Damages
961	Order	Granting In Part & Denying In Part State Defts' Cross Motion To Establish Procedures & Legal Evidence For Confirming Native Hawaiian Blood Quantum For Waiting List Damages Subclass
962	Order	Granting In Part & Denying In Part Pltfs' Motino [<i>Sic</i>] For Partial Summary Judgment On Native Hawaiian Blood Quantum For Waiting List Subclass Members Whose Applications Were Accepted By DHHL
968		State Defts' Objections To Pltfs' [Proposed] Order Granting Pltfs' Motion To Adopt A Method To Compute Agricultural & Pastoral Damages [Filed September 16, 2016]
969		Pltf's Supplemental Memorandum In Support Of Motion For Sactions [<i>sic</i>] And To Adopt Method For Calculating Damages In Cases Where Defts Have Lost Application And Award Files
972	Order	Granting Pltfs' Motion To Adopt A Method To Compute Agricultural & Pastoral Damages Etc
973	Order	Granting In Part & Denying In Part Pltfs' Motion For Reconsideration Of Court's Ruling That Pins 168, 1496, 1309, 530 & 1875 Refused A Homestead Award Verbally Announced On June 30, 2015 Etc
974	Order	Granting Pltfs' Motion To Establish Claims Administration Process To Resolve All Claims Filed November 9, 2016
975	Order	Granting In Part & Denying In Part Pltfs' Motion For Summary Judgment To Compute The Amount Of Damage For Waiting List Subclass O'ahu Residential Group A [Filed January 20, 2015)
976	Order	Granting Pltfs' Motion To Establish Class List & Waiting List Subclass List [Filed July 1, 2016]
982		State Defts' Objections To Pltfs [Proposed] Order Granting In Part & Denying In Part Pltfs' Motion For Entry Of Judgment For Waiting List Subclass & To Decertify Subclasses 2-9 Filed November 9, 2016 Etc

JEFS	ORDER	DOCUMENT REFERENCE
983	Order	Granting In Part & Denying In Part Pltfs' Motion For Sanctions & To Adopt Method For Calculating Damages In Cases Where Defts Have Lost Application & Award Files
984	Order	1) Disposing Of Pltfs Motion For Entry Of Judgment For Waiting List Damages Subclass & To Decertify Subclasses 2-9 Etc & 2) Directing Entry Of A Final Haw R Civ Proc 54(B) Final Judgment Infavor Of The Waiting List Subclass' Pltf Reps James Akiona Etal & The Members Of The Waiting List Subclass & Against State Defts
985		State Defts' Motion To Clarify Order Granting In Part & Denying In Part Pltfs Motion For Sanctions & To Adopt Method For Calculating Damages For Cases Where Defts Have Lost Application & Award Files Filed On October 30, 2017
986		State Defts Objections To Pltfs [Proposed] HRCP Rule 54(B) Final Judgment As To The Claims Of The Waiting List Subclass
987		Pltfs Memorandum In Opposition To State Defts Motion To Clarify Order Granting In Part & Denying in Part Pltfs Motion For Sanctions & To Adopt Method Of Calculating Damages For Cases Where Defts Have Lost Application & Award Files, Filed On October 30, 2017
989		State Defts Reply Memorandum In Support Of Their Motion To Clarify Order Granting In Part & Denying in Part Pltfs Motion For Sanctions & To Adopt Method For Calculating Damages For Cases Where Defts Have Lost Application & Award Files Filed On October 30, 2017
991		HRCP Rule 54(B) Final Judgment As To The Claims Of The Waiting List Subclass

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August 13, 2021

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Re: *Kalima v. State*, Civil No. 99-4771-12

Dear Carl and Tom:

This responds to Carl's March 20, 2021 letter regarding this matter. Specific responses to the issues in your letter are set forth below.

7. ***"Please confirm the timetable for retention [of a Special Deputy Attorney General] and, when available, a copy of the contract and scope of services."***

Donna Kalama of Farm Benedict Sugihara has been retained as Special Deputy Attorney General for this case. She is in the process of reviewing the file and getting up to speed on the outstanding issues. A copy of the Scope of Services from the special deputy contract with Farm Benedict Sugihara is enclosed.

1. ***"Defendants' ongoing (2018-2021) refusal to comply with Judge Crandall's July 26, 2017 order requiring the parties to meet-and-confer during the pendency of the appeal"***

We disagree that Defendants have “refused to comply” with the July 26, 2017 Order Granting Plaintiffs’ Motion to Establish Claims Administration Process to Resolve All Claims (“Admin Order”). But rather than argue about that, we suggest the parties proceed to identify and address those claimants whose claim for damages must be denied for one of the reasons set out in Section B, items 1, 2, 3, 5, 8, and 10 of the Admin Order, based on information in pleadings or discovery already in the record, or in material we previously provided to you. The parties can next address, by way of example, those individuals who do not meet Native Hawaiian Qualification or did not submit a homestead application, and so forth. See Admin Order at Section B, items 7, 4. In the meantime, our office has started and will continue to gather and update as appropriate the information needed to process damages claims for those claimants who are entitled to them.

We would also like to discuss finalizing the claim form including the cover letter to claimants explaining the current status of the case and the claims process; how long claimants will have to return the claim form; consolidation of the addresses for claimants we each have for more expeditiously mailing the form to them; the address to which claimants should return the claim form; the persons and other sources from whom claimants may seek information if they have questions about the claim form; and the many other logistics regarding the claims process we need to work out before the forms can be sent out.

2. ***“Plaintiffs’ request that Defendants update the damages matrix for residential claims and generate the damage matrix for agricultural and pastoral claims ordered by the court in its July 26, 2017, Order Granting Plaintiffs’ Motion to Adopt a Method to Compute Agricultural and Pastoral Damages [Filed September 16, 2016].”***

The July 26, 2017 Order does not require Defendants to generate a damage matrix for agricultural and pastoral claims; it describes the methods by which damages may be quantified for agricultural and pastoral waiting list claimants (in conjunction with other damage calculation rules). Our office has been working with CBRE to produce agricultural and pastoral matrices; that work, however, is currently our work product until such time as we decide that we will identify CBRE as our expert for purposes of the agricultural and pastoral damages calculations. This matter has now been turned over to the Special Deputy for further handling.

The July 26, 2017 Order does not require Defendants to update the damages matrix for residential claims and we disagree that any updating is needed.

3. ***“Confirming when attorneys’ fees and costs incurred in the most recent appeal will be paid”***

The checks for attorneys’ fees and costs have been delivered to you and Tom.

4. ***“Confirming when the State will update its prior production to the most recent mailing list for the class members”***

We plan to use DHHL’s current addresses for claimants to the extent they are applicants or lessees as well as the addresses we used to complete the 2012 mailout, as these are the only

addresses available to us. As you did in 2012, we would appreciate receiving a list of the addresses you have for the class members. Our special deputy will work with DHHL to obtain the addresses DHHL currently has.

5. *“Arrangements for the scanning and production of Hawaiian Claims Office files which were requested in Plaintiffs’ 11th Request for Production of Documents – Hawaiian Home Lands Trust Individual Claims Review Panel Files served on November 18, 2020.”*

All Claims Office files were previously made available to you for inspection. The documents have been moved to another area of the Department of Commerce and Consumer Affairs’ offices and will again be made accessible to you at a mutually convenient date and time. The files’ current location is clean, well-lit and equipped with sufficient power for you to bring staff and equipment to copy them. Please suggest dates and times for your inspection so we may make the necessary arrangements.

Separate and apart from this litigation, DCCA plans to hire a vendor to scan the claims files. We are not sure when this scanning project will happen but anticipate it will start within the next few months. We will let you know the anticipated dates once we get confirmation from DCCA.

6. *“Confirming that Defendants have made a budgetary request for payment of the costs of updating and creating the damages matrices, claims administration costs including retention and payment of both the claims administrator and Special Master.”*

Our litigation expenses are paid out of our litigation fund which is funded by general funds appropriated for that purpose, annually. Judgments and other monetary assessments and orders against the State are presented to the Legislature for appropriation unless there is authority to use already appropriated funds for that purpose. Further, other than the Stipulation and Order entered by Judge Crandall on October 22, 2015, none of the orders that reference a Special Master include details about salaries and administrative costs for the Special Master, or the Claims Administrator whom the Special Master is required to appoint. We suggest that these costs be included in cost containment discussions we very much need to have, given the State’s current fiscal situation. We also intend to raise these questions and concerns with Judge Cataldo, including the scope of the Special Master’s work, upon the Judge’s return to the civil calendar.

8. *Pending discovery requests related to Maui and Hawaii Island agricultural lease applicants.*

We suggest setting the discovery requests aside for a while for two reasons. First, our office’s and DHHL’s resources have been focused on obtaining and verifying the information needed to fill out the claim forms for the claimants. The process includes updating and verifying substantial amounts of information, information that is also sought in the discovery requests, including data regarding applications (claim form question #1 – application type, date, area or island) and leases (claim form question #3 – island, type, lease number, lease date, homestead

August 13, 2021
Page 4 of 4

area, current status of lease).¹ When the information for the claim form is confirmed, we will also be able to respond to the discovery requests. We do not yet have a time estimate for finalizing the collection of information for the claim form. As you may be aware, the information most difficult to obtain is the information needed to complete question #3, including ensuring that our information is current. We will be dedicating additional resources within our department to complete this review as quickly as possible as information comes in from DHHL. In the meantime however, there is still much work to be done by the parties with regard to other issues that should be resolved prior to sending out the claim form at least some of which are noted in my response to your item #1, above. There is efficiency to be gained in our review process by identifying those persons for whom application and lease dates are not at issue because they are precluded from obtaining damages for other reasons.

On a going forward basis, please feel free to contact Ms. Kalama directly regarding this case. Her email address is dkalama@fbslawyers.com.

Very Truly Yours,



Craig Y. Iha
Deputy Attorney General
State of Hawaii

cc: Donna H. Kalama, Esq.
Enclosure

¹ The claim form preparation process also includes organizing the information in a mergeable format so that the claim forms can be generated and produced for mailing.

October 5, 2021

Via email

Carl M. Varady, Esq.
Pauahi Tower
1003 Bishop Street, Suite 1730
Honolulu, HI 96813
carl@varadylaw.com

Thomas R. Grande, Esq.
41-859 Kalanianaʻole Highway, #271
Waimanalo, HI 96795
tgrande@grandelawoffices.com

Re: *Kalima et al., v. State, etc. et al.*, Civil No. 99-4771-12

Dear Carl and Tom:

This letter further responds to your letter of September 10, 2021.

Meet and Confer Regarding Minimum Qualifications.

We hope that the procedure proposed in my September 27, 2021 letter to you is acceptable. We really believe it will help us move forward expeditiously if you identify those Subclass claimants whom we can agree (1) submitted a homestead application on or before 6/30/88; (2) meet NHQ; and (3) were of requisite age at the time of application.

Computation of Damages

State Defendants are not trying to delay claims payment when they suggest that the parties address affirmative defenses as part of getting ready for the claims process. Clearly, there are many aspects to resolving any particular Subclass member's claim, including but not necessarily limited to jurisdictional issues, minimum qualifications, damages (including proof of fact of damages and calculations thereof), affirmative defenses, and other matters that affect the ultimate outcome of each Subclass member's entitlement to damages and amount of damages if appropriate. Trying to find ways to address and streamline the determination of those issues while *simultaneously* discussing other aspects of the claims administration process is an effort to achieve efficiency, not delay. We will, no doubt, discuss with Judge Cataldo the implications of the

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Carl M. Varady, Esq.
Thomas R. Grande, Esq.
October 5, 2021
Page 2

Supreme Court's decision for the claims process. Suffice to say for now, we respectfully disagree with your characterization of the decision's impact. Your apparent suggestion that defenses be ignored until claims are otherwise resolved is impractical and nonsensical. The special master (which is yet another matter needing clarification) cannot resolve claims or calculate damages as you assert without addressing the potential impact of the many issues, some of which are mentioned above, that bear on those calculations.

Work Plan and Related Issues

We agree that the parties and the Judge should revisit the claims administration process. We respectfully disagree with what you appear to be suggesting are the implications of the Supreme Court's decision for the claims process. But please do forward on a proposed revision of the "work plan" for our review. We are anxious to consider it and provide feedback.

Under separate cover dated September 27, 2021, and with our reservation of rights and defenses, we transmitted to you the CBRE-prepared matrices for agricultural and pastoral lots.

We continue to disagree that any matrices must be updated. We again note that there is no court order requiring the matrices be updated. I reviewed the pages of the Supreme Court's decision you cited in your letter (page 5) and could not find any statement to the effect that damages continue to the "date of judgment or award," as you contend, or that the matrices had to be updated. And there is a complete lack of court findings and a complete lack of evidence in the record demonstrating a causal connection between the breaches found (which occurred between 1959 and 1988) and the reason any eligible Subclass claimant was waiting at any point in time after the 2013 trial.¹

As Mr. Iha noted in his letter to you, the HCO claim files are available for your review and scanning or copying. As he further noted, DCCA is separately undertaking a scanning project that to our understanding will include the HCO claim files. Unfortunately (and although we have been asking for and hoping for an update with a firm date when the files will be done), at this time we do not have a time estimate to provide to you. Based on the information we received, the files will be in searchable form once scanned, and when they are done (if you have not already copied them), they will be produced to you in electronic searchable format. We will continue to ask for

¹ There is no finding or evidence connecting the found breaches (which occurred between statehood and June 30, 1988) to any individual's waiting, but we are assuming solely for purposes of this letter that if an eligible Subclass member is entitled to damages for waiting, such damages may be measured through the 2013 trial unless some other rule cuts off damages earlier. We reserve the right to argue that the cutoff date Subclass wide or individually should be earlier, as may be appropriate and consistent with other court rulings.

updates on the scanning project. In the meantime, if you would like to view the files to decide whether to copy or scan them yourselves, please let us know so we can make arrangements.²

The discovery requests for which you are demanding responses appear to be unauthorized. The time for this type of discovery has long passed, trial having taken place in 2009 and 2013. The circuit court's Claims Administration Order provided that State Defendants were to answer "*outstanding* discovery regarding claimants' application and award dates." Order at 4 (emphasis added). The requests in question were *not* outstanding at the time of the appeal; they were served after the appeal. That being said, as Mr. Iha stated in his 8/13/2021 letter, we are devoting substantial time and effort to obtain and verify the information needed to fill out the claim form for each Subclass member, including application and lease information. The process has been and continues to be very laborious. But once done, we will have and provide to you the same information you are seeking by way of the discovery requests. As Mr. Iha notes in his letter, the information most difficult to obtain and verify is the lease information. Although it remains difficult to provide a definite time frame for completion of this task, our current estimate is it will take another 60 days. While that may seem like a long time, as you know, the Subclass is large. But it will not hold us up because there are many other parts of the claims process we can focus on now, before the lease information is needed in any event. These include updating the claims process, revising the claim form and cover letter, discussing with the Judge how we will be proceeding, if a claims administrator or special master is to be utilized, retaining such individual(s), and disposing of the claims of those who clearly do not fall within the Subclass requirements, among other things.

Special Master

We are not clear what particular point you are trying to make here. We respectfully refer you back to Mr. Iha's letter about the need for discussions with the Judge about the scope of the special master's work and cost containment.

Genealogist

NHQ is not a damages-limiting issue, it is a basic qualification issue for which Plaintiffs bear the burden. "Claimants bear the burden of proving that they are entitled to receive damages." *Kalima II*, 148 Hawai'i at 152, 468 P.3d at 166. It is too early to determine whether a court-appointed genealogist will be required or helpful for the claims administration process, but State Defendants have begun to try and identify persons who may be qualified to serve in that role.

² We previously informed you by email dated September 30, 2021, that there are approximately 56 boxes of documents to be scanned. We believe that estimate was correct, but also wanted to let you know that the boxes in which the files are stored are the longer-sized bankers boxes, in case that makes a difference to you.

Carl M. Varady, Esq.
Thomas R. Grande, Esq.
October 5, 2021
Page 4

Updating Addresses

We will provide you with an updated address list based on DHHL's current records under separate cover later today.

Affirmative Defenses

In response to the particular matters you raise, and reserving State Defendants' rights to assert ineligibility of any particular Subclass member or to assert appropriate applicable defenses, we will work on generating a list regarding those Subclass members who failed to file timely claims with the Panel and a list regarding those Subclass members who died before their claim was filed (even though these issues appear to be issues of qualification/jurisdiction rather than limitation of damages).

Conclusion

Inasmuch as no special master has been appointed, it seems this would be a good time to discuss all of these issues and more with Judge Cataldo and a status is conference is in order. But in the meantime, the parties can themselves continue forward with preparation for the claims administration process.

Very truly yours,



Donna H. Kalama

cc: Craig Y. Iha, Esq.

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into by and between Named Plaintiffs, on behalf of themselves and Plaintiffs as defined in paragraph I.(25), below (collectively, “Plaintiffs”), and State Defendants. Plaintiffs and State Defendants are collectively referred to as the “Parties.”

Subject to Court approval as required by Rule 23, Hawai‘i Rules of Civil Procedure (“HRCP”), the Parties hereby stipulate and agree that, in consideration of the mutual promises, covenants, and consideration set forth in this Agreement, the above-captioned action titled *Leona Kalima, et al. v. State of Hawai‘i, et al.*, Civil No. 99-4771-12 LWC (the “Lawsuit”), shall be settled and compromised in accordance with the terms herein.

RECITALS

WHEREAS, the Lawsuit was commenced by the filing of a Complaint on December 29, 1999, which included class claims asserted on behalf of over 2,700 persons who asserted a right to sue for breach of trust pursuant to Chapter 674, Hawai‘i Revised Statutes (“HRS”), and for breach of settlement agreement under HRS Chapter 661; and

WHEREAS, the Court certified a “Right To Sue” class on August 29, 2000, and determined that the Complaint’s claims could properly be maintained against State Defendants; and

WHEREAS, State Defendants appealed the Court’s determination that claims could be maintained for breach of trust or breach of settlement agreement; and

WHEREAS, the Hawai‘i Supreme Court held that the Right to Sue class could maintain claims under HRS Chapter 674 but not under HRS Chapter 661 in an opinion titled *Kalima v. State*, 111 Hawai‘i 84, 137 P.3d 990 (2006) (“*Kalima I*”); and

WHEREAS, on remand from the Supreme Court’s *Kalima I* decision, a First Amended Complaint was filed in the Lawsuit on February 1, 2007, a Second Amended Complaint was filed on May 9, 2007, and a Supplemental Complaint for Waiting List Damages was filed on July 15, 2013; and

WHEREAS, the operative Second Amended Complaint and Supplemental Complaint are pled as a class action lawsuit and assert claims under HRS Chapter 674 on behalf of over 2,700 individuals who filed over 4,000 claims with the Panel; and

WHEREAS, the operative Second Amended Complaint, in addition to the “Right to Sue” class, identified nine (9) putative subclasses including: (i) waiting list; (ii) ultra vires qualifications; (iii) uninhabitable awards; (iv) lost applications; (v) construction defects; (vi) successor rights; (vii) loans; (viii) leases; and (ix) other claims; and

WHEREAS, through multiple orders the Court certified subclass (i), the waiting list subclass, for purposes of liability, causation, fact of damage, and the amount of damage (the “Waiting List Damages Subclass”); and

WHEREAS the Court certified the following subclasses for purposes of liability only: (ii) ultra vires qualifications (iii) uninhabitable awards; (iv) lost applications; and (vi) successor rights; and was not asked to certify the following subclasses: (v) construction defects, (vii) loans, (viii) leases, and (ix) other claims; and

WHEREAS, all Right To Sue class members are members of the Waiting List Damages Subclass; and

WHEREAS, the liability, causation and fact of damage claims of the Waiting List Damages Subclass were litigated, with the Court having found State Defendants liable for breaches of trust, and having found that the breaches of trust were the cause of Plaintiffs’ damages; and

WHEREAS, the Parties litigated and the Court ruled on how actual damages (as defined in HRS Chapter 674) for the Waiting List Damages Subclass would be determined, using a fair market rental value model, and further determined how the claims administration process would be carried out; and

WHEREAS, no liability, causation, or damages was or has been found by the Court with regard to the other eight (8) subclasses; and

WHEREAS, an HRCP Rule 54(b) final judgment was entered in favor of the Waiting List Damages Subclass and against State Defendants on January 9, 2018; and

WHEREAS, the Parties cross-appealed from the Rule 54(b) judgment, raising various issues; and

WHEREAS, in *Kalima v. State*, 148 Hawai‘i 129, 468 P.3d 143 (2020) (*Kalima II*), the Supreme Court decided, among other things, that the trial court did not err by adopting the fair market rental value damages model for the Waiting List Damages Subclass; the trial court correctly ruled that adjusting damages to present value constitutes an award of prejudgment interest in violation of HRS § 661-8; the trial court erred in ruling that damages for Waiting List Damages Subclass members do not begin to accrue until six years after receipt of a beneficiary’s homestead application; the trial court did not err in finding that State Defendants breached their trust duties by not recovering lands that were withdrawn from the Hawaiian Home Lands Trust before statehood; and the trial court did not err in establishing the waiting list subclass list such that it included individuals who were not properly part of the waiting list subclass so as to bind such individuals to the judgment in the Lawsuit; and

WHEREAS, on remand, the Parties disagreed about the effect of the *Kalima II* decision on the Court’s waiting list subclass claims administration process including how members of the

waiting list subclass prove their claims and amount of damages, if any, to which they are entitled; and

WHEREAS, on remand, the non-waiting list claims remain unresolved as to liability, causation, and damages, and the Parties disagreed about the merits of such claims; and

WHEREAS, Plaintiffs and their counsel have extensively analyzed and evaluated the merits of the Parties' respective claims and defenses in this Lawsuit, and recognize the risks of continued litigation including the possibility that if not settled now, a fair and final resolution of all claims, including non-waiting list claims, may not occur for several years, and there remain unresolved issues regarding the claims administration process for and defenses applicable to waiting list subclass claims that could negatively impact damages calculations; and

WHEREAS, prior to finalization of the Court's waiting list subclass claims administration process – with certain issues regarding the waiting list subclass claims process and all non-waiting list claims still unresolved – the Parties engaged in arms-length settlement discussions through their respective counsel with the assistance of the Honorable Gary W.B. Chang, Judge of the First Circuit Court, 14th Division, State of Hawai'i; and

WHEREAS, the Parties have reached a proposed comprehensive settlement of the Lawsuit, including all claims asserted or which could have been asserted in the Complaint, First Amended Complaint, Second Amended Complaint and the Supplemental Complaint for Waiting List Damages, including the claims of the waiting list subclass and the claims of all other certified and uncertified subclasses identified in the Second Amended Complaint and the Supplemental Complaint which to date have not been litigated or ruled upon; and

WHEREAS, the Settlement Class is defined to include the claims of all Plaintiffs, including class members of the certified and uncertified subclasses;

WHEREAS, on April 14, 2022, the Parties stipulated to the material terms of a valid and binding settlement agreement which material terms were memorialized in a signed document, approved by the Settlement Judge, titled Stipulated Terms of Settlement; and

WHEREAS, the Parties expressly contemplated that the material terms set forth in the Stipulated Terms of Settlement would be incorporated into a full settlement agreement, and this Agreement is the contemplated full settlement agreement; and

WHEREAS, Named Plaintiffs and Plaintiffs' counsel are satisfied that the terms and conditions of this Agreement are fair, reasonable, and adequate, and that this Agreement is in the best interests of all Plaintiffs;

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth in this Agreement, as well as the good and valuable consideration provided for herein, the Parties hereto agree to a full and complete settlement of the Lawsuit on the following terms and conditions:

TERMS OF AGREEMENT

I. Definitions

In addition to the definitions set forth above, the following definitions shall apply:

1. **“Agreement”** means this Settlement Agreement.
2. **“Claims Administration Process”** means the process by which the Claims Administrator determines which members of the Settlement Class are Payment Recipients, determines the amount payable to each Payment Recipient, and issues settlement payments to Payment Recipients.
3. **“Claims Administrator”** means the person responsible for implementing the Notice Plan and Claims Administration Process, subject to supervision by the Settlement Special Master and the Court.
4. **“Class Counsel”** means:
 - a. Carl M. Varady, Esq.
Law Office of Carl M. Varady
Pauahi Tower, Suite 1730
1003 Bishop Street
Honolulu, HI 96813
 - b. Thomas R. Grande, Esq.
Grande Law Offices
41-859 Kalaniana'ole Highway, #271
Waimanalo, HI 96795

Class Counsel are sometimes referred to as **Plaintiffs’ counsel**.

5. **“Class Notice”** means the forms of notice approved and required by the Court to be provided to Settlement Class Members pursuant to the Notice Plan.
6. **“Class Settlement Amount”** means exactly three hundred twenty-eight million and no/100 dollars (\$328,000,000.00).
7. **“Complaint”** means the Complaint, First Amended Complaint, Second Amended Complaint and Supplemental Complaint filed in this Lawsuit, individually and collectively (unless the context otherwise requires), and all claims which arose out of the facts alleged in the Lawsuit or which were or could have been brought in the Lawsuit.
8. **“Court”** means the Circuit Court of the First Circuit, State of Hawai‘i. The Court is sometimes referred to as the **trial court**.

9. **“Day”** means a calendar day.
10. **“DHHL”** means the Department of Hawaiian Home Lands, State of Hawai‘i.
11. **“Fairness Hearing”** means the hearing on the Motion for Final Approval of Settlement.
12. **“Final Approval”** means the occurrence of the following:
Following the Fairness Hearing, the Court has entered a final appealable order or judgment approving the Settlement, and
 - i. The time for appellate review and review by application for certiorari has expired, and no notice of appeal has been filed; or
 - ii. If appellate review or review by application for certiorari is sought, after any and all avenues of appellate review have been exhausted, the order approving settlement has not been modified, amended, or reversed in any way.
13. **“Legislation Enactment Deadline”** means July 13, 2022, or such later date as the Parties may agree to in writing.
14. **“Motion for Final Approval of Settlement”** means the motion to be filed by Plaintiffs seeking the Court’s final approval of the Settlement which motion shall be heard at the Fairness Hearing.
15. **“Motion for Preliminary Approval of Settlement”** means the motion to be filed by Plaintiffs seeking the Court’s preliminary approval of the Settlement.
16. **“Named Plaintiffs”** means the Class Representatives representing the Class named in the Complaint filed in the Lawsuit on December 29, 1999, the Second Amended Complaint filed in the Lawsuit on May 9, 2007, and the Supplemental Complaint for Waiting List Damages filed in the Lawsuit on July 15, 2013, except those individuals who have been removed as named plaintiffs or whose claims have been dismissed, and those named individuals who have died. In the latter case, Named Plaintiff refers to the authorized representative of an individual who has died if the authorized representative has been properly substituted in the Lawsuit as a named plaintiff in place of the deceased individual.
17. **“Net Settlement Amount”** means the amount available for settlement payments to Payment Recipients pursuant to the Payment Distribution Plan.
18. **“Notice Plan”** means the plan by which Settlement Class Members are to be notified of the Settlement and their options under the Settlement.
19. **“Panel”** means the Hawaiian Home Lands Trust Individual Claims Review Panel established by HRS Chapter 674.

20. **“Parties”** means Plaintiffs and State Defendants.
21. **“Payment Distribution Plan”** means, the plan that requires the Claims Administrator to pay the Net Settlement Amount in the form of settlement payments to Payment Recipients after Final Approval.
22. **“Payment of Plaintiffs’ Attorneys Fees”** means the amount the Court determines is payable to Plaintiffs or Plaintiffs’ attorneys as and for attorneys’ fees, as described in Section IV(C), below.
23. **“Payments to Plaintiffs”** means the distribution of the Net Settlement Amount to Payment Recipients in accordance with the Payment Distribution Plan.
24. **“Payment Recipients”** means those Settlement Class Members described in Section VII(C), below.
25. **“Plaintiffs”** means, collectively, (i) all Named Plaintiffs, (ii) all individuals who are members of any class or subclass certified during the course of the Lawsuit, (iii) all individuals who are putative members of any putative class or subclass identified but not certified during the course of the Lawsuit; and (iv) all individuals whose claims were or could have been brought pursuant to the Complaint.
26. **“Preliminary Approval Order”** means an order entered by the Court following the hearing on the Motion for Preliminary Approval of Settlement preliminarily approving the terms set forth in this Agreement and approving the Notice Plan and the proposed forms of Class Notice.
27. **“Release of Claims”** means the release of claims described and defined in Section V, below.
28. **“Releasees”** means the State Defendants, i.e., the State of Hawai‘i, the Department of Hawaiian Home Lands, the Hawaiian Home Lands Trust Individual Claims Review Panel, David Y. Ige, in his official capacity as Governor of the State of Hawai‘i, all State of Hawai‘i agencies, directors, officers, agents, employees, representatives, insurers, attorneys, administrators, and all other persons acting on behalf of the State.
29. **“Settlement”** means the compromise and settlement of the Lawsuit on the terms and conditions set forth in this Agreement.
30. **“Settlement Class”** means the class of persons defined in Section II, below.
31. **“Settlement Class Members”** means the members of the Settlement Class.
32. **“Settlement Fund”** means the account established with the Court into which the Class Settlement Amount is to be deposited as described in Section IV(A), below.

33. **“Settlement Payments”** or **“settlement payments”** means the individual payments to Payment Recipients made pursuant to the Payment Distribution Plan.
34. **“State Defendants”** means, collectively, the State of Hawai‘i, State of Hawai‘i Department of Hawaiian Home Lands, State of Hawai‘i Hawaiian Home Lands Trust Individual Claims Review Panel, and David Y. Ige, in his official capacity as Governor of the State of Hawai‘i. “State Defendants” does not include Doe Defendants, none of whom were identified during the course of the Lawsuit.
35. **“Stipulation Regarding Settlement Claims Administration Costs”** means the document of that title attached to this Agreement as Exhibit “A”.

II. Settlement Class

The Hawai‘i Supreme Court in *Kalima v. State*, 148 Hawai‘i 129, 151-152 (2020) (*Kalima II*), held that the trial court’s certification of a litigation class consisting of all persons who filed a claim with the Panel was proper, “in order to bind all persons who could pursue a claim as a waitlist member to the judgment in this case.” *Id.* at 151. The Supreme Court further recognized that:

HRCF Rule 23(c)(3) (2011) provides that a judgment can only bind and preclude persons who are members of a class. As Plaintiffs note, “exclusion of these individuals from the class adjudication process means that they would be free to pursue their own claims against Defendants and that there would be no res judicata effect on these claims because they were not litigated and reduced to judgment.” Therefore, although some of these class members may not have viable claims, it is appropriate to include them in the class in order to preclude them from attempting to relitigate their non-viable claims.

Id. at 152. The Parties intend that this Settlement shall similarly bind all persons who filed a claim with the Panel, and that those persons without viable claims, including without limitation those who settled their claims or who opt out, shall not be entitled to a settlement payment.

The Parties intend that this Settlement shall bind *all* Plaintiffs as that term is defined in Section I.(25), above. Thus, at the conclusion of this Settlement, the claims of all Plaintiffs which were or which could have been brought under the Complaint will have been disposed of via the Settlement either through the Release of Claims provided for below in Section V (and the subsequent dismissal of said claims) or by the opting out of individual Settlement Class Members in accordance with the Opt-Out Process set forth in Section VI(D), below.

For purposes of this Settlement, there shall be one class called the Settlement Class, which shall be defined as:

All persons who filed claims with the Hawaiian Home Lands Trust Individual Claims Review Panel on or before August 31, 1995.

The definition is coextensive with the definition of “Plaintiffs” and includes all persons listed on the “Class and Waiting List Subclass List” attached as Exhibit 1 to Plaintiffs’ Motion to Establish Class List and Waiting List Subclass List filed July 1, 2016, and which was adopted by the Court by the Order Granting Plaintiffs’ Motion to Establish Class List and Waiting List Subclass List [Filed July 1, 2016], filed July 26, 2017.

All Settlement Class Members are bound by the terms of this Agreement. However, not all Settlement Class Members are entitled to a settlement payment under this Settlement. To qualify for a payment under this Settlement, a Settlement Class Member must: (i) be a member of the Settlement Class, and (ii) meet the requirements of a Payment Recipient as described in Section VII.(C), below.

Plaintiffs shall take all steps reasonably necessary to ensure that this Settlement and the Release of Claims provided for herein shall be binding on all Settlement Class Members (meaning all Plaintiffs) including those Settlement Class Members who do not qualify for a settlement payment, including but not limited to: (i) providing class notice to all Settlement Class Members; (ii) providing all Settlement Class Members with adequate opportunity to exclude themselves from the Settlement or object to the Settlement; and (iii) obtaining all Court orders necessary to effectuate such binding effect on all Settlement Class Members.

Subject to Court approval, the representatives of the Settlement Class shall be Leona Kalima, Diane Boner, and Raynette Nalani Ah Chong, Special Administrator of the Estate of Joseph Ching. Class Counsel shall, in the Motion for Preliminary Approval of Settlement, seek the Court’s appointment of these individuals to be the representatives of the Settlement Class under HRCF Rule 23.

Attorneys Thomas R. Grande and Carl M. Varady shall, in the Motion for Preliminary Approval of Settlement, request that the Court appoint them as class counsel pursuant to HRCF Rule 23 to represent all Plaintiffs, including the Settlement Class, for purposes of this Settlement. This Settlement is contingent upon the Court’s appointment of qualified class counsel to represent the Plaintiffs, including the Settlement Class.

The Parties and Class Counsel agree that, if approved, certification of the Settlement Class is a conditional certification for settlement purposes only, and if for any reason the Court does not grant final approval of the Settlement, or if for any other reason the Settlement does not become effective, the certification of the Settlement Class for settlement purposes shall be deemed null and void without further action by the Court or any of the Parties, each Party shall retain their respective rights and shall be returned to their relative legal positions *status quo ante* as they existed prior to execution of this Agreement, and neither this Agreement nor any of its accompanying exhibits or orders entered by the Court in connection with this Agreement shall be admissible or used for any purpose in the Lawsuit.

III. Legislation

The Parties acknowledge and agree that this Agreement is contingent on the enactment of legislation by the Hawai’i Legislature to authorize the appropriation of monies to fund the Class

Settlement Amount. The Parties agree that enactment of this legislation is material and essential to this Agreement and that if such legislation is not enacted into law by the Legislation Enactment Deadline, unless such date is mutually agreed by the Parties in writing to be extended, the Settlement shall automatically become null and void and the Lawsuit shall proceed.

IV. Payment by the State of Hawai'i to Fund the Settlement

A. Deposit of Class Settlement Amount in Court's Settlement Fund

In consideration of, and subject to, the terms and conditions of this Agreement, and subject to Court approval, not more than thirty (30) days after the required legislative appropriation(s) becomes effective, the State of Hawai'i shall deposit the Class Settlement Amount into the Settlement Fund.

Other than the Class Settlement Amount, State Defendants owe no other sums to Plaintiffs or Plaintiffs' attorneys whatsoever.

No distributions from the Class Settlement Amount shall be made until the conditions precedent to distributing said funds under this Agreement have been satisfied.

Notwithstanding the foregoing paragraph, and subject to the Court's approval and entry of the Stipulation Regarding Settlement Claims Administration Costs attached as Exhibit "A" hereto, the Claims Administrator may be paid during the interim between when the legislative appropriation becomes effective and Final Approval. Costs paid under this paragraph shall not exceed One Million and no/100 dollars (\$1,000,000.00), or another amount agreed to by the Parties in writing, or as may be ordered by the Court. The costs shall be paid out of the moneys deposited into the Settlement Fund as directed by the Settlement Special Master. Any amount paid under this paragraph shall be credited to the State as set forth in the Stipulation Regarding Settlement Claims Administration Costs.

B. Authorized Uses of Class Settlement Amount

The Class Settlement Amount shall be used to pay for only the following:

1. Payments to Plaintiffs in accordance with the Court's approved Payment Distribution Plan.
2. Costs necessary to implement the Settlement including, but not limited to, reasonable and necessary costs to:
 - a. Retain a Settlement Special Master and Probate Special Master subject to Court appointment;
 - b. Retain a qualified Claims Administrator subject to Court appointment;
 - c. Implement the Notice Plan;
 - d. Implement the Claims Administration Process including the Payment Distribution Plan;

- e. Subject to Court approval, retain such additional qualified professionals the Court, the Special Masters, or the Claims Administrator may deem necessary to efficiently and effectively implement the Claims Administration Process.
3. Reasonable and necessary costs related to probate proceedings for deceased Settlement Class Members.
4. Payment of Plaintiffs' Attorneys' Fees in accordance with Section IV(C), below.

C. Payment of Plaintiffs' Attorneys' Fees

The amount of the Payment of Plaintiffs' Attorneys' Fees shall be determined as follows:

1. On proper notice and motion to be heard at the Fairness Hearing, Plaintiffs or Plaintiffs' attorneys may request that the Payment of Plaintiffs' Attorneys' Fees be paid *from the Class Settlement Amount* based on contingent fee, HRS Chapter 674, or any other theory, in an amount not to exceed forty million and no/100 dollars (\$40,000,000.00). The amount to be paid shall be determined by the Court except that Plaintiffs' attorneys shall not accept any fees in excess of \$40,000,000.00. Any amounts awarded in excess of \$40,000,000.00, if any, shall remain in the Class Settlement Amount to be paid to Payment Recipients pursuant to the Payment Distribution Plan.
2. State Defendants shall not oppose Plaintiffs' or Plaintiffs' attorneys' request for Payment of Plaintiffs' Attorneys' Fees in an amount less than or equal to twenty-eight million and no/100 dollars (\$28,000,000.00).
3. Class Counsel and State Defendants waive any appeal of the Court's award of Payment of Plaintiffs' Attorneys' Fees as set forth in this Section IV.(C).
4. Plaintiffs and Plaintiffs' attorneys waive and will not seek any additional amounts for payment of costs incurred in and for the Lawsuit. This limitation does not apply to expenditures authorized under Section IV.(B)(1) – (3).
5. The Court shall have sole discretion to decide the amount to be awarded as Payment of Plaintiffs' Attorneys' Fees at the Fairness Hearing.
6. Plaintiffs or Plaintiffs' attorneys shall give notice of the intent to seek attorneys' fees, including the amount they are permitted to seek pursuant to this Section IV.(C), in the Motion for Preliminary Approval of Settlement and in the Class Notice provided to Plaintiffs so that Plaintiffs may have an opportunity to object to the requested fee award prior to the Fairness Hearing.

Thirty-one days after Final Approval, the Claims Administrator shall disburse the amount approved by the Court for Payment of Plaintiffs' Attorneys' Fees from the Class Settlement Amount.

Class Counsel represent that there are no outstanding attorney liens to which the Payment of Plaintiffs' Attorneys' Fees or any portion of the Class Settlement Amount are subject and shall defend and indemnify State Defendants against any such liens or claims if any person(s) enforces or attempts to enforce such liens or claims against said funds.

D. Payments to be Returned to the State if Settlement is Not Approved

In the event there is no Final Approval of the Settlement, the funds remaining on deposit in the Settlement Fund shall be returned to the State of Hawai'i, and any payments made from the funds shall be credited to any future administrative costs the State may be ordered to pay in the Lawsuit as set forth in the Stipulation Regarding Settlement Claims Administration Costs.

V. Release of Claims

In consideration for the payment of the Class Settlement Amount, Plaintiffs, for themselves, their heirs, successors, and assignees, will, upon Final Approval, release all Releasees from all claims arising out of the facts alleged in the Lawsuit, all claims that were asserted or could have been asserted before the Panel, and all claims that were asserted or could have been asserted in this Lawsuit (the "Release of Claims").

The Release of Claims shall be effective at the moment of, and be conditioned upon Final Approval of the Settlement, as defined in section I, above, without further action by the Parties.

VI. Court Approval of Settlement; Notice Plan; Procedures for Settlement Class Members to Exclude Themselves From (Opt Out of) or Object to Settlement

A. Motion for Preliminary Approval of Settlement

Plaintiffs shall file the Motion for Preliminary Approval of Settlement at such time as the Court may direct. The motion shall include a summary of the terms of this Settlement, a description of the proposed Payment Distribution Plan, notice of an intent to seek the Payment of Plaintiffs' Attorneys' Fees including the amount allowed by this Settlement, a request for approval of the Notice Plan, a request for approval of the specific form of Class Notice to be sent to Settlement Class Members, information on how Settlement Class Members may exclude themselves from the Settlement (opt-out) or object to the Settlement or the Payment of Plaintiffs' Attorneys' Fees, and shall include a complete copy of this Agreement and its exhibits. The motion shall also request certification of the Settlement Class, appointment of the Settlement Class Representatives and Class Counsel, and shall request that the Court schedule a Fairness Hearing.

B. Notice Plan

The Claims Administrator shall implement the Notice Plan approved by the Court. The Notice Plan shall, to the extent practicable, be designed to provide individual notice to Settlement Class Members or their authorized representatives or successors.

Prior to mailing the approved Class Notices, the Claims Administrator shall process the Settlement Class List against the National Change of Address Database maintained by the United States Postal Service ("USPS").

C. Content of Class Notice

Class Notices or other written communications sent to Settlement Class Members shall first be approved by the Court.

D. Opt-Out Process

Plaintiffs not wanting to participate in this Settlement and not wanting to release claims pursuant to this Settlement shall submit a valid and timely Opt-Out Letter.

To be valid, the Opt-Out Letter shall contain a statement which clearly conveys a request to be excluded from and not participate in the Settlement, the individual's full name, mailing address, and telephone number, and must be signed and dated. To be timely, an Opt-Out Letter must be postmarked by the date approved by the Court and set forth in the Class Notice. Opt-Out Letters shall be sent to the Claims Administrator.

A Plaintiff who submits a valid and timely Opt-Out Letter shall not be entitled to a settlement payment and forever waives their right to receive a share of the Class Settlement Amount.

1. Individuals Who Settled Their Claims

Individuals who settled their claims at the Panel level or directly with DHHL do not have valid claims in this Lawsuit and are not eligible for a settlement payment under this Settlement. Inasmuch as the claims they submitted to the Panel have already been dismissed with prejudice, individuals who settled their claims at the Panel level also cannot opt out and pursue their claims in a separate lawsuit. These individuals will be provided with a form of Class Notice or other communication that informs them they have no right to a settlement payment. *See also* Section VII.(C), below.

2. Individuals Who Previously Opted Out of the Lawsuit

Individuals who previously opted out of this Lawsuit in 2007 or 2012 do not have valid claims in this Lawsuit and are not eligible for a settlement payment under this Settlement. Inasmuch as the previous decision to opt out in 2007 or 2012 meant that these individuals were no longer part of this Lawsuit as of the opt out date, such individuals cannot now opt out and

pursue their claims in a separate lawsuit. These individuals will be provided with a form of Class Notice or other communication that informs them they have no right to a settlement payment. *See also* Section VII.(C), below.

E. Objections to Settlement or to Payment of Plaintiffs' Attorneys' Fees

A Settlement Class Member who wishes to object to this Agreement, the Settlement, or the Payment of Plaintiffs' Attorneys' Fees must timely file with the Clerk of the Court and serve on counsel for the Parties a statement of their objections and whether the Settlement Class Member intends to appear at the Fairness Hearing.

Any Settlement Class Member may appear at the Fairness Hearing to object to any aspect of this Agreement, the Settlement, or Plaintiffs' Request for Attorneys' Fees. Settlement Class Members may act either on their own or through counsel employed at their own expense.

To be considered timely, a Settlement Class Member's objections must be postmarked on or before the date approved by the Court and set forth in the Class Notice.

F. Fairness Hearing

Plaintiffs shall file a Motion for Final Approval of Settlement at such time as the Court may direct which shall include a summary of the Claims Administrator's implementation of the Notice Plan and a report on requests to opt out of and objections to the Settlement.

The Fairness Hearing is to be held on a date determined by the Court in consultation with the Parties. At the Fairness Hearing, Class Counsel will request that the Court:

1. Consider any objections by Plaintiffs, including Settlement Class Members;
2. Give final approval to the Settlement as fair, reasonable, and adequate, and binding on those Settlement Class Members who did not validly and timely submit Opt-Out Letters;
3. Determine the amount of the Payment of Plaintiffs' Attorneys' Fees;
4. Determine the Net Settlement Amount to be distributed to Payment Recipients, including for distribution in probate proceedings to be conducted after Final Approval.

G. Effect of Failure to Grant Final Approval

In the event the Settlement and this Agreement are not granted Final Approval, they shall be deemed null, void, and unenforceable and shall not be used or admissible in any subsequent proceedings against State Defendants or other agencies, officials, or employees of the State of Hawai'i either in this Court or in any other judicial, arbitral, administrative, investigative, or other forum; and the Lawsuit shall recommence. In the event the Settlement and this Agreement are not approved by the Court or Final Approval is otherwise not obtained, State Defendants will not be deemed to have waived, limited, or affected in any way their defenses to the Lawsuit.

VII. Claims Administration Process

The Claims Administration Process shall be implemented as approved by the Court.

A. Role and Responsibilities of the Claims Administrator

The Claims Administrator shall have primary responsibility for implementing the Notice Plan and the Claims Administration Process approved by the Court.

Under the supervision of the Settlement Special Master, the Claims Administrator shall submit regular progress reports to the Parties and the Court regarding all disbursements including settlement payments to Payment Recipients.

B. Role and Responsibilities of the Settlement Special Master

The Settlement Special Master shall be appointed by the Court to supervise the Claims Administration Process and the Claims Administrator. Subject to Court approval, the Settlement Special Master may expend all reasonable and necessary funds in fulfillment of her/his responsibilities as follows:

1. Work with Class Counsel and the Claims Administrator to implement the Claims Administration Process, including:
 - a. Notice and outreach to Settlement Class Members;
 - b. Settlement payment computation; and
 - c. The Payment Distribution Plan.
2. Supervise and coordinate disbursement of monies for Claims Administration expenses.
3. Supervise and coordinate issuance of settlement payments to living Settlement Class Members.
4. Coordinate with the Probate Special Master/Special Administrator to implement a probate plan if one is developed and approved by the Court, and supervise and coordinate issuance of settlement payments to deceased Settlement Class Members' estates.
5. Review the Claims Administrator's determination that Settlement Class Members do not qualify for participation in the settlement and provide appropriate notice to such class members and the Court.
6. Make periodic and final reports to the Court as ordered or as needed.
7. Perform such other duties necessary to administer the Claims Administration Process as requested or as the Court may order.

C. Payment Recipients; Certain Settlement Class Members Not Entitled to Settlement Payments

All Settlement Class Members are Payment Recipients except that the following individuals shall *not* be entitled to a settlement payment under this Agreement:

1. Individuals who did not file a claim with the Panel on or before August 31, 1995.
2. Individuals who filed a timely claim with the Panel but the claim did not assert an individual breach of trust which occurred between August 21, 1959, and June 30, 1988.
3. Individuals who filed a timely claim with the Panel but the claim asserted an individual breach of trust that occurred after June 30, 1988.
4. Individuals who filed a timely claim with the Panel but the claim was not a valid HRS Chapter 674 claim.
5. Individuals who filed a timely claim with the Panel but settled their claim.
6. Individuals who opted out of the Lawsuit in response to the 2007 class notice.
7. Individuals who opted out of the Lawsuit in response to the 2012 class notice.
8. Individuals who opt out of the Settlement Class and this Settlement by sending a valid and timely Opt-Out Letter to the Claims Administrator, as described above.

The Parties are not aware of any separate lawsuits filed by individuals who opted out of this Lawsuit in 2007 or 2012.

D. Payment Distribution Plan

Thirty-one days after Final Approval, the Claims Administrator shall issue settlement payments from the Net Settlement Amount to each Payment Recipient via check in accordance with the Payment Distribution Plan approved by the Court. All settlement payment checks issued to Settlement Class Members will expire and become void 120 days after they are issued.

Payment to each Payment Recipient is deemed made at the moment the settlement payment check for a Payment Recipient is issued, i.e., prepared and signed by the Claims Administrator, payable to the Payment Recipient and mailed to the Payment Recipient's last known address. The completion of this Settlement is not contingent upon Payment Recipients negotiating their respective payment checks. Settlement Class Members who do not opt out are bound by this Agreement, including the Release of Claims, even if some Payment Recipients do not negotiate their checks for any reason.

Interest on any funds held pending issuance of settlement payments shall be used to pay for claims administration expenses.

E. Disposition of Residual Funds

Any remainder of the Class Settlement Amount that cannot be distributed after all authorized payments are made in accordance with this Agreement and applicable orders of the Court shall be paid to the Department of Hawaiian Home Lands loan fund established by section 213(c) of the Hawaiian Homes Commission Act and used exclusively for the purposes enumerated in section 214(a) of the Hawaiian Homes Commission Act.

F. Court Approval Required

Class Counsel shall seek the Court's approval of the Claims Administration Process, including the Payment Distribution Plan, referenced in this Section VII.

VIII. Other Responsibilities of the Parties Under this Agreement

The Parties shall take the following actions in furtherance of the Settlement herein:

A. Defendants shall:

1. To the extent practicable, and for information not already provided to Class Counsel during the litigation of this Lawsuit, provide Plaintiffs and the Claims Administrator information in their possession reasonably necessary to advance the resolution of the payment of claims, including, without limitation, known original lease application dates and award dates for all applications and awards to Settlement Class Members, including known accelerated and undivided award effective dates.
2. To the extent practicable, but not more than every two weeks unless otherwise ordered by the Court, and for information not already provided to Class Counsel during the litigation of this Lawsuit, have DHHL provide Plaintiffs and the Claims Administrator regular updates of Settlement Class Members' addresses and telephone numbers and the names of deceased Plaintiffs' successors to the extent such information is known or becomes known to DHHL. The foregoing is subject to first obtaining a protective order from the Court as to the release of any information deemed confidential under section 10-2-3(d), Hawai'i Administrative Rules.
3. Support Plaintiffs' or the Claims Administrator's requests to the Court for an order under section 338-18, Hawai'i Revised Statutes, or other state law in seeking records from the Hawai'i Department of Health or other agency to provide Plaintiffs and the Claims Administrator information reasonable and

necessary to advance the resolution of the payment of claims, including maintaining and updating the list of all deceased class members.

4. Not oppose Plaintiffs' application to the Court for:
 - a. preliminary approval of the Settlement;
 - b. certification of the Settlement Class;
 - c. reappointment of Class Counsel as counsel for the Settlement Class;
 - d. appointment of the Settlement Class Representative(s);
 - e. retention of a Settlement Special Master;
 - f. retention of a Claims Administrator;
 - g. approval of the Notice Plan; and
 - h. scheduling of the Fairness Hearing.

Defendants' obligations under this paragraph are subject to Defendants being provided a reasonable opportunity to review, comment on, and concur with said applications prior to Plaintiffs' filing of the applications, which non-opposition shall not be unreasonably withheld, conditioned, or delayed.

5. Not oppose Plaintiffs' application to the Court for:
 - a. final approval of the Settlement;
 - b. final approval of the Payment Distribution Plan; and
 - c. Payment of Plaintiffs' Attorneys' Fees to Plaintiffs' counsel except as set forth in section VII(C), above.

Defendants' obligations under this paragraph are subject to Defendants being provided a reasonable opportunity to review, comment on, and concur with said applications prior to Plaintiffs' filing of the applications, which non-opposition shall not be unreasonably withheld, conditioned, or delayed.

B. Plaintiffs shall:

1. Prepare and submit all documents necessary to seek approval by the Court of the Settlement under HRCF Rule 23, including, but not limited to, submission of the Notice Plan to the Court for its review and approval.
2. Submit the Payment Distribution Plan to the Court for its review and approval.
3. Subject to Court appointment, retain the Settlement Special Master, Probate Special Master and Claims Administrator as provided for in this Agreement.

C. The Parties shall:

1. Cooperate fully and take all actions reasonably necessary to implement and achieve this Settlement, including actions reasonably necessary to conclude the Claims Administration Process.
2. If they receive original Opt-Out Letters or objections that should have been submitted to the Claims Administrator or the Court, as the case may be, promptly submit said communications to the proper person as contemplated by this Agreement with copies to opposing counsel.

IX. Stipulation for Dismissal with Prejudice; Continuing Court Oversight

A. Stipulation for Dismissal With Prejudice

Within thirty (30) days after the Final Approval and Release of Claims become effective, payment checks are issued to Payment Recipients, and Payment of Plaintiffs' Attorneys' Fees is disbursed to Class Counsel as provided herein, the Parties shall stipulate to a dismissal with prejudice of the Complaint and the Lawsuit in a form and substance approved by the Court.

B. Continuing Court Oversight

The Parties shall continue to confer with the Court at routine intervals set by the Court to assure the fulfillment of the Settlement and this Settlement Agreement. The Court shall retain jurisdiction over this matter to enforce the terms of the Settlement, including ensuring that payments are made in accordance with the Court-approved Payment Distribution Plan. Such jurisdiction shall terminate upon final distribution of all funds in the Court account, including payment of residual funds, if any, pursuant to paragraph VII(E), or 60 days after the submission of the final report by the Special Master, whichever is later.

X. Additional Provisions

1. **No Effect on Waiting List, DHHL Decision Making.** This Settlement does not affect the present status or qualification of any Plaintiff/Settlement Class Member on any waiting list maintained by DHHL or qualifications to receive a lease under the Hawaiian Homes Commission Act. Decisions or findings by the Claims Administrator shall not be binding on DHHL or the Hawaiian Homes Commission except for purposes of this Settlement.
2. **No Third-Party Beneficiaries.** This Agreement shall not be construed to create rights in, or to grant remedies to, or delegate any duty, obligation or undertaking established herein to any third party as a beneficiary of this Agreement.
3. The rule of construction that an agreement is to be construed against the drafting party is not to be applied in interpreting this Agreement. The Parties acknowledge that they have read this Agreement, that they understand its meaning and intent, that

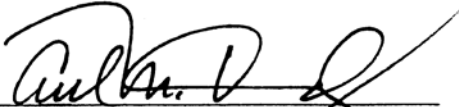
they have executed it voluntarily and with opportunity to consult with legal counsel, and have participated and had an equal opportunity to participate in the drafting and approval of drafting of this Agreement. No ambiguity shall be construed against any party based upon a claim that the party drafted the ambiguous language. This Agreement contains all essential terms of the settlement the Parties have reached. While other documents may be prepared hereafter to further effectuate the provisions hereof, the Parties intend that this Agreement is a valid, binding agreement, enforceable by the Court.

4. **This Agreement Incorporates the Stipulated Terms of Settlement.** This Agreement is intended to incorporate in all material respects and to supersede the Stipulated Terms of Settlement dated April 14, 2022. To the extent the terms of this Agreement conflict with the Stipulated Terms of Settlement, this Agreement shall control.
5. The representative signatories to this Agreement each represent that they are fully authorized to enter into this Agreement and bind the respective Parties to its terms and conditions. This Agreement may be executed in counterparts.

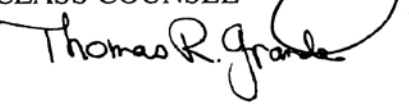
SIGNATURES

Wherefore, intending to be legally bound in accordance with the terms of this Agreement, the Parties hereby execute this Agreement, effective on June 2, 2022, which is the date on which the last signatory signed this Agreement.

FOR PLAINTIFFS

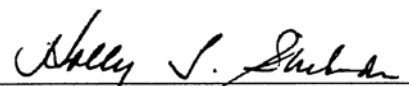


CARL M. VARADY
CLASS COUNSEL



THOMAS R. GRANDE
CLASS COUNSEL

FOR DEFENDANTS



HOLLY T. SHIKADA
Attorney General, State of Hawai'i
CRAIG Y. IHA
Deputy Attorney General
LINDA LEE K. FARM
DONNA H. KALAMA
Special Deputy Attorneys General

ATTORNEYS FOR DEFENDANTS

From: [Carl Varady](#)
To: "[Donna Kalama](#)"; "[Thomas R. Grande](#)"; [Michael Broderick](#)
Cc: [Iha, Craig Y](#); jordan.ak.ching@hawaii.gov; [Linda Lee K. Farm](#); [Viv Lopez](#)
Subject: RE: Kalima - State Defendants' Position re Plaintiffs' Motion for Final Approval, Motion for Attorneys' Fees
Date: Monday, June 19, 2023 11:45:38 AM

I understand this to mean "any" attorneys' fees. Is that correct?

Carl M. Varady
Pauahi Tower
1003 Bishop Street
Suite 1730
Honolulu, Hawai`i 96813
Telephone: 808.523.8447
Facsimile: 808.523.8448
e-mail: carl@varadylaw.com
www: <http://www.varadylaw.com>
linkedin: [Linkedin Profile](#)

****Statements made in this e-mail do not constitute legal advice.***

Calls made to the above number may be recorded for quality assurance.

From: Donna Kalama <dkalama@fbslawyers.com>
Sent: Monday, June 19, 2023 11:30 AM
To: Carl Varady <carl@varadylaw.com>; 'Thomas R. Grande' <tgrande@grandelawoffices.com>; Michael Broderick <info@broderickresolution.com>
Cc: Iha, Craig Y <craig.y.iha@hawaii.gov>; jordan.ak.ching@hawaii.gov; Linda Lee K. Farm <lfarm@fbslawyers.com>; Viv Lopez <vivialopez@gmail.com>
Subject: Kalima - State Defendants' Position re Plaintiffs' Motion for Final Approval, Motion for Attorneys' Fees

Counsel,

State Defendants' Position Regarding Motion for Final Approval

Thank you for providing the revised draft of the Motion for Final Approval emailed to us on Sunday, June 18, 2023, at 6:52 a.m. We appreciate that a number of our suggested edits have been made.

We understand that with a motion of this magnitude, you have many moving parts to coordinate. Unfortunately, to date, we have not been able to review the Motion and all of its component parts, including the Payment Distribution Plan (PDP), as a whole so that we can assess whether everything works together and the information needed to ensure a complete record is present in at least one of the filings.

Just as importantly, there is content in the Motion and/or PDP with which we simply cannot agree. Since we don't expect you to change the Motion to address our concerns, we cannot concur with the Motion or the PDP as they have thus far been presented.

State Defendants continue to believe that the \$328 million Class Settlement Amount provides a fair, reasonable and adequate settlement for Settlement Class Members. To that end, State Defendants authorize you to include the following statement in its entirety in your Motion for Final Approval or the memo in support thereof. You are not authorized to include only portions of this statement, nor to make any other representation regarding State Defendants' position.

“State Defendants do not oppose the Court’s granting of the Motion for Final Approval, or the Court’s approval of the Settlement and Settlement Agreement. State Defendants reserve their right to: (1) file a position statement regarding the Motion for Final Approval and the Payment Distribution Plan; (2) file an opposition to Class Counsel’s Motion for Attorneys’ Fees; and (3) object to the form of any proposed orders or judgment that Plaintiffs may submit to the Court and to submit their own forms thereof as permitted by Rule 23 of the Rules of the Circuit Court.”

State Defendants’ Position Regarding Motion for Attorneys’ Fees

Thank you for providing a draft of the Motion for Attorneys’ Fees emailed to us on Sunday, June 18, 2023, at 12:32 p.m. State Defendants will be opposing your Motion for Attorneys’ Fees.

Thank you,
Donna

From: [Carl Varady](#)
To: "Iha, Craig Y"; [Thomas R. Grande](#); [Donna Kalama](#); [Linda Lee K. Farm](#); [Ching, Jordan AK](#)
Cc: info@broderickresolution.com; [Viv Lopez](#)
Subject: RE: [EXTERNAL] Kalima - Stipulation re Length of Memo - COUNSEL PLEASE APPROVE FOR FILING
Date: Monday, June 19, 2023 2:29:39 PM

Craig,

Donna has not responded to my e-mail regarding her statement that Defendants will oppose the fee motion. Would you kindly confirm whether Defendants will oppose any award of fees or the increment in excess of \$28 million or something else?

Thanks,


Carl

Carl M. Varady
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Honolulu, Hawai`i 96813
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Facsimile: 808.523.8448
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FINAL REPORT TO THE GOVERNOR
AND THE
HAWAI'I STATE LEGISLATURE

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SUBMITTED BY
THE HAWAIIAN HOME LANDS TRUST
INDIVIDUAL CLAIMS REVIEW PANEL

Peter Liholiho Trask
Chairperson

Marie A. McDonald
Vice-Chairperson

Warren C.R. Perry
Panel Member



JAN 06 2009



I do hereby certify that the foregoing is a true and correct copy of the original record of the proceedings of the State of Hawaii.
Dated at: Honolulu, Hawaii, this 12th day of June, 2023. /s/ Carl M. Varady, Clerk of the First Judicial Circuit, State of Hawaii.

EXHIBIT 6 TO DELCARATION OF CARL M. VARADY



I. Introduction

On June 10, 1999, Governor Cayetano vetoed a bill that would have extended the life of the Hawaiian Home Lands Trust Individual Claims Review Panel ("Panel") for a year. The Governor's veto effectively ended the individual claims process established by Chapter 674, Hawai'i Revised Statutes ("HRS"). In this, the Panel's final report to the Legislature, the Panel reviews the history of the claims process, discusses the steps taken by the Panel after the Governor's veto, and provides a summary of those claims that were completed in 1999.

II. The Right to Sue

After years of debate in the Legislature and lobbying by the Hawaiian community, the 1988 Legislature passed Act 395 (1988 Haw. Sess. Laws 942) allowing native Hawaiian beneficiaries to bring suit against the State for money damages arising from breaches of the Hawaiian Home Lands and Public Land trusts occurring after July 1, 1988. Section 5 of Act 395 gave the Governor until 1991 to present a plan to resolve controversies relating to past breaches of these trusts - breaches occurring between August 21, 1959, the date of Hawai'i's admission as a State, and June 30, 1988.

In 1991, Governor Waihøe submitted an action plan to the Legislature to address controversies related to the Hawaiian Home Lands and Public Land trusts. The Governor's action plan proposed the creation of a board to hear claims of actual economic losses suffered by individual beneficiaries of the Hawaiian Home Lands trust for past breaches. The 1991 Legislature accepted the Governor's Action Plan with modifications and also passed Act 323 (1991 Haw. Sess. Laws 990) as one component of the overall plan to address breach of trust claims.

Act 323, codified as Chapter 674, HRS, established the Hawaiian Home Lands Trust Individual Claims Review Panel to receive and review claims of individual native Hawaiian beneficiaries for actual damages resulting from an act or omission by an employee of the State in the management and disposition of Hawaiian Home Lands trust resources for the period August 21, 1959, to June 30, 1988. The law authorized the Panel to review and evaluate the merits of each claim, to render findings, and to recommend monetary damages and other relief in an advisory opinion to the Legislature. Act 323 provided that a claimant would be able to sue the State directly in circuit court if the claimant did not accept the action taken by the legislature on the claim.

Act 323 set the filing deadline to submit claims as August 31, 1993. The original deadline to file a written notice that the claimant did not accept legislative action on his or her claim was October 1, 1994, while the deadline for filing an action in circuit court was set at September 30, 1996, two years after the written notice to the Panel.

III. The Panel and Claims Process

In April 1992, the Governor nominated and the Senate approved the appointment of five Panel members. The Panel members had diverse skills and life

experiences, reflecting the diversity of the Hawaiian community itself. The law required that the chair of the Panel be an attorney or former judge. The Governor named Peter Liholiho Trask, an attorney with over twenty years experience and a former per diem judge, as the Panel chair. The remaining Panel members were appointed from a list of nominees submitted by Native Hawaiian organizations. Appointed to the Panel were Marie A. McDonald, a homesteader and flower grower from the island of Hawai'i, Warren C.R. Perry, an attorney in private practice on Kaua'i, Alexander A.S. Akuna, a Maui County police officer, and Monsignor Charles A. Kekumano, an O'ahu clergyman and community leader.¹ The Panel immediately set to work promulgating rules for the claims process. The rules were approved by the Governor in January 1993, and the Panel began accepting claims from beneficiaries in February 1993.

The Panel, administratively attached to the Department of Commerce and Consumer Affairs, also hired staff for the Hawaiian Claims Office ("HCO") and began an intensive community information program about the claims process.

Because of delays in forming the Panel, the 1993 Legislature revised the original claims deadlines. Act 351 (1993 Haw. Sess. Laws 991) extended the claims filing deadline to August 31, 1995, and changed the deadline to file a written notice not accepting legislative action on a claim to October 1, 1997. Finally, the statute of limitations for filing an action in circuit court was extended from September 30, 1996, to September 30, 1999.

In 1993, the Panel submitted its first report to the Legislature detailing the progress of the claims process. In 1994, the Legislature considered and approved the Panel's liability decisions in two claims, although no money damages or other relief were recommended.

IV. Waiting List Claims

In its 1995 report to the Legislature, the Panel reported that 67% of the claims it had received were classified as "waiting list" claims - claims based upon the length of time a beneficiary had been waiting to receive a homestead. The Panel also explained its approach to the waiting list claims.

The Panel had hired a team of consultants to study the State's use of resources in administering the Hawaiian Home Lands trust from Statehood to June 30, 1988, in order to determine how well the trust had been managed. Using the consultants' findings as a basis, the Panel opened a docket entitled HCO Special Proceeding 1, and held a three-day administrative hearing in August 1994 to take evidence on the issue of the management of the trust and the effect on DHHL's ability to produce homesteads. All parties were invited to participate. Claimants, represented by the Native Hawaiian Legal Corporation and other attorneys, hired an economist who presented independent findings. DHHL chose not to actively participate in the hearing, but did send a representative to testify.

¹ Maui Panel member, Alexander Akuna resigned from the Panel in July 1996. Monsignor Charles Kekumano passed away in January 1998. Both seats remained vacant.

On June 27, 1995, the Panel issued its Findings of Fact and Conclusions of Law in HCO Special Proceeding 1. Based on the information presented at the hearing, the Panel determined that between 1959 and 1988, DHHL breached its fiduciary obligations by failing to optimally manage the trust and, as a result, by failing to produce substantially more homesteads than were actually produced. The Panel concluded that all applicants who applied prior to June 30, 1988, should have received developed homesteads within a reasonable time after application. In reaching this conclusion, the Panel also determined that DHHL failed to act with reasonable care and skill in managing the trust, failed to act solely in the interests of the beneficiaries, and failed to act with prudence in the management of trust resources.

In the 1995 legislative session, the Legislature considered and passed Act 14 in Special Session (1995 Haw. Sp. Sess Laws 696). Act 14-S settled all claims for breaches of the State's duties under the Hawaiian Homes Commission Act arising during the period August 21, 1959, through July 1, 1988, except for individual claims brought pursuant to Chapter 674, HRS. Act 14-S also amended the definition of actual damages in §674-2, HRS, shortened the time period for claimants to file a circuit court action, and added a provision to Chapter 674 precluding title-related claims.

In 1996, the Panel reported that, by the claims filing deadline, approximately 2,800 individuals had filed 4,327 breach of trust claims. In the 1996 legislative session, for the first time the Attorney General questioned the Panel's approach to waiting list claims. She argued that Act 14-S provided a remedy for waiting list claimants through the settlement of DHHL's breach of trust claims and that the Panel did not have jurisdiction over claims where more than one beneficiary had been injured. The Legislature, however, did not act on the Attorney General's argument and the Senate failed to pass out a measure that would have precluded the Panel from applying HCO Special Proceeding 1 to claims.

As the year progressed, the Panel began to apply its findings in HCO Special Proceeding 1 and developed a methodology for calculating damages. During this period, the Panel also allowed the Attorney General, acting as DHHL's counsel, to file a Motion for Reconsideration in HCO Special Proceeding 1 even though the motion was brought more than a year after the Panel's decision. The motion for reconsideration, however, did not provide substantive evidence on the issue of DHHL's trust breaches, but challenged the Panel's jurisdiction to review waiting list claims. The Panel soundly rejected the Attorney General's arguments.

V. Act 382

In 1997, the Panel submitted its first report to the Legislature containing recommended damage awards. Since the Panel had not completed its review of all claims, it requested a two year extension to review claims. In the 1997 legislative session, the Attorney General objected to the Panel's approach to waiting list claims and attempted to restrict the types of claims that the Panel could review.

This time, the Attorney General's arguments found greater support. While the Legislature did not eliminate waiting list claims, as urged by the Attorney General, the Legislature passed Act 382 (1997 Haw. Sess. Laws 1208) creating a working group

to review the claims process and “prescribe a formula and any criteria necessary to qualify and resolve all claims.” The working group was composed of the Attorney General, the Chair of the Hawaiian Homes Commission, the Director of Budget and Finance, and the Panel Chair. Act 382 required the Panel to apply the working group's formula and criteria after it was approved by the Governor.

Act 382 also extended the Panel's review period by two years, mandating a final report to the 1999 Legislature. The deadline for a claimant to file a written notice not accepting legislative action on a claim was extended to October 1, 1999. However, claimants were then given only three months, to December 31, 1999, to file an action in circuit court.

The working group submitted its recommendations to Governor Cayetano on December 23, 1997, although Act 382 set an October 15, 1997, deadline for the working group to complete its task. The Chair of the Panel issued a dissenting report in response to the working group's recommendations on the same day. Nevertheless, the Governor approved the working group's formula and criteria on December 30, 1997.

The working group recommended the elimination of almost 60% of the active claims in the claims process and significantly changed the Panel's formula for calculating actual damages. Consequently, a group of claimants challenged the constitutionality of Act 382 in State Circuit Court. The Panel also believed that Act 382 was seriously flawed and determined that it would not implement the working group's recommendations until a court reviewed the constitutionality of Act 382. Further, the Panel was concerned about the administrative nightmare that would be created if claims were dismissed based on the working group's formula and criteria and a court subsequently found Act 382 to be unlawful.

In July 1998, a Circuit Court Judge issued an order determining that certain provisions of Act 382 were unconstitutional and deprived claimants of due process of law. The Court added that the composition of the working group undermined the appearance of a fair disposition of claimants' claims. In an order issued on December 30, 1998, the Court further explained its earlier decision. The Court reiterated its earlier determinations and also found that Act 382 improperly delegated legislative authority to the working group by empowering the working group to conclusively interpret the language of Chapter 674, HRS, and define the standard for compensation. The Court permanently enjoined the Panel from applying the working group's formula and criteria to claims.

While the Court's ruling confirmed the Panel's view of Act 382, the Panel and its staff had lost almost a year of productive work time. The Panel had not process claims since the Panel had not known whether to apply its own interpretation of Chapter 674 or whether to apply the working group's formula and criteria.

VI. H.B. 1675

Due to the delays caused by Act 382, in the 1999 legislative session, the Panel sought a two year extension to complete its work. The Panel reported that 47% of all claims had been closed, dismissed, or completed by a Panel decision,

leaving 53% of the claims filed with the Panel unresolved.

In the 1999 Legislature, State officials and the Attorney General's office again submitted proposals to amend Chapter 674 by adopting the Act 382 working group's recommendations. The Legislature rejected these proposals. Instead, the Legislature passed H.B. 1675, HD 1, SD 1, CD1 ("H.B. 1675") giving the Panel a one year extension to complete its review of claims. All other deadlines, such as the deadline to file a lawsuit in circuit court, were similarly extended.

H.B. 1675 also established a 7-member claims compensation commission to look at sources of funding for damages awards and alternative methods of compensation. The commission included the Panel chair, the Chair of the Hawaiian Homes Commission, the Director of Budget and Finance, the Speaker of the House and President of the Senate or their designees, a successful native Hawaiian claimant, and a native Hawaiian beneficiary who had not filed a claim with the Panel. These last two members were to be appointed by the Governor from lists of nominees submitted by Hawaiian homestead associations. The commission was required to report to the 2000 Legislature with its recommendations, which could have included compensation in the form of reparations, low-cost rental housing for elderly low-income claimants, or any other appropriate proposal.

VII. Governor's Veto

On June 16, 1999, the Panel received word that the Governor had vetoed H.B. 1675. In his veto message, the Governor cited the length of time the claims process had taken, as well as his belief that the Panel had misapplied the formula and criteria for claims and had recommended unrealistically high damages awards. The Governor also questioned the Panel's impartiality.

The Panel was disappointed and deeply troubled by the Governor's veto. The Panel had interpreted Chapter 674, HRS, according to the Panel's understanding of legislative intent and the plain language of the law. The Governor and Attorney General disagreed with this interpretation and had done everything possible to undermine the claims process. The courts had struck down one such attempt - the working group's recommendations - as unconstitutional and the legislature had not adopted those recommendations as advocated by the Attorney General.

Moreover, the facts did not support the Governor's assertion that the Panel was biased in favor of claimants. The Panel and its staff had closed or dismissed almost 40% of all claims, finding only 13% of all claims considered meritorious. The veto of H.B. 1675 raised the possibility of rekindling these closed claims and potentially exposing the State to increased liability. Even if the State ultimately prevailed in the lawsuits brought by individual beneficiaries, these lawsuits had the potential to engender more animosity and ill-will toward the State and DHHL by its beneficiaries.

Finally, the Panel felt that the claims compensation commission established in H.B. 1675 presented a real opportunity for the Governor, the

Legislature, the Panel, and native Hawaiian beneficiaries to tackle and resolve some of the long-standing disagreements about damages recommendations. Four members of the compensation commission would have been gubernatorial appointees. The commission could have made recommendations that would have substantially reduced damages - for instance, a set "reparations" amount for certain kinds of claims, rather than an "actual damages" calculation. H.B. 1675 presented a political opportunity for the Governor to address problems that no one else has been able to resolve. Unfortunately, the Governor chose not to take that opportunity.

Sadly, the Governor's veto left beneficiaries whose claims were pending, as well as those who had received a Panel determination, in a state of limbo since Chapter 674 provides no guidance as to what happens to claims in the event of a veto.

VIII. Status of Claims Process

The Panel received 4,327 claims filed by approximately 2,800 individuals by the August 31, 1995, claims filing deadline.² In 1997, the Panel submitted its first report to the legislature containing recommended damage awards. The Panel reported that it had rendered advisory opinions in 172 claims affecting 147 claimants and recommended damages awards totaling approximately \$6.7 million in 162 meritorious claims.

In the Panel's report to the 1999 Legislature, covering claims reviewed by the Panel in 1998 and 1999, the Panel recommended the award of a total of \$9.7 million in damages for 346 claims involving 246 claimants. The Panel also found no merit in 20 claims.

As of December 31, 1998, the Panel had issued decisions in a cumulative total of 546 claims, finding merit in 509 claims and no merit in 37 claims. In addition, the Panel and its staff had closed or dismissed another 1,464 claims from the claims process. Finally, 40 claims had been settled. Thus, as of December 31, 1998, the Panel and its staff had either closed or issued recommendations on 2,050 claims, representing 47% of all claims filed. The Panel's cumulative recommended damages awards for 1996-1998 totaled \$16,434,675.75.

At a regularly scheduled meeting on June 22nd, the Panel completed work on pending claims. From January through June 1999, the Panel issued decisions in 70 claims affecting 53 claimants. The Panel found merit in 69 claims and recommended damages totaling \$1,536,146.99. The Panel found no merit in one claim. In addition, the Panel amended a decision reported to the 1999 Legislature, which resulted in a slight decrease in the damages recommendation. A summary of

² Since the Panel's rules allowed additional time for service by mail, the Panel established a policy accepting claims mailed on August 31, 1995. Moreover, in order to ease the burden on neighbor island claimants, the Panel sought assistance from the Office of Hawaiian Affairs to allow claimants to file their claims with OHA on August 30 and August 31, 1995; the Panel also decided to accept claims sent by facsimile transmission. Finally, the Panel's office remained open for extended hours on August 31, 1995.

these decisions is found in the Appendix while Table III summarizes recommended damage amounts.

Finally, from January through June 16, 1999, when the Panel was informed that the Governor had vetoed H.B. 1675, the Panel's staff had dismissed 180 additional claims from the claims process. As shown in Table I, by the end of June 1999, the Panel and its staff had closed or made recommendations on 53% of all claims filed.

IX. Effect of the Veto

Meeting on June 22, 1999, the Panel reviewed Chapter 674, HRS, with staff and counsel in order to determine how best to proceed. Unfortunately, Chapter 674 provided no guidance to the Panel or the parties as to what happens when there is a veto. Chapter 674 allows claimants to file a lawsuit in circuit court after review by the Panel and legislative action on the claim. The claimant is required to file a notice with the Panel by October 1, 1999, rejecting the Legislature's action on the claim and then must file suit in State circuit court by December 31, 1999.

Fully half of all claimants had not had their claims considered by the Panel or its staff. Moreover, with the exception of two claims, the Legislature had not affirmatively acted on any of the claims that had been reported. Consequently, the Panel was uncertain as to which claimants, if any, would be able to file suit in circuit court. Nevertheless, since the administrative review process set up in Chapter 674 had been dismantled through no fault of the claimants, it seemed possible that a court might determine that all claimants could pursue their claims in circuit court. The Panel concluded that all claimants, including those whose claims had been dismissed, might have the right to pursue their claims in court, and that all claimants should therefore be informed of that right.

Since claimants appeared to be required to file a notice with the Panel by October 1, 1999, and to file suit in court by December 31, 1999, the Panel could see no useful purpose in proceeding forward with reviewing and determining additional claims. The Panel instructed staff to cease investigating and reviewing claims, and to concentrate their efforts in notifying claimants of the October 1st deadline.

The Panel sent out its first letter on June 30, 1999, informing claimants of the Governor's veto. Included with the Panel's letter was a sample "Notice for Judicial Relief" which the claimant could sign and return to the Panel. The Panel sent out additional notices in early August and again in September reminding claimants of the October 1, 1999, filing deadline. The Panel also published a notice in the September issue of Ka Wai Ola o OHA, the Office of Hawaiian Affairs newspaper, reminding claimants of the October 1, 1999, deadline and asking for assistance in locating claimants whose addresses had changed.

As Table II indicates, as of October 1, 1999, the Panel had received notices in 2,592 claims. Notices were received in another 43 claims after October 1, 1999. In addition, on October 1, 1999, the Native Hawaiian Legal Corporation filed a notice of non acceptance of legislative action on behalf of all claimants who had

timely filed claims with the Panel but who had not filed notices by the October 1st deadline.

As the Panel's staff at the Hawaiian Claims Office received notices from claimants, a copy of each notice was put in a separate binder to be kept for reference at the Department of Commerce and Consumer. Another copy was returned to the claimant along with a copy of his or her claim form and any other relevant documents, such as an extra copy of the investigation report on the claim or exhibits submitted by the claimant at hearing. The original notice was then put into the claimant's master file and the file was closed.

On September 30, 1999, three claimants, with claims at various stages of the claims process, filed suit in U.S. Federal District Court asking that the Federal Court extend or nullify both the October 1, 1999, deadline for filing a notice with the Panel and the December 31, 1999, deadline to file suit in circuit court. The claimants alleged, among other things, a violation of due process and equal protection. Additionally, the claimants argued that Chapter 674, HRS, the sole mechanism for resolving individual trust claims, was part of the Act 14-S settlement of Hawaiian Home Lands trust claims. The settlement embodied in Act 14-S, they contended, was a contract between beneficiaries and the State, which the State could not unilaterally modify. A hearing on the claimants' motion for preliminary injunction was held on November 15, 1999. The Court has yet to issue a decision on the motion. If the claimants are successful, both the October 1, 1999, and December 31, 1999, deadlines could be nullified for all claimants.

The Hawaiian Claims Office, which houses the Panel's staff, officially closed its doors on October 29, 1999. Although the terms of the Panel members run until December 31, 1999, the work of the Panel's staff was substantially complete once the October 1st deadline passed. Beginning in August, HCO began reducing its staff, with three staff members remaining during the month of October to answer claimant inquiries, close out and box claim files, and shut down the office. The Panel's records have been stored at the Department of Commerce and Consumer Affairs.

X. Conclusion

Although the claims process held out great hope for correcting past wrongs, it has not lived up to its original promise. The claims process has ended, not because of legislative action or because all claims have been reviewed, but as the result of a long and acrimonious disagreement about the parameters of the Panel's jurisdiction. Thus, the Panel ends its tenure with both sadness and regret, knowing that it has not been able to complete its mission and that the distrust of State government that is already so pervasive in the Hawaiian community has been confirmed.

TABLE I
STATUS OF CLAIMS
June 1999

	Cumulative	Summary
	Dec-98	Jun-99
Total Number of Claims Filed	4,327	4,327
Closed After Preliminary Inv.	396	396
Accepted for Investigation	3,931	3,931
Disposition of Claims - Accepted for Investigation/ Investigation Stage	3,931	3,931
Dismissed After Acceptance	554	644
Dismissed/Panel to Review	1	2
Dismissal Pending	9	12
Settled	5	5
Under Investigation	1,919	1,623
Investigation Completed	1,443	1,645
Disposition of Claims - Investigation Completed/ Hearing Stage	1,443	1,645
Dismissed	514	604
Dismissed/Panel to Review	3	2
Dismissal Pending	0	11
Settled	35	35
Panel Dec - No Liability	37	38
Panel Dec - Liability	509	578
Remand to H.O.	0	0
H.O. Dec/Panel to Review	16	12
Hrgs Held/H.O. to Issue Dec.	50	42
Settlement Negotiations	2	0
Hearings Pending	277	323

TABLE I			
	Jun-99	Dismissed or Pending Dismissal	Pending
Total Number of Claims Filed	4,327		
Closed After Preliminary Inv.	396	396	
Accepted for Investigation	3,931		
Disposition of Claims - Accepted for Investigation/ Investigation Stage	3,931		
Dismissed After Acceptance	644	644	
Dismissed/Panel to Review	2	2	
Dismissal Pending	12	12	
Settled	5		
Under Investigation	1,623		1623
Investigation Completed	1,645		
Disposition of Claims - Investigation Completed/ Hearing Stage	1,645		
Dismissed	604	604	
Dismissed/Panel to Review	2	2	
Dismissal Pending	11	11	
Settled	35		
Panel Dec - No Liability	38	38	
Panel Dec - Liability	578		
Remand to H.O.	0		
H.O Decision/Panel to Review	12		12
Hrgs Held/H.O. to Issue Dec.	42		42
Settlement Negotiations	0		
Hearings Pending	323		323
TOTALS		1709	2000

COMPARISON OF CLAIMS FILED TO DECISIONS, DISMISSALS AND PENDING CLAIMS		PERCENTAGE OF TOTAL CLAIMS FILED
TOTAL CLAIMS FILED	4327	100.00%
Dismissed or Dismissal Pending	1709	39.50%
Pending	2000	46.22%
Total Dismissed, Dismissal Pending or Pending	3709	85.72%
Total Claims Resulting in Recommended Panel Awards	578	13.36%

STATE OF HAWAII
AGREEMENT FOR SPECIAL DEPUTY ATTORNEY GENERAL SERVICES

This Agreement, executed on the respective dates indicated below, is effective as of JANUARY 24, 2014, between the Department of the Attorney General, State of Hawaii (hereinafter "STATE"), by the Attorney General (hereinafter also referred to as "DIRECTOR"), whose address is 425 Queen Street, Honolulu, Hawaii 96813, and Cronin, Fried, Sekiya, Kekina & Fairbanks, a Law Corporation (insert "corporation," "partnership," "sole proprietorship" or other legal form of the Contractor) (hereinafter "CONTRACTOR"), under the laws of the State of Hawaii, by L. Richard Fried, Jr. its managing partner or authorized designee whose business address and taxpayer identification number are as follows: 841 Bishop Street, Suite 600, Honolulu, Hawaii 96813; Federal ID No. _____, State ID No. _____. The member(s) of the firm primarily responsible for this Agreement shall be L. Richard Fried, Jr. principal attorneys(s)

RECITALS

A. The STATE desires to retain and engage the CONTRACTOR to provide the services described in this Agreement and its attachments, and the CONTRACTOR agrees to provide said services.

B. The authority of the STATE to enter into this Agreement for Special Deputy Attorney General Services is HRS § 28-8.3.

C. Money is available to fund this Agreement pursuant to:
(1) N/A (identify state sources) or N/A (identify federal sources)
or both, in the following amounts: State \$ N/A Federal N/A

NOW, THEREFORE, in consideration of the promises contained in this Agreement, the STATE and the CONTRACTOR agree as follows:

1. **Scope of Services.** The CONTRACTOR shall, in a proper and satisfactory manner as determined by the STATE, provide all the services set forth in Attachment 1, which is hereby made a part of this Agreement.
2. **Time of Performance.** The time of performance for this Agreement is contained in Attachment 2, which is hereby made a part of this Agreement.

3. Compensation. The CONTRACTOR shall be compensated for services rendered and costs incurred under this Agreement in a total amount not to exceed _____
_____ N/A _____ DOLLARS (N/A), including taxes, according to the Compensation and Payment Schedule set forth in Attachment 3, which is hereby made a part of this Agreement. As provided hereafter, the hourly rate of the principal attorney, the maximum fees and costs payable under this Agreement, and the amount of errors and omission insurance required of the law firm are as follows:

Hourly rate: _____ N/A _____
Maximum fee cap: _____ N/A _____
Maximum cost cap: _____ N/A _____
Errors & omission insurance _____ \$10 Million _____

4. Standards of Conduct Declaration. The Standards of Conduct Declaration by the CONTRACTOR is attached hereto and made a part of this Agreement.

5. Other Terms and Conditions. The General Conditions and any Special Conditions are attached hereto and made a part of this Agreement. In the event of a conflict between the General Conditions and the Special Conditions, the Special Conditions shall control.

IN VIEW OF THE ABOVE, the parties execute this Agreement by their signatures, on the dates below, to be effective as of the date first above written.

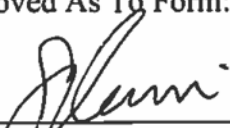
STATE

By 

DAVID M. LOUIE
ATTORNEY GENERAL

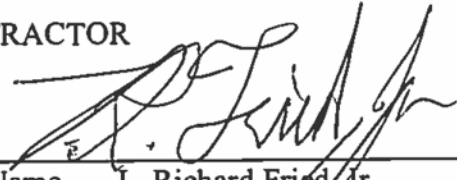
Date JAN 28 2014

Approved As To Form:

By 

Deputy Attorney General
Stephen H. Levins

CONTRACTOR

By 

Print Name L. Richard Fried, Jr.
Title PRESIDENT *

Date 1/24/14

FUNDING AGENCY (to be signed by head of funding agency if other than the Attorney General)

By _____
Print Name _____
Title _____
Date _____

*Evidence of authority of the CONTRACTOR's representative to sign this Agreement for the CONTRACTOR must be attached.



STATE OF HAWAII

CONTRACTOR'S ACKNOWLEDGMENT

STATE OF Hawaii)
City of Honolulu) SS.
COUNTY OF Honolulu)

On this 24th day of January, 2014, before me personally appeared L. Richard Fried Jr. and _____, to me known to be the person(s) described herein and who, being duly sworn, did say that he/she/they is/are the President of Crown Fried Shipyard (Kekaha), the CONTRACTOR named in the foregoing instrument, and that he/she/they is/are authorized to sign said instrument on behalf of the CONTRACTOR, and acknowledges that he/she/they executed said instrument as the free act and deed of the CONTRACTOR.

(Notary Stamp or Seal)

Donna C. Toyofuku
(Signature)
DONNA C. TOYOFUKU No. 81-780
(Print Name)
Notary Public, State of Hawaii
My commission expires: 10/2/17

Doc. Date: undated at time of notary # Pages: 5 pages attached
Notary Name: **DONNA C. TOYOFUKU** Just
Doc. Description: State of Hawaii Agent for Special Quality City of Honolulu
Director Crown Shipyard Kekaha
contractor



(Notary Stamp or Seal)

Donna C. Toyofuku 1/24/14
Notary Signature Date

NOTARY CERTIFICATION

**CONTRACTOR'S
STANDARDS OF CONDUCT DECLARATION**

For the purposes of this declaration:

"Agency" means and includes the State, the legislature and its committees, all executive departments, boards, commissions, committees, bureaus, offices; and all independent commissions and other establishments of the state government but excluding the courts.

"Controlling interest" means an interest in a business or other undertaking which is sufficient in fact to control, whether the interest is greater or less than fifty per cent (50%).

"Employee" means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices, and judges. (Section 84-3, HRS).

On behalf of Cronin, Fried Sekiya, Kekina & Fairbanks, CONTRACTOR, the undersigned does declare as follows:

1. CONTRACTOR is* is not a legislator or an employee or a business in which a legislator or an employee has a controlling interest. (Section 84-15(a), HRS).
2. CONTRACTOR has not been represented or assisted personally in the matter by an individual who has been an employee of the agency awarding this Contract within the preceding two years and who participated while so employed in the matter with which the Contract is directly concerned. (Section 84-15(b), HRS).
3. CONTRACTOR has not been assisted or represented by a legislator or employee for a fee or other compensation to obtain this Contract and will not be assisted or represented by a legislator or employee for a fee or other compensation in the performance of this Contract, if the legislator or employee had been involved in the development or award of the Contract. (Section 84-14 (d), HRS).
4. CONTRACTOR has not been represented on matters related to this Contract, for a fee or other consideration by an individual who, within the past twelve (12) months, has been an agency employee, or in the case of the Legislature, a legislator, and participated while an

* Reminder to agency: If the "is" block is checked and if the Contract involves goods or services of a value in excess of \$10,000, the Contract must be awarded by competitive sealed bidding under section 103D-302, HRS, or a competitive sealed proposal under section 103D-303, HRS. Otherwise, the agency may not award the Contract unless it posts a notice of its intent to award it and files a copy of the notice with the State Ethics Commission. (Section 84-15(a), HRS).

employee or legislator on matters related to this Contract. (Sections 84-18(b) and (c), HRS).

CONTRACTOR understands that the Contract to which this document is attached is voidable on behalf of the STATE if this Contract was entered into in violation of any provision of chapter 84, Hawaii Revised Statutes, commonly referred to as the Code of Ethics, including the provisions which are the source of the declarations above. Additionally, any fee, compensation, gift, or profit received by any person as a result of a violation of the Code of Ethics may be recovered by the STATE.

DATED: Honolulu, Hawaii, _____.

CONTRACTOR

By _____

(signature)

Print Name L. Richard Fried, Jr.

Print Title PRESIDENT

Name of Contractor Cronin, Fried, Sekiya,

Kekina & Fairbanks

Date 1/24/14

SCOPE OF SERVICES

1. **Employment of Attorney-Scope.** The STATE retains CONTRACTOR to represent the State of Hawaii in the investigation and prosecution of its claims for monetary damages, civil fraud, unfair or deceptive trade practices, false claims, interest, injunctive relief, costs and attorneys' fees, and other appropriate claims and relief against pharmaceutical companies and other entities responsible for the improper marketing of the drug, Plavix, in the state of Hawaii (collectively referred to as the "Litigation"). CONTRACTOR is authorized and directed to assist the STATE in making such claims for the State of Hawaii, and to prosecute such claims through assessment, enforcement, collection, and all necessary and reasonable appeals as the STATE shall direct, and to enforce all judgments and settlements as shall be obtained. CONTRACTOR shall provide all legal services that are reasonably necessary for such representation and assistance, including without limitation, the preparation and filing of all claims, pleadings, responses, motions, petitions, memoranda, briefs, notices, and other documents. CONTRACTOR shall also conduct negotiations and provide representation at all hearings, depositions, trials, appeals, and other appearances as may be required in said actions. CONTRACTOR agrees to perform such other duties or undertake such other activities as may be necessary even if such duties or activities are not expressly set forth in this Scope of Services, when required by the court as part of the Litigation, or as directed by the Attorney General.
2. **Authority Over Litigation.** The Attorney General shall have final authority over all aspects of this Litigation. The Litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General. The Attorney General at his sole discretion has the right to appoint a designated deputy ("designated deputy") to oversee the Litigation, which appointment the Attorney General may modify at will. The Attorney General must approve in advance all aspects of this Litigation and shall be included in any settlement discussions. CONTRACTOR shall confer with the Attorney General as early as practicable in any settlement negotiation process.
3. **Coordination of Legal Services.** CONTRACTOR shall coordinate the provision of the legal services with the Attorney General or his designated deputy, other personnel of the Department of the Attorney General, and such others as the Attorney General may appoint as counsel. All pleadings, motions, briefs, and other material which may be filed with the court shall first be approved by the Attorney General and provided to his office in draft form in a reasonable and timely manner for review. Regular status meetings shall be held as requested by the Attorney General.
4. **Document Review and Discovery.** CONTRACTOR shall advance all costs and expenses and provide all necessary personnel in order to comply with any discovery request made by anyone related to this Litigation. This includes but is not limited to:

- a. Working directly with State personnel who may be tasked with responding to discovery requests;
- b. Gathering, reviewing, analyzing, and storing paper documents to determine if they should be produced to opposing parties;
- c. Gathering, reviewing, and analyzing relevant information contained in electronic form in order to comply with e-discovery requests or the discovery of electronically stored information;
- d. Creating electronic databases designed to extract and convert data files in order to facilitate the automated and manual analysis of documents;
- e. Preparing production, privilege, and redaction logs; and
- f. Implementing processes to address the inadvertent disclosure of privileged information.

5. Communication to State Entities. CONTRACTOR shall communicate with state entities through the Department of the Attorney General unless otherwise authorized by the Attorney General.

6. Outside Assistance. CONTRACTOR shall, with the prior written approval of the Attorney General, retain other attorneys, consultants, experts, and investigators (collectively referred to as "Professionals"), as necessary, to diligently prosecute the claims and causes of action hereunder. Additionally, it may be necessary for CONTRACTOR to retain special outside counsel to assist on matters. STATE agrees that CONTRACTOR may, with the approval of the Attorney General, retain such special outside counsel to assist CONTRACTOR when CONTRACTOR deems such assistance to be reasonably necessary. Any fees or costs due to outside counsel and other Professionals resulting from representing the STATE in this matter shall be the sole responsibility of CONTRACTOR.

7. Communication with the Attorney General. CONTRACTOR agrees to consult in advance, by telephone, electronic means, or in writing, with the Attorney General promptly on all matters that may be precedential, controversial, of particular public interest, or otherwise noteworthy or important, and to keep the Attorney General fully informed at all times.

CONTRACTOR shall give timely written notice to the Attorney General of any and all of the following legal events in this Litigation:

1. Pleadings
2. Dispositive motions
3. Hearings
4. Rulings
5. Trials

6. Settlement negotiations
7. Appeals or Notice of Appeals
8. Briefs filed by any party or entity
9. Appellate arguments or decisions
10. Enforcement efforts

CONTRACTOR agrees to meet with Attorney General's office personnel when and where requested by the Attorney General in furtherance of this Litigation.

TIME OF PERFORMANCE

This Agreement begins on the date it is signed, and will continue until completion of the Litigation.

COMPENSATION AND PAYMENT SCHEDULE

The following provisions shall apply to all compensation and reimbursements under this Agreement.

1. This is a contingent fee case. CONTRACTOR shall receive no compensation for any services rendered unless the State of Hawaii receives a settlement or an award of civil penalties or damages in connection with this Litigation. If the State receives such an award, CONTRACTOR will be compensated for its services as follows:
 - a. These costs and expenses necessary for conducting this Litigation, as defined by this Agreement, shall initially be advanced by CONTRACTOR and shall be deducted from the Litigation's gross or total recovery, if any, before any further distribution is made;
 - b. Of the monies remaining from any settlement or recovery after deduction of costs and expenses, CONTRACTOR shall receive a contingent fee of 20% from the net proceeds of any judgment or settlement.
2. All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the Department of the Attorney General, which shall distribute them or have them distributed.
3. CONTRACTOR shall advance all costs, expenses, and disbursements, including but not limited to expert witness fees and costs, deposition costs, and costs of document review and production. CONTRACTOR's agreement to advance all Litigation expenses and costs, as well as its agreement to defer fees while any and all Litigation (including appeals and enforcement actions) is pending, has been taken into consideration in establishing the fee schedule above.
4. CONTRACTOR shall be reimbursed for its expenses and costs solely from the Litigation's gross recovery as approved by the Attorney General for certain reasonable expenses and costs enumerated below. Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by CONTRACTOR for a least one full year following this Agreement's termination. All expenses must be itemized and no reimbursement may be applied for or requested for "miscellaneous" listings. The Attorney General in his sole discretion may decline to reimburse CONTRACTOR for improperly documented, unnecessary, or unreasonable costs or expenses.

5. The STATE will not pay for attorney or paralegal time spent performing clerical tasks, such as filing, indexing, or page numbering.
6. Reimbursable expenses.
 - a. Extraordinary expenses. Unless prior written approval of the Attorney General is obtained, the STATE shall have no obligation to reimburse CONTRACTOR for any extraordinary expenses incurred by CONTRACTOR, including without limitation, expenses for investigative services, computer litigation support services, videotaping of depositions, meals, and services of experts and consultants which exceed \$25,000 per expert or consultant.
 - b. Ordinary expenses. Expenses, such as the following, incurred by CONTRACTOR will be eligible for reimbursement from the STATE at actual cost, provided that written substantiation or verification (such as invoices and billings, and the taxpayer identification number of the entity to which payment was made) is submitted by CONTRACTOR and the expenses are deemed reasonable and necessary by the STATE:
 - (1) Depositions and transcripts;
 - (2) Long-distance telephone calls;
 - (3) Postage;
 - (4) Photo copying;
 - (5) Outside messenger service; or
 - (6) Outgoing faxes.

In addition, Contractor will be entitled to reimbursement for those costs and expenses set forth in the "General Conditions", paragraph 13.

7. No State obligation to pay. Notwithstanding any other provision of this Agreement, the STATE shall have no duty to pay CONTRACTOR, nor any of its attorneys, legal assistants, paralegals, and any other staff, nor any other person performing services on behalf of CONTRACTOR, unless the requirements described in this Compensation and Payment Schedule are first met to the STATE's satisfaction. The STATE will not be required to pay for any services it determines to be unreasonable, unnecessary, or duplicative.

CERTIFICATE OF EXEMPTION FROM CIVIL SERVICE

1. By Heads of Departments or Agencies as Delegated by the Director of Human Resources Development¹.

Pursuant to the delegation of the authority by the Director of Human Resources Development, I certify that the services provided under this Contract, and the person(s) providing the services under this Contract are exempt from the civil service, pursuant to §76-16, Hawai'i Revised Statutes (HRS).

(Signature) _____


_____ JAN 28 2014 _____
(Date)

_____ DAVID M. LOUIE _____
(Print Name)

_____ Attorney General _____
(Print Title)

¹ This part of the form may be used by all department heads and others to whom the Director of Human Resources Development (DHRD) has delegated authority to certify §76-16, HRS, civil service exemptions. The specific paragraph(s) of §76-16, HRS, upon which an exemption is based should be noted in the contract file. **NOTE:** Authority to certify exemptions under §§ 76-16(2), 76-16(12), and 76-16(15), HRS, has not been delegated; only the Director of DHRD may certify §§76-16(2), 76-16(12), and 76-16(15) exemptions.

2. By the Director of Human Resources Development, State of Hawai'i.

I certify that the services to be provided under this Contract, and the person(s) providing the services under this Contract are exempt from the civil service, pursuant to §76-16, Hawai'i Revised Statutes (HRS).

_____ *(Signature)*

_____ *(Date)*

_____ *(Print Name)*

_____ *(Print Title, if designee of the Director of DHRD)*

GENERAL CONDITIONS FOR AGREEMENT FOR
SPECIAL DEPUTY ATTORNEY GENERAL SERVICES

Table of Contents

	<u>Page(s)</u>
1. <u>Coordination with and Reporting to the State</u>	1
2. <u>Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities</u>	1
3. <u>Personnel Requirements</u>	2
4. <u>Errors and Omissions Insurance and Indemnity</u>	2
5. <u>Nondiscrimination</u>	3
6. <u>Conflicts of Interest</u>	3
7. <u>Subcontracts and Assignments</u>	3
8. <u>Cost of Litigation</u>	4
9. <u>STATE's Right to Offset</u>	4
10. <u>Disputes</u>	5
11. <u>Termination, Generally</u>	5
12. <u>Termination by Contractor</u>	5
13. <u>Costs and Expenses</u>	5
14. <u>Payment Procedures: Final Payment; Tax Clearance</u>	5
15. <u>Federal Funds</u>	6
16. <u>Modification of Agreement</u>	6
17. <u>Confidentiality of Material</u>	7
18. <u>Publicity</u>	7

19. Records Retention..... 7

20. Antitrust Claims..... 7

21. Governing Law..... 7

22. Compliance with Laws..... 7

23. Conflict between General Conditions and Procurement Rules..... 8

24. Entire Agreement..... 8

25. Severability..... 8

26. Waiver..... 8

27. Notices..... 8

28. Ethics of Attorneys..... 8

29. Campaign Contributions..... 8

30. Confidentiality of Personal Information..... 9

GENERAL CONDITIONS

1. Coordination with and Reporting to the State. The ATTORNEY GENERAL, by letter or in the Scope of Services, may designate a member of the ATTORNEY GENERAL's staff to coordinate the services to be provided by CONTRACTOR in order to complete the performance required in the Agreement. CONTRACTOR shall maintain communications with the person so designated at all stages of CONTRACTOR's work, and submit to that person for resolution any questions which may arise as to the performance of this Agreement. CONTRACTOR shall make periodic status reports to the ATTORNEY GENERAL every three (3) months or at such other times as may be reasonably requested by the ATTORNEY GENERAL. If the ATTORNEY GENERAL does not designate a member of the ATTORNEY GENERAL's staff to coordinate this Agreement, the ATTORNEY GENERAL will be the coordinator of services.

2. Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities.
 - a. In the performance of services required under this Agreement, CONTRACTOR is an "independent contractor" with the authority and responsibility to control and direct the performance and details of the work and services required under this Agreement; however, the STATE shall have a general right to inspect work in progress to determine whether, in the STATE's opinion, the services are being performed by CONTRACTOR in compliance with this Agreement. Unless otherwise provided by special condition, it is understood that the STATE does not agree to use CONTRACTOR exclusively, and that CONTRACTOR is free to contract to provide services to other individuals or entities while under contract with the STATE.
 - b. CONTRACTOR and CONTRACTOR's employees and agents are not by reason of this Agreement, agents or employees of the State for any purpose, and CONTRACTOR and CONTRACTOR's employees and agents shall not be entitled to claim or receive from the State any vacation, sick leave, retirement, workers' compensation, unemployment insurance, or other benefits provided to state employees.
 - c. CONTRACTOR shall be responsible for the accuracy, completeness, and adequacy of CONTRACTOR's performance under this Agreement. Furthermore, CONTRACTOR intentionally, voluntarily, and knowingly assumes the sole and entire liability to CONTRACTOR's employees and agents, and to any individual not a party to this Agreement, for all loss, damage, or injury caused by CONTRACTOR, or CONTRACTOR's employees or agents in the course of their employment.
 - d. CONTRACTOR shall be responsible for payment of all applicable federal, state, and county taxes and fees which may become due and owing by CONTRACTOR by reason of this Agreement, including but not limited to (i) income taxes, (ii)

employment related fees, assessments, and taxes, and (iii) general excise taxes. CONTRACTOR also is responsible for obtaining all licenses, permits, and certificates that may be required in order to perform this Agreement.

- e. CONTRACTOR, if subject to the tax imposed by section 237-9, HRS, shall obtain a general excise tax license from the Department of Taxation, State of Hawaii, in accordance with section 237-9, HRS, and shall comply with all requirements thereof. CONTRACTOR shall obtain a tax clearance certificate from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, showing that all delinquent taxes, if any, levied or accrued against CONTRACTOR have been paid and submit the same to the STATE prior to commencing any performance under this Agreement. CONTRACTOR shall also be solely responsible for meeting all requirements necessary to obtain the tax clearance certificate required for final payment under sections 103-53 and 103D-328, HRS, and paragraph 14 of these General Conditions.
- f. CONTRACTOR is responsible for securing all employee-related insurance coverage for CONTRACTOR and CONTRACTOR's employees and agents that is or may be required by law, and for payment of all premiums, costs, and other liabilities associated with securing the insurance coverage.

3. Personnel Requirements.

- a. CONTRACTOR shall secure, at CONTRACTOR's own expense, all personnel required to perform this Agreement.
- b. CONTRACTOR shall ensure that CONTRACTOR's employees or agents are experienced and fully qualified to engage in the activities and perform the services required under this Agreement, and that all applicable licensing and operating requirements imposed or required under federal, state, or county law, and all applicable accreditation and other standards of quality generally accepted in the field of the activities of such employees and agents are complied with.
- c. CONTRACTOR shall promptly inform the STATE when any personnel assigned to this project leaves the employment of CONTRACTOR, whereupon the STATE may enter into separate new agreements with any former personnel of CONTRACTOR to work on this project.

4. Errors and Omissions Insurance and Indemnity. CONTRACTOR shall obtain and keep in force throughout the term of this Agreement a standard professional liability insurance policy that covers claims resulting from errors or omission in providing legal services under this Agreement. The policy shall provide a minimum aggregate coverage in the amount of at least FIVE MILLION AND NO/100 DOLLARS (\$5,000,000.00), subject to applicable deductibles, unless otherwise justified by CONTRACTOR and approved by the STATE. In such instance, CONTRACTOR shall justify to the satisfaction of the STATE a coverage amount appropriate to the legal services provided in this Agreement.

Any amount less than \$5,000,000 shall be set forth as a special condition. Upon request, CONTRACTOR shall provide the State proof of such insurance policy. In addition, and to the extent not covered by the insurance policy (for example, claims exceeding the coverage limits, or claims within CONTRACTOR's self insured retention), CONTRACTOR agrees to defend and indemnify the State, the contracting agency, and their officers, employees, and agents from and against all liability, loss, damages, costs and expenses, including all attorneys' fees, and all claims, suits, and demands therefor, arising out of or resulting from the acts or omissions of CONTRACTOR or CONTRACTOR's employees, officers, agents, or subcontractors under this Agreement; provided, however, that no obligation to defend or indemnify the State shall have the effect of (i) rendering inapplicable (in whole or in part) any professional liability insurance maintained by CONTRACTOR, (ii) extending any statute of limitations governing any claim arising from CONTRACTOR's acts or omissions, or (iii) waiving any claims or defenses that CONTRACTOR may have against the State or any other party.

5. Nondiscrimination. No person performing work under this Agreement, including any subcontractor, employee, or agent of CONTRACTOR, shall engage in any discrimination that is prohibited by any applicable federal, state, or county law.

6. Conflicts of Interest.
 - a. With regard to CONTRACTOR's current clients, CONTRACTOR hereby discloses on Exhibit ____, attached hereto, a list of such clients who have interests adverse to the STATE in pending administrative actions or litigation and the nature of those interests. The execution of the Agreement by the STATE constitutes the STATE's consent to CONTRACTOR's representation identified in Exhibit ____, but such consent is limited to the extent the representation is identified and disclosed.

 - b. With regard to potential clients whom CONTRACTOR wishes to represent during the duration of this Agreement who have interests adverse to the STATE in then pending administrative actions or litigation, CONTRACTOR agrees to consult with the STATE prior to representing the clients. Following consultation, the STATE shall grant or withhold its consent to the proposed representation.

7. Subcontracts and Assignments. CONTRACTOR shall not assign or subcontract any of the CONTRACTOR's duties, obligations, or interests under this Agreement and no such assignment or subcontract shall be effective unless (i) CONTRACTOR obtains the prior written consent of the STATE and (ii) CONTRACTOR's assignee or subcontractor submits to the STATE a tax clearance certificate from the Director of Taxation State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against CONTRACTOR's assignee or subcontractor have been paid. Additionally, no assignment by CONTRACTOR of CONTRACTOR's right to compensation under this Agreement shall be effective unless and until the assignment is approved by the Comptroller of the State of Hawaii, as provided in section 40-58, HRS.

- a. Recognition of a successor in interest. When in the best interest of the STATE, a successor in interest may be recognized in an assignment agreement in which the STATE, CONTRACTOR and the assignee or transferee (hereinafter referred to as the "Assignee") agree that:
- (1) The Assignee assumes all of CONTRACTOR's obligations;
 - (2) CONTRACTOR remains liable for all obligations under this Agreement but waives all rights under this Agreement as against the STATE; and
 - (3) CONTRACTOR shall continue to furnish, and the Assignee shall also furnish, all required insurance.
- b. Change of Name. When CONTRACTOR asks to change the name in which it holds this Agreement with the STATE, the DIRECTOR or the DIRECTOR's designee shall, upon receipt of a document satisfactory to the DIRECTOR or the DIRECTOR's designee indicating such change of name (for example, an amendment to CONTRACTOR's articles of incorporation), enter into an amendment of this Agreement with CONTRACTOR to effect such a change of name. The amendment to this Agreement changing CONTRACTOR's name shall specifically indicate that no other terms and conditions of this Agreement are thereby changed.
- c. Reports. All assignment contracts and amendments to this Agreement effecting changes of CONTRACTOR's name or novation hereunder shall be reported to the chief procurement officer as defined in section 103D-203(a), HRS, within thirty days of the date that the assignment contract or amendment becomes effective.
8. Cost of Litigation. In case the STATE shall, without any fault on its part, be made a party to any litigation commenced by or against CONTRACTOR in connection with this Agreement, CONTRACTOR shall pay all costs and expenses incurred by or imposed on the STATE, including attorneys' fees.
9. STATE's Right of Offset. The STATE may offset against any monies or other obligations the STATE owes to CONTRACTOR under this Agreement, any amounts owed to the State of Hawaii by CONTRACTOR under this Agreement or any other agreements or pursuant to any law or other obligation owed to the State of Hawaii by CONTRACTOR, including, without limitation, the payment of any taxes or levies of any kind or nature. The STATE will notify CONTRACTOR in writing of any offset and the nature of such offset. For purposes of this paragraph, amounts owed to the State of Hawaii shall not include debts or obligations which have been liquidated, agreed to by CONTRACTOR, and are covered by an installment payment or other settlement plan approved by the State of Hawaii, provided, however, that CONTRACTOR shall be entitled to such exclusion only to the extent that CONTRACTOR is current with, and not

delinquent on, any payments or obligations owed to the State of Hawaii under such payment or other settlement plan.

10. Disputes. Disputes shall be resolved in accordance with section 103D-703, HRS, and chapter 3-126, Hawaii Administrative Rules ("the Procurement Rules"), chapter 126, as the same may be amended from time to time.
11. Termination, Generally. This Agreement may be terminated at the option of the STATE upon ten (10) days written notice to CONTRACTOR. If the STATE elects to terminate, CONTRACTOR shall be entitled to reasonable payment as determined by the STATE for satisfactory services rendered under the Agreement up to the time of termination.
12. Termination by Contractor. CONTRACTOR may withdraw from this Agreement with the consent to the STATE. Any such withdrawal must comply with the ethics standards applicable to the practice of law. The STATE's consent shall not be withheld unreasonably. The STATE, upon CONTRACTOR's withdrawal, will determine whether payment is due to CONTRACTOR and the amount that is due.
13. Costs and Expenses. Any reimbursement due CONTRACTOR for per diem and transportation expenses under this Agreement shall be subject to chapter 3-123 (Cost Principles) of the Procurement Rules and the following guidelines:
 - a. Reimbursement for air transportation shall be for actual cost or coach class air fare, whichever is less.
 - b. Reimbursement for ground transportation costs shall not exceed the actual cost of renting an intermediate-size vehicle.
 - c. Unless prior written approval of the DIRECTOR is obtained, reimbursement for subsistence allowance (i.e., hotel and meals, etc.) shall not exceed the applicable daily authorized rates for interisland or out-of-state travel that are set forth in the current Governor's Executive Order authorizing adjustments in salaries and benefits for state officers and employees in the executive branch who are excluded from collective bargaining coverage.
 - d. If travel is undertaken for more than one client, CONTRACTOR shall be reimbursed only the STATE's share or all subsistence and transportation costs. The STATE will compensate for time spent in transit only if work is done for the STATE during such transit.
14. Payment Procedures: Final Payment; Tax Clearance.
 - a. Original invoices required. All payments under this Agreement shall be made only upon submission by CONTRACTOR of original invoices specifying the amount due and certifying that services requested under the Agreement have been performed by CONTRACTOR according to the Agreement.

- b. Subject to available funds. Such payments are subject to availability of funds and allotment by the Director of Finance in accordance with chapter 37, HRS. Further, all payments shall be made in accordance with and subject to chapter 40, HRS.
 - c. Prompt payment.
 - (1) Any money, other than retainage, paid to CONTRACTOR shall be dispersed to subcontractors within ten days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes; and
 - (2) Upon final payment to CONTRACTOR, full payment to the subcontractor, including retainage, shall be made within ten days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.
 - d. Final payment. Final payment under this Agreement shall be subject to sections 103-53 and 103D-328, HRS, which require a tax clearance from the Director of Taxation, State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against CONTRACTOR have been paid.
15. Federal Funds. If this Agreement is payable in whole or in part from federal funds, CONTRACTOR agrees that, as to the portion of the compensation under this Agreement to be payable from federal funds, CONTRACTOR shall be paid only from such funds received from the federal government, and shall not be paid from any other funds, Failure of the STATE to receive anticipated federal funds shall not be considered a breach by the STATE or an excuse for nonperformance by CONTRACTOR.
16. Modification of Agreement.
- a. In writing. Any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Agreement permitted by this Agreement shall be made by written amendment to this Agreement, signed by CONTRACTOR and the STATE.
 - b. No oral modification. No oral modification, alteration, amendment, change, or extension of any term, provision or condition of this Agreement shall be permitted.
 - d. Tax clearance. The STATE may, at its discretion, require CONTRACTOR to submit to the STATE, prior to the STATE's approval of any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Agreement, a tax clearance from the Director of Taxation, State of Hawaii,

showing that all delinquent taxes, if any, levied or accrued under state law against CONTRACTOR have been paid.

17. Confidentiality of Material.

- a. All material given to or made available to CONTRACTOR by virtue of this Agreement, which is identified as proprietary or confidential information, will be safeguarded by CONTRACTOR and shall not be disclosed to any individual or organization without the prior written approval of the STATE.
- b. All information, data, or other material provided by CONTRACTOR to the STATE shall be subject to the Uniform Information Practices Act, chapter 92F, HRS.

18. Publicity. CONTRACTOR shall not refer to the STATE, or any office, agency, or officer thereof, or any State employee, including the DIRECTOR, or to the services or goods, or both, provided under this Agreement, in any of CONTRACTOR's brochures, advertisements, or other publicity of CONTRACTOR. All media contacts with CONTRACTOR about the subject matter of this Agreement shall be referred to the DIRECTOR or the DIRECTOR's designee.

19. Records Retention.

- a. Upon any termination of this Contract or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
- b. CONTRACTOR and any subcontractors shall maintain the files, books, and records, that relate to the Contract, including any personal information created or received by CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least seven (7) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the seven (7) year, or other retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS, or returned to the STATE at the request of the STATE.

20. Antitrust Claims. The STATE and CONTRACTOR recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, CONTRACTOR hereby assigns to the STATE any and all claims for overcharges as to goods and materials purchased in connection with this Agreement, except as to overcharges which result from violations commencing after the price is established under this Agreement and which were not passed on to the STATE under an escalation clause.

21. Governing Law. The validity of this Agreement and any of its terms or provisions, as well as the rights and duties of the parties to this Agreement, shall be governed by the laws of the State of Hawaii. Any action at law or in equity to enforce or interpret the provisions of this Agreement shall be brought in a state court of competent jurisdiction in Honolulu, Hawaii.
22. Compliance with Laws. CONTRACTOR shall comply with all federal, state, and county laws, ordinances, codes, rules, and regulations, as the same may be amended from time to time, that in any way affect CONTRACTOR's performance of this Agreement.
23. Conflict between General Conditions and Procurement Rules. In the event of a conflict between the General Conditions and the Procurement Rules, the Procurement Rules in effect on the date this Agreement became effective shall control.
24. Entire Agreement. This Agreement sets forth all of the agreements, conditions, understandings, promises, warranties, and representations between the STATE and CONTRACTOR relative to this Agreement. This Agreement supersedes all prior agreements, conditions, understandings, promises, warranties, and representations, which shall have no further force or effect. There are no agreements, conditions, understandings, promises, warranties, or representations oral or written, express or implied, between the STATE and CONTRACTOR other than as set forth or as referred to herein.
25. Severability. In the event that any provision of this Agreement is declared invalid or unenforceable by a court, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining terms of this Agreement.
26. Waiver. The failure of the STATE to insist upon the strict compliance with any term, provision, or condition of this Agreement shall not constitute or be deemed to constitute a waiver or relinquishment of the STATE's right to enforce the same in accordance with this Agreement. The fact that the STATE specifically refers to one provision of the Procurement Rules or one section of the Hawaii Revised Statutes, and does not include other provisions or statutory sections in this Agreement shall not constitute a waiver or relinquishment of the STATE's rights or CONTRACTOR's obligations under the Procurement Rules or statutes.
27. Notices. Any written notice required to be given by a party to this Agreement shall be (a) delivered personally, or (b) sent by United States first class mail, postage prepaid. Notice to the STATE shall be sent to the DIRECTOR at the DIRECTOR's address as indicated in the Agreement. Notice to CONTRACTOR shall be sent to CONTRACTOR at CONTRACTOR's address as indicated in the Agreement. A notice shall be deemed to have been received three (3) days after mailing or at the time of actual receipt, whichever is earlier. CONTRACTOR is responsible for notifying the STATE in writing of any change of address.

28. Ethics of Attorneys. CONTRACTOR shall abide by and perform CONTRACTOR's duties under and pursuant to this Agreement in accordance with the ethics of the legal profession and all federal, state, and municipal laws, regulations, and ordinances regulating the practice of law.
29. Campaign Contributions. CONTRACTOR is hereby notified of the applicability of section 11-205.5, HRS, which states that campaign contributions are prohibited from specified state or county government contractors during the terms of their contracts if the contractors are paid with funds appropriated by a legislative body.
30. Confidentiality of Personal Information.

a. Definitions.

"Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either name or data elements are not encrypted:

- (1) Social security number;
- (2) Driver's license number or Hawaii identification card number; or
- (3) Account number, credit or debit card number, access code, or password that would permit access to an individual's financial information.

Personal information does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

"Technological safeguards" means the technology and the policy and procedures for use of the technology to protect and control access to personal information.

b. Confidentiality of Material.

- (1) All material given to or made available to CONTRACTOR by the STATE by virtue of this Contract which is identified as personal information, shall be safeguarded by CONTRACTOR and shall not be disclosed without prior written approval of the STATE.
- (2) CONTRACTOR agrees not to retain, use, or disclose personal information for any purpose other than as permitted or required by this Contract.
- (3) CONTRACTOR agrees to implement appropriate "technological safeguards" that are acceptable to the STATE to reduce the risk of unauthorized access to personal information.

- (4) CONTRACTOR shall report to the STATE in a prompt and complete manner any security breaches involving personal information.
- (5) CONTRACTOR agrees to mitigate, to the extent practicable, any harmful effect that is known to CONTRACTOR because of a use or disclosure of personal information by CONTRACTOR in violation of the requirements of this paragraph.
- (6) CONTRACTOR shall complete and retain a log of all disclosures made of personal information received from the STATE, or personal information created or received by CONTRACTOR on behalf of the STATE.

c. Security Awareness Training and Confidentiality Agreements.

- (1) CONTRACTOR certifies that all of its employees who will have access to the personal information have completed training on security awareness topics relating to protecting personal information.
- (2) CONTRACTOR certifies that confidentiality agreements have been signed by all of its employees who will have access to the personal information acknowledging that:
 - (A) The personal information collected, used, or maintained by CONTRACTOR will be treated as confidential;
 - (B) Access to the personal information will be allowed only as necessary to perform the Contract; and
 - (C) Use of the personal information will be restricted to uses consistent with the services subject to this Contract.

d. Termination for Cause. In addition to any other remedies provided for by this Contract, if the STATE learns of a material breach by CONTRACTOR of this paragraph by CONTRACTOR, the STATE may at its sole discretion:

- (1) Provide an opportunity for CONTRACTOR to cure the breach or end the violation; or
- (2) Immediately terminate this Contract.

In either instance, CONTRACTOR and the STATE shall follow chapter 487N, HRS, with respect to notification of a security breach of personal information.

e. Records Retention.

- (1) Upon any termination of this Contract, or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
- (2) CONTRACTOR and any subcontractors shall maintain the files, books, and records that relate to the Contract, including any personal information created or received by CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least seven (7) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the seven (7) year, or other retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS, or returned to the STATE at the request of the STATE.



**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

CERTIFICATE OF VENDOR COMPLIANCE

This document presents the compliance status of the vendor identified below on the issue date with respect to certificates required from the Hawaii Department of Taxation (DOTAX), the Internal Revenue Service, the Hawaii Department of Labor and Industrial Relations (DLIR), and the Hawaii Department of Commerce and Consumer Affairs (DCCA).

Vendor Name: CRONIN, FRIED, SEKIYA, KEKINA & FAIRBANKS, ATTORNEYS AT LAW, A LAW CORPORATION

DBA/Trade Name: CRONIN, FRIED, SEKIYA, KEKINA & FAIRBANKS, ATTORNEYS AT LAW, A LAW CORPORATION

Issue Date: 01/27/2014

Status: Compliant

Hawaii Tax#:
FEIN/SSN#: XX-XXX2557
UI#: XXXXXX8088
DCCA FILE#: 54911

Status of Compliance for this Vendor on issue date:

Form	Department(s)	Status
A-6	Hawaii Department of Taxation	Compliant
	Internal Revenue Service	Compliant
COGS	Hawaii Department of Commerce & Consumer Affairs	Compliant
LIR27	Hawaii Department of Labor & Industrial Relations	Compliant

Status Legend:

Status	Description
Exempt	The entity is exempt from this requirement
Compliant	The entity is compliant with this requirement or the entity is in agreement with agency and actively working towards compliance

Pending	The entity is compliant with DLIR requirement
Submitted	The entity has applied for the certificate but it is awaiting approval
Not Compliant	The entity is not in compliance with the requirement and should contact the issuing agency for more information

STATE OF HAWAII
AGREEMENT FOR SPECIAL DEPUTY ATTORNEY GENERAL SERVICES

This Agreement, executed on the respective dates indicated below, is effective as of _____, 2019, between the Department of the Attorney General, State of Hawaii (hereinafter "STATE"), by the Attorney General (hereinafter also referred to as "DIRECTOR"), whose address is 425 Queen Street, Honolulu, Hawaii 96813, and **BARON & BUDD, P.C.**, Law Corporation (hereinafter "CONTRACTOR"), under the laws of the State of Hawaii, by **Russell W. Budd** whose business address and taxpayer identification number are as follows: 3102 Oak Lawn Avenue, Suite 1100, Dallas, Texas 75219, Federal ID No. 75-1573501, State ID No. CO-193-536-6656-01. The member(s) of the firm primarily responsible for this Agreement shall be Russell W. Budd.

RECITALS

A. The STATE desires to retain and engage the CONTRACTOR to provide the services described in this Agreement and its attachments, and the CONTRACTOR agrees to provide said services.

B. The authority of the STATE to enter into this Agreement for Special Deputy Attorney General Services is HRS § 28-8.3.

C. Money is available to fund this Agreement pursuant to:

(1) _____ or _____
(identify state sources) *(identify federal sources)*

or both, in the following amounts: State \$ N/A Federal N/A

NOW, THEREFORE, in consideration of the promises contained in this Agreement, the STATE and the CONTRACTOR agree as follows:

1. Scope of Services. The CONTRACTOR shall, in a proper and satisfactory manner as determined by the STATE, provide all the services set forth in Attachment 1, which is hereby made a part of this Agreement.

2. Time of Performance. The time of performance for this Agreement is contained in Attachment 2, which is hereby made a part of this Agreement.

3. Compensation. The CONTRACTOR shall be compensated for services rendered and costs incurred under this Agreement in a total amount not to exceed _____
_____ N/A DOLLARS (N/A),

including taxes, according to the Compensation and Payment Schedule set forth in Attachment 3, which is hereby made a part of this Agreement. As provided hereafter, the hourly rate of the principal attorney, the maximum fees and costs payable under this Agreement, and the amount of errors and omission insurance required of the law firm are as follows:

Hourly rate: N/A
Maximum fee cap: N/A
Maximum cost cap: N/A
Errors & omission insurance \$10 Million

4. Standards of Conduct Declaration. The Standards of Conduct Declaration by the CONTRACTOR is attached hereto and made a part of this Agreement.

5. Other Terms and Conditions. The General Conditions and any Special Conditions are attached hereto and made a part of this Agreement. In the event of a conflict between the General Conditions and the Special Conditions, the Special Conditions shall control.

IN VIEW OF THE ABOVE, the parties execute this Agreement by their signatures, on the dates below, to be effective as of the date first above written.

STATE

By [Signature]
CLARE E. CONNORS
ATTORNEY GENERAL

Date 6/25/19

Approved As To Form:

By [Signature]
Bryan C. Yee
Deputy Attorney General

CONTRACTOR

By [Signature]
Print Name Russell W. Budd
Title President, Managing Shareholder *

Date June 3 2019

FUNDING AGENCY (to be signed by head of funding agency if other than the Attorney General)

By _____
Print Name _____
Title _____
Date _____

*Evidence of authority of the CONTRACTOR's representative to sign this Agreement for the CONTRACTOR must be attached.



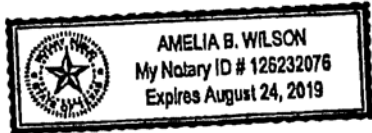
STATE OF HAWAII

CONTRACTOR'S ACKNOWLEDGMENT

STATE OF Texas)
DALLAS COUNTY OF DALLAS) SS.

On this 3rd day of June, 20 19, before me personally appeared Russell W. Budd and N/A, to me known to be the person(s) described herein and who, being duly sworn, did say that he/she/they is/are the President/Managing Shareholder of Baron & Budd, P.C., the CONTRACTOR named in the foregoing instrument, and that he/she/they is/are authorized to sign said instrument on behalf of the CONTRACTOR, and acknowledges that he/she/they executed said instrument as the free act and deed of the CONTRACTOR.

(Notary Stamp or Seal)



Handwritten signature of Amelia B. Wilson

Amelia B. Wilson (Print Name)

Notary Public, State of Texas

My commission expires: August 24, 2019

Doc. Date: # Pages:

Notary Name: Circuit

Doc. Description:

(Notary Stamp or Seal)

Notary Signature Date

NOTARY CERTIFICATION

**CONTRACTOR'S
STANDARDS OF CONDUCT DECLARATION**

For the purposes of this declaration:

"Agency" means and includes the State, the legislature and its committees, all executive departments, boards, commissions, committees, bureaus, offices; and all independent commissions and other establishments of the state government but excluding the courts.

"Controlling interest" means an interest in a business or other undertaking which is sufficient in fact to control, whether the interest is greater or less than fifty per cent (50%).

"Employee" means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices, and judges. (Section 84-3, HRS).

On behalf of Baron & Budd, P.C., CONTRACTOR, the undersigned does declare as follows:

1. CONTRACTOR is* is not a legislator or an employee or a business in which a legislator or an employee has a controlling interest. (Section 84-15(a), HRS).
2. CONTRACTOR has not been represented or assisted personally in the matter by an individual who has been an employee of the agency awarding this Contract within the preceding two years and who participated while so employed in the matter with which the Contract is directly concerned. (Section 84-15(b), HRS).
3. CONTRACTOR has not been assisted or represented by a legislator or employee for a fee or other compensation to obtain this Contract and will not be assisted or represented by a legislator or employee for a fee or other compensation in the performance of this Contract, if the legislator or employee had been involved in the development or award of the Contract. (Section 84-14 (d), HRS).
4. CONTRACTOR has not been represented on matters related to this Contract, for a fee or other consideration by an individual who, within the past twelve (12) months, has been an agency employee, or in the case of the Legislature, a legislator, and participated while an employee or legislator on matters related to this Contract. (Sections 84-18(b) and (c), HRS).

* Reminder to agency: If the "is" block is checked and if the Contract involves goods or services of a value in excess of \$10,000, the Contract must be awarded by competitive sealed bidding under section 103D-302, HRS, or a competitive sealed proposal under section 103D-303, HRS. Otherwise, the agency may not award the Contract unless it posts a notice of its intent to award it and files a copy of the notice with the State Ethics Commission. (Section 84-15(a), HRS).

CONTRACTOR understands that the Contract to which this document is attached is voidable on behalf of the STATE if this Contract was entered into in violation of any provision of chapter 84, Hawaii Revised Statutes, commonly referred to as the Code of Ethics, including the provisions which are the source of the declarations above. Additionally, any fee, compensation, gift, or profit received by any person as a result of a violation of the Code of Ethics may be recovered by the STATE.

DATED: Dallas, Texas, _____.

CONTRACTOR

By _____

(signature)

Print Name Russell W. Budd

Print Title President and Managing Shareholder

Name of Contractor Baron & Budd, P.C.

Date June 3, 2019

SCOPE OF SERVICES

1. Employment of Attorney-Scope. The STATE retains CONTRACTOR to represent the State of Hawaii in the investigation and prosecution of such claims relating to the improper marketing, distribution and/or sale of opioids in the State of Hawaii as shall be determined by the Attorney General or her designee after consultation with the CONTRACTOR, which may include, but will not necessarily be limited to, claims for monetary damages, civil fraud, unfair or deceptive trade practices, false claims, interest, injunctive relief, costs and attorneys' fees, and other appropriate claims and relief against opioid manufacturers, distributors, and/or sellers, related entities and individuals, and other entities responsible for the improper marketing, distribution or sale of opioids in the State of Hawaii (collectively referred to as the "Litigation"). CONTRACTOR is authorized and directed to assist the STATE in making such claims for the State of Hawaii, and to prosecute such claims through assessment, enforcement, collection, and all necessary and reasonable appeals as the STATE shall direct, and to enforce all judgments and settlements as shall be obtained. CONTRACTOR shall provide all legal services that are reasonably necessary for such representation and assistance, including without limitation, the preparation and filing of all claims, pleadings, responses, motions, petitions, memoranda, briefs, notices, and other documents. CONTRACTOR shall also conduct negotiations and provide representation at all hearings, depositions, trials, appeals, and other appearances as may be required in said actions. CONTRACTOR agrees to perform such other duties or undertake such other activities as may be necessary even if such duties or activities are not expressly set forth in this Scope of Services, when required by the court as part of the Litigation, or as directed by the Attorney General.

2. Authority Over Litigation. The Attorney General shall have final authority over all aspects of this Litigation. The Litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General. The Attorney General at her sole discretion has the right to appoint a designated deputy ("designated deputy") to oversee the Litigation, which appointment the Attorney General may modify at will. The Attorney General must approve in advance all aspects of this Litigation and shall be included in any settlement discussions. CONTRACTOR shall confer with the Attorney General as early as practicable in any settlement negotiation process. The Attorney General also agrees to advise CONTRACTOR as soon as practicable if the State receives a settlement offer from any defendant, and to consult with CONTRACTOR prior to agreeing to any settlement offer.

3. Coordination of Legal Services. CONTRACTOR shall coordinate the provision of the legal services with the Attorney General or her designated deputy, other personnel of the Department of the Attorney General, and such others as the Attorney General may appoint as counsel. All pleadings, motions, briefs, and other material which may be filed with the court shall first be approved by the Attorney General and provided to her office in draft form in a

reasonable and timely manner for review. Regular status meetings shall be held as requested by the Attorney General.

4. Document Review and Discovery. CONTRACTOR shall advance all costs and expenses and provide all necessary personnel in order to comply with any discovery requests made by anyone related to this Litigation. This includes but is not limited to:

- a. Working directly with State personnel who may be tasked with responding to discovery requests;
- b. Gathering, reviewing, analyzing, and storing paper documents to determine if they should be produced to opposing parties;
- c. Gathering, reviewing, and analyzing relevant information contained in electronic form in order to comply with e-discovery requests or the discovery of electronically stored information;
- d. Creating electronic databases designed to extract and convert data files in order to facilitate the automated and manual analysis of documents;
- e. Preparing production, privilege, and redaction logs; and
- f. Implementing processes to address the inadvertent disclosure of privileged information.

5. Communication to State Entities. Except as provided in Paragraph 4.a. above, CONTRACTOR shall communicate with state entities through the Department of the Attorney General unless otherwise authorized by the Attorney General.

6. Outside Assistance. CONTRACTOR shall, with the prior written approval of the Attorney General, retain other consultants, experts, and investigators (collectively referred to as "Professionals"), as necessary, to diligently prosecute the claims and causes of action hereunder. Additionally, it may be necessary for CONTRACTOR to retain special outside counsel to assist on matters. STATE agrees that CONTRACTOR may, with the approval of the Attorney General, retain such special outside counsel to assist CONTRACTOR when CONTRACTOR deems such assistance to be reasonably necessary. Any fees or costs due to outside counsel resulting from representing the STATE in this matter shall be the sole responsibility of CONTRACTOR, except as provided in paragraph 5 of Attachment 3, Compensation and Payment Schedule.

7. Key Person Requirement. In providing services under this Agreement, CONTRACTOR shall associate itself with the law firm of Cronin, Fried, Sekiya, Kekina & Fairbanks, and utilize the services of those persons identified in its response to the Notice to Attorneys Interested in Providing Legal Services Regarding Opioid Litigation on Behalf of the State of Hawaii. CONTRACTOR may change the firm it is associated with and the particular individuals assigned to this matter with the consent of the Attorney General.

8. Communication with the Attorney General. CONTRACTOR agrees to consult in advance, by telephone, electronic means, or in writing, with the Attorney General promptly on all matters that may be precedential, controversial, of particular public interest, or otherwise noteworthy or important, and to keep the Attorney General fully informed at all times.

CONTRACTOR shall give timely written notice to the Attorney General of any and all of the following legal events in this Litigation:

1. Pleadings
2. Dispositive motions
3. Hearings
4. Rulings
5. Trials
6. Settlement negotiations
7. Appeals or Notice of Appeals
8. Briefs filed by any party or entity
9. Appellate arguments or decisions
10. Enforcement efforts

CONTRACTOR agrees to meet with Attorney General's office personnel when and where requested by the Attorney General in furtherance of this Litigation.

TIME OF PERFORMANCE

This Agreement begins on the date it is signed, and will continue until completion of the Litigation.

COMPENSATION AND PAYMENT SCHEDULE

The following provisions shall apply to all compensation and reimbursements under this Agreement.

1. This is a contingent fee case. CONTRACTOR shall receive no compensation from the State for any services rendered unless the State of Hawaii recovers civil penalties, compensatory or punitive damages, and/or attorneys' fees in connection with this Litigation. If the State obtains such a recovery, CONTRACTOR will be compensated for its services as follows:
 - a. Those costs and expenses necessary for conducting this Litigation, as defined by this Agreement, shall initially be advanced by CONTRACTOR and shall be deducted from the Litigation's gross or total recovery, if any, before any further distribution is made;
 - b. Of the monies remaining from any recovery after deduction of costs and expenses, CONTRACTOR shall receive a contingent fee of seventeen per cent (17%) of the net proceeds of any recovery equal to or less than seventy-five million dollars (\$75,000,000) in aggregate, and fourteen per cent (14%) of the net proceeds of any recovery in excess of seventy-five million dollars (\$75,000,000) in aggregate, subject to the provisions of paragraphs 1.c and 1.d .
 - c. CONTRACTOR shall not receive a contingency fee or be otherwise compensated for any amounts to be paid to the State of Hawaii from Purdue Pharma, L.P., Purdue Pharma, Inc., The Purdue Frederick Company, Inc., or their related entities (collectively the "Purdue entities") pursuant to any settlement agreement reached, in principle or otherwise, prior to the commencement of the trial of the multi-district litigation, Docket No. 1:17-MD-2804. Nor shall CONTRACTOR receive a contingency fee or be otherwise compensated for any goods, services or "in kind" payments provided by the Purdue entities or any other defendants as part of any settlement with the State of Hawaii.
 - d. CONTRACTOR shall not receive a contingency fee or be otherwise compensated for any amounts to be paid to the State of Hawaii from a defendant not named in a lawsuit filed by CONTRACTOR, unless such defendant is an affiliate, subsidiary, or officer of a defendant named in the lawsuit filed by CONTRACTOR.

- e. Under no circumstances shall the State of Hawaii be obligated to pay any attorney's fee or any litigation expenses except from moneys expended by any defendant(s) pursuant to the resolution of the State of Hawaii's claims.
- 2. All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the Department of the Attorney General, which shall distribute them or have them distributed.
- 3. CONTRACTOR shall advance all costs, expenses, and disbursements, including but not limited to expert witness fees and costs, deposition costs, and costs of document review and production. CONTRACTOR's agreement to advance all Litigation expenses and costs, as well as its agreement to defer fees while any and all Litigation (including appeals and enforcement actions) is pending, has been taken into consideration in establishing the fee schedule above.
- 4. CONTRACTOR shall be reimbursed for its expenses and costs solely from the Litigation's gross recovery as approved by the Attorney General for certain reasonable expenses and costs enumerated below. Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by CONTRACTOR for a least one full year following this Agreement's termination. All expenses must be itemized and no reimbursement may be applied for or requested for "miscellaneous" listings. The Attorney General in her sole discretion may decline to reimburse CONTRACTOR for improperly documented, unnecessary, or unreasonable costs or expenses.
- 5. CONTRACTOR may be reimbursed for its costs solely from the Litigation's gross recovery as approved by the Attorney General for the retention of a bankruptcy attorney, provided the identity, scope of services, and compensation and payment schedule is approved in writing by the Attorney General prior to retention.
- 6. The STATE will not pay for attorney or paralegal time spent performing clerical tasks, such as filing, indexing, or page numbering.
- 7. Reimbursable expenses.
 - a. Extraordinary expenses. Unless prior written approval of the ATTORNEY GENERAL is obtained, the STATE shall have no obligation to reimburse CONTRACTOR for any extraordinary expenses incurred by CONTRACTOR, including without limitation, expenses for investigative services, computer litigation support services, videotaping of depositions, meals, and services of experts and consultants which exceed \$25,000 per expert or consultant.

- b. Ordinary expenses. Expenses, such as the following, incurred by CONTRACTOR will be eligible for reimbursement from the STATE at actual cost, provided that written substantiation or verification (such as invoices and billings, and the taxpayer identification number of the entity to which payment was made) is submitted by CONTRACTOR and the expenses are deemed reasonable and necessary by the STATE:
- (1) Depositions and transcripts;
 - (2) Long-distance telephone calls;
 - (3) Postage;
 - (4) Photo copying;
 - (5) Outside messenger service; or
 - (6) Outgoing faxes.

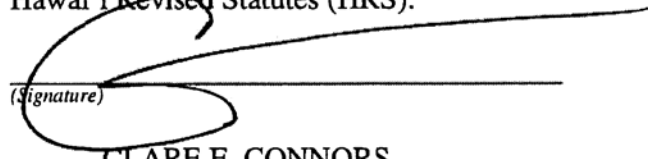
In addition, Contractor will be entitled to reimbursement for those costs and expenses set forth in the "General Conditions", paragraph 13.

8. No State obligation to pay. Notwithstanding any other provision of this Agreement, the STATE shall have no duty to pay CONTRACTOR, nor any of its attorneys, legal assistants, paralegals, and any other staff, nor any other person performing services on behalf of CONTRACTOR, unless the requirements described in this Compensation and Payment Schedule are first met to the STATE's satisfaction. The STATE will not be required to pay for any services it determines to be unreasonable, unnecessary, or duplicative.

CERTIFICATE OF EXEMPTION FROM CIVIL SERVICE

1. By Heads of Departments or Agencies as Delegated by the Director of Human Resources Development¹.

Pursuant to the delegation of the authority by the Director of Human Resources Development, I certify that the services provided under this Contract, and the person(s) providing the services under this Contract are exempt from the civil service, pursuant to §76-16, Hawai'i Revised Statutes (HRS).



(Signature)

JUN 25 2019
(Date)

CLARE E. CONNORS

(Print Name)

Attorney General

(Print Title)

¹ This part of the form may be used by all department heads and others to whom the Director of Human Resources Development (DHRD) has delegated authority to certify §76-16, HRS, civil service exemptions. The specific paragraph(s) of §76-16, HRS, upon which an exemption is based should be noted in the contract file. **NOTE:** Authority to certify exemptions under §§ 76-16(2), 76-16(12), and 76-16(15), HRS, has not been delegated; only the Director of DHRD may certify §§76-16(2), 76-16(12), and 76-16(15) exemptions.

2. By the Director of Human Resources Development, State of Hawai'i.

I certify that the services to be provided under this Contract, and the person(s) providing the services under this Contract are exempt from the civil service, pursuant to §76-16, Hawai'i Revised Statutes (HRS).

(Signature)

(Date)

(Print Name)

(Print Title, if designee of the Director of DHRD)

GENERAL CONDITIONS FOR AGREEMENT FOR
SPECIAL DEPUTY ATTORNEY GENERAL SERVICES

Table of Contents

	<u>Page(s)</u>
1. <u>Coordination with and Reporting to the State</u>	1
2. <u>Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities</u>	1
3. <u>Personnel Requirements</u>	2
4. <u>Errors and Omissions Insurance and Indemnity</u>	2
5. <u>Nondiscrimination</u>	3
6. <u>Conflicts of Interest</u>	3
7. <u>Subcontracts and Assignments</u>	3
8. <u>Cost of Litigation</u>	4
9. <u>STATE's Right to Offset</u>	4
10. <u>Disputes</u>	5
11. <u>Termination, Generally</u>	5
12. <u>Termination by Contractor</u>	5
13. <u>Costs and Expenses</u>	5
14. <u>Payment Procedures: Final Payment; Tax Clearance</u>	5
15. <u>Federal Funds</u>	6
16. <u>Modification of Agreement</u>	6
17. <u>Confidentiality of Material</u>	7
18. <u>Publicity</u>	7

19.	<u>Records Retention</u>	7
20.	<u>Antitrust Claims</u>	7
21.	<u>Governing Law</u>	7
22.	<u>Compliance with Laws</u>	7
23.	<u>Conflict between General Conditions and Procurement Rules</u>	8
24.	<u>Entire Agreement</u>	8
25.	<u>Severability</u>	8
26.	<u>Waiver</u>	8
27.	<u>Notices</u>	8
28.	<u>Ethics of Attorneys</u>	8
29.	<u>Campaign Contributions</u>	8
30.	<u>Confidentiality of Personal Information</u>	9

GENERAL CONDITIONS

1. Coordination with and Reporting to the State. The ATTORNEY GENERAL, by letter or in the Scope of Services, may designate a member of the ATTORNEY GENERAL's staff to coordinate the services to be provided by CONTRACTOR in order to complete the performance required in the Agreement. CONTRACTOR shall maintain communications with the person so designated at all stages of CONTRACTOR's work, and submit to that person for resolution any questions which may arise as to the performance of this Agreement. CONTRACTOR shall make periodic status reports to the ATTORNEY GENERAL every three (3) months or at such other times as may be reasonably requested by the ATTORNEY GENERAL. If the ATTORNEY GENERAL does not designate a member of the ATTORNEY GENERAL's staff to coordinate this Agreement, the ATTORNEY GENERAL will be the coordinator of services.

2. Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities.
 - a. In the performance of services required under this Agreement, CONTRACTOR is an "independent contractor" with the authority and responsibility to control and direct the performance and details of the work and services required under this Agreement; however, the STATE shall have a general right to inspect work in progress to determine whether, in the STATE's opinion, the services are being performed by CONTRACTOR in compliance with this Agreement. Unless otherwise provided by special condition, it is understood that the STATE does not agree to use CONTRACTOR exclusively, and that CONTRACTOR is free to contract to provide services to other individuals or entities while under contract with the STATE.

 - b. CONTRACTOR and CONTRACTOR's employees and agents are not by reason of this Agreement, agents or employees of the State for any purpose, and CONTRACTOR and CONTRACTOR's employees and agents shall not be entitled to claim or receive from the State any vacation, sick leave, retirement, workers' compensation, unemployment insurance, or other benefits provided to state employees.

 - c. CONTRACTOR shall be responsible for the accuracy, completeness, and adequacy of CONTRACTOR's performance under this Agreement. Furthermore, CONTRACTOR intentionally, voluntarily, and knowingly assumes the sole and entire liability to CONTRACTOR's employees and agents, and to any individual not a party to this Agreement, for all loss, damage, or injury caused by CONTRACTOR, or CONTRACTOR's employees or agents in the course of their employment.

 - d. CONTRACTOR shall be responsible for payment of all applicable federal, state, and county taxes and fees which may become due and owing by CONTRACTOR by reason of this Agreement, including but not limited to (i) income taxes, (ii)

employment related fees, assessments, and taxes, and (iii) general excise taxes. CONTRACTOR also is responsible for obtaining all licenses, permits, and certificates that may be required in order to perform this Agreement.

- e. CONTRACTOR, if subject to the tax imposed by section 237-9, HRS, shall obtain a general excise tax license from the Department of Taxation, State of Hawaii, in accordance with section 237-9, HRS, and shall comply with all requirements thereof. CONTRACTOR shall obtain a tax clearance certificate from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, showing that all delinquent taxes, if any, levied or accrued against CONTRACTOR have been paid and submit the same to the STATE prior to commencing any performance under this Agreement. CONTRACTOR shall also be solely responsible for meeting all requirements necessary to obtain the tax clearance certificate required for final payment under sections 103-53 and 103D-328, HRS, and paragraph 14 of these General Conditions.
- f. CONTRACTOR is responsible for securing all employee-related insurance coverage for CONTRACTOR and CONTRACTOR's employees and agents that is or may be required by law, and for payment of all premiums, costs, and other liabilities associated with securing the insurance coverage.

3. Personnel Requirements.

- a. Except as provided in Attachment 3 (COMPENSATION AND PAYMENT SCHEDULE), Paragraph 5 and Paragraph 6 (Reimbursable Expenses), CONTRACTOR shall secure, at CONTRACTOR's own expense, all personnel required to perform this Agreement.
- b. CONTRACTOR shall ensure that CONTRACTOR's employees or agents are experienced and fully qualified to engage in the activities and perform the services required under this Agreement, and that all applicable licensing and operating requirements imposed or required under federal, state, or county law, and all applicable accreditation and other standards of quality generally accepted in the field of the activities of such employees and agents are complied with.
- c. CONTRACTOR shall promptly inform the STATE when any personnel assigned to this project leaves the employment of CONTRACTOR, whereupon the STATE may enter into separate new agreements with any former personnel of CONTRACTOR to work on this project.

4. Errors and Omissions Insurance and Indemnity. CONTRACTOR shall obtain and keep in force throughout the term of this Agreement a standard professional liability insurance policy that covers claims resulting from errors or omission in providing legal services under this Agreement. The policy shall provide a minimum aggregate coverage in the amount of at least TEN MILLION AND NO/100 DOLLARS (\$10,000,000.00), subject to applicable deductibles, unless otherwise justified by CONTRACTOR and approved by

the STATE. In such instance, CONTRACTOR shall justify to the satisfaction of the STATE a coverage amount appropriate to the legal services provided in this Agreement. Any amount less than \$10,000,000 shall be set forth as a special condition. Upon request, CONTRACTOR shall provide the State proof of such insurance policy. In addition, and to the extent not covered by the insurance policy (for example, claims exceeding the coverage limits, or claims within CONTRACTOR's self insured retention), CONTRACTOR agrees to defend and indemnify the State, the contracting agency, and their officers, employees, and agents from and against all liability, loss, damages, costs and expenses, including all attorneys' fees, and all claims, suits, and demands therefor, arising out of or resulting from the acts or omissions of CONTRACTOR or CONTRACTOR's employees, officers, agents, or subcontractors under this Agreement; provided, however, that no obligation to defend or indemnify the State shall have the effect of (i) rendering inapplicable (in whole or in part) any professional liability insurance maintained by CONTRACTOR, (ii) extending any statute of limitations governing any claim arising from CONTRACTOR's acts or omissions, or (iii) waiving any claims or defenses that CONTRACTOR may have against the State or any other party.

5. Nondiscrimination. No person performing work under this Agreement, including any subcontractor, employee, or agent of CONTRACTOR, shall engage in any discrimination that is prohibited by any applicable federal, state, or county law.

6. Conflicts of Interest.
 - a. With regard to CONTRACTOR's current clients, CONTRACTOR hereby discloses on Exhibit ____, attached hereto, a list of such clients who have interests adverse to the STATE in pending administrative actions or litigation and the nature of those interests. The execution of the Agreement by the STATE constitutes the STATE's consent to CONTRACTOR's representation identified in Exhibit ____, but such consent is limited to the extent the representation is identified and disclosed.

 - b. With regard to potential clients whom CONTRACTOR wishes to represent during the duration of this Agreement who have interests adverse to the STATE in then pending administrative actions or litigation, CONTRACTOR agrees to consult with the STATE prior to representing the clients. Following consultation, the STATE shall grant or withhold its consent to the proposed representation.

7. Subcontracts and Assignments. CONTRACTOR shall not assign or subcontract any of the CONTRACTOR's duties, obligations, or interests under this Agreement and no such assignment or subcontract shall be effective unless (i) CONTRACTOR obtains the prior written consent of the STATE and (ii) CONTRACTOR's assignee or subcontractor submits to the STATE a tax clearance certificate from the Director of Taxation State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against CONTRACTOR's assignee or subcontractor have been paid. Additionally, no assignment by CONTRACTOR of CONTRACTOR's right to compensation under this

Agreement shall be effective unless and until the assignment is approved by the Comptroller of the State of Hawaii, as provided in section 40-58, HRS.

- a. Recognition of a successor in interest. When in the best interest of the STATE, a successor in interest may be recognized in an assignment agreement in which the STATE, CONTRACTOR and the assignee or transferee (hereinafter referred to as the "Assignee") agree that:
 - (1) The Assignee assumes all of CONTRACTOR's obligations;
 - (2) CONTRACTOR remains liable for all obligations under this Agreement but waives all rights under this Agreement as against the STATE; and
 - (3) CONTRACTOR shall continue to furnish, and the Assignee shall also furnish, all required insurance.
 - b. Change of Name. When CONTRACTOR asks to change the name in which it holds this Agreement with the STATE, the DIRECTOR or the DIRECTOR's designee shall, upon receipt of a document satisfactory to the DIRECTOR or the DIRECTOR's designee indicating such change of name (for example, an amendment to CONTRACTOR's articles of incorporation), enter into an amendment of this Agreement with CONTRACTOR to effect such a change of name. The amendment to this Agreement changing CONTRACTOR's name shall specifically indicate that no other terms and conditions of this Agreement are thereby changed.
 - c. Reports. All assignment contracts and amendments to this Agreement effecting changes of CONTRACTOR's name or novation hereunder shall be reported to the chief procurement officer as defined in section 103D-203(a), HRS, within thirty days of the date that the assignment contract or amendment becomes effective.
8. Cost of Litigation. In case the STATE shall, without any fault on its part, be made a party to any litigation commenced by or against CONTRACTOR in connection with this Agreement, CONTRACTOR shall pay all costs and expenses incurred by or imposed on the STATE, including reasonable attorneys' fees.
 9. STATE's Right of Offset. The STATE may offset against any monies or other obligations the STATE owes to CONTRACTOR under this Agreement, any amounts owed to the State of Hawaii by CONTRACTOR under this Agreement or any other agreements or pursuant to any law or other obligation owed to the State of Hawaii by CONTRACTOR, including, without limitation, the payment of any taxes or levies of any kind or nature. The STATE will notify CONTRACTOR in writing of any offset and the nature of such offset. For purposes of this paragraph, amounts owed to the State of Hawaii shall not include debts or obligations which have been liquidated, agreed to by CONTRACTOR, and are covered by an installment payment or other settlement plan approved by the State of Hawaii, provided, however, that CONTRACTOR shall be

entitled to such exclusion only to the extent that CONTRACTOR is current with, and not delinquent on, any payments or obligations owed to the State of Hawaii under such payment or other settlement plan.

10. Disputes. Disputes shall be resolved in accordance with section 103D-703, HRS, and chapter 3-126, Hawaii Administrative Rules ("the Procurement Rules"), chapter 126, as the same may be amended from time to time.
11. Termination, Generally. This Agreement may be terminated at the option of the STATE upon ten (10) days written notice to CONTRACTOR. If the STATE elects to terminate, CONTRACTOR shall be entitled to reasonable payment as determined by the STATE for satisfactory services rendered under the Agreement up to the time of termination.
12. Termination by Contractor. CONTRACTOR may withdraw from this Agreement with the consent to the STATE. Any such withdrawal must comply with the ethics standards applicable to the practice of law. The STATE's consent shall not be withheld unreasonably. The STATE, upon CONTRACTOR's withdrawal, will determine whether payment is due to CONTRACTOR and the amount that is due.
13. Costs and Expenses. Any reimbursement due CONTRACTOR for per diem and transportation expenses under this Agreement shall be subject to chapter 3-123 (Cost Principles) of the Procurement Rules and the following guidelines:
 - a. Reimbursement for air transportation shall be for actual cost or coach class air fare, whichever is less.
 - b. Reimbursement for ground transportation costs shall not exceed the actual cost of renting an intermediate-size vehicle.
 - c. Unless prior written approval of the DIRECTOR is obtained, reimbursement for subsistence allowance (i.e., hotel and meals, etc.) shall not exceed the applicable daily authorized rates for interisland or out-of-state travel that are set forth in the current Governor's Executive Order authorizing adjustments in salaries and benefits for state officers and employees in the executive branch who are excluded from collective bargaining coverage.
 - d. If travel is undertaken for more than one client, CONTRACTOR shall be reimbursed only the STATE's share or all subsistence and transportation costs. The STATE will compensate for time spent in transit only if work is done for the STATE during such transit.
14. Payment Procedures: Final Payment; Tax Clearance.
 - a. Original invoices required. All payments under this Agreement shall be made only upon submission by CONTRACTOR of original invoices specifying the

amount due and certifying that services requested under the Agreement have been performed by CONTRACTOR according to the Agreement.

- b. Subject to available funds. Such payments are subject to availability of funds and allotment by the Director of Finance in accordance with chapter 37, HRS. Further, all payments shall be made in accordance with and subject to chapter 40, HRS.
 - c. Prompt payment.
 - (1) Any money, other than retainage, paid to CONTRACTOR shall be dispersed to subcontractors within ten days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes; and
 - (2) Upon final payment to CONTRACTOR, full payment to the subcontractor, including retainage, shall be made within ten days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.
 - d. Final payment. Final payment under this Agreement shall be subject to sections 103-53 and 103D-328, HRS, which require a tax clearance from the Director of Taxation, State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against CONTRACTOR have been paid.
15. Federal Funds. If this Agreement is payable in whole or in part from federal funds, CONTRACTOR agrees that, as to the portion of the compensation under this Agreement to be payable from federal funds, CONTRACTOR shall be paid only from such funds received from the federal government, and shall not be paid from any other funds, Failure of the STATE to receive anticipated federal funds shall not be considered a breach by the STATE or an excuse for nonperformance by CONTRACTOR.
16. Modification of Agreement.
- a. In writing. Any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Agreement permitted by this Agreement shall be made by written amendment to this Agreement, signed by CONTRACTOR and the STATE.
 - b. No oral modification. No oral modification, alteration, amendment, change, or extension of any term, provision or condition of this Agreement shall be permitted.
 - d. Tax clearance. The STATE may, at its discretion, require CONTRACTOR to submit to the STATE, prior to the STATE's approval of any modification,

alteration, amendment, change, or extension of any term, provision, or condition of this Agreement, a tax clearance from the Director of Taxation, State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against CONTRACTOR have been paid.

17. Confidentiality of Material.

- a. All material given to or made available to CONTRACTOR by virtue of this Agreement, which is identified as proprietary or confidential information, will be safeguarded by CONTRACTOR and shall not be disclosed to any individual or organization without the prior written approval of the STATE.
- b. All information, data, or other material provided by CONTRACTOR to the STATE shall be subject to the Uniform Information Practices Act, chapter 92F, HRS.

18. Publicity. CONTRACTOR shall not refer to the STATE, or any office, agency, or officer thereof, or any State employee, including the DIRECTOR, or to the services or goods, or both, provided under this Agreement, in any of CONTRACTOR's brochures, advertisements, or other publicity of CONTRACTOR. All media contacts with CONTRACTOR about the subject matter of this Agreement shall be referred to the DIRECTOR or the DIRECTOR's designee.

19. Records Retention.

- a. Upon any termination of this Contract or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
- b. CONTRACTOR and any subcontractors shall maintain the files, books, and records, that relate to the Contract, including any personal information created or received by CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least seven (7) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the seven (7) year, or other retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS, or returned to the STATE at the request of the STATE.

20. Antitrust Claims. The STATE and CONTRACTOR recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, CONTRACTOR hereby assigns to the STATE any and all claims for overcharges as to goods and materials purchased in connection with this Agreement, except as to overcharges which result from violations commencing after the price is established under this Agreement and which were not passed on to the STATE under an escalation clause.

21. Governing Law. The validity of this Agreement and any of its terms or provisions, as well as the rights and duties of the parties to this Agreement, shall be governed by the laws of the State of Hawaii. Any action at law or in equity to enforce or interpret the provisions of this Agreement shall be brought in a state court of competent jurisdiction in Honolulu, Hawaii.
22. Compliance with Laws. CONTRACTOR shall comply with all federal, state, and county laws, ordinances, codes, rules, and regulations, as the same may be amended from time to time, that in any way affect CONTRACTOR's performance of this Agreement.
23. Conflict between General Conditions and Procurement Rules. In the event of a conflict between the General Conditions and the Procurement Rules, the Procurement Rules in effect on the date this Agreement became effective shall control.
24. Entire Agreement. This Agreement sets forth all of the agreements, conditions, understandings, promises, warranties, and representations between the STATE and CONTRACTOR relative to this Agreement. This Agreement supersedes all prior agreements, conditions, understandings, promises, warranties, and representations, which shall have no further force or effect. There are no agreements, conditions, understandings, promises, warranties, or representations oral or written, express or implied, between the STATE and CONTRACTOR other than as set forth or as referred to herein.
25. Severability. In the event that any provision of this Agreement is declared invalid or unenforceable by a court, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining terms of this Agreement.
26. Waiver. The failure of the STATE to insist upon the strict compliance with any term, provision, or condition of this Agreement shall not constitute or be deemed to constitute a waiver or relinquishment of the STATE's right to enforce the same in accordance with this Agreement. The fact that the STATE specifically refers to one provision of the Procurement Rules or one section of the Hawaii Revised Statutes, and does not include other provisions or statutory sections in this Agreement shall not constitute a waiver or relinquishment of the STATE's rights or CONTRACTOR's obligations under the Procurement Rules or statutes.
27. Notices. Any written notice required to be given by a party to this Agreement shall be (a) delivered personally, or (b) sent by United States first class mail, postage prepaid. Notice to the STATE shall be sent to the DIRECTOR at the DIRECTOR's address as indicated in the Agreement. Notice to CONTRACTOR shall be sent to CONTRACTOR at CONTRACTOR's address as indicated in the Agreement. A notice shall be deemed to have been received three (3) days after mailing or at the time of actual receipt, whichever is earlier. CONTRACTOR is responsible for notifying the STATE in writing of any change of address.

28. Ethics of Attorneys. CONTRACTOR shall abide by and perform CONTRACTOR's duties under and pursuant to this Agreement in accordance with the ethics of the legal profession and all federal, state, and municipal laws, regulations, and ordinances regulating the practice of law.
29. Campaign Contributions. CONTRACTOR is hereby notified of the applicability of section 11-205.5, HRS, which states that campaign contributions are prohibited from specified state or county government contractors during the terms of their contracts if the contractors are paid with funds appropriated by a legislative body.
30. Confidentiality of Personal Information.

a. Definitions.

"Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either name or data elements are not encrypted:

- (1) Social security number;
- (2) Driver's license number or Hawaii identification card number; or
- (3) Account number, credit or debit card number, access code, or password that would permit access to an individual's financial information.

Personal information does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

"Technological safeguards" means the technology and the policy and procedures for use of the technology to protect and control access to personal information.

b. Confidentiality of Material.

- (1) All material given to or made available to CONTRACTOR by the STATE by virtue of this Contract which is identified as personal information, shall be safeguarded by CONTRACTOR and shall not be disclosed without prior written approval of the STATE.
- (2) CONTRACTOR agrees not to retain, use, or disclose personal information for any purpose other than as permitted or required by this Contract.
- (3) CONTRACTOR agrees to implement appropriate "technological safeguards" that are acceptable to the STATE to reduce the risk of unauthorized access to personal information.

- (4) CONTRACTOR shall report to the STATE in a prompt and complete manner any security breaches involving personal information.
- (5) CONTRACTOR agrees to mitigate, to the extent practicable, any harmful effect that is known to CONTRACTOR because of a use or disclosure of personal information by CONTRACTOR in violation of the requirements of this paragraph.
- (6) CONTRACTOR shall complete and retain a log of all disclosures made of personal information received from the STATE, or personal information created or received by CONTRACTOR on behalf of the STATE.

c. Security Awareness Training and Confidentiality Agreements.

- (1) CONTRACTOR certifies that all of its employees who will have access to the personal information have completed training on security awareness topics relating to protecting personal information.
- (2) CONTRACTOR certifies that confidentiality agreements have been signed by all of its employees who will have access to the personal information acknowledging that:
 - (A) The personal information collected, used, or maintained by CONTRACTOR will be treated as confidential;
 - (B) Access to the personal information will be allowed only as necessary to perform the Contract; and
 - (C) Use of the personal information will be restricted to uses consistent with the services subject to this Contract.

d. Termination for Cause. In addition to any other remedies provided for by this Contract, if the STATE learns of a material breach by CONTRACTOR of this paragraph by CONTRACTOR, the STATE may at its sole discretion:

- (1) Provide an opportunity for CONTRACTOR to cure the breach or end the violation; or
- (2) Immediately terminate this Contract.

In either instance, CONTRACTOR and the STATE shall follow chapter 487N, HRS, with respect to notification of a security breach of personal information.

e. Records Retention.

- (1) Upon any termination of this Contract, or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
- (2) CONTRACTOR and any subcontractors shall maintain the files, books, and records that relate to the Contract, including any personal information created or received by CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least seven (7) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the seven (7) year, or other retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS, or returned to the STATE at the request of the STATE.

STATE OF HAWAII
AGREEMENT FOR SPECIAL DEPUTY ATTORNEY GENERAL SERVICES

This Agreement, executed on the respective dates indicated below, is effective as of January _____, 2020, between the Department of the Attorney General, State of Hawaii (hereinafter "STATE"), by the Attorney General (hereinafter also referred to as "DIRECTOR"), whose address is 425 Queen Street, Honolulu, Hawaii 96813, and Lieff Cabraser Heimann & Bernstein, a Limited Liability Partnership, *(insert "corporation," "partnership," "sole proprietorship" or other legal form of the Contractor)* (hereinafter "CONTRACTOR"), under the laws of the State of Hawaii, by Robert J. Nelson *its managing partner or* *authorized designee* whose business address and taxpayer identification number are as follows: 275 Battery Street, 29th Floor, San Francisco, California 94111; Federal ID No. 94-2262492, State ID No. 236-0060-4. The member(s) of the firm primarily responsible for this Agreement shall be Robert J. Nelson and Lexi J. Hazam. *principal attorneys(s)*

RECITALS

A. The STATE desires to retain and engage the CONTRACTOR to provide the services described in this Agreement and its attachments, and the CONTRACTOR agrees to provide said services.

B. The authority of the STATE to enter into this Agreement for Special Deputy Attorney General Services is HRS § 28-8.3.

C. Money is available to fund this Agreement pursuant to:

(1) N/A *(identify state sources)* or N/A *(identify federal sources)*

or both, in the following amounts: State \$ N/A Federal N/A

NOW, THEREFORE, in consideration of the promises contained in this Agreement, the STATE and the CONTRACTOR agree as follows:

1. Scope of Services. The CONTRACTOR shall, in a proper and satisfactory manner as determined by the STATE, provide all the services set forth in Attachment 1, which is hereby made a part of this Agreement.

2. Time of Performance. The time of performance for this Agreement is contained in Attachment 2, which is hereby made a part of this Agreement.

3. Compensation. The CONTRACTOR shall be compensated for services rendered and costs incurred under this Agreement in a total amount not to exceed _____
 _____ N/A _____ DOLLARS (_____ N/A _____),
 including taxes, according to the Compensation and Payment Schedule set forth in Attachment 3,
 which is hereby made a part of this Agreement. As provided hereafter, the hourly rate of the
 principal attorney, the maximum fees and costs payable under this Agreement, and the amount of
 errors and omission insurance required of the law firm are as follows:

Hourly rate: _____ N/A _____
 Maximum fee cap: _____ N/A _____
 Maximum cost cap: _____ N/A _____
 Errors & omission insurance _____ \$10 Million _____

4. Standards of Conduct Declaration. The Standards of Conduct Declaration
 by the CONTRACTOR is attached hereto and made a part of this Agreement.

5. Other Terms and Conditions. The General Conditions and any Special
 Conditions are attached hereto and made a part of this Agreement. In the event of a conflict
 between the General Conditions and the Special Conditions, the Special Conditions shall control.

IN VIEW OF THE ABOVE, the parties execute this Agreement by their
 signatures, on the dates below, to be effective as of the date first above written.

STATE _____ CONTRACTOR _____
 By _____
 CLARE E. CONNORS
 ATTORNEY GENERAL
 JUN - 2 2020
 Date _____

By _____
 Print Name _____ Robert J. Nelson _____
 Title _____ Partner _____ *
 Date _____ 1/15/20 _____

Approved As To Form:
 By _____
 Deputy Attorney General
 Bryan C. Yee

FUNDING AGENCY (to be signed by head of
 funding agency if other than the Attorney General)
 By _____
 Print Name _____
 Title _____
 Date _____

*Evidence of authority of the CONTRACTOR's representative to sign this Agreement for the
 CONTRACTOR must be attached.



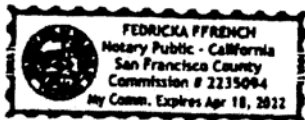
STATE OF HAWAII

CONTRACTOR'S ACKNOWLEDGMENT

STATE OF California)
) SS.
COUNTY OF San Francisco

On this 15th day of January, 2020, before me personally appeared Robert J. Nelson and _____, to me known to be the person(s) described herein and who, being duly sworn, did say that he/she/they is/are the partner of Lieff Cabraser Heimann & Bernstein, LLP, the CONTRACTOR named in the foregoing instrument, and that he/she/they is/are authorized to sign said instrument on behalf of the CONTRACTOR, and acknowledges that he/she/they executed said instrument as the free act and deed of the CONTRACTOR.

(Notary Stamp or Seal)



Fedricka Ffrench
(Signature)
Fedricka Ffrench
(Print Name)

Notary Public, State of California
My commission expires: April 18, 2022

Doc. Date: January 15, 2020 # Pages: 26
Notary Name: Fedricka Ffrench Circuit _____
Doc. Description: State of Hawaii Agreement for Special Deputy Attorney General Services

(Notary Stamp or Seal)

Fedricka Ffrench
Notary Signature Date January 15, 2020



NOTARY CERTIFICATION

**CONTRACTOR'S
STANDARDS OF CONDUCT DECLARATION**

For the purposes of this declaration:

"Agency" means and includes the State, the legislature and its committees, all executive departments, boards, commissions, committees, bureaus, offices; and all independent commissions and other establishments of the state government but excluding the courts.

"Controlling interest" means an interest in a business or other undertaking which is sufficient in fact to control, whether the interest is greater or less than fifty per cent (50%).

"Employee" means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices, and judges. (Section 84-3, HRS).

On behalf of Lieff Cabraser Heimann & Bernstein, CONTRACTOR, the undersigned does declare as follows:

1. CONTRACTOR is is not a legislator or an employee or a business in which a legislator or an employee has a controlling interest. (Section 84-15(a), HRS).
2. CONTRACTOR has not been represented or assisted personally in the matter by an individual who has been an employee of the agency awarding this Contract within the preceding two years and who participated while so employed in the matter with which the Contract is directly concerned. (Section 84-15(b), HRS).
3. CONTRACTOR has not been assisted or represented by a legislator or employee for a fee or other compensation to obtain this Contract and will not be assisted or represented by a legislator or employee for a fee or other compensation in the performance of this Contract, if the legislator or employee had been involved in the development or award of the Contract. (Section 84-14 (d), HRS).
4. CONTRACTOR has not been represented on matters related to this Contract, for a fee or other consideration by an individual who, within the past twelve (12) months, has been an agency employee, or in the case of the Legislature, a legislator, and participated while an

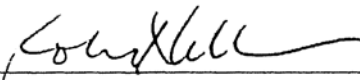
* **Reminder to agency:** If the "is" block is checked and if the Contract involves goods or services of a value in excess of \$10,000, the Contract must be awarded by competitive sealed bidding under section 103D-302, HRS, or a competitive sealed proposal under section 103D-303, HRS. Otherwise, the agency may not award the Contract unless it posts a notice of its intent to award it and files a copy of the notice with the State Ethics Commission. (Section 84-15(a), HRS).

employee or legislator on matters related to this Contract. (Sections 84-18(b) and (c), HRS).

CONTRACTOR understands that the Contract to which this document is attached is voidable on behalf of the STATE if this Contract was entered into in violation of any provision of chapter 84, Hawaii Revised Statutes, commonly referred to as the Code of Ethics, including the provisions which are the source of the declarations above. Additionally, any fee, compensation, gift, or profit received by any person as a result of a violation of the Code of Ethics may be recovered by the STATE.

DATED: Honolulu, Hawaii, _____.

CONTRACTOR

By 
(signature)

Print Name Robert J. Nelson

Print Title Partner

Name of Contractor Lieff Cabraser Heimann &
Bernstein, LLP

Date 1/15/2020

SCOPE OF SERVICES

1. Employment of Attorney-Scope. The STATE retains CONTRACTOR to represent the State of Hawaii in the investigation and prosecution of such claims relating to the improper marketing, distribution and/or sale of e-cigarettes and accessory items in the State of Hawaii as shall be determined by the Attorney General or her designee after consultation with the CONTRACTOR, which may include, but will not necessarily be limited to, claims for monetary damages, civil fraud, unfair or deceptive trade practices, false claims, nuisance, interest, injunctive relief, costs and attorneys' fees, and other appropriate claims and relief against e-cigarette and related accessory manufacturers, distributors, and/or sellers, related entities and individuals, and other entities responsible for the improper marketing, distribution, and/or sale of e-cigarettes or related accessories, in the state of Hawaii (collectively referred to as the "Litigation"). CONTRACTOR is authorized and directed to assist the STATE in making such claims for the State of Hawaii, and to prosecute such claims through assessment, enforcement, collection, and all necessary and reasonable appeals as the STATE shall direct, and to enforce all judgments and settlements as shall be obtained. CONTRACTOR shall provide all legal services that are reasonably necessary for such representation and assistance, including without limitation, the preparation and filing of all claims, pleadings, responses, motions, petitions, memoranda, briefs, notices, and other documents. CONTRACTOR shall also conduct discovery, negotiations, and provide representation at all hearings, depositions, trials, appeals, and other appearances as may be required in said actions. In the event that a defendant declares bankruptcy during the Litigation, CONTRACTOR shall also provide representation in bankruptcy proceedings, or contract with bankruptcy counsel, as may be necessary during the course of the Litigation. CONTRACTOR agrees to perform such other duties or undertake such other activities as may be necessary even if such duties or activities are not expressly set forth in this Scope of Services, when required by the court as part of the Litigation, or as directed by the Attorney General.

2. Authority Over Litigation. The Attorney General shall have final authority over all aspects of this Litigation. The Litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General. The Attorney General at his sole discretion has the right to appoint a designated deputy ("designated deputy") to oversee the Litigation, which appointment the Attorney General may modify at will. The Attorney General must approve in advance all aspects of this Litigation and shall be included in any settlement discussions. CONTRACTOR shall confer with the Attorney General as early as practicable in any settlement negotiation process.

3. Coordination of Legal Services. CONTRACTOR shall coordinate the provision of the legal services with the Attorney General or his designated deputy, other personnel of the Department of the Attorney General, and such others as the Attorney General may appoint as counsel. All pleadings, motions, briefs, and other material which may be filed with the court shall first be approved by the Attorney General and provided to his office in draft form in a

reasonable and timely manner for review. Regular status meetings shall be held as requested by the Attorney General.

4. Document Review and Discovery. CONTRACTOR shall advance all costs and expenses and provide all necessary personnel in order to comply with any discovery request made by anyone related to this Litigation. This includes but is not limited to:

- a. Working directly with State personnel who may be tasked with responding to discovery requests;
- b. Gathering, reviewing, analyzing, and storing paper documents to determine if they should be produced to opposing parties;
- c. Gathering, reviewing, and analyzing relevant information contained in electronic form in order to comply with e-discovery requests or the discovery of electronically stored information;
- d. Creating electronic databases designed to extract and convert data files in order to facilitate the automated and manual analysis of documents;
- e. Preparing production, privilege, and redaction logs; and
- f. Implementing processes to address the inadvertent disclosure of privileged information.

5. Communication to State Entities. Except as provided in Paragraph 4.a. above, CONTRACTOR shall communicate with state entities through the Department of the Attorney General unless otherwise authorized by the Attorney General.

6. Outside Assistance. CONTRACTOR shall, with the prior written approval of the Attorney General, retain other attorneys, consultants, experts, and investigators (collectively referred to as "Professionals"), as necessary, to diligently prosecute the claims and causes of action hereunder. Additionally, it may be necessary for CONTRACTOR to retain special outside counsel to assist on matters. STATE agrees that CONTRACTOR may, with the approval of the Attorney General, retain such special outside counsel to assist CONTRACTOR when CONTRACTOR deems such assistance to be reasonably necessary. Any fees or costs due to outside counsel and other Professionals resulting from representing the STATE in this matter shall be the sole responsibility of CONTRACTOR.

7. Key Person Requirement. In providing services under this Agreement, CONTRACTOR shall associate itself with a local law firm approved by the Attorney General, and shall utilize the services of those persons identified in its response to the Notice to Attorney Interested in Providing Legal Services on Behalf of the State of Hawaii. Contractor may change the firm it is associated with and the particular individuals assigned to this matter only with the consent of the Attorney General.

8. Communication with the Attorney General. CONTRACTOR agrees to consult in advance, by telephone, electronic means, or in writing, with the Attorney General promptly on all matters that may be precedential, controversial, of particular public interest, or otherwise noteworthy or important, and to keep the Attorney General fully informed at all times.

CONTRACTOR shall give timely written notice to the Attorney General of any and all of the following legal events in this Litigation:

1. Pleadings
2. Dispositive motions
3. Hearings
4. Rulings
5. Trials
6. Settlement negotiations
7. Appeals or Notice of Appeals
8. Briefs filed by any party or entity
9. Appellate arguments or decisions
10. Enforcement efforts

CONTRACTOR agrees to meet with Attorney General's office personnel when and where requested by the Attorney General in furtherance of this Litigation.

TIME OF PERFORMANCE

This Agreement begins on the date it is signed, and continues until completion of the Litigation.

COMPENSATION AND PAYMENT SCHEDULE

The following provisions shall apply to all compensation and reimbursements under this Agreement.

1. This is a contingent fee case. CONTRACTOR shall receive no compensation for any services rendered unless the State of Hawaii recovers civil penalties, compensatory or punitive damages, and/or attorneys' fees in connection with this Litigation. If the State receives such a recovery, CONTRACTOR will be compensated for its services as follows:
 - a. These costs and expenses necessary for conducting this Litigation, as defined by this Agreement, shall initially be advanced by CONTRACTOR and shall be deducted from the Litigation's gross or total recovery, if any, before any further distribution is made;
 - b. Of the monies remaining from any settlement or recovery after deduction of costs and expenses, CONTRACTOR shall receive a contingent fee of 14% from the net proceeds of any judgment or settlement.
2. All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the Department of the Attorney General, which shall distribute them or have them distributed.
3. CONTRACTOR shall advance all costs, expenses, and disbursements, including but not limited to expert witness fees and costs, deposition costs, and costs of document review and production. CONTRACTOR's agreement to advance all Litigation expenses and costs, as well as its agreement to defer fees while any and all Litigation (including appeals and enforcement actions) is pending, has been taken into consideration in establishing the fee schedule above.
4. CONTRACTOR shall be reimbursed for its expenses and costs solely from the Litigation's gross recovery as approved by the Attorney General for certain reasonable expenses and costs enumerated below. Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by CONTRACTOR for a least one full year following this Agreement's termination. All expenses must be itemized, and no reimbursement may be applied for or requested for "miscellaneous" listings. The Attorney General in her sole discretion may decline to reimburse CONTRACTOR for improperly documented, unnecessary, or unreasonable costs or expenses.

5. The STATE will not pay for attorney or paralegal time spent performing clerical tasks, such as filing, indexing, or page numbering.
6. Reimbursable expenses.
 - a. Extraordinary expenses. Unless prior written approval of the ATTORNEY GENERAL is obtained, the STATE shall have no obligation to reimburse CONTRACTOR for any extraordinary expenses incurred by CONTRACTOR, including without limitation, expenses for investigative services, computer litigation support services, videotaping of depositions, meals, and services of experts and consultants which exceed \$25,000 per expert or consultant.
 - b. Ordinary expenses. Expenses, such as the following, incurred by CONTRACTOR will be eligible for reimbursement from the STATE at actual cost, provided that written substantiation or verification (such as invoices and billings, and the taxpayer identification number of the entity to which payment was made) is submitted by CONTRACTOR and the expenses are deemed reasonable and necessary by the STATE:
 - (1) Depositions and transcripts;
 - (2) Long-distance telephone calls;
 - (3) Postage;
 - (4) Photo copying;
 - (5) Outside messenger service; or
 - (6) Outgoing faxes.

In addition, Contractor will be entitled to reimbursement for those costs and expenses set forth in the "General Conditions", paragraph 13.

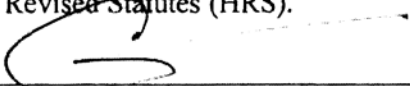
7. No State obligation to pay. Notwithstanding any other provision of this Agreement, the STATE shall have no duty to pay CONTRACTOR, nor any of its attorneys, legal assistants, paralegals, and any other staff, nor any other person performing services on behalf of CONTRACTOR, unless the requirements described in this Compensation and Payment Schedule are first met to the STATE's satisfaction. The STATE will not be

required to pay for any services it determines to be unreasonable, unnecessary, or duplicative.

CERTIFICATE OF EXEMPTION FROM CIVIL SERVICE

1. By Heads of Departments or Agencies as Delegated by the Director of Human Resources Development¹.

Pursuant to the delegation of the authority by the Director of Human Resources Development, I certify that the services provided under this Contract, and the person(s) providing the services under this Contract are exempt from the civil service, pursuant to §76-16, Hawai'i Revised Statutes (HRS).



(Signature)

JUN - 2 2020

(Date)

CLARE E. CONNORS

(Print Name)

Attorney General

(Print Title)

¹ This part of the form may be used by all department heads and others to whom the Director of Human Resources Development (DHRD) has delegated authority to certify §76-16, HRS, civil service exemptions. The specific paragraph(s) of §76-16, HRS, upon which an exemption is based should be noted in the contract file. **NOTE:** Authority to certify exemptions under §§ 76-16(2), 76-16(12), and 76-16(15), HRS, has not been delegated; only the Director of DHRD may certify §§76-16(2), 76-16(12), and 76-16(15) exemptions.

2. By the Director of Human Resources Development, State of Hawai'i.

I certify that the services to be provided under this Contract, and the person(s) providing the services under this Contract are exempt from the civil service, pursuant to §76-16, Hawai'i Revised Statutes (HRS).

(Signature)

(Date)

(Print Name)

(Print Title, if designee of the Director of DHRD)

GENERAL CONDITIONS FOR AGREEMENT FOR
SPECIAL DEPUTY ATTORNEY GENERAL SERVICES

Table of Contents

	<u>Page(s)</u>
1. <u>Coordination with and Reporting to the State</u>	1
2. <u>Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities</u>	1
3. <u>Personnel Requirements</u>	2
4. <u>Errors and Omissions Insurance and Indemnity</u>	2
5. <u>Nondiscrimination</u>	3
6. <u>Conflicts of Interest</u>	3
7. <u>Subcontracts and Assignments</u>	3
8. <u>Cost of Litigation</u>	4
9. <u>STATE's Right to Offset</u>	4
10. <u>Disputes</u>	5
11. <u>Termination, Generally</u>	5
12. <u>Termination by Contractor</u>	5
13. <u>Costs and Expenses</u>	5
14. <u>Payment Procedures: Final Payment; Tax Clearance</u>	5
15. <u>Federal Funds</u>	6
16. <u>Modification of Agreement</u>	6
17. <u>Confidentiality of Material</u>	7
18. <u>Publicity</u>	7

19. Records Retention..... 7

20. Antitrust Claims..... 7

21. Governing Law..... 7

22. Compliance with Laws..... 7

23. Conflict between General Conditions and Procurement Rules..... 8

24. Entire Agreement..... 8

25. Severability..... 8

26. Waiver..... 8

27. Notices..... 8

28. Ethics of Attorneys..... 8

29. Campaign Contributions..... 8

30. Confidentiality of Personal Information..... 9

GENERAL CONDITIONS

1. Coordination with and Reporting to the State. The ATTORNEY GENERAL, by letter or in the Scope of Services, may designate a member of the ATTORNEY GENERAL's staff to coordinate the services to be provided by CONTRACTOR in order to complete the performance required in the Agreement. CONTRACTOR shall maintain communications with the person so designated at all stages of CONTRACTOR's work, and submit to that person for resolution any questions which may arise as to the performance of this Agreement. CONTRACTOR shall make periodic status reports to the ATTORNEY GENERAL every three (3) months or at such other times as may be reasonably requested by the ATTORNEY GENERAL. If the ATTORNEY GENERAL does not designate a member of the ATTORNEY GENERAL's staff to coordinate this Agreement, the ATTORNEY GENERAL will be the coordinator of services.
2. Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities.
 - a. In the performance of services required under this Agreement, CONTRACTOR is an "independent contractor" with the authority and responsibility to control and direct the performance and details of the work and services required under this Agreement; however, the STATE shall have a general right to inspect work in progress to determine whether, in the STATE's opinion, the services are being performed by CONTRACTOR in compliance with this Agreement. Unless otherwise provided by special condition, it is understood that the STATE does not agree to use CONTRACTOR exclusively, and that CONTRACTOR is free to contract to provide services to other individuals or entities while under contract with the STATE.
 - b. CONTRACTOR and CONTRACTOR's employees and agents are not by reason of this Agreement, agents or employees of the State for any purpose, and CONTRACTOR and CONTRACTOR's employees and agents shall not be entitled to claim or receive from the State any vacation, sick leave, retirement, workers' compensation, unemployment insurance, or other benefits provided to state employees.
 - c. CONTRACTOR shall be responsible for the accuracy, completeness, and adequacy of CONTRACTOR's performance under this Agreement. Furthermore, CONTRACTOR intentionally, voluntarily, and knowingly assumes the sole and entire liability to CONTRACTOR's employees and agents, and to any individual not a party to this Agreement, for all loss, damage, or injury caused by CONTRACTOR, or CONTRACTOR's employees or agents in the course of their employment.
 - d. CONTRACTOR shall be responsible for payment of all applicable federal, state, and county taxes and fees which may become due and owing by CONTRACTOR by reason of this Agreement, including but not limited to (i) income taxes, (ii)

employment related fees, assessments, and taxes, and (iii) general excise taxes. CONTRACTOR also is responsible for obtaining all licenses, permits, and certificates that may be required in order to perform this Agreement.

- e. CONTRACTOR, if subject to the tax imposed by section 237-9, HRS, shall obtain a general excise tax license from the Department of Taxation, State of Hawaii, in accordance with section 237-9, HRS, and shall comply with all requirements thereof. CONTRACTOR shall obtain a tax clearance certificate from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, showing that all delinquent taxes, if any, levied or accrued against CONTRACTOR have been paid and submit the same to the STATE prior to commencing any performance under this Agreement. CONTRACTOR shall also be solely responsible for meeting all requirements necessary to obtain the tax clearance certificate required for final payment under sections 103-53 and 103D-328, HRS, and paragraph 14 of these General Conditions.
- f. CONTRACTOR is responsible for securing all employee-related insurance coverage for CONTRACTOR and CONTRACTOR's employees and agents that is or may be required by law, and for payment of all premiums, costs, and other liabilities associated with securing the insurance coverage.

3. Personnel Requirements.

- a. CONTRACTOR shall secure, at CONTRACTOR's own expense, all personnel required to perform this Agreement.
- b. CONTRACTOR shall ensure that CONTRACTOR's employees or agents are experienced and fully qualified to engage in the activities and perform the services required under this Agreement, and that all applicable licensing and operating requirements imposed or required under federal, state, or county law, and all applicable accreditation and other standards of quality generally accepted in the field of the activities of such employees and agents are complied with.
- c. CONTRACTOR shall promptly inform the STATE when any personnel assigned to this project leaves the employment of CONTRACTOR, whereupon the STATE may enter into separate new agreements with any former personnel of CONTRACTOR to work on this project.

4. Errors and Omissions Insurance and Indemnity. CONTRACTOR shall obtain and keep in force throughout the term of this Agreement a standard professional liability insurance policy that covers claims resulting from errors or omission in providing legal services under this Agreement. The policy shall provide a minimum aggregate coverage in the amount of at least FIVE MILLION AND NO/100 DOLLARS (\$5,000,000.00), subject to applicable deductibles, unless otherwise justified by CONTRACTOR and approved by the STATE. In such instance, CONTRACTOR shall justify to the satisfaction of the STATE a coverage amount appropriate to the legal services provided in this Agreement.

Any amount less than \$5,000,000 shall be set forth as a special condition. Upon request, CONTRACTOR shall provide the State proof of such insurance policy. In addition, and to the extent not covered by the insurance policy (for example, claims exceeding the coverage limits, or claims within CONTRACTOR's self insured retention), CONTRACTOR agrees to defend and indemnify the State, the contracting agency, and their officers, employees, and agents from and against all liability, loss, damages, costs and expenses, including all attorneys' fees, and all claims, suits, and demands therefor, arising out of or resulting from the acts or omissions of CONTRACTOR or CONTRACTOR's employees, officers, agents, or subcontractors under this Agreement; provided, however, that no obligation to defend or indemnify the State shall have the effect of (i) rendering inapplicable (in whole or in part) any professional liability insurance maintained by CONTRACTOR, (ii) extending any statute of limitations governing any claim arising from CONTRACTOR's acts or omissions, or (iii) waiving any claims or defenses that CONTRACTOR may have against the State or any other party.

5. Nondiscrimination. No person performing work under this Agreement, including any subcontractor, employee, or agent of CONTRACTOR, shall engage in any discrimination that is prohibited by any applicable federal, state, or county law.

6. Conflicts of Interest.
 - a. With regard to CONTRACTOR's current clients, CONTRACTOR hereby discloses on Exhibit ____, attached hereto, a list of such clients who have interests adverse to the STATE in pending administrative actions or litigation and the nature of those interests. The execution of the Agreement by the STATE constitutes the STATE's consent to CONTRACTOR's representation identified in Exhibit ____, but such consent is limited to the extent the representation is identified and disclosed.

 - b. With regard to potential clients whom CONTRACTOR wishes to represent during the duration of this Agreement who have interests adverse to the STATE in then pending administrative actions or litigation, CONTRACTOR agrees to consult with the STATE prior to representing the clients. Following consultation, the STATE shall grant or withhold its consent to the proposed representation.

7. Subcontracts and Assignments. CONTRACTOR shall not assign or subcontract any of the CONTRACTOR's duties, obligations, or interests under this Agreement and no such assignment or subcontract shall be effective unless (i) CONTRACTOR obtains the prior written consent of the STATE and (ii) CONTRACTOR's assignee or subcontractor submits to the STATE a tax clearance certificate from the Director of Taxation State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against CONTRACTOR's assignee or subcontractor have been paid. Additionally, no assignment by CONTRACTOR of CONTRACTOR's right to compensation under this Agreement shall be effective unless and until the assignment is approved by the Comptroller of the State of Hawaii, as provided in section 40-58, HRS.

- a. Recognition of a successor in interest. When in the best interest of the STATE, a successor in interest may be recognized in an assignment agreement in which the STATE, CONTRACTOR and the assignee or transferee (hereinafter referred to as the "Assignee") agree that:
- (1) The Assignee assumes all of CONTRACTOR's obligations;
 - (2) CONTRACTOR remains liable for all obligations under this Agreement but waives all rights under this Agreement as against the STATE; and
 - (3) CONTRACTOR shall continue to furnish, and the Assignee shall also furnish, all required insurance.
- b. Change of Name. When CONTRACTOR asks to change the name in which it holds this Agreement with the STATE, the DIRECTOR or the DIRECTOR's designee shall, upon receipt of a document satisfactory to the DIRECTOR or the DIRECTOR's designee indicating such change of name (for example, an amendment to CONTRACTOR's articles of incorporation), enter into an amendment of this Agreement with CONTRACTOR to effect such a change of name. The amendment to this Agreement changing CONTRACTOR's name shall specifically indicate that no other terms and conditions of this Agreement are thereby changed.
- c. Reports. All assignment contracts and amendments to this Agreement effecting changes of CONTRACTOR's name or novation hereunder shall be reported to the chief procurement officer as defined in section 103D-203(a), HRS, within thirty days of the date that the assignment contract or amendment becomes effective.
8. Cost of Litigation. In case the STATE shall, without any fault on its part, be made a party to any litigation commenced by or against CONTRACTOR in connection with this Agreement, CONTRACTOR shall pay all costs and expenses incurred by or imposed on the STATE, including attorneys' fees.
9. STATE's Right of Offset. The STATE may offset against any monies or other obligations the STATE owes to CONTRACTOR under this Agreement, any amounts owed to the State of Hawaii by CONTRACTOR under this Agreement or any other agreements or pursuant to any law or other obligation owed to the State of Hawaii by CONTRACTOR, including, without limitation, the payment of any taxes or levies of any kind or nature. The STATE will notify CONTRACTOR in writing of any offset and the nature of such offset. For purposes of this paragraph, amounts owed to the State of Hawaii shall not include debts or obligations which have been liquidated, agreed to by CONTRACTOR, and are covered by an installment payment or other settlement plan approved by the State of Hawaii, provided, however, that CONTRACTOR shall be entitled to such exclusion only to the extent that CONTRACTOR is current with, and not

delinquent on, any payments or obligations owed to the State of Hawaii under such payment or other settlement plan.

10. Disputes. Disputes shall be resolved in accordance with section 103D-703, HRS, and chapter 3-126, Hawaii Administrative Rules ("the Procurement Rules"), chapter 126, as the same may be amended from time to time.
11. Termination, Generally. This Agreement may be terminated at the option of the STATE upon ten (10) days written notice to CONTRACTOR. If the STATE elects to terminate, CONTRACTOR shall be entitled to reasonable payment as determined by the STATE for satisfactory services rendered under the Agreement up to the time of termination.
12. Termination by Contractor. CONTRACTOR may withdraw from this Agreement with the consent to the STATE. Any such withdrawal must comply with the ethics standards applicable to the practice of law. The STATE's consent shall not be withheld unreasonably. The STATE, upon CONTRACTOR's withdrawal, will determine whether payment is due to CONTRACTOR and the amount that is due.
13. Costs and Expenses. Any reimbursement due CONTRACTOR for per diem and transportation expenses under this Agreement shall be subject to chapter 3-123 (Cost Principles) of the Procurement Rules and the following guidelines:
 - a. Reimbursement for air transportation shall be for actual cost or coach class air fare, whichever is less.
 - b. Reimbursement for ground transportation costs shall not exceed the actual cost of renting an intermediate-size vehicle.
 - c. Unless prior written approval of the DIRECTOR is obtained, reimbursement for subsistence allowance (i.e., hotel and meals, etc.) shall not exceed the applicable daily authorized rates for interisland or out-of-state travel that are set forth in the current Governor's Executive Order authorizing adjustments in salaries and benefits for state officers and employees in the executive branch who are excluded from collective bargaining coverage.
 - d. If travel is undertaken for more than one client, CONTRACTOR shall be reimbursed only the STATE's share or all subsistence and transportation costs. The STATE will compensate for time spent in transit only if work is done for the STATE during such transit.
14. Payment Procedures: Final Payment; Tax Clearance.
 - a. Original invoices required. All payments under this Agreement shall be made only upon submission by CONTRACTOR of original invoices specifying the amount due and certifying that services requested under the Agreement have been performed by CONTRACTOR according to the Agreement.

- b. Subject to available funds. Such payments are subject to availability of funds and allotment by the Director of Finance in accordance with chapter 37, HRS. Further, all payments shall be made in accordance with and subject to chapter 40, HRS.
 - c. Prompt payment.
 - (1) Any money, other than retainage, paid to CONTRACTOR shall be dispersed to subcontractors within ten days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes; and
 - (2) Upon final payment to CONTRACTOR, full payment to the subcontractor, including retainage, shall be made within ten days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.
 - d. Final payment. Final payment under this Agreement shall be subject to sections 103-53 and 103D-328, HRS, which require a tax clearance from the Director of Taxation, State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against CONTRACTOR have been paid.
15. Federal Funds. If this Agreement is payable in whole or in part from federal funds, CONTRACTOR agrees that, as to the portion of the compensation under this Agreement to be payable from federal funds, CONTRACTOR shall be paid only from such funds received from the federal government, and shall not be paid from any other funds, Failure of the STATE to receive anticipated federal funds shall not be considered a breach by the STATE or an excuse for nonperformance by CONTRACTOR.
16. Modification of Agreement.
- a. In writing. Any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Agreement permitted by this Agreement shall be made by written amendment to this Agreement, signed by CONTRACTOR and the STATE.
 - b. No oral modification. No oral modification, alteration, amendment, change, or extension of any term, provision or condition of this Agreement shall be permitted.
 - d. Tax clearance. The STATE may, at its discretion, require CONTRACTOR to submit to the STATE, prior to the STATE's approval of any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Agreement, a tax clearance from the Director of Taxation, State of Hawaii,

showing that all delinquent taxes, if any, levied or accrued under state law against CONTRACTOR have been paid.

17. Confidentiality of Material.

- a. All material given to or made available to CONTRACTOR by virtue of this Agreement, which is identified as proprietary or confidential information, will be safeguarded by CONTRACTOR and shall not be disclosed to any individual or organization without the prior written approval of the STATE.
- b. All information, data, or other material provided by CONTRACTOR to the STATE shall be subject to the Uniform Information Practices Act, chapter 92F, HRS.

18. Publicity. CONTRACTOR shall not refer to the STATE, or any office, agency, or officer thereof, or any State employee, including the DIRECTOR, or to the services or goods, or both, provided under this Agreement, in any of CONTRACTOR's brochures, advertisements, or other publicity of CONTRACTOR. All media contacts with CONTRACTOR about the subject matter of this Agreement shall be referred to the DIRECTOR or the DIRECTOR's designee.

19. Records Retention.

- a. Upon any termination of this Contract or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
- b. CONTRACTOR and any subcontractors shall maintain the files, books, and records, that relate to the Contract, including any personal information created or received by CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least seven (7) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the seven (7) year, or other retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS, or returned to the STATE at the request of the STATE.

20. Antitrust Claims. The STATE and CONTRACTOR recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, CONTRACTOR hereby assigns to the STATE any and all claims for overcharges as to goods and materials purchased in connection with this Agreement, except as to overcharges which result from violations commencing after the price is established under this Agreement and which were not passed on to the STATE under an escalation clause.

21. Governing Law. The validity of this Agreement and any of its terms or provisions, as well as the rights and duties of the parties to this Agreement, shall be governed by the laws of the State of Hawaii. Any action at law or in equity to enforce or interpret the provisions of this Agreement shall be brought in a state court of competent jurisdiction in Honolulu, Hawaii.
22. Compliance with Laws. CONTRACTOR shall comply with all federal, state, and county laws, ordinances, codes, rules, and regulations, as the same may be amended from time to time, that in any way affect CONTRACTOR's performance of this Agreement.
23. Conflict between General Conditions and Procurement Rules. In the event of a conflict between the General Conditions and the Procurement Rules, the Procurement Rules in effect on the date this Agreement became effective shall control.
24. Entire Agreement. This Agreement sets forth all of the agreements, conditions, understandings, promises, warranties, and representations between the STATE and CONTRACTOR relative to this Agreement. This Agreement supersedes all prior agreements, conditions, understandings, promises, warranties, and representations, which shall have no further force or effect. There are no agreements, conditions, understandings, promises, warranties, or representations oral or written, express or implied, between the STATE and CONTRACTOR other than as set forth or as referred to herein.
25. Severability. In the event that any provision of this Agreement is declared invalid or unenforceable by a court, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining terms of this Agreement.
26. Waiver. The failure of the STATE to insist upon the strict compliance with any term, provision, or condition of this Agreement shall not constitute or be deemed to constitute a waiver or relinquishment of the STATE's right to enforce the same in accordance with this Agreement. The fact that the STATE specifically refers to one provision of the Procurement Rules or one section of the Hawaii Revised Statutes, and does not include other provisions or statutory sections in this Agreement shall not constitute a waiver or relinquishment of the STATE's rights or CONTRACTOR's obligations under the Procurement Rules or statutes.
27. Notices. Any written notice required to be given by a party to this Agreement shall be (a) delivered personally, or (b) sent by United States first class mail, postage prepaid. Notice to the STATE shall be sent to the DIRECTOR at the DIRECTOR's address as indicated in the Agreement. Notice to CONTRACTOR shall be sent to CONTRACTOR at CONTRACTOR's address as indicated in the Agreement. A notice shall be deemed to have been received three (3) days after mailing or at the time of actual receipt, whichever is earlier. CONTRACTOR is responsible for notifying the STATE in writing of any change of address.

28. Ethics of Attorneys. CONTRACTOR shall abide by and perform CONTRACTOR's duties under and pursuant to this Agreement in accordance with the ethics of the legal profession and all federal, state, and municipal laws, regulations, and ordinances regulating the practice of law.
29. Campaign Contributions. CONTRACTOR is hereby notified of the applicability of section 11-205.5, HRS, which states that campaign contributions are prohibited from specified state or county government contractors during the terms of their contracts if the contractors are paid with funds appropriated by a legislative body.
30. Confidentiality of Personal Information.

a. Definitions.

"Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either name or data elements are not encrypted:

- (1) Social security number;
- (2) Driver's license number or Hawaii identification card number; or
- (3) Account number, credit or debit card number, access code, or password that would permit access to an individual's financial information.

Personal information does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

"Technological safeguards" means the technology and the policy and procedures for use of the technology to protect and control access to personal information.

b. Confidentiality of Material.

- (1) All material given to or made available to CONTRACTOR by the STATE by virtue of this Contract which is identified as personal information, shall be safeguarded by CONTRACTOR and shall not be disclosed without prior written approval of the STATE.
- (2) CONTRACTOR agrees not to retain, use, or disclose personal information for any purpose other than as permitted or required by this Contract.
- (3) CONTRACTOR agrees to implement appropriate "technological safeguards" that are acceptable to the STATE to reduce the risk of unauthorized access to personal information.

- (4) CONTRACTOR shall report to the STATE in a prompt and complete manner any security breaches involving personal information.
- (5) CONTRACTOR agrees to mitigate, to the extent practicable, any harmful effect that is known to CONTRACTOR because of a use or disclosure of personal information by CONTRACTOR in violation of the requirements of this paragraph.
- (6) CONTRACTOR shall complete and retain a log of all disclosures made of personal information received from the STATE, or personal information created or received by CONTRACTOR on behalf of the STATE.

c. Security Awareness Training and Confidentiality Agreements.

- (1) CONTRACTOR certifies that all of its employees who will have access to the personal information have completed training on security awareness topics relating to protecting personal information.
- (2) CONTRACTOR certifies that confidentiality agreements have been signed by all of its employees who will have access to the personal information acknowledging that:
 - (A) The personal information collected, used, or maintained by CONTRACTOR will be treated as confidential;
 - (B) Access to the personal information will be allowed only as necessary to perform the Contract; and
 - (C) Use of the personal information will be restricted to uses consistent with the services subject to this Contract.

d. Termination for Cause. In addition to any other remedies provided for by this Contract, if the STATE learns of a material breach by CONTRACTOR of this paragraph by CONTRACTOR, the STATE may at its sole discretion:

- (1) Provide an opportunity for CONTRACTOR to cure the breach or end the violation; or
- (2) Immediately terminate this Contract.

In either instance, CONTRACTOR and the STATE shall follow chapter 487N, HRS, with respect to notification of a security breach of personal information.

e. Records Retention.

- (1) Upon any termination of this Contract, or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
- (2) CONTRACTOR and any subcontractors shall maintain the files, books, and records that relate to the Contract, including any personal information created or received by CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least seven (7) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the seven (7) year, or other retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS, or returned to the STATE at the request of the STATE.

EXHIBIT A

List of individual clients represented by Lief, Cabraser, Heimann & Bernstein, LLP and for whom a case has been filed against JUUL Labs, Inc.

Maria Beatriz-Alegre, individually and on behalf of minor child, T.B. – <i>Maria Beatriz Alegre v. JUUL Labs, Inc.</i> , No. 3:19-cv-05174 (N.D.C.A. Aug. 19, 2019), transferred into the MDL <i>In re JUUL Labs, Inc.</i> , No. 3:19-md-02913-WHO
Maxwell Berger – <i>Berger v. JUUL Labs, Inc.</i> , No. CGC-19-577444 (Cal. Sup. Ct. July 8, 2019) (San Francisco)
Rudy Blalock – <i>Macias v. JUUL Labs, Inc.</i> , No. CGC-19-579628 (Cal. Sup. Ct. Sept. 30, 2019) (San Francisco)
Aliona Brichkov – <i>Brichov v. JUUL Labs, Inc.</i> , No. CGC-19-579614 (Cal. Sup. Ct. Sept. 27, 2019) (San Francisco)
Gianna Demase – <i>Demase v. JUUL Labs, Inc.</i> , No. CGC-19-581104 (Cal. Sup. Ct. Nov. 27, 2019) (San Francisco)
Tonatiuh Franco – <i>Franco v. JUUL Labs, Inc.</i> , No. CGC-19-579616 (Cal. Sup. Ct. Sept. 27, 2019) (San Francisco)
Micah Karson – <i>Karson v. JUUL Labs, Inc.</i> , No. 3:19-cv-06616 (N.D.C.A. Oct. 15, 2019), transferred into the MDL <i>In re JUUL Labs, Inc.</i> , No. 3:19-md-02913-WHO
Nicholas Macias – <i>Macias v. JUUL Labs, Inc.</i> , No. CGC-19-579628 (Cal. Sup. Ct. Sept. 30, 2019) (San Francisco)
Tamara McMullan, individually and on behalf of minor child, K.B. – <i>McMullan v. JUUL Labs, Inc.</i> , No. CGC-19-579612 (Cal. Sup. Ct. Sept. 27, 2019) (San Francisco)
Anita Rogers – <i>Rogers v. JUUL Labs, Inc.</i> , No. CGC-19-581907 (Cal. Sup. Ct. Dec. 30, 2019) (San Francisco)
Max Schragger – <i>Karson v. JUUL Labs, Inc.</i> , No. 3:19-cv-06616 (N.D.C.A. Oct. 15, 2019), transferred into the MDL <i>In re JUUL Labs, Inc.</i> , No. 3:19-md-02913-WHO
Heather Ward – <i>Ward v. JUUL Labs, Inc.</i> , No. CGC-19-580537 (Cal. Sup. Ct. Nov. 5, 2019) (San Francisco)

Special Conditions

Paragraph 6 "Conflicts of Interest" is deleted and replaced with the following.

Conflicts of Interest.

- a. With regard to CONTRACTOR's current clients, CONTRACTOR hereby discloses on Exhibit A, attached hereto, a list of individual clients CONTRACTOR represents who were injured by JUUL or other e-cigarette use and for whom CONTRACTOR has filed a lawsuit. CONTRACTOR does not believe that the interests of those individual clients are adverse to the interests of the State. Further, CONTRACTOR does not believe that there is a significant risk that the representation of State will be materially limited by its responsibilities to those individual clients. The execution of this Agreement by STATE constitutes the State's consent to CONTRACTOR's representation of those individuals described on Exhibit A, it being understood that CONTRACTOR and its attorneys' representation in all of those matters will be provided in accordance with the Rules of Professional Conduct.
- b. CONTRACTOR agrees to update the disclosures on Exhibit A, on January 1, April 1, July 1, or October 1, whichever occurs first, after CONTRACTOR retains any new client who was injured by JUUL or other e-cigarette use.
- c. CONTRACTOR hereby discloses that CONTRACTOR's attorney Sarah London has been appointed co-lead counsel on behalf of plaintiffs in the consolidated multi-district litigation, *In re Juul Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation*, Case No. 19-md-02913 (N.D.C.A.). Contractor does not believe that Ms. London's appointment as co-lead counsel creates a concurrent conflict of interest. On the contrary, CONTRACTOR believes and has advised the State that Ms. London's appointment as co-lead counsel will benefit the STATE.
- d. CONTRACTOR has not previously represented the STATE.
- e. CONTRACTOR does not currently, and has not previously, represented clients adverse to the STATE.
- f. With regard to potential clients whom CONTRACTOR wishes to represent during the duration of this Agreement who have interests adverse to the STATE in then pending administrative actions or litigation, CONTRACTOR agrees to consult with the STATE prior to representing the clients. Following consultation, the STATE shall grant or withhold its consent to the proposed representation.

STATE OF HAWAII
AGREEMENT FOR SPECIAL DEPUTY ATTORNEY GENERAL SERVICES

This Agreement, executed on the respective dates indicated below, is effective as of January 25, 2012, between the Department of the Attorney General, State of Hawaii (hereinafter "STATE"), by the Attorney General (hereinafter also referred to as "DIRECTOR"), whose address is 425 Queen Street, 3rd Floor, Honolulu, Hawaii 96813, and _____
Golomb & Honik, a Partnership
name of law firm *(insert "corporation," "partnership," "sole proprietorship" or other legal form of the Contractor)*
(hereinafter "CONTRACTOR"), under the laws of the State of Hawaii, by Richard M. Golomb
its managing partner or
_____ whose business address and taxpayer identification number are as follows:
authorized designee
1515 Market Street, Suite 1100, Philadelphia, Pennsylvania 19102. The
member(s) of the firm primarily responsible for this Agreement shall be Richard M. Golomb
principal attorneys(s)

RECITALS

A. The STATE desires to retain and engage the CONTRACTOR to provide the services described in this Agreement and its attachments, and the CONTRACTOR agrees to provide said services.

B. The authority of the STATE to enter into this Agreement for Special Deputy Attorney General is HRS § 28-8.3.

C. Money is available to fund this Agreement pursuant to:

(1) N/A or N/A
(identify state sources) *(identify federal sources)*

or both, in the following amounts: State \$ N/A Federal N/A

NOW, THEREFORE, in consideration of the promises contained in this Agreement, the STATE and the CONTRACTOR agree as follows:

1. **Scope of Services.** The CONTRACTOR shall, in a proper and satisfactory manner as determined by the STATE, provide all the services set forth in Attachment 1, which is hereby made a part of this Agreement.

2. **Time of Performance.** The time of performance for this Agreement is contained in Attachment 2, which is hereby made a part of this Agreement.

3. Compensation. The CONTRACTOR shall be compensated for services rendered and costs incurred under this Agreement in a total amount not to exceed _____
 _____ N/A _____ DOLLARS (N/A),
 including taxes, according to the Compensation and Payment Schedule set forth in Attachment 3,
 which is hereby made a part of this Agreement. As provided hereafter, the hourly rate of the
 principal attorney, the maximum fees and costs payable under this Agreement, and the amount of
 errors and omission insurance required of the law firm are as follows:

Hourly rate: _____ N/A _____
 Maximum fee cap: _____ N/A _____
 Maximum cost cap: _____ N/A _____
 Errors & omission insurance _____ \$10 Million _____

4. Standards of Conduct Declaration. The Standards of Conduct Declaration
 by the CONTRACTOR is attached hereto and made a part of this Agreement.

5. Other Terms and Conditions. The General Conditions and any Special
 Conditions are attached hereto and made a part of this Agreement. In the event of a conflict
 between the General Conditions and the Special Conditions, the Special Conditions shall control.

IN VIEW OF THE ABOVE, the parties execute this Agreement by their
 signatures, on the dates below, to be effective as of the date first above written.

STATE

CONTRACTOR

By [Signature]
 DAVID M. LOUIE
 ATTORNEY GENERAL

By [Signature]
 Print Name Richard M. Golomb
 Title PRSS 10 SDR *

Date MAR 13 2012

Date 1/17/12

Approved As To Form:

*FUNDING AGENCY (to be signed by head of
 funding agency if other than the Attorney General)*

By [Signature]
 Deputy Attorney General
 STEPHEN H. LEVINS

By _____
 Print Name _____
 Title _____
 Date _____

*Evidence of authority of the CONTRACTOR's representative to sign this Agreement for the
 CONTRACTOR must be attached.



STATE OF HAWAII

CONTRACTOR'S ACKNOWLEDGMENT

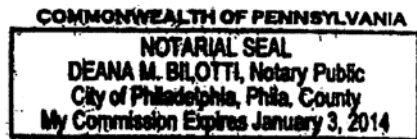
STATE OF _____)
) SS.
COUNTY OF _____)

On this 17th day of JANUARY, 20 12, before me personally appeared RICHARD GOLDMS and _____, to me known to be the person(s) described herein and who, being duly sworn, did say that he/she/they is/are the PRESIDENT of GOLDMS & LAMIK, the CONTRACTOR named in the foregoing instrument, and that he/she/they is/are authorized to sign said instrument on behalf of the CONTRACTOR, and acknowledges that he/she/they executed said instrument as the free act and deed of the CONTRACTOR.

(Notary Stamp or Seal)

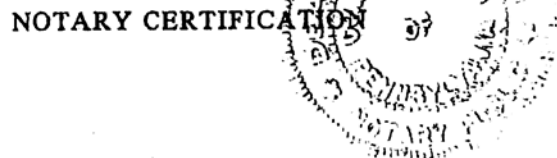
Richard Goldms (Signature)
Richard Goldms (Print Name)
Notary Public, State of PA
My commission expires: _____

Doc. Date: 1-17-12 # Pages: 25
Notary Name: DEANA BILOTTI Circuit
Doc. Description: _____



(Notary Stamp or Seal)

Deana M. Bilotti (Signature) 1-17-12 (Date)
Notary Signature Date



**CONTRACTOR'S
STANDARDS OF CONDUCT DECLARATION**

For the purposes of this declaration:

"Agency" means and includes the State, the legislature and its committees, all executive departments, boards, commissions, committees, bureaus, offices; and all independent commissions and other establishments of the state government but excluding the courts.

"Controlling interest" means an interest in a business or other undertaking which is sufficient in fact to control, whether the interest is greater or less than fifty per cent (50%).

"Employee" means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices, and judges. (Section 84-3, HRS).

On behalf of Golomb & Honik, CONTRACTOR, the undersigned does declare as follows:

1. CONTRACTOR is is not a legislator or an employee or a business in which a legislator or an employee has a controlling interest. (Section 84-15(a), HRS).
2. CONTRACTOR has not been represented or assisted personally in the matter by an individual who has been an employee of the agency awarding this Contract within the preceding two years and who participated while so employed in the matter with which the Contract is directly concerned. (Section 84-15(b), HRS).
3. CONTRACTOR has not been assisted or represented by a legislator or employee for a fee or other compensation to obtain this Contract and will not be assisted or represented by a legislator or employee for a fee or other compensation in the performance of this Contract, if the legislator or employee had been involved in the development or award of the Contract. (Section 84-14 (d), HRS).
4. CONTRACTOR has not been represented on matters related to this Contract, for a fee or other consideration by an individual who, within the past twelve (12) months, has been an agency employee, or in the case of the Legislature, a legislator, and participated while an

*** Reminder to agency:** If the "is" block is checked and if the Contract involves goods or services of a value in excess of \$10,000, the Contract must be awarded by competitive sealed bidding under section 103D-302, HRS, or a competitive sealed proposal under section 103D-303, HRS. Otherwise, the agency may not award the Contract unless it posts a notice of its intent to award it and files a copy of the notice with the State Ethics Commission. (Section 84-15(a), HRS).

employee or legislator on matters related to this Contract. (Sections 84-18(b) and (c), HRS).

CONTRACTOR understands that the Contract to which this document is attached is voidable on behalf of the STATE if this Contract was entered into in violation of any provision of chapter 84, Hawaii Revised Statutes, commonly referred to as the Code of Ethics, including the provisions which are the source of the declarations above. Additionally, any fee, compensation, gift, or profit received by any person as a result of a violation of the Code of Ethics may be recovered by the STATE.

DATED: Honolulu, Hawaii, _____.

CONTRACTOR

By Richard M. Golomb
(signature)

Print Name Richard M. Golomb

Print Title President

Name of Contractor Golomb & Honik

Date 11/17/12

SCOPE OF SERVICES

1. Employment of Attorney-Scope. The STATE retains the CONTRACTOR to represent the State of Hawaii in the investigation and prosecution of its claims for monetary damages, civil fraud, unfair or deceptive trade practices, interest, injunctive relief, costs and attorneys' fees, and other appropriate relief against financial services companies for the improper imposition of charges on consumer credit card accounts, and claims or causes of action ancillary thereto (collectively referred to as the "Litigation"). The CONTRACTOR is authorized and directed to assist the STATE in making such claims for the State of Hawaii, and to prosecute such claims through assessment, enforcement, collection, and all necessary and reasonable appeals as the STATE shall direct, and to enforce all judgments and settlements as shall be obtained. The CONTRACTOR shall provide all legal services that are reasonably necessary for such representation and assistance, including without limitation, the preparation and filing of all claims, pleadings, responses, motions, petitions, memoranda, briefs, notices, and other documents. The CONTRACTOR shall also conduct negotiations and provide representation at all hearings, depositions, trials, appeals, and other appearances as may be required in said actions. The CONTRACTOR agrees to perform such other duties or undertake such other activities as may be necessary even if such duties or activities are not expressly set forth in this Scope of Services, when required by the court as part of the Litigation, or as directed by the Attorney General.

2. Authority Over Litigation. The Attorney General shall have final authority over all aspects of this Litigation. The Litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General. The Attorney General at his sole discretion has the right to appoint a designated deputy ("designated deputy") to oversee the Litigation, which appointment the Attorney General may modify at will. The Attorney General must approve in advance all aspects of this Litigation and shall be included in any settlement discussions. The CONTRACTOR shall confer with the Attorney General as early as practicable in any settlement negotiation process.

3. Coordination of Legal Services. The CONTRACTOR shall coordinate the provision of the legal services with the Attorney General or his designated deputy, other personnel of the Department of the Attorney General, and such others as the Attorney General may appoint as counsel. All pleadings, motions, briefs, and other material which may be filed with the court shall first be approved by the Attorney General and provided to his office in draft forms in a reasonable and timely manner for review. Regular status meetings may be held as requested by the Attorney General.

4. Communication to State Entities. The CONTRACTOR shall communicate with state entities through the Department of the Attorney General unless otherwise authorized by the Attorney General.

5. Outside Assistance. The CONTRACTOR shall, with the prior written approval of the Attorney General, retain other attorneys, consultants, experts, and investigators (collectively referred to as "Professionals"), as necessary, to diligently prosecute the claims and causes of action hereunder. Additionally, it may be necessary for the CONTRACTOR to retain special outside counsel to assist on matters. STATE agrees that the CONTRACTOR may, with the approval of the Attorney General, retain such special outside counsel to assist the CONTRACTOR when the CONTRACTOR deems such assistance to be reasonably necessary. Any fees or costs due to outside counsel resulting from representing the STATE in this matter shall be the sole responsibility of the CONTRACTOR.

6. Communication with the Attorney General. The CONTRACTOR agrees to consult in advance, by telephone, fax machine, email, or in writing, with the Attorney General promptly on all matters that may be precedential, controversial, of particular public interest, or otherwise noteworthy or important, and to keep the Attorney General fully informed at all times.

CONTRACTOR shall give timely written notice to the Attorney General of any and all of the following legal events in this Litigation:

1. Pleadings
2. Dispositive motions
3. Hearings
4. Rulings
5. Trials
6. Settlement negotiations
7. Appeals or Notice of Appeals
8. Briefs filed by any party or entity
9. Appellate arguments or decisions
10. Enforcement efforts

CONTRACTOR agrees to meet or consult with Attorney General's office personnel when and where requested by the Attorney General in furtherance of this Litigation.

TIME OF PERFORMANCE

This Agreement begins on the date it is signed, and will continue until completion of the Litigation.

COMPENSATION AND PAYMENT SCHEDULE

The following provisions shall apply to all compensation and reimbursements under this Agreement.

1. This is a contingent fee case. CONTRACTOR shall receive no compensation for any services rendered unless the State of Hawaii receives a settlement or an award of civil penalties or damages in connection with this Litigation. If the State receives such an award, CONTRACTOR will be compensated for its services as follows:
 - a. These costs and expenses necessary for conducting this Litigation, as defined by this Agreement, shall initially be advanced by CONTRACTOR and shall be deducted from the Litigation's gross or total recovery, if any, before any further distribution is made; and
 - b. Of the monies remaining from any settlement or recovery after deduction of costs and expenses, CONTRACTOR shall receive a percentage as follows:

Amount of net proceeds of judgments or settlements (in millions)	Contingent percentage
First \$0 to \$5	23%
Excess over \$5 up to \$10	20%
Excess over \$10 up to \$25	17%
Excess over \$25	14%

The above-referenced contingent percentages shall apply to the total amount recovered by CONTRACTOR resulting from its investigation and prosecution of all claims as described in Paragraph No. 1 of the Scope of Services.

2. All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the Department of the Attorney General, which shall distribute them or have them distributed.
3. CONTRACTOR shall advance all costs, expenses, and disbursements, including but not limited to expert witness fees and costs, deposition costs, and costs of document production. CONTRACTOR's agreement to advance all Litigation expenses and costs, as well as its agreement to defer fees while any and all Litigation (including appeals and enforcement actions) is pending, has been taken into consideration in establishing the fee schedule above.

4. **CONTRACTOR shall be reimbursed for its expenses and costs solely from the Litigation's gross recovery as approved by the Attorney General for certain reasonable expenses and costs enumerated below. Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by CONTRACTOR for a least one full year following this Agreement's termination. All expenses must be itemized and no reimbursement may be applied for or requested for "miscellaneous" listings. The Attorney General in his sole discretion may decline to reimburse CONTRACTOR for improperly documented, unnecessary, or unreasonable costs or expenses.**
5. **The STATE will not pay for attorney or paralegal time spent performing clerical tasks, such as filing, indexing, or page numbering.**
6. **Reimbursable expenses.**
 - a. **Extraordinary expenses. Unless prior written approval of the Attorney General is obtained, the STATE shall have no obligation to reimburse the CONTRACTOR for any extraordinary expenses incurred by the CONTRACTOR, including without limitation, expenses for services of experts and consultants which exceed \$25,000 per expert or consultant.**
 - b. **Ordinary expenses. Expenses, such as the following, incurred by the CONTRACTOR will be eligible for reimbursement from the STATE at actual cost, provided that written substantiation or verification (such as invoices and billings, and the taxpayer identification number of the entity to which payment was made) is submitted by the CONTRACTOR and the expenses are deemed reasonable and necessary by the STATE:**
 - (1) Depositions and transcripts;
 - (2) Long-distance telephone calls;
 - (3) Postage;
 - (4) Photo copying;
 - (5) Outside messenger service; or
 - (6) Outgoing faxes.


In the event that a conflict arises between this Paragraph No. 6. Reimbursable expenses and Paragraph No. 13. Costs and Expenses contained in the General Conditions of this Agreement, Paragraph No. 13. Costs and Expenses shall prevail.

7. Detailed time sheets required. The CONTRACTOR shall keep itemized statements of costs which reflect all time spent and expenses incurred in connection with services performed under this Agreement.
8. No State obligation to pay. Notwithstanding any other provision of this Agreement, the STATE shall have no duty to pay the CONTRACTOR, nor any of its attorneys, legal assistants, paralegals, and any other staff, nor any other person performing services on behalf of the CONTRACTOR, unless the requirements described in this Compensation and Payment Schedule are first met to the STATE's satisfaction. The STATE will not be required to pay for any services it determines to be unreasonable, unnecessary, or duplicative.

CERTIFICATE OF EXEMPTION FROM CIVIL SERVICE

1. By Heads of Departments or Agencies as Delegated by the Director of Human Resources Development¹.

Pursuant to the delegation of the authority by the Director of Human Resources Development, I certify that the services provided under this Contract, and the person(s) providing the services under this Contract are exempt from the civil service, pursuant to §76-16, Hawai'i Revised Statutes (HRS).



(Signature)

MAR 13 2012

(Date)

DAVID M. LOUIE

(Print Name)

Attorney General

(Print Title)

¹ This part of the form may be used by all department heads and others to whom the Director of Human Resources Development (DHRD) has delegated authority to certify §76-16, HRS, civil service exemptions. The specific paragraph(s) of §76-16, HRS, upon which an exemption is based should be noted in the contract file. NOTE: Authority to certify exemptions under §§ 76-16(2), 76-16(12), and 76-16(15), HRS, has not been delegated; only the Director of DHRD may certify §§76-16(2), 76-16(12), and 76-16(15) exemptions.

2. By the Director of Human Resources Development, State of Hawai'i.

I certify that the services to be provided under this Contract, and the person(s) providing the services under this Contract are exempt from the civil service, pursuant to §76-16, Hawai'i Revised Statutes (HRS).

(Signature)

(Date)

(Print Name)

(Print Title, if designee of the Director of DHRD)

GENERAL CONDITIONS FOR AGREEMENT FOR
SPECIAL DEPUTY ATTORNEY GENERAL SERVICES

Table of Contents

	<u>Page(s)</u>
1. <u>Coordination with and Reporting to the State</u>	1
2. <u>Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities</u>	1
3. <u>Personnel Requirements</u>	2
4. <u>Errors and Omissions Insurance and Indemnity</u>	2
5. <u>Nondiscrimination</u>	3
6. <u>Conflicts of Interest</u>	3
7. <u>Subcontracts and Assignments</u>	3
8. <u>Cost of Litigation</u>	4
9. <u>STATE's Right to Offset</u>	4
10. <u>Disputes</u>	5
11. <u>Termination, Generally</u>	5
12. <u>Termination by Contractor</u>	5
13. <u>Costs and Expenses</u>	5
14. <u>Payment Procedures: Final Payment; Tax Clearance</u>	5
15. <u>Federal Funds</u>	6
16. <u>Modification of Agreement</u>	6
17. <u>Confidentiality of Material</u>	7
18. <u>Publicity</u>	7

19.	<u>Records Retention</u>	7
20.	<u>Antitrust Claims</u>	7
21.	<u>Governing Law</u>	7
22.	<u>Compliance with Laws</u>	7
23.	<u>Conflict between General Conditions and Procurement Rules</u>	8
24.	<u>Entire Agreement</u>	8
25.	<u>Severability</u>	8
26.	<u>Waiver</u>	8
27.	<u>Notices</u>	8
28.	<u>Ethics of Attorneys</u>	8
29.	<u>Campaign Contributions</u>	8
30.	<u>Confidentiality of Personal Information</u>	9

GENERAL CONDITIONS

1. Coordination with and Reporting to the State. The ATTORNEY GENERAL, by letter or in the Scope of Services, may designate a member of the ATTORNEY GENERAL's staff to coordinate the services to be provided by the CONTRACTOR in order to complete the performance required in the Agreement. The CONTRACTOR shall maintain communications with the person so designated at all stages of the CONTRACTOR's work, and submit to that person for resolution any questions which may arise as to the performance of this Agreement. The CONTRACTOR shall make periodic status reports to the ATTORNEY GENERAL every three (3) months or at such other times as may be reasonably requested by the ATTORNEY GENERAL. If the ATTORNEY GENERAL does not designate a member of the ATTORNEY GENERAL's staff to coordinate this Agreement, the ATTORNEY GENERAL will be the coordinator of services.
2. Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities.
 - a. In the performance of services required under this Agreement, the CONTRACTOR is an "independent contractor" with the authority and responsibility to control and direct the performance and details of the work and services required under this Agreement; however, the STATE shall have a general right to inspect work in progress to determine whether, in the STATE's opinion, the services are being performed by the CONTRACTOR in compliance with this Agreement. Unless otherwise provided by special condition, it is understood that the STATE does not agree to use the CONTRACTOR exclusively, and that the CONTRACTOR is free to contract to provide services to other individuals or entities while under contract with the STATE.
 - b. The CONTRACTOR and the CONTRACTOR's employees and agents are not by reason of this Agreement, agents or employees of the State for any purpose, and the CONTRACTOR and the CONTRACTOR's employees and agents shall not be entitled to claim or receive from the State any vacation, sick leave, retirement, workers' compensation, unemployment insurance, or other benefits provided to state employees.
 - c. The CONTRACTOR shall be responsible for the accuracy, completeness, and adequacy of the CONTRACTOR's performance under this Agreement. Furthermore, the CONTRACTOR intentionally, voluntarily, and knowingly assumes the sole and entire liability to the CONTRACTOR's employees and agents, and to any individual not a party to this Agreement, for all loss, damage, or injury caused by the CONTRACTOR, or the CONTRACTOR's employees or agents in the course of their employment.
 - d. The CONTRACTOR shall be responsible for payment of all applicable federal, state, and county taxes and fees which may become due and owing by the CONTRACTOR by reason of this Agreement, including but not limited to (i)

income taxes, (ii) employment related fees, assessments, and taxes, and (iii) general excise taxes. The CONTRACTOR also is responsible for obtaining all licenses, permits, and certificates that may be required in order to perform this Agreement.

- e. The CONTRACTOR, if subject to the tax imposed by section 237-9, HRS, shall obtain a general excise tax license from the Department of Taxation, State of Hawaii, in accordance with section 237-9, HRS, and shall comply with all requirements thereof. The CONTRACTOR shall obtain a tax clearance certificate from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, showing that all delinquent taxes, if any, levied or accrued against the CONTRACTOR have been paid and submit the same to the STATE prior to commencing any performance under this Agreement. The CONTRACTOR shall also be solely responsible for meeting all requirements necessary to obtain the tax clearance certificate required for final payment under sections 103-53 and 103D-328, HRS, and paragraph 14 of these General Conditions.
- f. The CONTRACTOR is responsible for securing all employee-related insurance coverage for the CONTRACTOR and the CONTRACTOR's employees and agents that is or may be required by law, and for payment of all premiums, costs, and other liabilities associated with securing the insurance coverage.

3. Personnel Requirements.

- a. The CONTRACTOR shall secure, at the CONTRACTOR's own expense, all personnel required to perform this Agreement.
- b. The CONTRACTOR shall ensure that the CONTRACTOR's employees or agents are experienced and fully qualified to engage in the activities and perform the services required under this Agreement, and that all applicable licensing and operating requirements imposed or required under federal, state, or county law, and all applicable accreditation and other standards of quality generally accepted in the field of the activities of such employees and agents are complied with.
- c. The CONTRACTOR shall promptly inform the STATE when any personnel assigned to this project leaves the employment of the CONTRACTOR, whereupon the STATE may enter into separate new agreements with any former personnel of CONTRACTOR to work on this project.

4. Errors and Omissions Insurance and Indemnity. The CONTRACTOR shall obtain and keep in force throughout the term of this Agreement a standard professional liability insurance policy that covers claims resulting from errors or omission in providing legal services under this Agreement. The policy shall provide a minimum aggregate coverage in the amount of at least TEN MILLION AND NO/100 DOLLARS (\$10,000,000.00), subject to applicable deductibles, unless otherwise justified by CONTRACTOR and approved by the STATE. In such instance, the CONTRACTOR shall justify to the

satisfaction of the STATE a coverage amount appropriate to the legal services provided in this Agreement. Any amount less than \$10,000,000 shall be set forth as a special condition. Upon request, the CONTRACTOR shall provide the State proof of such insurance policy. In addition, and to the extent not covered by the insurance policy (for example, claims exceeding the coverage limits, or claims within the CONTRACTOR's self insured retention), the CONTRACTOR agrees to defend and indemnify the State, the contracting agency, and their officers, employees, and agents from and against all liability, loss, damages, costs and expenses, including all attorneys' fees, and all claims, suits, and demands therefor, arising out of or resulting from the acts or omissions of the CONTRACTOR or the CONTRACTOR's employees, officers, agents, or subcontractors under this Agreement; provided, however, that no obligation to defend or indemnify the State shall have the effect of (i) rendering inapplicable (in whole or in part) any professional liability insurance maintained by the CONTRACTOR, (ii) extending any statute of limitations governing any claim arising from the CONTRACTOR's acts or omissions, or (iii) waiving any claims or defenses that CONTRACTOR may have against the State or any other party.

5. Nondiscrimination. No person performing work under this Agreement, including any subcontractor, employee, or agent of the CONTRACTOR, shall engage in any discrimination that is prohibited by any applicable federal, state, or county law.
6. Conflicts of Interest.
 - a. With regard to the CONTRACTOR's current clients, CONTRACTOR hereby discloses on Exhibit ____, attached hereto, a list of such clients who have interests adverse to the STATE in pending administrative actions or litigation and the nature of those interests. The execution of the Agreement by the STATE constitutes the STATE's consent to the CONTRACTOR's representation identified in Exhibit ____, but such consent is limited to the extent the representation is identified and disclosed.
 - b. With regard to potential clients whom the CONTRACTOR wishes to represent during the duration of this Agreement who have interests adverse to the STATE in then pending administrative actions or litigation, the CONTRACTOR agrees to consult with the STATE prior to representing the clients. Following consultation, the STATE shall grant or withhold its consent to the proposed representation.
7. Subcontracts and Assignments. The CONTRACTOR shall not assign or subcontract any of the CONTRACTOR's duties, obligations, or interests under this Agreement and no such assignment or subcontract shall be effective unless (i) the CONTRACTOR obtains the prior written consent of the STATE and (ii) the CONTRACTOR's assignee or subcontractor submits to the STATE a tax clearance certificate from the Director of Taxation State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against the CONTRACTOR's assignee or subcontractor have been paid. Additionally, no assignment by the CONTRACTOR of the CONTRACTOR's right to

compensation under this Agreement shall be effective unless and until the assignment is approved by the Comptroller of the State of Hawaii, as provided in section 40-58, HRS.

- a. **Recognition of a successor in interest.** When in the best interest of the STATE, a successor in interest may be recognized in an assignment agreement in which the STATE, the CONTRACTOR and the assignee or transferee (hereinafter referred to as the "Assignee") agree that:
 - (1) The Assignee assumes all of the CONTRACTOR's obligations;
 - (2) The CONTRACTOR remains liable for all obligations under this Agreement but waives all rights under this Agreement as against the STATE; and
 - (3) The CONTRACTOR shall continue to furnish, and the Assignee shall also furnish, all required insurance.
 - b. **Change of Name.** When the CONTRACTOR asks to change the name in which it holds this Agreement with the STATE, the DIRECTOR or the DIRECTOR's designee shall, upon receipt of a document satisfactory to the DIRECTOR or the DIRECTOR's designee indicating such change of name (for example, an amendment to the CONTRACTOR's articles of incorporation), enter into an amendment of this Agreement with the CONTRACTOR to effect such a change of name. The amendment to this Agreement changing the CONTRACTOR's name shall specifically indicate that no other terms and conditions of this Agreement are thereby changed.
 - c. **Reports.** All assignment contracts and amendments to this Agreement effecting changes of the CONTRACTOR's name or novation hereunder shall be reported to the chief procurement officer as defined in section 103D-203(a), HRS, within thirty days of the date that the assignment contract or amendment becomes effective.
8. **Cost of Litigation.** In case the STATE shall, without any fault on its part, be made a party to any litigation commenced by or against the CONTRACTOR in connection with this Agreement, the CONTRACTOR shall pay all costs and expenses incurred by or imposed on the STATE, including attorneys' fees.
 9. **STATE's Right of Offset.** The STATE may offset against any monies or other obligations the STATE owes to the CONTRACTOR under this Agreement, any amounts owed to the State of Hawaii by the CONTRACTOR under this Agreement or any other agreements or pursuant to any law or other obligation owed to the State of Hawaii by the CONTRACTOR, including, without limitation, the payment of any taxes or levies of any kind or nature. The STATE will notify the CONTRACTOR in writing of any offset and the nature of such offset. For purposes of this paragraph, amounts owed to the State of Hawaii shall not include debts or obligations which have been liquidated, agreed to by

the CONTRACTOR, and are covered by an installment payment or other settlement plan approved by the State of Hawaii, provided, however, that the CONTRACTOR shall be entitled to such exclusion only to the extent that the CONTRACTOR is current with, and not delinquent on, any payments or obligations owed to the State of Hawaii under such payment or other settlement plan.

10. Disputes. Disputes shall be resolved in accordance with section 103D-703, HRS, and chapter 3-126, Hawaii Administrative Rules ("the Procurement Rules"), chapter 126, as the same may be amended from time to time.
11. Termination, Generally. This Agreement may be terminated at the option of the STATE upon ten (10) days written notice to the CONTRACTOR. If the STATE elects to terminate, the CONTRACTOR shall be entitled to reasonable payment as determined by the STATE for satisfactory services rendered under the Agreement up to the time of termination.
12. Termination by Contractor. The CONTRACTOR may withdraw from this Agreement with the consent to the STATE. Any such withdrawal must comply with the ethics standards applicable to the practice of law. The STATE's consent shall not be withheld unreasonably. The STATE, upon the CONTRACTOR's withdrawal, will determine whether payment is due to the CONTRACTOR and the amount that is due.
13. Costs and Expenses. Any reimbursement due the CONTRACTOR for per diem and transportation expenses under this Agreement shall be subject to chapter 3-123 (Cost Principles) of the Procurement Rules and the following guidelines:
 - a. Reimbursement for air transportation shall be for actual cost or coach class air fare, whichever is less.
 - b. Reimbursement for ground transportation costs shall not exceed the actual cost of renting an intermediate-size vehicle.
 - c. Unless prior written approval of the DIRECTOR is obtained, reimbursement for subsistence allowance (i.e., hotel and meals, etc.) shall not exceed the applicable daily authorized rates for interisland or out-of-state travel that are set forth in the current Governor's Executive Order authorizing adjustments in salaries and benefits for state officers and employees in the executive branch who are excluded from collective bargaining coverage.
 - d. If travel is undertaken for more than one client, the CONTRACTOR shall be reimbursed only the STATE's share or all subsistence and transportation costs. The STATE will compensate for time spent in transit only if work is done for the STATE during such transit.

14. Payment Procedures: Final Payment; Tax Clearance.

- a. Original invoices required. All payments under this Agreement shall be made only upon submission by the CONTRACTOR of original invoices specifying the amount due and certifying that services requested under the Agreement have been performed by the CONTRACTOR according to the Agreement.
- b. Subject to available funds. Such payments are subject to availability of funds and allotment by the Director of Finance in accordance with chapter 37, HRS. Further, all payments shall be made in accordance with and subject to chapter 40, HRS.
- c. Prompt payment.
 - (1) Any money, other than retainage, paid to the CONTRACTOR shall be dispersed to subcontractors within ten days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes; and
 - (2) Upon final payment to the CONTRACTOR, full payment to the subcontractor, including retainage, shall be made within ten days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.
- d. Final payment. Final payment under this Agreement shall be subject to sections 103-53 and 103D-328, HRS, which require a tax clearance from the Director of Taxation, State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against the CONTRACTOR have been paid.

15. Federal Funds. If this Agreement is payable in whole or in part from federal funds, CONTRACTOR agrees that, as to the portion of the compensation under this Agreement to be payable from federal funds, the CONTRACTOR shall be paid only from such funds received from the federal government, and shall not be paid from any other funds, Failure of the STATE to receive anticipated federal funds shall not be considered a breach by the STATE or an excuse for nonperformance by the CONTRACTOR.

16. Modification of Agreement.

- a. In writing. Any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Agreement permitted by this Agreement shall be made by written amendment to this Agreement, signed by the CONTRACTOR and the STATE.

- b. No oral modification. No oral modification, alteration, amendment, change, or extension of any term, provision or condition of this Agreement shall be permitted.
 - d. Tax clearance. The STATE may, at its discretion, require the CONTRACTOR to submit to the STATE, prior to the STATE's approval of any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Agreement, a tax clearance from the Director of Taxation, State of Hawaii, showing that all delinquent taxes, if any, levied or accrued under state law against the CONTRACTOR have been paid.
17. Confidentiality of Material.
- a. All material given to or made available to the CONTRACTOR by virtue of this Agreement, which is identified as proprietary or confidential information, will be safeguarded by the CONTRACTOR and shall not be disclosed to any individual or organization without the prior written approval of the STATE.
 - b. All information, data, or other material provided by the CONTRACTOR to the STATE shall be subject to the Uniform Information Practices Act, chapter 92F, HRS.
18. Publicity. The CONTRACTOR shall not refer to the STATE, or any office, agency, or officer thereof, or any State employee, including the DIRECTOR, or to the services or goods, or both, provided under this Agreement, in any of the CONTRACTOR's brochures, advertisements, or other publicity of the CONTRACTOR. All media contacts with the CONTRACTOR about the subject matter of this Agreement shall be referred to the DIRECTOR or the DIRECTOR's designee.
19. Records Retention.
- a. Upon any termination of this Contract or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
 - b. The CONTRACTOR and any subcontractors shall maintain the files, books, and records, that relate to the Contract, including any personal information created or received by the CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least seven (7) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the seven (7) year, or other retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS, or returned to the STATE at the request of the STATE.

20. **Antitrust Claims.** The STATE and the CONTRACTOR recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, the CONTRACTOR hereby assigns to the STATE any and all claims for overcharges as to goods and materials purchased in connection with this Agreement, except as to overcharges which result from violations commencing after the price is established under this Agreement and which were not passed on to the STATE under an escalation clause.
21. **Governing Law.** The validity of this Agreement and any of its terms or provisions, as well as the rights and duties of the parties to this Agreement, shall be governed by the laws of the State of Hawaii. Any action at law or in equity to enforce or interpret the provisions of this Agreement shall be brought in a state court of competent jurisdiction in Honolulu, Hawaii.
22. **Compliance with Laws.** The CONTRACTOR shall comply with all federal, state, and county laws, ordinances, codes, rules, and regulations, as the same may be amended from time to time, that in any way affect the CONTRACTOR's performance of this Agreement.
23. **Conflict between General Conditions and Procurement Rules.** In the event of a conflict between the General Conditions and the Procurement Rules, the Procurement Rules in effect on the date this Agreement became effective shall control.
24. **Entire Agreement.** This Agreement sets forth all of the agreements, conditions, understandings, promises, warranties, and representations between the STATE and the CONTRACTOR relative to this Agreement. This Agreement supersedes all prior agreements, conditions, understandings, promises, warranties, and representations, which shall have no further force or effect. There are no agreements, conditions, understandings, promises, warranties, or representations oral or written, express or implied, between the STATE and the CONTRACTOR other than as set forth or as referred to herein.
25. **Severability.** In the event that any provision of this Agreement is declared invalid or unenforceable by a court, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining terms of this Agreement.
26. **Waiver.** The failure of the STATE to insist upon the strict compliance with any term, provision, or condition of this Agreement shall not constitute or be deemed to constitute a waiver or relinquishment of the STATE's right to enforce the same in accordance with this Agreement. The fact that the STATE specifically refers to one provision of the Procurement Rules or one section of the Hawaii Revised Statutes, and does not include other provisions or statutory sections in this Agreement shall not constitute a waiver or relinquishment of the STATE's rights or the CONTRACTOR's obligations under the Procurement Rules or statutes.

27. Notices. Any written notice required to be given by a party to this Agreement shall be (a) delivered personally, or (b) sent by United States first class mail, postage prepaid. Notice to the STATE shall be sent to the DIRECTOR at the DIRECTOR's address as indicated in the Agreement. Notice to the CONTRACTOR shall be sent to the CONTRACTOR at the CONTRACTOR's address as indicated in the Agreement. A notice shall be deemed to have been received three (3) days after mailing or at the time of actual receipt, whichever is earlier. The CONTRACTOR is responsible for notifying the STATE in writing of any change of address.

28. Ethics of Attorneys. CONTRACTOR shall abide by and perform the CONTRACTOR's duties under and pursuant to this Agreement in accordance with the ethics of the legal profession and all federal, state, and municipal laws, regulations, and ordinances regulating the practice of law.

29. Campaign Contributions. The CONTRACTOR is hereby notified of the applicability of section 11-205.5, HRS, which states that campaign contributions are prohibited from specified state or county government contractors during the terms of their contracts if the contractors are paid with funds appropriated by a legislative body.

30. Confidentiality of Personal Information.

a. Definitions.

"Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either name or data elements are not encrypted:

- (1) Social security number;
- (2) Driver's license number or Hawaii identification card number; or
- (3) Account number, credit or debit card number, access code, or password that would permit access to an individual's financial information.

Personal information does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

"Technological safeguards" means the technology and the policy and procedures for use of the technology to protect and control access to personal information.

b. Confidentiality of Material.

- (1) All material given to or made available to the CONTRACTOR by the STATE by virtue of this Contract which is identified as personal

information, shall be safeguarded by the CONTRACTOR and shall not be disclosed without prior written approval of the STATE.

- (2) CONTRACTOR agrees not to retain, use, or disclose personal information for any purpose other than as permitted or required by this Contract.
- (3) CONTRACTOR agrees to implement appropriate "technological safeguards" that are acceptable to the STATE to reduce the risk of unauthorized access to personal information.
- (4) CONTRACTOR shall report to the STATE in a prompt and complete manner any security breaches involving personal information.
- (5) CONTRACTOR agrees to mitigate, to the extent practicable, any harmful effect that is known to CONTRACTOR because of a use or disclosure of personal information by CONTRACTOR in violation of the requirements of this paragraph.
- (6) CONTRACTOR shall complete and retain a log of all disclosures made of personal information received from the STATE, or personal information created or received by CONTRACTOR on behalf of the STATE.

c. Security Awareness Training and Confidentiality Agreements.

- (1) CONTRACTOR certifies that all of its employees who will have access to the personal information have completed training on security awareness topics relating to protecting personal information.
- (2) CONTRACTOR certifies that confidentiality agreements have been signed by all of its employees who will have access to the personal information acknowledging that:
 - (A) The personal information collected, used, or maintained by the CONTRACTOR will be treated as confidential;
 - (B) Access to the personal information will be allowed only as necessary to perform the Contract; and
 - (C) Use of the personal information will be restricted to uses consistent with the services subject to this Contract.

d. Termination for Cause. In addition to any other remedies provided for by this Contract, if the STATE learns of a material breach by CONTRACTOR of this paragraph by CONTRACTOR, the STATE may at its sole discretion:

- (1) Provide an opportunity for the CONTRACTOR to cure the breach or end the violation; or
- (2) Immediately terminate this Contract.

In either instance, the CONTRACTOR and the STATE shall follow chapter 487N, HRS, with respect to notification of a security breach of personal information.

e. Records Retention.

- (1) Upon any termination of this Contract, or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS destroy all copies (paper or electronic form) of personal information received from the STATE.
- (2) The CONTRACTOR and any subcontractors shall maintain the files, books, and records that relate to the Contract, including any personal information created or received by the CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least seven (7) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the seven (7) year, or other retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS, or returned to the STATE at the request of the STATE.



STATE OF HAWAII
STATE PROCUREMENT OFFICE

CERTIFICATE OF VENDOR COMPLIANCE

This document presents the compliance status of the vendor identified below on the issue date with respect to certificates required from the Hawaii Department of Taxation (DOTAX), the Internal Revenue Service, the Hawaii Department of Labor and Industrial Relations (DLIR), and the Hawaii Department of Commerce and Consumer Affairs (DCCA).

Vendor Name: **Golomb & Honik, PC**

DBA/Trade Name: **Golomb & Honik, PC**

Issue Date: **02/16/2012**

Status: **Compliant**

Hawaii Tax#:

FEIN/SSN#: **XX-XXX0933**

UI#: **No record**

DCCA FILE#:

Status of Compliance for this Vendor on Issue date:

Form	Department(s)	Status
A-6	Hawaii Department of Taxation	Compliant
	Internal Revenue Service	Compliant
COGS	Hawaii Department of Commerce & Consumer Affairs	Exempt
LIR27	Hawaii Department of Labor & Industrial Relations	Compliant

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Status	Description
Exempt	The entity is exempt from this requirement
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An Empirical Study of Class Action Settlements and Their Fee Awards

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This article is a comprehensive empirical study of class action settlements in federal court. Although there have been prior empirical studies of federal class action settlements, these studies have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). By contrast, in this article, I attempt to study every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first attempt to collect a complete set of federal class action settlements for any given year. I find that district court judges approved 688 class action settlements over this two-year period, involving nearly \$33 billion. Of this \$33 billion, roughly \$5 billion was awarded to class action lawyers, or about 15 percent of the total. Most judges chose to award fees by using the highly discretionary percentage-of-the-settlement method, and the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Fee percentages were strongly and inversely associated with the size of the settlement. The age of the case at settlement was positively associated with fee percentages. There was some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located, with lower percentages in securities cases and in settlements from the Second and Ninth Circuits. There was no evidence that fee percentages were associated with whether the class action was certified as a settlement class or with the political affiliation of the judge who made the award.

I. INTRODUCTION

Class actions have been the source of great controversy in the United States. Corporations fear them.¹ Policymakers have tried to corral them.² Commentators and scholars have

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¹See, e.g., Robert W. Wood, *Defining Employees and Independent Contractors*, *Bus. L. Today* 45, 48 (May–June 2008).

²See Private Securities Litigation Reform Act (PSLRA) of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); Class Action Fairness Act of 2005, 28 U.S.C. §§ 1453, 1711–1715 (2006).

suggested countless ways to reform them.³ Despite all the attention showered on class actions, and despite the excellent empirical work on class actions to date, the data that currently exist on how the class action system operates in the United States are limited. We do not know, for example, how much money changes hands in class action litigation every year. We do not know how much of this money goes to class action lawyers rather than class members. Indeed, we do not even know how many class action cases are resolved on an annual basis. To intelligently assess our class action system as well as whether and how it should be reformed, answers to all these questions are important. Answers to these questions are equally important to policymakers in other countries who are currently thinking about adopting U.S.-style class action devices.⁴

This article tries to answer these and other questions by reporting the results of an empirical study that attempted to gather all class action settlements approved by federal judges over a recent two-year period, 2006 and 2007. I use class action settlements as the basis of the study because, even more so than individual litigation, virtually all cases certified as class actions and not dismissed before trial end in settlement.⁵ I use federal settlements as the basis of the study for practical reasons: it was easier to identify and collect settlements approved by federal judges than those approved by state judges. Systematic study of class action settlements in state courts must await further study;⁶ these future studies are important because there may be more class action settlements in state courts than there are in federal court.⁷

This article attempts to make three contributions to the existing empirical literature on class action settlements. First, virtually all the prior empirical studies of federal class action settlements have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). In this article, by contrast, I attempt to collect every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first to attempt to collect a complete set of federal class action settlements for

³See, e.g., Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U.L. Rev. 485, 490–94 (2003); Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1080–81 (2005).

⁴See, e.g., Samuel Issacharoff & Geoffrey Miller, *Will Aggregate Litigation Come to Europe?*, 62 Vand. L. Rev. 179 (2009).

⁵See, e.g., Emery Lee & Thomas E. Willing, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two’s Pre-CAFA Sample of Diversity Class Actions 11* (Federal Judicial Center 2008); Tom Baker & Sean J. Griffith, *How the Merits Matter: D&O Insurance and Securities Settlements*, 157 U. Pa. L. Rev. 755 (2009).

⁶Empirical scholars have begun to study state court class actions in certain subject areas and in certain states. See, e.g., Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Suits*, 57 Vand. L. Rev. 1747 (2004); Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 Vand. L. Rev. 133 (2004); *Findings of the Study of California Class Action Litigation* (Administrative Office of the Courts) (First Interim Report, 2009).

⁷See Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 56 (2000).

any given year.⁸ As such, this article allows us to see for the first time a complete picture of the cases that are settled in federal court. This includes aggregate annual statistics, such as how many class actions are settled every year, how much money is approved every year in these settlements, and how much of that money class action lawyers reap every year. It also includes how these settlements are distributed geographically as well as by litigation area, what sort of relief was provided in the settlements, how long the class actions took to reach settlement, and an analysis of what factors were associated with the fees awarded to class counsel by district court judges.

Second, because this article analyzes settlements that were approved in both published and unpublished opinions, it allows us to assess how well the few prior studies that looked beyond securities cases but relied only on published opinions capture the complete picture of class action settlements. To the extent these prior studies adequately capture the complete picture, it may be less imperative for courts, policymakers, and empirical scholars to spend the considerable resources needed to collect unpublished opinions in order to make sound decisions about how to design our class action system.

Third, this article studies factors that may influence district court judges when they award fees to class counsel that have not been studied before. For example, in light of the discretion district court judges have been delegated over fees under Rule 23, as well as the salience the issue of class action litigation has assumed in national politics, realist theories of judicial behavior would predict that Republican judges would award smaller fee percentages than Democratic judges. I study whether the political beliefs of district court judges are associated with the fees they award and, in doing so, contribute to the literature that attempts to assess the extent to which these beliefs influence the decisions of not just appellate judges, but trial judges as well. Moreover, the article contributes to the small but growing literature examining whether the ideological influences found in published judicial decisions persist when unpublished decisions are examined as well.

In Section II of this article, I briefly survey the existing empirical studies of class action settlements. In Section III, I describe the methodology I used to collect the 2006–2007 federal class action settlements and I report my findings regarding these settlements. District court judges approved 688 class action settlements over this two-year period, involving over \$33 billion. I report a number of descriptive statistics for these settlements, including the number of plaintiff versus defendant classes, the distribution of settlements by subject matter, the age of the case at settlement, the geographic distribution of settlements, the number of settlement classes, the distribution of relief across settlements, and various statistics on the amount of money involved in the settlements. It should be noted that despite the fact that the few prior studies that looked beyond securities settlements appeared to oversample larger settlements, much of the analysis set forth in this article is consistent with these prior studies. This suggests that scholars may not need to sample unpublished as well as published opinions in order to paint an adequate picture of class action settlements.

⁸Of course, I cannot be certain that I found every one of the class actions that settled in federal court over this period. Nonetheless, I am confident that if I did not find some, the number I did not find is small and would not contribute meaningfully to the data reported in this article.

In Section IV, I perform an analysis of the fees judges awarded to class action lawyers in the 2006–2007 settlements. All told, judges awarded nearly \$5 billion over this two-year period in fees and expenses to class action lawyers, or about 15 percent of the total amount of the settlements. Most federal judges chose to award fees by using the highly discretionary percentage-of-the-settlement method and, unsurprisingly, the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Using regression analysis, I confirm prior studies and find that fee percentages are strongly and inversely associated with the size of the settlement. Further, I find that the age of the case is positively associated with fee percentages but that the percentages were not associated with whether the class action was certified as a settlement class. There also appeared to be some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all other areas, and district courts in some circuits—the Ninth and the Second (in securities cases)—awarded lower fee percentages than courts in many other circuits. Finally, the regression analysis did not confirm the realist hypothesis: there was no association between fee percentage and the political beliefs of the judge in any regression.

II. PRIOR EMPIRICAL STUDIES OF CLASS ACTION SETTLEMENTS

There are many existing empirical studies of federal securities class action settlements.⁹ Studies of securities settlements have been plentiful because for-profit organizations maintain lists of all federal securities class action settlements for the benefit of institutional investors that are entitled to file claims in these settlements.¹⁰ Using these data, studies have shown that since 2005, for example, there have been roughly 100 securities class action settlements in federal court each year, and these settlements have involved between \$7 billion and \$17 billion per year.¹¹ Scholars have used these data to analyze many different aspects of these settlements, including the factors that are associated with the percentage of

⁹See, e.g., James D. Cox & Randall S. Thomas, Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions, 106 Colum. L. Rev. 1587 (2006); James D. Cox, Randall S. Thomas & Lynn Bai, There are Plaintiffs and . . . there are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements, 61 Vand. L. Rev. 355 (2008); Theodore Eisenberg, Geoffrey Miller & Michael A. Perino, A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions after *Goldberger v. Integrated Resources, Inc.*, 29 Wash. U.J.L. & Pol'y 5 (2009); Michael A. Perino, Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions (St. John's Legal Studies, Research Paper No. 06-0034, 2006), available at <<http://ssrn.com/abstract=870577>> [hereinafter Perino, Markets and Monitors]; Michael A. Perino, The Milberg Weiss Prosecution: No Harm, No Foul? (St. John's Legal Studies, Research Paper No. 08-0135, 2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133995> [hereinafter Perino, Milberg Weiss].

¹⁰See, e.g., RiskMetrics Group, available at <<http://www.riskmetrics.com/scas>>.

¹¹See Cornerstone Research, Securities Class Action Settlements: 2007 Review and Analysis 1 (2008), available at <http://securities.stanford.edu/Settlements/REVIEW_1995-2007/Settlements_Through_12_2007.pdf>.

the settlements that courts have awarded to class action lawyers.¹² These studies have found that the mean and median fees awarded by district court judges are between 20 percent and 30 percent of the settlement amount.¹³ These studies have also found that a number of factors are associated with the percentage of the settlement awarded as fees, including (inversely) the size of the settlement, the age of the case, whether a public pension fund was the lead plaintiff, and whether certain law firms were class counsel.¹⁴ None of these studies has examined whether the political affiliation of the federal district court judge awarding the fees was associated with the size of awards.

There are no comparable organizations that maintain lists of nonsecurities class action settlements. As such, studies of class action settlements beyond the securities area are much rarer and, when they have been done, rely on samples of settlements that were not intended to be representative of the whole. The two largest studies of class action settlements not limited to securities class actions are a 2004 study by Ted Eisenberg and Geoff Miller,¹⁵ which was recently updated to include data through 2008,¹⁶ and a 2003 study by Class Action Reports.¹⁷ The Eisenberg-Miller studies collected data from class action settlements in both state and federal courts found from court opinions published in the Westlaw and Lexis databases and checked against lists maintained by the CCH Federal Securities and Trade Regulation Reporters. Through 2008, their studies have now identified 689 settlements over a 16-year period, or less than 45 settlements per year.¹⁸ Over this 16-year period, their studies found that the mean and median settlement amounts were, respectively, \$116 million and \$12.5 million (in 2008 dollars), and that the mean and median fees awarded by district courts were 23 percent and 24 percent of the settlement, respectively.¹⁹ Their studies also performed an analysis of fee percentages and fee awards. For the data through 2002, they found that the percentage of the settlement awarded as fees was associated with the size of the settlement (inversely), the age of the case, and whether the

¹²See, e.g., Eisenberg, Miller & Perino, *supra* note 9, at 17–24, 28–36; Perino, *Markets and Monitors*, *supra* note 9, at 12–28, 39–44; Perino, *Milberg Weiss*, *supra* note 9, at 32–33, 39–60.

¹³See, e.g., Eisenberg, Miller & Perino, *supra* note 9, at 17–18, 22, 28, 33; Perino, *Markets and Monitors*, *supra* note 9, at 20–21, 40; Perino, *Milberg Weiss*, *supra* note 9, at 32–33, 51–53.

¹⁴See, e.g., Eisenberg, Miller & Perino, *supra* note 9, at 14–24, 29–30, 33–34; Perino, *Markets and Monitors*, *supra* note 9, at 20–28, 41; Perino, *Milberg Weiss*, *supra* note 9, at 39–58.

¹⁵See Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 *J. Empirical Legal Stud.* 27 (2004).

¹⁶See Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008*, 7 *J. Empirical Legal Stud.* 248 (2010) [hereinafter Eisenberg & Miller II].

¹⁷See Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., *Attorney Fee Awards in Common Fund Class Actions*, 24 *Class Action Rep.* 169 (Mar.–Apr. 2003).

¹⁸See Eisenberg & Miller II, *supra* note 16, at 251.

¹⁹*Id.* at 258–59.

district court went out of its way to comment on the level of risk that class counsel had assumed in pursuing the case.²⁰ For the data through 2008, they regressed only fee awards and found that the awards were inversely associated with the size of the settlement, that state courts gave lower awards than federal courts, and that the level of risk was still associated with larger awards.²¹ Their studies have not examined whether the political affiliations of the federal district court judges awarding fees were associated with the size of the awards.

The Class Action Reports study collected data on 1,120 state and federal settlements over a 30-year period, or less than 40 settlements per year.²² Over the same 10-year period analyzed by the Eisenberg-Miller study, the Class Action Reports data found mean and median settlements of \$35.4 and \$7.6 million (in 2002 dollars), as well as mean and median fee percentages between 25 percent and 30 percent.²³ Professors Eisenberg and Miller performed an analysis of the fee awards in the Class Action Reports study and found the percentage of the settlement awarded as fees was likewise associated with the size of the settlement (inversely) and the age of the case.²⁴

III. FEDERAL CLASS ACTION SETTLEMENTS, 2006 AND 2007

As far as I am aware, there has never been an empirical study of all federal class action settlements in a particular year. In this article, I attempt to make such a study for two recent years: 2006 and 2007. To compile a list of all federal class settlements in 2006 and 2007, I started with one of the aforementioned lists of securities settlements, the one maintained by RiskMetrics, and I supplemented this list with settlements that could be found through three other sources: (1) broad searches of district court opinions in the Westlaw and Lexis databases,²⁵ (2) four reporters of class action settlements—*BNA Class Action Litigation Report*, *Mealey's Jury Verdicts and Settlements*, *Mealey's Litigation Report*, and the *Class Action World* website²⁶—and (3) a list from the Administrative Office of Courts of all district court cases

²⁰See Eisenberg & Miller, *supra* note 15, at 61–62.

²¹See Eisenberg & Miller II, *supra* note 16, at 278.

²²See Eisenberg & Miller, *supra* note 15, at 34.

²³*Id.* at 47, 51.

²⁴*Id.* at 61–62.

²⁵The searches consisted of the following terms: (“class action” & (settle! /s approv! /s (2006 2007))); (((counsel attorney) /s fee /s award!) & (settle! /s (2006 2007)) & “class action”); (“class action” /s settle! & da(aft 12/31/2005 & bef 1/1/2008)); (“class action” /s (fair reasonable adequate) & da(aft 12/31/2005 & bef 1/1/2008)).

²⁶See <<http://classactionworld.com/>>.

coded as class actions that terminated by settlement between 2005 and 2008.²⁷ I then removed any duplicate cases and examined the docket sheets and court orders of each of the remaining cases to determine whether the cases were in fact certified as class actions under either Rule 23, Rule 23.1, or Rule 23.2.²⁸ For each of the cases verified as such, I gathered the district court's order approving the settlement, the district court's order awarding attorney fees, and, in many cases, the settlement agreements and class counsel's motions for fees, from electronic databases (such as Westlaw or PACER) and, when necessary, from the clerk's offices of the various federal district courts. In this section, I report the characteristics of the settlements themselves; in the next section, I report the characteristics of the attorney fees awarded to class counsel by the district courts that approved the settlements.

A. Number of Settlements

I found 688 settlements approved by federal district courts during 2006 and 2007 using the methodology described above. This is almost the exact same number the Eisenberg-Miller study found over a 16-year period in both federal *and* state court. Indeed, the number of annual settlements identified in this study is *several times* the number of annual settlements that have been identified in any prior empirical study of class action settlements. Of the 688 settlements I found, 304 were approved in 2006 and 384 were approved in 2007.²⁹

B. Defendant Versus Plaintiff Classes

Although Rule 23 permits federal judges to certify either a class of plaintiffs or a class of defendants, it is widely assumed that it is extremely rare for courts to certify defendant classes.³⁰ My findings confirm this widely held assumption. Of the 688 class action settlements approved in 2006 and 2007, 685 involved plaintiff classes and only three involved

²⁷I examined the AO lists in the year before and after the two-year period under investigation because the termination date recorded by the AO was not necessarily the same date the district court approved the settlement.

²⁸See Fed. R. Civ. P. 23, 23.1, 23.2. I excluded from this analysis opt-in collective actions, such as those brought pursuant to the provisions of the Fair Labor Standards Act (see 29 U.S.C. § 216(b)), if such actions did not also include claims certified under the opt-out mechanism in Rule 23.

²⁹A settlement was assigned to a particular year if the district court judge's order approving the settlement was dated between January 1 and December 31 of that year. Cases involving multiple defendants sometimes settled over time because defendants would settle separately with the plaintiff class. All such partial settlements approved by the district court on the same date were treated as one settlement. Partial settlements approved by the district court on different dates were treated as different settlements.

³⁰See, e.g., Robert H. Klonoff, Edward K.M. Bilich & Suzette M. Malveaux, *Class Actions and Other Multi-Party Litigation: Cases and Materials* 1061 (2d ed. 2006).

defendant classes. All three of the defendant-class settlements were in employment benefits cases, where companies sued classes of current or former employees.³¹

C. Settlement Subject Areas

Although courts are free to certify Rule 23 classes in almost any subject area, it is widely assumed that securities settlements dominate the federal class action docket.³² At least in terms of the number of settlements, my findings reject this conventional wisdom. As Table 1 shows, although securities settlements comprised a large percentage of the 2006 and 2007 settlements, they did not comprise a majority of those settlements. As one would have

Table 1: The Number of Class Action Settlements Approved by Federal Judges in 2006 and 2007 in Each Subject Area

<i>Subject Matter</i>	<i>Number of Settlements</i>	
	<i>2006</i>	<i>2007</i>
Securities	122 (40%)	135 (35%)
Labor and employment	41 (14%)	53 (14%)
Consumer	40 (13%)	47 (12%)
Employee benefits	23 (8%)	38 (10%)
Civil rights	24 (8%)	37 (10%)
Debt collection	19 (6%)	23 (6%)
Antitrust	13 (4%)	17 (4%)
Commercial	4 (1%)	9 (2%)
Other	18 (6%)	25 (6%)
Total	304	384

NOTE: Securities: cases brought under federal and state securities laws. Labor and employment: workplace claims brought under either federal or state law, with the exception of ERISA cases. Consumer: cases brought under the Fair Credit Reporting Act as well as cases for consumer fraud and the like. Employee benefits: ERISA cases. Civil rights: cases brought under 42 U.S.C. § 1983 or cases brought under the Americans with Disabilities Act seeking nonworkplace accommodations. Debt collection: cases brought under the Fair Debt Collection Practices Act. Antitrust: cases brought under federal or state antitrust laws. Commercial: cases between businesses, excluding antitrust cases. Other: includes, among other things, derivative actions against corporate managers and directors, environmental suits, insurance suits, Medicare and Medicaid suits, product liability suits, and mass tort suits.

SOURCES: Westlaw, PACER, district court clerks' offices.

³¹See *Halliburton Co. v. Graves*, No. 04-00280 (S.D. Tex., Sept. 28, 2007); *Rexam, Inc. v. United Steel Workers of Am.*, No. 03-2998 (D. Minn. Aug. 29, 2007); *Rexam, Inc. v. United Steel Workers of Am.*, No. 03-2998 (D. Minn. Sept. 17, 2007).

³²See, e.g., John C. Coffee, Jr., *Reforming the Security Class Action: An Essay on Deterrence and its Implementation*, 106 *Colum. L. Rev.* 1534, 1539–40 (2006) (describing securities class actions as “the 800-pound gorilla that dominates and overshadows other forms of class actions”).

expected in light of Supreme Court precedent over the last two decades,³³ there were almost no mass tort class actions (included in the “Other” category) settled over the two-year period.

Although the Eisenberg-Miller study through 2008 is not directly comparable on the distribution of settlements across litigation subject areas—because its state and federal court data cannot be separated (more than 10 percent of the settlements were from state court³⁴) and because it excludes settlements in fee-shifting cases—their study through 2008 is the best existing point of comparison. Interestingly, despite the fact that state courts were included in their data, their study through 2008 found about the same percentage of securities cases (39 percent) as my 2006–2007 data set shows.³⁵ However, their study found many more consumer (18 percent) and antitrust (10 percent) cases, while finding many fewer labor and employment (8 percent), employee benefits (6 percent), and civil rights (3 percent) cases.³⁶ This is not unexpected given their reliance on published opinions and their exclusion of fee-shifting cases.

D. Settlement Classes

The Federal Rules of Civil Procedure permit parties to seek certification of a suit as a class action for settlement purposes only.³⁷ When the district court certifies a class in such circumstances, the court need not consider whether it would be manageable to try the litigation as a class.³⁸ So-called settlement classes have always been more controversial than classes certified for litigation because they raise the prospect that, at least where there are competing class actions filed against the same defendant, the defendant could play class counsel off one another to find the one willing to settle the case for the least amount of money.³⁹ Prior to the Supreme Court’s 1997 opinion in *Amchem Products, Inc. v. Windsor*,⁴⁰ it was uncertain whether the Federal Rules even permitted settlement classes. It may therefore be a bit surprising to learn that 68 percent of the federal settlements in 2006 and 2007 were settlement classes. This percentage is higher than the percentage found in the Eisenberg-Miller studies, which found that only 57 percent of class action settlements in

³³See, e.g., Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 Sup. Ct. Rev. 183, 208.

³⁴See Eisenberg & Miller II, *supra* note 16, at 257.

³⁵*Id.* at 262.

³⁶*Id.*

³⁷See Martin H. Redish, *Settlement Class Actions, The Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. Chi. L. Rev. 545, 553 (2006).

³⁸See *Amchem Prods., Inc v Windsor*, 521 U.S. 591, 620 (1997).

³⁹See Redish, *supra* note 368, at 557–59.

⁴⁰521 U.S. 591 (1997).

state and federal court between 2003 and 2008 were settlement classes.⁴¹ It should be noted that the distribution of litigation subject areas among the settlement classes in my 2006–2007 federal data set did not differ much from the distribution among nonsettlement classes, with two exceptions. One exception was consumer cases, which were nearly three times as prevalent among settlement classes (15.9 percent) as among nonsettlement classes (5.9 percent); the other was civil rights cases, which were four times as prevalent among nonsettlement classes (18.0 percent) as among settlements classes (4.5 percent). In light of the skepticism with which the courts had long treated settlement classes, one might have suspected that courts would award lower fee percentages in such settlements. Nonetheless, as I report in Section III, whether a case was certified as a settlement class was not associated with the fee percentages awarded by federal district court judges.

E. The Age at Settlement

One interesting question is how long class actions were litigated before they reached settlement. Unsurprisingly, cases reached settlement over a wide range of ages.⁴² As shown in Table 2, the average time to settlement was a bit more than three years (1,196 days) and the median time was a bit under three years (1,068 days). The average and median ages here are similar to those found in the Eisenberg-Miller study through 2002, which found averages of 3.35 years in fee-shifting cases and 2.86 years in non-fee-shifting cases, and

Table 2: The Number of Days, 2006–2007, Federal Class Action Cases Took to Reach Settlement in Each Subject Area

<i>Subject Matter</i>	<i>Average</i>	<i>Median</i>	<i>Minimum</i>	<i>Maximum</i>
Securities	1,438	1,327	392	3,802
Labor and employment	928	786	105	2,497
Consumer	963	720	127	4,961
Employee benefits	1,162	1,161	164	3,157
Civil rights	1,373	1,360	181	3,354
Debt collection	738	673	223	1,973
Antitrust	1,140	1,167	237	2,480
Commercial	1,267	760	163	5,443
Other	1,065	962	185	3,620
All	1,196	1,068	105	5,443

SOURCE: PACER.

⁴¹See Eisenberg & Miller II, *supra* note 16, at 266.

⁴²The age of the case was calculated by subtracting the date the relevant complaint was filed from the date the settlement was approved by the district court judge. The dates were taken from PACER. For consolidated cases, I used the date of the earliest complaint. If the case had been transferred, consolidated, or removed, the date the complaint was filed was not always available from PACER. In such cases, I used the date the case was transferred, consolidated, or removed as the start date.

medians of 4.01 years in fee-shifting cases and 3.0 years in non-fee-shifting cases.⁴³ Their study through 2008 did not report case ages.

The shortest time to settlement was 105 days in a labor and employment case.⁴⁴ The longest time to settlement was nearly 15 years (5,443 days) in a commercial case.⁴⁵ The average and median time to settlement varied significantly by litigation subject matter, with securities cases generally taking the longest time and debt collection cases taking the shortest time. Labor and employment cases and consumer cases also settled relatively early.

F. The Location of Settlements

The 2006–2007 federal class action settlements were not distributed across the country in the same way federal civil litigation is in general. As Figure 1 shows, some of the geographic circuits attracted much more class action attention than we would expect based on their docket size, and others attracted much less. In particular, district courts in the First, Second, Seventh, and Ninth Circuits approved a much larger share of class action settlements than the share of all civil litigation they resolved, with the First, Second, and Seventh Circuits approving nearly double the share and the Ninth Circuit approving one-and-one-half times the share. By contrast, the shares of class action settlements approved by district courts in the Fifth and Eighth Circuits were less than one-half of their share of all civil litigation, with the Third, Fourth, and Eleventh Circuits also exhibiting significant underrepresentation.

With respect to a comparison with the Eisenberg-Miller studies, their federal court data through 2008 can be separated from their state court data on the question of the geographic distribution of settlements, and there are some significant differences between their federal data and the numbers reflected in Figure 1. Their study reported considerably higher proportions of settlements than I found from the Second (23.8 percent), Third (19.7 percent), Eighth (4.8 percent), and D.C. (3.3 percent) Circuits, and considerably lower proportions from the Fourth (1.3 percent), Seventh (6.8 percent), and Ninth (16.6 percent) Circuits.⁴⁶

Figure 2 separates the class action settlement data in Figure 1 into securities and nonsecurities cases. Figure 2 suggests that the overrepresentation of settlements in the First and Second Circuits is largely attributable to securities cases, whereas the overrepresentation in the Seventh Circuit is attributable to nonsecurities cases, and the overrepresentation in the Ninth is attributable to both securities and nonsecurities cases.

It is interesting to ask why some circuits received more class action attention than others. One hypothesis is that class actions are filed in circuits where class action lawyers

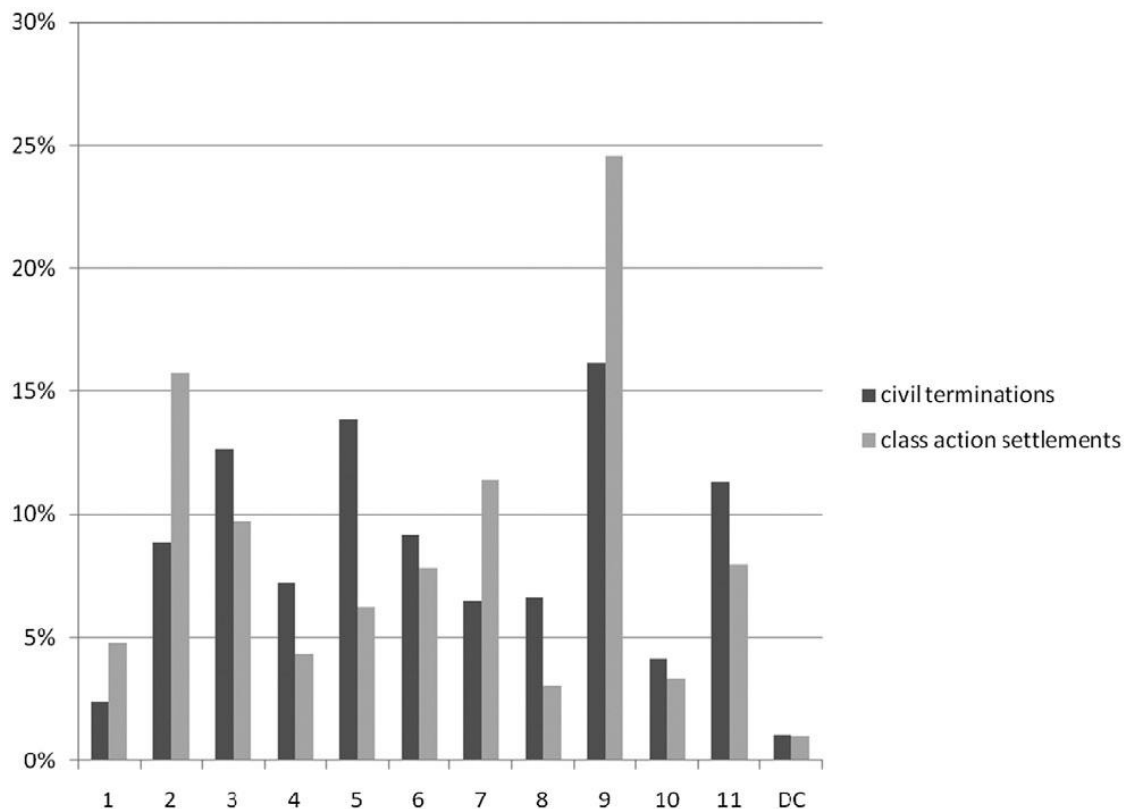
⁴³See Eisenberg & Miller, *supra* note 15, at 59–60.

⁴⁴See *Clemmons v. Rent-a-Center W., Inc.*, No. 05-6307 (D. Or. Jan. 20, 2006).

⁴⁵See *Allapattah Servs. Inc. v. Exxon Corp.*, No. 91-0986 (S.D. Fla. Apr. 7, 2006).

⁴⁶See Eisenberg & Miller II, *supra* note 16, at 260.

Figure 1: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



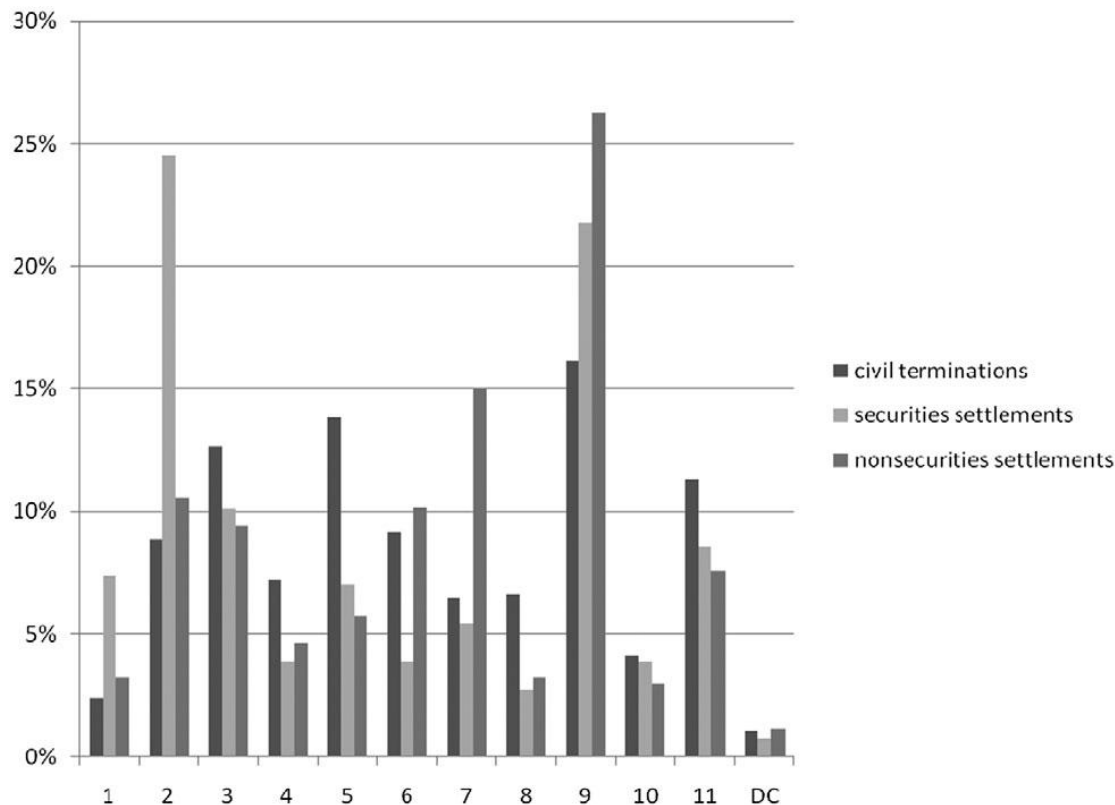
SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <<http://www.uscourts.gov/stats/index.html>>).

believe they can find favorable law or favorable judges. Federal class actions often involve class members spread across multiple states and, as such, class action lawyers may have a great deal of discretion over the district in which file suit.⁴⁷ One way law or judges may be favorable to class action attorneys is with regard to attorney fees. In Section III, I attempt to test whether district court judges in the circuits with the most over- and undersubscribed class action dockets award attorney fees that would attract or discourage filings there; I find no evidence that they do.

Another hypothesis is that class action suits are settled in jurisdictions where defendants are located. This might be the case because although class action lawyers may have discretion over where to file, venue restrictions might ultimately restrict cases to jurisdic-

⁴⁷See Samuel Issacharoff & Richard Nagareda, *Class Settlements Under Attack*, 156 U. Pa. L. Rev. 1649, 1662 (2008).

Figure 2: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <<http://www.uscourts.gov/stats/index.html>>).

tions in which defendants have their corporate headquarters or other operations.⁴⁸ This might explain why the Second Circuit, with the financial industry in New York, sees so many securities suits, and why other circuits with cities with a large corporate presence, such as the First (Boston), Seventh (Chicago), and Ninth (Los Angeles and San Francisco), see more settlements than one would expect based on the size of their civil dockets.

Another hypothesis might be that class action lawyers file cases wherever it is most convenient for them to litigate the cases—that is, in the cities in which their offices are located. This, too, might explain the Second Circuit’s overrepresentation in securities settlements, with prominent securities firms located in New York, as well as the

⁴⁸See 28 U.S.C. §§ 1391, 1404, 1406, 1407. See also *Foster v. Nationwide Mut. Ins. Co.*, No. 07-04928, 2007 U.S. Dist. LEXIS 95240 at *2–17 (N.D. Cal. Dec. 14, 2007) (transferring venue to jurisdiction where defendant’s corporate headquarters were located). One prior empirical study of securities class action settlements found that 85 percent of such cases are filed in the home circuit of the defendant corporation. See James D. Cox, Randall S. Thomas & Lynn Bai, Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses, 2009 Wis. L. Rev. 421, 429, 440, 450–51 (2009).

overrepresentation of other settlements in some of the circuits in which major metropolitan areas with prominent plaintiffs' firms are found.

G. Type of Relief

Under Rule 23, district court judges can certify class actions for injunctive or declaratory relief, for money damages, or for a combination of the two.⁴⁹ In addition, settlements can provide money damages both in the form of cash as well as in the form of in-kind relief, such as coupons to purchase the defendant's products.⁵⁰

As shown in Table 3, the vast majority of class actions settled in 2006 and 2007 provided cash relief to the class (89 percent), but a substantial number also provided in-kind relief (6 percent) or injunctive or declaratory relief (23 percent). As would be

Table 3: The Percentage of 2006 and 2007 Class Action Settlements Providing Each Type of Relief in Each Subject Area

<i>Subject Matter</i>	<i>Cash</i>	<i>In-Kind Relief</i>	<i>Injunctive or Declaratory Relief</i>
Securities (<i>n</i> = 257)	100%	0%	2%
Labor and employment (<i>n</i> = 94)	95%	6%	29%
Consumer (<i>n</i> = 87)	74%	30%	37%
Employee benefits (<i>n</i> = 61)	90%	0%	34%
Civil rights (<i>n</i> = 61)	49%	2%	75%
Debt collection (<i>n</i> = 42)	98%	0%	12%
Antitrust (<i>n</i> = 30)	97%	13%	7%
Commercial (<i>n</i> = 13)	92%	0%	62%
Other (<i>n</i> = 43)	77%	7%	33%
All (<i>n</i> = 688)	89%	6%	23%

NOTE: Cash: cash, securities, refunds, charitable contributions, contributions to employee benefit plans, forgiven debt, relinquishment of liens or claims, and liquidated repairs to property. In-kind relief: vouchers, coupons, gift cards, warranty extensions, merchandise, services, and extended insurance policies. Injunctive or declaratory relief: modification of terms of employee benefit plans, modification of compensation practices, changes in business practices, capital improvements, research, and unliquidated repairs to property.

SOURCES: Westlaw, PACER, district court clerks' offices.

⁴⁹See Fed. R. Civ. P. 23(b).

⁵⁰These coupon settlements have become very controversial in recent years, and Congress discouraged them in the Class Action Fairness Act of 2005 by tying attorney fees to the value of coupons that were ultimately redeemed by class members as opposed to the value of coupons offered class members. See 28 U.S.C. § 1712.

expected in light of the focus on consumer cases in the debate over the anti-coupon provision in the Class Action Fairness Act of 2005,⁵¹ consumer cases had the greatest percentage of settlements providing for in-kind relief (30 percent). Civil rights cases had the greatest percentage of settlements providing for injunctive or declaratory relief (75 percent), though almost half the civil rights cases also provided some cash relief (49 percent). The securities settlements were quite distinctive from the settlements in other areas in their singular focus on cash relief: every single securities settlement provided cash to the class and almost none provided in-kind, injunctive, or declaratory relief. This is but one example of how the focus on securities settlements in the prior empirical scholarship can lead to a distorted picture of class action litigation.

H. Settlement Money

Although securities settlements did not comprise the majority of federal class action settlements in 2006 and 2007, they did comprise the majority of the money—indeed, the *vast majority* of the money—involved in class action settlements. In Table 4, I report the total amount of ascertainable value involved in the 2006 and 2007 settlements. This amount

Table 4: The Total Amount of Money Involved in Federal Class Action Settlements in 2006 and 2007

<i>Subject Matter</i>	<i>Total Ascertainable Monetary Value in Settlements (and Percentage of Overall Annual Total)</i>			
	<i>2006 (n = 304)</i>		<i>2007 (n = 384)</i>	
Securities	\$16,728	76%	\$8,038	73%
Labor and employment	\$266.5	1%	\$547.7	5%
Consumer	\$517.3	2%	\$732.8	7%
Employee benefits	\$443.8	2%	\$280.8	3%
Civil rights	\$265.4	1%	\$81.7	1%
Debt collection	\$8.9	<1%	\$5.7	<1%
Antitrust	\$1,079	5%	\$660.5	6%
Commercial	\$1,217	6%	\$124.0	1%
Other	\$1,568	7%	\$592.5	5%
Total	\$22,093	100%	\$11,063	100%

NOTE: Dollar amounts are in millions. Includes all determinate payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.

SOURCES: Westlaw, PACER, district court clerks’ offices.

⁵¹See, e.g., 151 Cong. Rec. H723 (2005) (statement of Rep. Sensenbrenner) (arguing that consumers are “seeing all of their gains go to attorneys and them just getting coupon settlements from the people who have allegedly done them wrong”).

includes all determinate⁵² payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.⁵³ I did not attempt to assign a value to any relief that was not valued by the district court (even if it may have been valued by class counsel). It should be noted that district courts did not often value in-kind or injunctive relief—they did so only 18 percent of the time—and very little of Table 4—only \$1.3 billion, or 4 percent—is based on these valuations. It should also be noted that the amounts in Table 4 reflect only what defendants *agreed to pay*; they do not reflect the amounts that defendants *actually paid* after the claims administration process concluded. Prior empirical research has found that, depending on how settlements are structured (e.g., whether they awarded a fixed amount of money to each class member who eventually files a valid claim or a pro rata amount of a fixed settlement to each class member), defendants can end up paying much less than they agreed.⁵⁴

Table 4 shows that in both years, around three-quarters of all the money involved in federal class action settlements came from securities cases. Thus, in this sense, the conventional wisdom about the dominance of securities cases in class action litigation is correct. Figure 3 is a graphical representation of the contribution each litigation area made to the total number and total amount of money involved in the 2006–2007 settlements.

Table 4 also shows that, in total, over \$33 billion was approved in the 2006–2007 settlements. Over \$22 billion was approved in 2006 and over \$11 billion in 2007. It should be emphasized again that the totals in Table 4 understate the amount of money defendants agreed to pay in class action settlements in 2006 and 2007 because they exclude the unascertainable value of those settlements. This understatement disproportionately affects litigation areas, such as civil rights, where much of the relief is injunctive because, as I noted, very little of such relief was valued by district courts. Nonetheless, these numbers are, as far as I am aware, the first attempt to calculate how much money is involved in federal class action settlements in a given year.

The significant discrepancy between the two years is largely attributable to the 2006 securities settlement related to the collapse of Enron, which totaled \$6.6 billion, as well as to the fact that seven of the eight 2006–2007 settlements for more than \$1 billion were approved in 2006.⁵⁵ Indeed, it is worth noting that the eight settlements for more than \$1

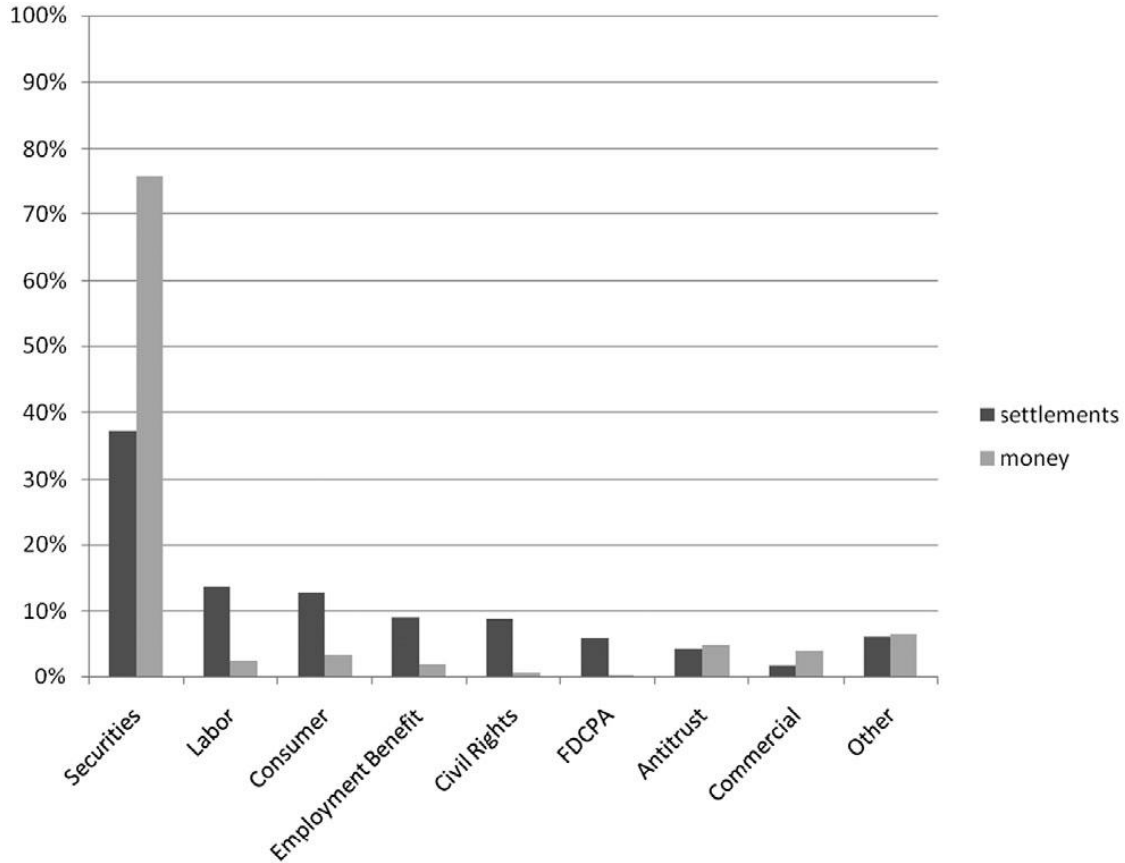
⁵²For example, I excluded awards of a fixed amount of money to each class member who eventually filed a valid claim (as opposed to settlements that awarded a pro rata amount of a fixed settlement to each class member) if the total amount of money set aside to pay the claims was not set forth in the settlement documents.

⁵³In some cases, the district court valued the relief in the settlement over a range. In these cases, I used the middle point in the range.

⁵⁴See Hensler et al., *supra* note 7, at 427–30.

⁵⁵See *In re Enron Corp. Secs. Litig.*, MDL 1446 (S.D. Tex. May 24, 2006) (\$6,600,000,000); *In re Tyco Int'l Ltd. Multidistrict Litig.*, MDL 02-1335 (D.N.H. Dec. 19, 2007) (\$3,200,000,000); *In re AOL Time Warner, Inc. Secs. & "ERISA" Litig.*, MDL 1500 (S.D.N.Y. Apr. 6, 2006) (\$2,500,000,000); *In re: Diet Drugs Prods. Liab. Litig.*, MDL 1203 (E.D. Pa. May 24, 2006) (\$1,275,000,000); *In re Nortel Networks Corp. Secs. Litig. (Nortel I)*, No. 01-1855 (S.D.N.Y. Dec. 26, 2006) (\$1,142,780,000); *In re Royal Ahold N.V. Secs. & ERISA Litig.*, 03-1539 (D. Md. Jun. 16, 2006)

Figure 3: The percentage of 2006–2007 federal class action settlements and settlement money from each subject area.



SOURCES: Westlaw, PACER, district court clerks’ offices.

billion accounted for almost \$18 billion of the \$33 billion that changed hands over the two-year period. That is, a mere 1 percent of the settlements comprised over 50 percent of the value involved in federal class action settlements in 2006 and 2007. To give some sense of the distribution of settlement size in the 2006–2007 data set, Table 5 sets forth the number of settlements with an ascertainable value beyond fee, expense, and class-representative incentive awards (605 out of the 688 settlements). Nearly two-thirds of all settlements fell below \$10 million.

Given the disproportionate influence exerted by securities settlements on the total amount of money involved in class actions, it is unsurprising that the average securities settlement involved more money than the average settlement in most of the other subject areas. These numbers are provided in Table 6, which includes, again, only the settlements

(\$1,100,000,000); *Allapattah Servs. Inc. v. Exxon Corp.*, No. 91-0986 (S.D. Fla. Apr. 7, 2006) (\$1,075,000,000); *In re Nortel Networks Corp. Secs. Litig. (Nortel II)*, No. 05-1659 (S.D.N.Y. Dec. 26, 2006) (\$1,074,270,000).

Table 5: The Distribution by Size of 2006–2007 Federal Class Action Settlements with Ascertainable Value

<i>Settlement Size (in Millions)</i>	<i>Number of Settlements</i>
[\$0 to \$1]	131 (21.7%)
(\$1 to \$10]	261 (43.1%)
(\$10 to \$50]	139 (23.0%)
(\$50 to \$100]	33 (5.45%)
(\$100 to \$500]	31 (5.12%)
(\$500 to \$6,600]	10 (1.65%)
Total	605

NOTE: Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.

SOURCES: Westlaw, PACER, district court clerks' offices.

Table 6: The Average and Median Settlement Amounts in the 2006–2007 Federal Class Action Settlements with Ascertainable Value to the Class

<i>Subject Matter</i>	<i>Average</i>	<i>Median</i>
Securities (<i>n</i> = 257)	\$96.4	\$8.0
Labor and employment (<i>n</i> = 88)	\$9.2	\$1.8
Consumer (<i>n</i> = 65)	\$18.8	\$2.9
Employee benefits (<i>n</i> = 52)	\$13.9	\$5.3
Civil rights (<i>n</i> = 34)	\$9.7	\$2.5
Debt collection (<i>n</i> = 40)	\$0.37	\$0.088
Antitrust (<i>n</i> = 29)	\$60.0	\$22.0
Commercial (<i>n</i> = 12)	\$111.7	\$7.1
Other (<i>n</i> = 28)	\$76.6	\$6.2
All (<i>N</i> = 605)	\$54.7	\$5.1

NOTE: Dollar amounts are in millions. Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.

SOURCES: Westlaw, PACER, district court clerks' offices.

with an ascertainable value beyond fee, expense, and class-representative incentive awards. The average settlement over the entire two-year period for all types of cases was almost \$55 million, but the median was only \$5.1 million. (With the \$6.6 billion Enron settlement excluded, the average settlement for all ascertainable cases dropped to \$43.8 million and, for securities cases, dropped to \$71.0 million.) The average settlements varied widely by litigation area, with securities and commercial settlements at the high end of around \$100

million, but the median settlements for nearly every area were bunched around a few million dollars. It should be noted that the high average for commercial cases is largely due to one settlement above \$1 billion;⁵⁶ when that settlement is removed, the average for commercial cases was only \$24.2 million.

Table 6 permits comparison with the two prior empirical studies of class action settlements that sought to include nonsecurities as well as securities cases in their purview. The Eisenberg-Miller study through 2002, which included both common-fund and fee-shifting cases, found that the mean class action settlement was \$112 million and the median was \$12.9 million, both in 2006 dollars,⁵⁷ more than double the average and median I found for all settlements in 2006 and 2007. The Eisenberg-Miller update through 2008 included only common-fund cases and found mean and median settlements in federal court of \$115 million and \$11.7 million (both again in 2006 dollars),⁵⁸ respectively; this is still more than double the average and median I found. This suggests that the methodology used by the Eisenberg-Miller studies—looking at district court opinions that were published in Westlaw or Lexis—oversampled larger class actions (because opinions approving larger class actions are, presumably, more likely to be published than opinions approving smaller ones). It is also possible that the exclusion of fee-shifting cases from their data through 2008 contributed to this skew, although, given that their data through 2002 included fee-shifting cases and found an almost identical mean and median as their data through 2008, the primary explanation for the much larger mean and median in their study through 2008 is probably their reliance on published opinions. Over the same years examined by Professors Eisenberg and Miller, the Class Action Reports study found a smaller average settlement than I did (\$39.5 million in 2006 dollars), but a larger median (\$8.48 million in 2006 dollars). It is possible that the Class Action Reports methodology also oversampled larger class actions, explaining its larger median, but that there are more “mega” class actions today than there were before 2003, explaining its smaller mean.⁵⁹

It is interesting to ask how significant the \$16 billion that was involved annually in these 350 or so federal class action settlements is in the grand scheme of U.S. litigation. Unfortunately, we do not know how much money is transferred every year in U.S. litigation. The only studies of which I am aware that attempt even a partial answer to this question are the estimates of how much money is transferred in the U.S. “tort” system every year by a financial services consulting firm, Tillinghast-Towers Perrin.⁶⁰ These studies are not directly

⁵⁶See *Allapattah Servs. Inc. v. Exxon Corp.*, No. 91-0986 (S.D. Fla. Apr. 7, 2006) (approving \$1,075,000,000 settlement).

⁵⁷See Eisenberg & Miller, *supra* note 15, at 47.

⁵⁸See Eisenberg & Miller II, *supra* note 16, at 262.

⁵⁹There were eight class action settlements during 2006 and 2007 of more than \$1 billion. See note 55 *supra*.

⁶⁰Some commentators have been critical of Tillinghast’s reports, typically on the ground that the reports overestimate the cost of the tort system. See M. Martin Boyer, *Three Insights from the Canadian D&O Insurance Market: Inertia, Information and Insiders*, 14 *Conn. Ins. L.J.* 75, 84 (2007); John Fabian Witt, *Form and Substance in the Law of*

comparable to the class action settlement numbers because, again, the number of tort class action settlements in 2006 and 2007 was very small. Nonetheless, as the tort system no doubt constitutes a large percentage of the money transferred in all litigation, these studies provide something of a point of reference to assess the significance of class action settlements. In 2006 and 2007, Tillinghast-Towers Perrin estimated that the U.S. tort system transferred \$160 billion and \$164 billion, respectively, to claimants and their lawyers.⁶¹ The total amount of money involved in the 2006 and 2007 federal class action settlements reported in Table 4 was, therefore, roughly 10 percent of the Tillinghast-Towers Perrin estimate. This suggests that in merely 350 cases every year, federal class action settlements involve the same amount of wealth as 10 percent of the entire U.S. tort system. It would seem that this is a significant amount of money for so few cases.

IV. ATTORNEY FEES IN FEDERAL CLASS ACTION SETTLEMENTS, 2006 AND 2007

A. *Total Amount of Fees and Expenses*

As I demonstrated in Section III, federal class action settlements involved a great deal of money in 2006 and 2007, some \$16 billion a year. A perennial concern with class action litigation is whether class action lawyers are reaping an outsized portion of this money.⁶² The 2006–2007 federal class action data suggest that these concerns may be exaggerated. Although class counsel were awarded some \$5 billion in fees and expenses over this period, as shown in Table 7, only 13 percent of the settlement amount in 2006 and 20 percent of the amount in 2007 went to fee and expense awards.⁶³ The 2006 percentage is lower than the 2007 percentage in large part because the class action lawyers in the Enron securities settlement received less than 10 percent of the \$6.6 billion corpus. In any event, the percentages in both 2006 and 2007 are far lower than the portions of settlements that contingency-fee lawyers receive in individual litigation, which are usually at least 33 percent.⁶⁴ Lawyers received less than 33 percent of settlements in fees and expenses in virtually every subject area in both years.

Counterinsurgency Damages, 41 *Loy. L.A.L. Rev.* 1455, 1475 n.135 (2008). If these criticisms are valid, then class action settlements would appear even more significant as compared to the tort system.

⁶¹See Tillinghast-Towers Perrin, *U.S. Tort Costs: 2008 Update 5* (2008). The report calculates \$252 billion in total tort “costs” in 2007 and \$246.9 billion in 2006, *id.*, but only 65 percent of those costs represent payments made to claimants and their lawyers (the remainder represents insurance administration costs and legal costs to defendants). See Tillinghast-Towers Perrin, *U.S. Tort Costs: 2003 Update 17* (2003).

⁶²See, e.g., Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?* 158 *U. Pa. L. Rev.* 2043, 2043–44 (2010).

⁶³In some of the partial settlements, see note 29 *supra*, the district court awarded expenses for all the settlements at once and it was unclear what portion of the expenses was attributable to which settlement. In these instances, I assigned each settlement a pro rata portion of expenses. To the extent possible, all the fee and expense numbers in this article exclude any interest known to be awarded by the courts.

⁶⁴See, e.g., Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 *DePaul L. Rev.* 267, 284–86 (1998) (reporting results of a survey of Wisconsin lawyers).

Table 7: The Total Amount of Fees and Expenses Awarded to Class Action Lawyers in Federal Class Action Settlements in 2006 and 2007

<i>Subject Matter</i>	<i>Total Fees and Expenses Awarded in Settlements (and as Percentage of Total Settlement Amounts) in Each Subject Area</i>	
	<i>2006</i> (n = 292)	<i>2007</i> (n = 363)
Securities	\$1,899 (11%)	\$1,467 (20%)
Labor and employment	\$75.1 (28%)	\$144.5 (26%)
Consumer	\$126.4 (24%)	\$65.3 (9%)
Employee benefits	\$57.1 (13%)	\$71.9 (26%)
Civil rights	\$31.0 (12%)	\$32.2 (39%)
Debt collection	\$2.5 (28%)	\$1.1 (19%)
Antitrust	\$274.6 (26%)	\$157.3 (24%)
Commercial	\$347.3 (29%)	\$18.2 (15%)
Other	\$119.3 (8%)	\$103.3 (17%)
Total	\$2,932 (13%)	\$2,063 (20%)

NOTE: Dollar amounts are in millions. Excludes settlements in which fees were not (or at least not yet) sought (22 settlements), settlements in which fees have not yet been awarded (two settlements), and settlements in which fees could not be ascertained due to indefinite award amounts, missing documents, or nonpublic side agreements (nine settlements).

SOURCES: Westlaw, PACER, district court clerks' offices.

It should be noted that, in some respects, the percentages in Table 7 overstate the portion of settlements that were awarded to class action attorneys because, again, many of these settlements involved indefinite cash relief or noncash relief that could not be valued.⁶⁵ If the value of all this relief could have been included, then the percentages in Table 7 would have been even lower. On the other hand, as noted above, not all the money defendants agree to pay in class action settlements is ultimately collected by the class.⁶⁶ To the extent leftover money is returned to the defendant, the percentages in Table 7 understate the portion class action lawyers received relative to their clients.

B. Method of Awarding Fees

District court judges have a great deal of discretion in how they set fee awards in class action cases. Under Rule 23, federal judges are told only that the fees they award to class counsel

⁶⁵Indeed, the large year-to-year variation in the percentages in labor, consumer, and employee benefits cases arose because district courts made particularly large valuations of the equitable relief in a few settlements and used the lodestar method to calculate the fees in these settlements (and thereby did not consider their large valuations in calculating the fees).

⁶⁶See Hensler et al., *supra* note 7, at 427–30.

must be “reasonable.”⁶⁷ Courts often exercise this discretion by choosing between two approaches: the lodestar approach or the percentage-of-the-settlement approach.⁶⁸ The lodestar approach works much the way it does in individual litigation: the court calculates the fee based on the number of hours class counsel actually worked on the case multiplied by a reasonable hourly rate and a discretionary multiplier.⁶⁹ The percentage-of-the-settlement approach bases the fee on the size of the settlement rather than on the hours class counsel actually worked: the district court picks a percentage of the settlement it thinks is reasonable based on a number of factors, one of which is often the fee lodestar (sometimes referred to as a “lodestar cross-check”).⁷⁰ My 2006–2007 data set shows that the percentage-of-the-settlement approach has become much more common than the lodestar approach. In 69 percent of the settlements reported in Table 7, district court judges employed the percentage-of-the-settlement method with or without the lodestar cross-check. They employed the lodestar method in only 12 percent of settlements. In the other 20 percent of settlements, the court did not state the method it used or it used another method altogether.⁷¹ The pure lodestar method was used most often in consumer (29 percent) and debt collection (45 percent) cases. These numbers are fairly consistent with the Eisenberg-Miller data from 2003 to 2008. They found that the lodestar method was used in only 9.6 percent of settlements.⁷² Their number is no doubt lower than the 12 percent number found in my 2006–2007 data set because they excluded fee-shifting cases from their study.

C. Variation in Fees Awarded

Not only do district courts often have discretion to choose between the lodestar method and the percentage-of-the-settlement method, but each of these methods leaves district courts with a great deal of discretion in how the method is ultimately applied. The courts

⁶⁷Fed. R. Civ. P. 23(h).

⁶⁸The discretion to pick between these methods is most pronounced in settlements where the underlying claim was not found in a statute that would shift attorney fees to the defendant. See, e.g., *In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995) (permitting either percentage or lodestar method in common-fund cases); *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (same); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (same). By contrast, courts typically used the lodestar approach in settlements arising from fee-shifting cases.

⁶⁹See Eisenberg & Miller, *supra* note 15, at 31.

⁷⁰*Id.* at 31–32.

⁷¹These numbers are based on the fee method described in the district court’s order awarding fees, unless the order was silent, in which case the method, if any, described in class counsel’s motion for fees (if it could be obtained) was used. If the court explicitly justified the fee award by reference to its percentage of the settlement, I counted it as the percentage method. If the court explicitly justified the award by reference to a lodestar calculation, I counted it as the lodestar method. If the court explicitly justified the award by reference to both, I counted it as the percentage method with a lodestar cross-check. If the court calculated neither a percentage nor the fee lodestar in its order, then I counted it as an “other” method.

⁷²See Eisenberg & Miller II, *supra* note 16, at 267.

that use the percentage-of-the-settlement method usually rely on a multifactor test⁷³ and, like most multifactor tests, it can plausibly yield many results. It is true that in many of these cases, judges examine the fee percentages that other courts have awarded to guide their discretion.⁷⁴ In addition, the Ninth Circuit has adopted a presumption that 25 percent is the proper fee award percentage in class action cases.⁷⁵ Moreover, in securities cases, some courts presume that the proper fee award percentage is the one class counsel agreed to when it was hired by the large shareholder that is now usually selected as the lead plaintiff in such cases.⁷⁶ Nonetheless, presumptions, of course, can be overcome and, as one court has put it, “[t]here is no hard and fast rule mandating a certain percentage . . . which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case.”⁷⁷ The court added: “[i]ndividualization in the exercise of a discretionary power [for fee awards] will alone retain equity as a living system and save it from sterility.”⁷⁸ It is therefore not surprising that district courts awarded fees over a broad range when they used the percentage-of-the-settlement method. Figure 4 is a graph of the distribution of fee awards as a percentage of the settlement in the 444 cases where district courts used the percentage method with or without a lodestar cross-check and the fee percentages were ascertainable. These fee awards are exclusive of awards for expenses whenever the awards could be separated by examining either the district court’s order or counsel’s motion for fees and expenses (which was 96 percent of the time). The awards ranged from 3 percent of the settlement to 47 percent of the settlement. The average award was 25.4 percent and the median was 25 percent. Most fee awards were between 25 percent and 35 percent, with almost no awards more than 35 percent. The Eisenberg-Miller study through 2008 found a slightly lower mean (24 percent) but the same median (25 percent) among its federal court settlements.⁷⁹

It should be noted that in 218 of these 444 settlements (49 percent), district courts said they considered the lodestar calculation as a factor in assessing the reasonableness of the fee percentages awarded. In 204 of these settlements, the lodestar multiplier resulting

⁷³The Eleventh Circuit, for example, has identified a nonexclusive list of 15 factors that district courts might consider. See *Camden I Condo. Ass’n, Inc. v. Dunkle*, 946 F.2d 768, 772 n.3, 775 (11th Cir. 1991). See also *In re Tyco Int’l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 265 (D.N.H. 2007) (five factors); *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (six factors); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000) (seven factors); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 385 (D. Md. 2006) (13 factors); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (12 factors); *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d 14, 17 (D.D.C. 2003) (seven factors).

⁷⁴See Eisenberg & Miller, *supra* note 15, at 32.

⁷⁵See *Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003).

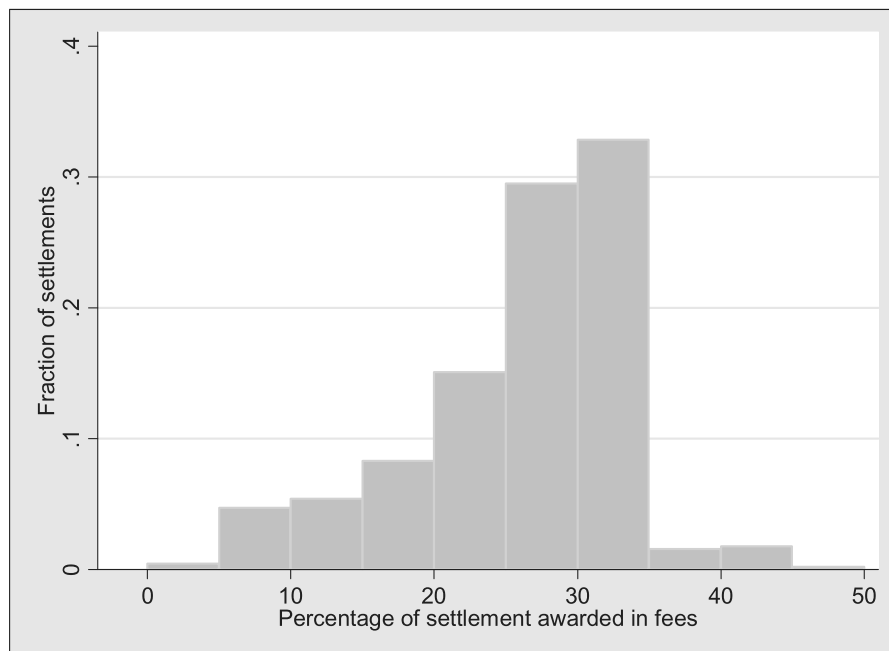
⁷⁶See, e.g., *In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir. 2001).

⁷⁷*Camden I Condo. Ass’n*, 946 F.2d at 774.

⁷⁸*Camden I Condo. Ass’n*, 946 F.2d at 774 (alterations in original and internal quotation marks omitted).

⁷⁹See Eisenberg & Miller II, *supra* note 16, at 259.

Figure 4: The distribution of 2006–2007 federal class action fee awards using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

from the fee award could be ascertained. The lodestar multiplier in these cases ranged from 0.07 to 10.3, with a mean of 1.65 and a median of 1.34. Although there is always the possibility that class counsel are optimistic with their timesheets when they submit them for lodestar consideration, these lodestar numbers—only one multiplier above 6.0, with the bulk of the range not much above 1.0—strike me as fairly parsimonious for the risk that goes into any piece of litigation and cast doubt on the notion that the percentage-of-the-settlement method results in windfalls to class counsel.⁸⁰

Table 8 shows the mean and median fee percentages awarded in each litigation subject area. The fee percentages did not appear to vary greatly across litigation subject areas, with most mean and median awards between 25 percent and 30 percent. As I report later in this section, however, after controlling for other variables, there were statistically significant differences in the fee percentages awarded in some subject areas compared to others. The mean and median percentages for securities cases were 24.7 percent and 25.0 percent, respectively; for all nonsecurities cases, the mean and median were 26.1 percent and 26.0 percent, respectively. The Eisenberg-Miller study through 2008 found mean awards ranging from 21–27 percent and medians from 19–25 percent,⁸¹ a bit lower than the ranges in my

⁸⁰It should be emphasized, of course, that these 204 settlements may not be representative of the settlements where the percentage-of-the-settlement method was used without the lodestar cross-check.

⁸¹See Eisenberg & Miller II, *supra* note 16, at 262.

Table 8: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

<i>Subject Matter</i>	<i>Percentage of Settlement Awarded as Fees</i>	
	<i>Mean</i>	<i>Median</i>
Securities (<i>n</i> = 233)	24.7	25.0
Labor and employment (<i>n</i> = 61)	28.0	29.0
Consumer (<i>n</i> = 39)	23.5	24.6
Employee benefits (<i>n</i> = 37)	26.0	28.0
Civil rights (<i>n</i> = 20)	29.0	30.3
Debt collection (<i>n</i> = 5)	24.2	25.0
Antitrust (<i>n</i> = 23)	25.4	25.0
Commercial (<i>n</i> = 7)	23.3	25.0
Other (<i>n</i> = 19)	24.9	26.0
All (<i>N</i> = 444)	25.7	25.0

SOURCES: Westlaw, PACER, district court clerks' offices.

2006–2007 data set, which again, may be because they oversampled larger settlements (as I show below, district courts awarded smaller fee percentages in larger cases).

In light of the fact that, as I noted above, the distribution of class action settlements among the geographic circuits does not track their civil litigation dockets generally, it is interesting to ask whether one reason for the pattern in class action cases is that circuits oversubscribed with class actions award higher fee percentages. Although this question will be taken up with more sophistication in the regression analysis below, it is worth describing here the mean and median fee percentages in each of the circuits. Those data are presented in Table 9. Contrary to the hypothesis set forth in Section III, two of the circuits most oversubscribed with class actions, the Second and the Ninth, were the only circuits in which the mean fee awards were *under* 25 percent. As I explain below, these differences are statistically significant and remain so after controlling for other variables.

The lodestar method likewise permits district courts to exercise a great deal of leeway through the application of the discretionary multiplier. Figure 5 shows the distribution of lodestar multipliers in the 71 settlements in which district courts used the lodestar method and the multiplier could be ascertained. The average multiplier was 0.98 and the median was 0.92, which suggest that courts were not terribly prone to exercise their discretion to deviate from the amount of money encompassed in the lodestar calculation. These 71

Table 9: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

<i>Circuit</i>	<i>Percentage of Settlement Awarded as Fees</i>	
	<i>Mean</i>	<i>Median</i>
First (<i>n</i> = 27)	27.0	25.0
Second (<i>n</i> = 72)	23.8	24.5
Third (<i>n</i> = 50)	25.4	29.3
Fourth (<i>n</i> = 19)	25.2	28.0
Fifth (<i>n</i> = 27)	26.4	29.0
Sixth (<i>n</i> = 25)	26.1	28.0
Seventh (<i>n</i> = 39)	27.4	29.0
Eighth (<i>n</i> = 15)	26.1	30.0
Ninth (<i>n</i> = 111)	23.9	25.0
Tenth (<i>n</i> = 18)	25.3	25.5
Eleventh (<i>n</i> = 35)	28.1	30.0
DC (<i>n</i> = 6)	26.9	26.0

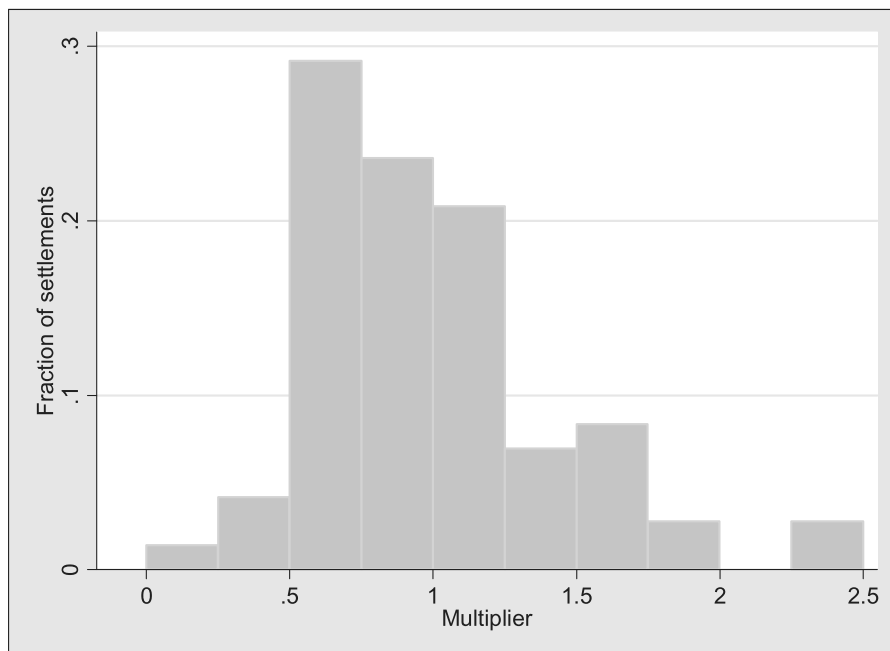
SOURCES: Westlaw, PACER, district court clerks' offices.

settlements were heavily concentrated within the consumer (median multiplier 1.13) and debt collection (0.66) subject areas. If cases in which district courts used the percentage-of-the-settlement method with a lodestar cross-check are combined with the lodestar cases, the average and median multipliers (in the 263 cases where the multipliers were ascertainable) were 1.45 and 1.19, respectively. Again—putting to one side the possibility that class counsel are optimistic with their timesheets—these multipliers appear fairly modest in light of the risk involved in any piece of litigation.

D. Factors Influencing Percentage Awards

Whether district courts are exercising their discretion over fee awards wisely is an important public policy question given the amount of money at stake in class action settlements. As shown above, district court judges awarded class action lawyers nearly \$5 billion in fees and expenses in 2006–2007. Based on the comparison to the tort system set forth in Section III, it is not difficult to surmise that in the 350 or so settlements every year, district court judges

Figure 5: The distribution of lodestar multipliers in 2006–2007 federal class action fee awards using the lodestar method.



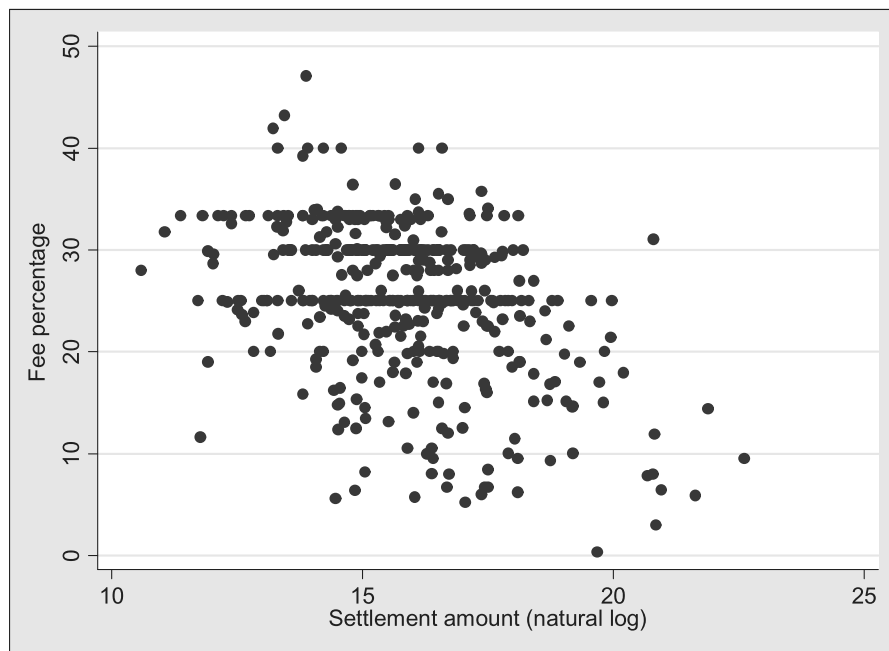
SOURCES: Westlaw, PACER, district court clerks' offices.

are awarding a significant portion of all the annual compensation received by contingency-fee lawyers in the United States. Moreover, contingency fees are arguably the engine that drives much of the noncriminal regulation in the United States; unlike many other nations, we regulate largely through the ex post, decentralized device of litigation.⁸² To the extent district courts could have exercised their discretion to award billions more or billions less to class action lawyers, district courts have been delegated a great deal of leeway over a big chunk of our regulatory horsepower. It is therefore worth examining how district courts exercise their discretion over fees. This examination is particularly important in cases where district courts use the percentage-of-the-settlement method to award fees: not only do such cases comprise the vast majority of settlements, but they comprise the vast majority of the money awarded as fees. As such, the analysis that follows will be confined to the 444 settlements where the district courts used the percentage-of-the-settlement method.

As I noted, prior empirical studies have shown that fee percentages are strongly and inversely related to the size of the settlement both in securities fraud and other cases. As shown in Figure 6, the 2006–2007 data are consistent with prior studies. Regression analysis, set forth in more detail below, confirms that after controlling for other variables, fee percentage is strongly and inversely associated with settlement size among all cases, among securities cases, and among all nonsecurities cases.

⁸²See, e.g., Samuel Issacharoff, *Regulating after the Fact*, 56 DePaul L. Rev. 375, 377 (2007).

Figure 6: Fee awards as a function of settlement size in 2006–2007 class action cases using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

As noted above, courts often look to fee percentages in other cases as one factor they consider in deciding what percentage to award in a settlement at hand. In light of this practice, and in light of the fact that the size of the settlement has such a strong relationship to fee percentages, scholars have tried to help guide the practice by reporting the distribution of fee percentages across different settlement sizes.⁸³ In Table 10, I follow the Eisenberg-Miller studies and attempt to contribute to this guidance by setting forth the mean and median fee percentages, as well as the standard deviation, for each decile of the 2006–2007 settlements in which courts used the percentage-of-the-settlement method to award fees. The mean percentages ranged from over 28 percent in the first decile to less than 19 percent in the last decile.

It should be noted that the last decile in Table 10 covers an especially wide range of settlements, those from \$72.5 million to the Enron settlement of \$6.6 billion. To give more meaningful data to courts that must award fees in the largest settlements, Table 11 shows the last decile broken into additional cut points. When both Tables 10 and 11 are examined together, it appears that fee percentages tended to drift lower at a fairly slow pace until a settlement size of \$100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time \$500 million was reached, they plunged well below 15 percent, with most awards at that level under even 10 percent.

⁸³See Eisenberg & Miller II, *supra* note 16, at 265.

Table 10: Mean, Median, and Standard Deviation of Fee Awards by Settlement Size in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

<i>Settlement Size (in Millions)</i>	<i>Mean</i>	<i>Median</i>	<i>SD</i>
[\$0 to \$0.75] (n = 45)	28.8%	29.6%	6.1%
(\$0.75 to \$1.75] (n = 44)	28.7%	30.0%	6.2%
(\$1.75 to \$2.85] (n = 45)	26.5%	29.3%	7.9%
(\$2.85 to \$4.45] (n = 45)	26.0%	27.5%	6.3%
(\$4.45 to \$7.0] (n = 44)	27.4%	29.7%	5.1%
(\$7.0 to \$10.0] (n = 43)	26.4%	28.0%	6.6%
(\$10.0 to \$15.2] (n = 45)	24.8%	25.0%	6.4%
(\$15.2 to \$30.0] (n = 46)	24.4%	25.0%	7.5%
(\$30.0 to \$72.5] (n = 42)	22.3%	24.9%	8.4%
(\$72.5 to \$6,600] (n = 45)	18.4%	19.0%	7.9%

SOURCES: Westlaw, PACER, district court clerks’ offices.

Table 11: Mean, Median, and Standard Deviation of Fee Awards of the Largest 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

<i>Settlement Size (in Millions)</i>	<i>Mean</i>	<i>Median</i>	<i>SD</i>
(\$72.5 to \$100] (n = 12)	23.7%	24.3%	5.3%
(\$100 to \$250] (n = 14)	17.9%	16.9%	5.2%
(\$250 to \$500] (n = 8)	17.8%	19.5%	7.9%
(\$500 to \$1,000] (n = 2)	12.9%	12.9%	7.2%
(\$1,000 to \$6,600] (n = 9)	13.7%	9.5%	11%

SOURCES: Westlaw, PACER, district court clerks’ offices.

Prior empirical studies have not examined whether fee awards are associated with the political affiliation of the district court judges making the awards. This is surprising because realist theories of judicial behavior would predict that political affiliation would influence fee decisions.⁸⁴ It is true that as a general matter, political affiliation may influence district court judges to a lesser degree than it does appellate judges (who have been the focus of most of the prior empirical studies of realist theories): district court judges decide more routine cases and are subject to greater oversight on appeal than appellate judges. On the other hand, class action settlements are a bit different in these regards than many other decisions made by district court judges. To begin with, class action settlements are almost never appealed, and when they are, the appeals are usually settled before the appellate court hears the case.⁸⁵ Thus, district courts have much less reason to worry about the constraint of appellate review in fashioning fee awards. Moreover, one would think the potential for political affiliation to influence judicial decision making is greatest when legal sources lead to indeterminate outcomes and when judicial decisions touch on matters that are salient in national politics. (The more salient a matter is, the more likely presidents will select judges with views on the matter and the more likely those views will diverge between Republicans and Democrats.) Fee award decisions would seem to satisfy both these criteria. The law of fee awards, as explained above, is highly discretionary, and fee award decisions are wrapped up in highly salient political issues such as tort reform and the relative power of plaintiffs' lawyers and corporations. I would expect to find that judges appointed by Democratic presidents awarded higher fees in the 2006–2007 settlements than did judges appointed by Republican presidents.

The data, however, do not appear to bear this out. Of the 444 fee awards using the percentage-of-the-settlement approach, 52 percent were approved by Republican appointees, 45 percent were approved by Democratic appointees, and 4 percent were approved by non-Article III judges (usually magistrate judges). The mean fee percentage approved by Republican appointees (25.6 percent) was slightly *greater* than the mean approved by Democratic appointees (24.9 percent). The medians (25 percent) were the same.

To examine whether the realist hypothesis fared better after controlling for other variables, I performed regression analysis of the fee percentage data for the 427 settlements approved by Article III judges. I used ordinary least squares regression with the dependent variable the percentage of the settlement that was awarded in fees.⁸⁶ The independent

⁸⁴See generally C.K. Rowland & Robert A. Carp, *Politics and Judgment in Federal District Courts* (1996). See also Max M. Schanzbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. Chi. L. Rev. 715, 724–25 (2008).

⁸⁵See Brian T. Fitzpatrick, *The End of Objector Blackmail?* 62 Vand. L. Rev. 1623, 1640, 1634–38 (2009) (finding that less than 10 percent of class action settlements approved by federal courts in 2006 were appealed by class members).

⁸⁶Professors Eisenberg and Miller used a square root transformation of the fee percentages in some of their regressions. I ran all the regressions using this transformation as well and it did not appreciably change the results. I also ran the regressions using a natural log transformation of fee percentage and with the dependent variable natural log of the fee amount (as opposed to the fee percentage). None of these models changed the results

variables were the natural log of the amount of the settlement, the natural log of the age of the case (in days), indicator variables for whether the class was certified as a settlement class, for litigation subject areas, and for circuits, as well as indicator variables for whether the judge was appointed by a Republican or Democratic president and for the judge's race and gender.⁸⁷

The results for five regressions are in Table 12. In the first regression (Column 1), only the settlement amount, case age, and judge's political affiliation, gender, and race were included as independent variables. In the second regression (Column 2), all the independent variables were included. In the third regression (Column 3), only securities cases were analyzed, and in the fourth regression (Column 4), only nonsecurities cases were analyzed.

In none of these regressions was the political affiliation of the district court judge associated with fee percentage in a statistically significant manner.⁸⁸ One possible explanation for the lack of evidence for the realist hypothesis is that district court judges elevate other preferences above their political and ideological ones. For example, district courts of both political stripes may succumb to docket-clearing pressures and largely rubber stamp whatever fee is requested by class counsel; after all, these requests are rarely challenged by defendants. Moreover, if judges award class counsel whatever they request, class counsel will not appeal and, given that, as noted above, class members rarely appeal settlements (and when they do, often settle them before the appeal is heard),⁸⁹ judges can thereby virtually guarantee there will be no appellate review of their settlement decisions. Indeed, scholars have found that in the vast majority of cases, the fees ultimately awarded by federal judges are little different than those sought by class counsel.⁹⁰

Another explanation for the lack of evidence for the realist hypothesis is that my data set includes both unpublished as well as published decisions. It is thought that realist theories of judicial behavior lose force in unpublished judicial decisions. This is the case because the kinds of questions for which realist theories would predict that judges have the most room to let their ideologies run are questions for which the law is ambiguous; it is

appreciably. The regressions were also run with and without the 2006 Enron settlement because it was such an outlier (\$6.6 billion); the case did not change the regression results appreciably. For every regression, the data and residuals were inspected to confirm the standard assumptions of linearity, homoscedasticity, and the normal distribution of errors.

⁸⁷Prior studies of judicial behavior have found that the race and sex of the judge can be associated with his or her decisions. See, e.g., Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 *Colum. L. Rev.* 1 (2008); Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 *J. Pol.* 425 (1994).

⁸⁸Although these coefficients are not reported in Table 8, the gender of the district court judge was never statistically significant. The race of the judge was only occasionally significant.

⁸⁹See Fitzpatrick, *supra* note 85, at 1640.

⁹⁰See Eisenberg & Miller II, *supra* note 16, at 270 (finding that state and federal judges awarded the fees requested by class counsel in 72.5 percent of settlements); Eisenberg, Miller & Perino, *supra* note 9, at 22 ("judges take a light touch when it comes to reviewing fee requests").

Table 12: Regression of Fee Percentages in 2006–2007 Settlements Using Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

<i>Independent Variable</i>	<i>Regression Coefficients (and Robust t Statistics)</i>				
	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
Settlement amount (natural log)	-1.77 (-5.43)**	-1.76 (-8.52)**	-1.76 (-7.16)**	-1.41 (-4.00)**	-1.78 (-8.67)**
Age of case (natural log days)	1.66 (2.31)**	1.99 (2.71)**	1.13 (1.21)	1.72 (1.47)	2.00 (2.69)**
Judge's political affiliation (1 = Democrat)	-0.630 (-0.83)	-0.345 (-0.49)	0.657 (0.76)	-1.43 (-1.20)	-0.232 (-0.34)
Settlement class		0.150 (0.19)	0.873 (0.84)	-1.62 (-1.00)	0.124 (0.15)
1st Circuit		3.30 (2.74)**	4.41 (3.32)**	0.031 (0.01)	0.579 (0.51)
2d Circuit		0.513 (0.44)	-0.813 (-0.61)	2.93 (1.14)	-2.23 (-1.98)**
3d Circuit		2.25 (1.99)**	4.00 (3.85)**	-1.11 (-0.50)	—
4th Circuit		2.34 (1.22)	0.544 (0.19)	3.81 (1.35)	—
5th Circuit		2.98 (1.90)*	1.09 (0.65)	6.11 (1.97)**	0.230 (0.15)
6th Circuit		2.91 (2.28)**	0.838 (0.57)	4.41 (2.15)**	—
7th Circuit		2.55 (2.23)**	3.22 (2.36)**	2.90 (1.46)	-0.227 (-0.20)
8th Circuit		2.12 (0.97)	-0.759 (-0.24)	3.73 (1.19)	-0.586 (-0.28)
9th Circuit		—	—	—	-2.73 (-3.44)**
10th Circuit		1.45 (0.94)	-0.254 (-0.13)	3.16 (1.29)	—
11th Circuit		4.05 (3.44)**	3.85 (3.07)**	4.14 (1.88)*	—
DC Circuit		2.76 (1.10)	2.60 (0.80)	2.41 (0.64)	—
Securities case		—	—	—	—
Labor and employment case		2.93 (3.00)**	—	—	2.85 (2.94)**
Consumer case		-1.65 (-0.88)	—	-4.39 (-2.20)**	-1.62 (-0.88)
Employee benefits case		-0.306 (-0.23)	—	-4.23 (-2.55)**	-0.325 (-0.26)
Civil rights case		1.85 (0.99)	—	-2.05 (-0.97)	1.76 (0.95)
Debt collection case		-4.93 (-1.71)*	—	-7.93 (-2.49)**	-5.04 (-1.75)*
Antitrust case		3.06 (2.11)**	—	0.937 (0.47)	2.78 (1.98)**

Table 12 *Continued*

<i>Independent Variable</i>	<i>Regression Coefficients (and Robust t Statistics)</i>				
	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
Commercial case		-0.028 (-0.01)		-2.65 (-0.73)	0.178 (0.05)
Other case		-0.340 (-0.17)		-3.73 (-1.65)	-0.221 (-0.11)
Constant	42.1 (7.29)**	37.2 (6.08)**	43.0 (6.72)**	38.2 (4.14)**	40.1 (7.62)**
<i>N</i>	427	427	232	195	427
<i>R</i> ²	.20	.26	.37	.26	.26
Root MSE	6.59	6.50	5.63	7.24	6.48

NOTE: **significant at the 5 percent level; *significant at the 10 percent level. Standard errors in Column 1 were clustered by circuit. Indicator variables for race and gender were included in each regression but not reported.

SOURCES: Westlaw, PACER, district court clerks' offices, Federal Judicial Center.

thought that these kinds of questions are more often answered in published opinions.⁹¹ Indeed, most of the studies finding an association between ideological beliefs and case outcomes were based on data sets that included only published opinions.⁹² On the other hand, there is a small but growing number of studies that examine unpublished opinions as well, and some of these studies have shown that ideological effects persisted.⁹³ Nonetheless, in light of the discretion that judges exercise with respect to fee award decisions, it hard to characterize *any* decision in this area as “unambiguous.” Thus, even when unpublished, I would have expected the fee award decisions to exhibit an association with ideological beliefs. Thus, I am more persuaded by the explanation suggesting that judges are more concerned with clearing their dockets or insulating their decisions from appeal in these cases than with furthering their ideological beliefs.

In all the regressions, the size of the settlement was strongly and inversely associated with fee percentages. Whether the case was certified as a settlement class was not associated

⁹¹See, e.g., Ahmed E. Taha, Data and Selection Bias: A Case Study, 75 UMKC L. Rev. 171, 179 (2006).

⁹²Id. at 178–79.

⁹³See, e.g., David S. Law, Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit, 73 U. Cin. L. Rev. 817, 843 (2005); Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 Vand. L. Rev. 71, 109 (2001); Donald R. Songer, Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 Judicature 307, 312 (1990). At the trial court level, however, the studies of civil cases have found no ideological effects. See Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States, 7 J. Empirical Legal Stud. 175, 192–93 (2010); Denise M. Keele et al., An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions, 6 J. Empirical Legal Stud. 213, 230 (2009); Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Stud. 257, 276–77 (1995). With respect to criminal cases, there is at least one study at the trial court level that has found ideological effects. See Schanzenbach & Tiller, *supra* note 81, at 734.

with fee percentages in any of the regressions. The age of the case at settlement was associated with fee percentages in the first two regressions, and when the settlement class variable was removed in regressions 3 and 4, the age variable became positively associated with fee percentages in nonsecurities cases but remained insignificant in securities cases. Professors Eisenberg and Miller likewise found that the age of the case at settlement was positively associated with fee percentages in their 1993–2002 data set,⁹⁴ and that settlement classes were not associated with fee percentages in their 2003–2008 data set.⁹⁵

Although the structure of these regressions did not permit extensive comparisons of fee awards across different litigation subject areas, fee percentages appeared to vary somewhat depending on the type of case that settled. Securities cases were used as the baseline litigation subject area in the second and fifth regressions, permitting a comparison of fee awards in each nonsecurities area with the awards in securities cases. These regressions show that awards in a few areas, including labor/employment and antitrust, were more lucrative than those in securities cases. In the fourth regression, which included only nonsecurities cases, labor and employment cases were used as the baseline litigation subject area, permitting comparison between fee percentages in that area and the other nonsecurities areas. This regression shows that fee percentages in several areas, including consumer and employee benefits cases, were lower than the percentages in labor and employment cases.

In the fifth regression (Column 5 of Table 12), I attempted to discern whether the circuits identified in Section III as those with the most overrepresented (the First, Second, Seventh, and Ninth) and underrepresented (the Fifth and Eighth) class action dockets awarded attorney fees differently than the other circuits. That is, perhaps district court judges in the First, Second, Seventh, and Ninth Circuits award greater percentages of class action settlements as fees than do the other circuits, whereas district court judges in the Fifth and Eighth Circuits award smaller percentages. To test this hypothesis, in the fifth regression, I included indicator variables only for the six circuits with unusual dockets to measure their fee awards against the other six circuits combined. The regression showed statistically significant association with fee percentages for only two of the six unusual circuits: the Second and Ninth Circuits. In both cases, however, the direction of the association (i.e., the Second and Ninth Circuits awarded *smaller* fees than the baseline circuits) was opposite the hypothesized direction.⁹⁶

⁹⁴See Eisenberg & Miller, *supra* note 15, at 61.

⁹⁵See Eisenberg & Miller II, *supra* note 16, at 266.

⁹⁶This relationship persisted when the regressions were rerun among the securities and nonsecurities cases separately. I do not report these results, but, even though the First, Second, and Ninth Circuits were oversubscribed with securities class action settlements and the Fifth, Sixth, and Eighth were undersubscribed, there was no association between fee percentages and any of these unusual circuits except, again, the inverse association with the Second and Ninth Circuits. In nonsecurities cases, even though the Seventh and Ninth Circuits were oversubscribed and the Fifth and the Eighth undersubscribed, there was no association between fee percentages and any of these unusual circuits except again for the inverse association with the Ninth Circuit.

The lack of the expected association with the unusual circuits might be explained by the fact that class action lawyers forum shop along dimensions other than their potential fee awards; they might, for example, put more emphasis on favorable class-certification law because there can be no fee award if the class is not certified. As noted above, it might also be the case that class action lawyers are unable to engage in forum shopping at all because defendants are able to transfer venue to the district in which they are headquartered or another district with a significant connection to the litigation.

It is unclear why the Second and Ninth Circuits were associated with lower fee awards despite their heavy class action dockets. Indeed, it should be noted that the Ninth Circuit was the baseline circuit in the second, third, and fourth regressions and, in all these regressions, district courts in the Ninth Circuit awarded smaller fees than courts in many of the other circuits. The lower fees in the Ninth Circuit may be attributable to the fact that it has adopted a presumption that the proper fee to be awarded in a class action settlement is 25 percent of the settlement.⁹⁷ This presumption may make it more difficult for district court judges to award larger fee percentages. The lower awards in the Second Circuit are more difficult to explain, but it should be noted that the difference between the Second Circuit and the baseline circuits went away when the fifth regression was rerun with only nonsecurities cases.⁹⁸ This suggests that the awards in the Second Circuit may be lower *only* in securities cases. In any event, it should be noted that the lower fee awards from the Second and Ninth Circuits contrast with the findings in the Eisenberg-Miller studies, which found no intercircuit differences in fee awards in common-fund cases in their data through 2008.⁹⁹

V. CONCLUSION

This article has attempted to fill some of the gaps in our knowledge about class action litigation by reporting the results of an empirical study that attempted to collect all class action settlements approved by federal judges in 2006 and 2007. District court judges approved 688 class action settlements over this two-year period, involving more than \$33 billion. Of this \$33 billion, nearly \$5 billion was awarded to class action lawyers, or about 15 percent of the total. District courts typically awarded fees using the highly discretionary percentage-of-the-settlement method, and fee awards varied over a wide range under this method, with a mean and median around 25 percent. Fee awards using this method were strongly and inversely associated with the size of the settlement. Fee percentages were positively associated with the age of the case at settlement. Fee percentages were not associated with whether the class action was certified as a settlement class or with the

⁹⁷See note 75 supra. It should be noted that none of the results from the previous regressions were affected when the Ninth Circuit settlements were excluded from the data.

⁹⁸The Ninth Circuit's differences persisted.

⁹⁹See Eisenberg & Miller II, supra note 16, at 260.

political affiliation of the judge who made the award. Finally, there appeared to be some variation in fee percentages depending on subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all of the other litigation areas, and district courts in the Ninth Circuit and in the Second Circuit (in securities cases) awarded lower fee percentages than district courts in several other circuits. The lower awards in the Ninth Circuit may be attributable to the fact that it is the only circuit that has adopted a presumptive fee percentage of 25 percent.

**NOTICE TO SETTLEMENT CLASS MEMBERS IN THE
KALIMA v. STATE OF HAWAI'I CLASS ACTION**

This notice explains the Settlement Payment process to Settlement Class Members in the *Kalima v. State of Hawai'i* class action and their representatives. Please read the sections that apply to your situation carefully.

NOTICE OF A PROPOSED PAYMENT FROM THE *KALIMA V. STATE OF HAWAI'I* CLASS ACTION SETTLEMENT Pages 1 - 4

All Settlement Class Members and their representatives should read this section. It describes the Settlement Payment(s) Class Members will receive and how those payments were calculated. This section also contains important information for anyone receiving a Settlement Payment who also is receiving public benefits or assistance and information about how you can support or object to the Settlement.

NOTICE AND SPECIAL INSTRUCTIONS FOR PAYMENT OF CLAIMS TO DECEASED CLASS MEMBERS' FAMILIES AND DEVISEES Pages 5 – 6

Representatives and family members of deceased Settlement Class Members should read this section. It describes the probate process that must be completed before the heirs and devisees of deceased Settlement Class Members will receive payment. This section also contains information about retaining a private probate attorney.

DECEASED CLASS MEMBER INFORMATION REQUEST FORM

Representatives and family members of deceased Settlement Class Members: Please submit this form to provide the Claims Administrator with more information about a deceased Settlement Class Member's possible heirs who may be entitled to payments. If applicable to you, you may return this form in the enclosed envelope.

TAX LETTER

All Settlement Class Members and their representatives should read this letter. This letter describes the general tax status of Settlement Payments. Each individual's tax income and other tax obligations are unique. The enclosed Tax Letter is presented for each Class Member's individual use.

DECLARATION IN SUPPORT OF SETTLEMENT

You can use this form to tell the Court you support the Settlement. By submitting the form, you may state to the Court why you believe the Settlement is fair, reasonable, and adequate. **Submitting the declaration of support form is optional and is not necessary to receive any Settlement Payment.**

**NOTICE OF A PROPOSED PAYMENT
FROM THE KALIMA V. STATE OF HAWAII CLASS ACTION SETTLEMENT**

Based upon a review of the records from the Hawaiian Claims Office (“HCO”) and State of Hawai‘i Department of Hawaiian Home Lands (“DHHL”) and any approved corrected information you provided, the start and end dates of your Waiting List Claim(s) and whether you have a Construction Claim have been determined.

<u>Type of Homestead</u>	<u>Start Date</u>	<u>End Date</u>
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Construction Claim	___ Yes	___ No
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As required by the Court-approved Settlement Distribution Plan, the **estimated*** Settlement Payments for Waiting List Claims were calculated using the Fair Market Rental Value formula approved by the Hawai‘i Supreme Court. Fair Market Rental Value is the amount the Court has concluded a person would **typically** have paid on the open market to rent the same type of lot(s) with infrastructure, less \$1 per year that would have been paid for the DHHL lease (*Kalima v. State*, 148 Haw. 129, 137-38, 468 P.3d 143, 151-52 (2020)). For Construction Claims, the **estimated*** Settlement Payment was calculated using the reasonable cost of repair claimed at the time the claim was submitted, based on the construction expert’s analysis and recommendation, as approved by the Court.

Subject to the Court’s final approval of the Settlement, the **estimated** Settlement Payment(s) for **your claim(s)** will be:

Residential:	Agricultural:	Pastoral:	Construction:
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The Court has scheduled the Fairness Hearing for July 21, 2023, at 9:00 a.m. A copy of the Motion for Final Approval and Motion for Fees will be available after it is filed on June 12, 2023, at kalima-lawsuit.com/important-documents. If Final Approval is granted by the Court on July 21, 2023, the Settlement Payment distribution process is expected to begin by September 1, 2023, or when any appeals end, whichever is later.

Please review the following pages for further information about how claims were calculated and for additional instructions on how to support or object to the Settlement:

- Instructions for All Settlement Class Members
- Notice and Special Instructions for Payment of Claims to Deceased Settlement Class Members’ Families and Devises
- Deceased Settlement Class Member Information Request Form
- Tax Letter
- Declaration in Support of Settlement

Please do not call the Judge, the Clerk of the Court, or the State of Hawai‘i about this notice. They will not be able to give you advice about this case. If you have questions, please contact the Claims Administrator at 808-650-5551 or 833-639-1308 or via email to info@kalima-lawsuit.com.

* Your estimated Settlement Payment may change depending on the Court’s ruling on the attorneys’ fees, claims administration costs, potential objections to the Settlement, and further unanticipated administration costs.

INSTRUCTIONS FOR ALL SETTLEMENT CLASS MEMBERS

IF YOU AGREE WITH THE INFORMATION LISTED ABOVE, YOU DO NOT NEED TO TAKE FURTHER ACTION OR RESPOND TO THIS NOTICE.

The Court has scheduled the Final Approval Hearing for July 21, 2023, at 9:00 a.m. Please follow the instructions below if you wish to support or object to the Settlement or make a statement at the hearing.

YOU DO NOT NEED TO ATTEND THE HEARING TO RECEIVE YOUR SETTLEMENT PAYMENT.

When Will We Receive Payment?

If Final Approval is granted by the Court on July 21, 2023, the Settlement Payment distribution process is expected to begin by September 1, 2023, or when any appeals end, whichever is later.

How Are Settlement Payments Calculated?

The estimated Settlement Payment(s) shown on the prior page was (were) calculated by the following method:

1. Individual claim values for all Settlement Class Members were added together to calculate the "Total Claims Amount."
2. Settlement Class Members' **individual** claim amounts were compared to the Total Claims Amount to calculate each Settlement Class Member's "Proportional Share Percentage" of the "Net Settlement Amount."
3. The Net Settlement Amount is calculated by deducting attorneys' fees, approved Class Representative Incentive Awards, and claims administration costs from the Gross Settlement Amount of \$328 million. Class Counsel has requested the Court approve their fees of approximately 12.19 % of the Gross Settlement Amount (\$40 million), as provided in the Settlement Agreement. Class Counsel has agreed to waive their costs (approximately \$500,000). Class Representative Incentive Awards total \$75,000 as provided for in the Settlement Agreement. Claims administration costs are estimated at .53% of the Gross Settlement Amount (\$1,728,700.00).
4. Settlement Class Members' Settlement Payment(s) are calculated by applying their Proportional Share Percentage to the Net Settlement Amount.

How Do I Support or Object to The Settlement?

1. To tell the Court you support the Settlement, please complete the enclosed Declaration in Support of Settlement and return it by mail addressed to Kalima Claims Administrator, P.O. Box 135035, Honolulu, HI 96801, or by email to info@kalima-lawsuit.com. You may also download a copy of the Declaration in Support of Settlement on the website at kalima-lawsuit.com/important-documents. Please mail or email the Declaration to the Claims Administrator by **July 6, 2023**.
2. You also may appear and ask to be heard in support of the Settlement at the July 21, 2023, 9:00 a.m. Final Approval Hearing. Please notify the Claims Administrator by **July 6, 2023**, by mail addressed to P.O. Box 135035, Honolulu, HI 96801, or by email to info@kalima-lawsuit.com if you wish to do so. Settlement Class Members will be heard in the order in which they sign up. Please focus your statements on whether you think the Settlement is fair, reasonable, and adequate.
3. If you wish to object to the Settlement, you must file your objection in writing addressed to *Kalima v. State*, Civ. No. 99-4771-12 LWC, Clerk of the First Circuit Court, Ka'ahumanu Hale, 777 Punchbowl Street, Honolulu, HI 96813-5093. The objection must be **received** by the Court no later than **July 6, 2023**. At the same time, you must also send a copy of your objection to the attorneys for all the Parties to the lawsuit, including Class Counsel, and the attorneys representing the Defendant at their addresses found below.

INSTRUCTIONS FOR ALL SETTLEMENT CLASS MEMBERS (CONTINUED)

Court	Class Counsel	Defense Counsel
<i>Kalima v. State</i> , Civ. No. 99-4771-12 LWC Clerk of the First Circuit Court Ka'ahumanu Hale 777 Punchbowl Street Honolulu, HI 96813-5093	Carl M. Varady Pauahi Tower 1003 Bishop Street, Suite 1730 Honolulu, HI 96813 Thomas R. Grande 41-859 Kalaniana'ole Highway, #271 Waimānalo, HI 96795	Anne E. Lopez Attorney General, State of Hawai'i 425 Queen Steet Honolulu, HI 96813

Any objection to the proposed Settlement must be filed in writing and must include:

1. the objector's full name, address, email address, and current telephone number;
2. the case name and number of the litigation (*Kalima, et al. v. State of Hawai'i, et al.*, Civil No. 99-4771-12 LWC);
3. all grounds for the objection, with factual and legal support for the stated objection, including any supporting materials, whether you intend to appear at the Final Approval Hearing, and the names and addresses of any witnesses you intend to call at the hearing;
4. the identification of any other objections the objector has filed, or has had filed on the objector's behalf, in any other class action cases in the last four years; and
5. the objector's signature.

If you file a written objection, you may appear at the Final Approval Hearing, which is scheduled for July 21, 2023, at 9:00 a.m. (or other date set by the Court), in person or through counsel to show cause as to why the proposed Settlement should not be approved as fair, reasonable, and adequate. Attendance at the hearing is not necessary. However, persons wishing to object to the Final Approval of the Settlement, the request for attorneys' fees and claims administration costs, and/or the request for an Incentive Award to the Class Representatives are required to file written objections that comply with the requirements described above and that are **received** by the Court on or before **July 6, 2023**.

If you hire an attorney in connection with making an objection, that attorney must also file with the Court a notice of appearance by the objection deadline of **July 6, 2023**. If you hire your own attorney, you will be solely responsible for payment of any fees and costs the attorney incurs on your behalf. If you exclude yourself from the Settlement, you cannot file an objection.

Are Settlement Payments Taxable?

Please review the enclosed Tax Letter explaining the general tax status of Settlement Payments. Each individual's tax obligations are unique. The enclosed Tax Letter is presented for each Settlement Class Member's individual use. A copy of the tax opinion on which the letter is based can be viewed at kalima-lawsuit.com/important-documents.

Will My Settlement Payment Affect Certain Public Benefits I Receive?

Certain public assistance programs, including, but not limited to, the Supplemental Nutrition Assistance Program (sometimes called "SNAP" or "food stamps"), subsidized housing/housing assistance (such as public housing or a voucher program sometimes called "Section 8"), some state-issued health insurance policies, some college tuition/grant programs, some Medicaid programs (sometimes known as "Quest" or "Med-Quest"), some VA benefits, Social Security Disability Insurance, or Supplemental Security Income, may be affected by your receipt of a Settlement Payment.

Contact Your Program

Each of these programs has complicated rules. Advice about your specific circumstances and public benefits are beyond the scope of our services, and we cannot advise you about these issues. Please comply with all program rules and requirements for these programs, especially including any rule or requirement that you disclose changes in financial status to the relevant public assistance program. Certain program agencies may provide additional information about their unique rules. The loss or limitation of certain benefits can sometimes be avoided by having payment made into a special type of trust called a "Special Needs Trust."

INSTRUCTIONS FOR ALL SETTLEMENT CLASS MEMBERS (CONTINUED)

Special Needs Trust by Hawai'i-Based Trustee

If you would like to have your Settlement Payment held for you and managed in a Special Needs Trust, please contact the Kalima Claims Administrator by mail at P.O. Box 135035, Honolulu, HI 96801, by phone at 808-650-5551 or 833-639-1308, or via email to info@kalima-lawsuit.com. The Claims Administrator will send you information about Special Needs Trusts, including contact information for a Hawai'i-based trustee. You must notify the Claims Administrator by **August 21, 2023**, that you want information about Special Needs Trusts. If you request such information, your Settlement Payment will be held by the Claims Administrator until the time set by the Court for you to decide whether you want your Settlement Payment to be managed in a Special Needs Trust. Please notify the Claims Administrator if you hire a private attorney to assist you with a Special Needs Trust.

Private Attorney for Special Needs Trust

You may want to hire your own private lawyer (at your own cost) to advise you about these complicated programs and/or a Special Needs Trust. If you want to hire a private attorney to counsel you about the Special Needs Trust, you should make sure that the attorney is familiar with the public benefit programs and Special Needs Trusts. You can contact the Hawai'i State Bar Association Lawyer Referral and Information Service at 808-537-9140 or via email to LRIS@hsba.org to seek assistance from an attorney for this purpose.

NOTICE AND SPECIAL INSTRUCTIONS FOR PAYMENT OF CLAIMS TO DECEASED SETTLEMENT CLASS MEMBERS' FAMILIES AND DEVISEES

The rightful heirs and devisees of deceased Settlement Class Members in this case may be entitled to receive their portion of a deceased Settlement Class Member's Settlement Payment made to that Settlement Class Member's estate.

An "heir" is a spouse, child, or other person who may share in the estate of a deceased Settlement Class Member as defined by H.R.S. §§ 560:1-201, 560:2-101, 560:2-102 and 560:2-701. The "estate" includes a Settlement Payment the deceased Settlement Class Member will receive in this case. A "devisee" means a person designated in a will to receive a share in the estate of a deceased Settlement Class Member, including a trustee, and as defined by H.R.S. § 560:1-201.

Probate Court approval is required for deceased Settlement Class Members' estates, heirs, or devisees to receive Settlement Payments. Please read and follow these instructions carefully.

1. To Seek a Settlement Payment, a Deceased Settlement Class Member's Heirs or Devisees Must Submit an Information Request Form for Deceased Class Members

In order to deliver Settlement Payments to the proper heirs and devisees of deceased Settlement Class Members, and to help expedite this process, the Claims Administrator must have complete contact information about all deceased Settlement Class Members' heirs and devisees. Additionally, please designate one person for each deceased Settlement Class Member to provide and receive information. By submitting this information, it will help speed up payment of the Deceased Class Member's Settlement Payment.

If you have not already done so, please complete the enclosed Information Request Form for Deceased Class Members.

The Information Request Form for Deceased Class Members is also available online at kalima-lawsuit.com/important-documents. If you have already filled out an Information Request Form and the information you submitted is accurate, you do not need to submit another. However, if the information you previously submitted has changed, please submit another form with the updated information.

2. Settlement Payments Made to Heirs and Devisees of Deceased Settlement Class Members

If a deceased Settlement Class Member qualifies to receive a Settlement Payment, the heirs or devisees of the deceased Settlement Class Member must follow the Court-approved Probate Plan. In the Court-approved plan, the Probate Settlement Funds will be managed and administered by a trust. You may review a copy of the Probate Plan and trust at kalima-lawsuit.com/important-documents.

Under Court supervision, the Trustee of the Trust will distribute Settlement proceeds as follows:

a. Settlement Payments from the Trust will be made to the Personal Representatives of deceased Settlement Class Members' estates after they present appropriate court documents establishing the Personal Representative's appointment.

b. Settlement Payments from the Trust will be made to the heirs and devisees of deceased Settlement Class Members who do not have Personal Representatives, after orders are issued by the Probate Court of the First Circuit, State of Hawai'i approving those payments.

3. Representation of Deceased Settlement Class Members in Probate Court

The Court-appointed Probate Special Master and Probate Special Counsel will carry out the Court-approved Probate Plan to distribute Settlement Payments to the proper takers entitled to the interests of the deceased Settlement Class Members. Costs and fees associated with this Probate Plan will be deducted from the Settlement Payment of the deceased Settlement Class Member.

4. Private Counsel

Heirs and devisees of the estate of a deceased Settlement Class Member may hire a private attorney at their own cost. You may contact the Hawai'i State Bar Association Lawyer Information and Referral Service at 808-537-9140 or email LRIS@hsba.org and request a referral to lawyers who are willing to work on the "Kalima Probate" claims. The referral service is not an endorsement or recommendation of the attorneys.

**NOTICE AND SPECIAL INSTRUCTIONS FOR PAYMENT OF CLAIMS TO DECEASED
SETTLEMENT CLASS MEMBERS' FAMILIES AND DEVISEES (CONTINUED)**

The deadline to notify the Claims Administrator that you have hired a private attorney is **December 1, 2023**. Please ask your private attorney to inform the Claims Administrator via letter that you are being represented by a private attorney for the probate of the deceased Settlement Class Member's Settlement Payment. Please ask your private attorney to reference the Kalima Settlement in court-filed documents.

5. Out of State Deceased Settlement Class Members

If the deceased Settlement Class Member died outside Hawai'i, the heirs and devisees must send a certified copy of the death certificate to the Claims Administrator. You may submit a paper copy by mail to Kalima Claims Administrator, P.O. Box 135035, Honolulu, HI 96801, or an electronic copy by email to info@kalima-lawsuit.com. Please make sure that you copy or scan both sides of the certificate so that any certification, seal, or stamp on the front or back of it is clear and visible. **Do not send the original copy.** Please also complete the Information Request Form for Deceased Class Members. Please contact a local attorney if you have questions about state laws where the Settlement Class Member died. The Probate Plan describes what documentation will be required to obtain payment and will address the interests of deceased Settlement Class Members who resided out of the State of Hawai'i at the time of their death. A summary of the requirements and a copy of the Probate Plan will be available for review at kalima-lawsuit.com/important-documents.

TO SENATE BILL NO. 1518

Honorable Members
Twentieth Legislature
State of Hawaii

Pursuant to Section 16 of Article III of the Constitution of the State of Hawaii, I am returning herewith, without my approval, Senate Bill No. 1518, entitled, 'A Bill for an Act Relating to Government Operations.'

The purpose of Senate Bill No. 1518 is to allow the actuarial investment earnings in excess of a ten percent actuarial investment yield from fiscal years 1996-1997 and 1997-1998 from the Employees' Retirement System be used to reduce the State's and the counties' contribution to the Employees' Retirement System for retirement costs for fiscal years 1999-2000 and 2000-2001. In addition, this bill appropriates State general funds to the counties for fiscal years 1998-1999, 1999-2000, and 2000-2001 for the collective bargaining costs of agreements negotiated with the Hawaii Government Employees Association and the United Public Workers. Moreover, this bill requires all State departments and agencies to identify their goals, objectives, and policies to provide a basis for determining priorities and allocating limited public funds and human resources.

While this bill as a whole has merit, I object to the general fund appropriations made to the counties in Section 4 of this bill for fiscal years 1998-1999, 1999-2000, and 2000-2001 to assist the counties with their collective bargaining costs. The counties will realize a tremendous, one-time savings from the reduction in the amounts that they would have to pay to the Employees' Retirement System for the retirement costs. As a matter of policy, it is wrong to use State tax dollars from the general fund to pay for county employees' raises. Counties are responsible for funding collective bargaining costs for their employees. Furthermore, the general fund appropriations for fiscal year 1998-1999 have an effective date of July 1, 1999. Since the authorization to expend funds appropriated for fiscal year 1998-1999 expires at the end of that fiscal period on June 30, 1999, the authorization to expend the funds will expire on the day before these appropriations become effective.

Consequently, I have indicated my objections to the appropriations in Section 4 of this bill by striking out the general fund appropriations for fiscal year 1998-1999 of \$2,133,499 for Maui County and \$154,500 for Kauai County; the general fund appropriations for fiscal year 1999-2000 of \$11,059,400 for the City and County of Honolulu, \$2,065,600 for Hawaii County, \$2,701,400 for Maui County, and \$858,900 for Kauai County; and the general fund appropriations for fiscal year 2000-2001 of \$11,059,400 for the City and County of Honolulu, \$2,065,600 for Hawaii County, \$2,701,400 for Maui County, and \$858,900 for Kauai County.

For the foregoing reasons, I am returning Senate Bill No. 1518 with the appropriations set forth above totaling \$2,287,999 for fiscal year 1998-1999, \$16,685,300 for fiscal year 1999-2000, and \$16,685,300 for fiscal year 2000-2001 stricken from Section 4 of the bill.

Respectfully,

/s/ Benjamin J. Cayetano

BENJAMIN J. CAYETANO
Governor of Hawaii

PROCLAMATION

WHEREAS, under Section 16 of Article III of the Constitution of the State of Hawaii, the Governor is required to give notice, by a proclamation, of his plan to return with his objections any bill presented to him less than ten days before

adjournment sine die or presented to him after adjournment sine die of the Legislature; and

WHEREAS, Senate Bill No. 1518, entitled, 'A Bill for an Act Relating to Government Operations,' passed by the Legislature, was presented to the Governor within the aforementioned period; and

WHEREAS, under Section 16 of Article III, the Governor may veto any specific item or items in any bill that appropriates money for specific purposes by striking out or reducing the same; and

WHEREAS, Senate Bill No. 1518 appropriates money for specific purposes and certain appropriation items in that bill are unacceptable to the Governor of the State of Hawaii;

NOW, THEREFORE, I, BENJAMIN J. CAYETANO, Governor of the State of Hawaii, do hereby issue this proclamation, pursuant to the provisions of Section 16 of Article III of the Constitution of the State of Hawaii, giving notice of my plan to return Senate Bill No. 1518 with my objections to certain appropriation items contained therein, to the Legislature as provided by said Section 16 of Article III of the Constitution.

DONE at the State Capitol,
Honolulu, State of Hawaii,
this 10th day of June, 1999

/s/ Benjamin J. Cayetano

BENJAMIN J. CAYETANO
Governor of Hawaii"

Gov. Msg. No. 241, returning House Bill No. 1675, without his approval and with his statement of objections relating to the measure, as follows:

"EXECUTIVE CHAMBERS
HONOLULU

June 10, 1999

STATEMENT OF OBJECTIONS
TO HOUSE BILL NO. 1675

Honorable Members
Twentieth Legislature
State of Hawaii

Pursuant to Section 16 of Article III of the Constitution of the State of Hawaii, I am returning herewith, without my approval, House Bill No. 1675, entitled, 'A Bill for an Act Relating to Hawaiian Home Lands Trust Individual Claims.'

The purpose of this bill is to extend the individual claims review process for one more year, without correcting the applicable criteria and formula for damages. This bill will also create a compensation commission to develop proposals for alternative means of compensating claimants who have received a favorable ruling from the Hawaiian Home Lands Individual Trust Claims Review Panel ('Panel').

By way of background, the individual claims review process was established by the Legislature in 1991 and it has been in operation for the last eight years. Moreover, after being established, the Panel took six long years before it finally submitted its first report to the Legislature with its recommended damage awards. This occurred in 1997. To date, the Panel has reviewed less than half of the more than 4000 claims filed. At this pace, it would certainly take more than 'one more year' for the Panel to complete its review of all the claims. This is totally unacceptable. The claimants as well as the State have been dragged through this process long enough, and this bill does nothing to expedite the matter.

Moreover, throughout the Panel's administrative review process, the Panel has continually misapplied the claims' criteria and formula for damages. For example, the Panel has improperly included 'wait list' claims as viable claims under chapter 674, Hawaii Revised Statutes. The problem of beneficiaries 'waiting' too long for a homestead was intended to be remedied by Act 14, Session Laws of Hawaii 1995, and not be the individual claims review process under chapter 674. Yet, under the currently applied criteria and formula, the Panel has deemed waiting list claims to be compensable. This bill fails to correct the Panel's erroneous inclusion of wait list claims as compensable claims.

Furthermore, in response to the Panel's first report to the Legislature containing recommended damages, the Legislature in 1997 enacted Act 382, which created a Working Group consisting of the Attorney General, the Director of Finance, the Chairperson of the Hawaiian Homes Commission, and the Chairperson of the Panel. This Working Group was created because the Legislature specifically found that there was 'disagreement between the parties over the formula utilized by the [Panel] to arrive at award amounts.' Accordingly, the Working Group was directed to discuss and formulate 'an appropriate formula and any criteria necessary to qualify and resolve all claims made under chapter 674, Hawaii Revised Statutes.' Upon approval by the Governor, the recommendations of the Working Group were to be applied by the Panel. Unfortunately, due to a civil lawsuit brought by several of the claimants, the Panel was enjoined from considering the twenty-five recommendations of the Working Group. Notwithstanding the injunction, this Legislature was still free to correct the disagreement over the claims' criteria and formula. The Legislature, having the opportunity this past legislative session to correct this matter, nevertheless failed to do this.

Other concerns with the validity of the Panel's recommended awards were further identified by the Attorney General in her response to the Panel's Report to the Governor and the 1999 Hawaii Legislature. Concerns were also raised by the Attorney General relative to the Panel's bias and conflicts of interests. None of these concerns are addressed by this bill.

Consequently, not only has the Legislature failed to clarify the disagreement over the criteria and formula for damages for these claims, but the Legislature is also responsible, in part, for the two-year delay, caused by the litigation, in processing these claims. Now, this bill will perpetuate the same erroneous standards for another year. This, in turn, will perpetuate the beneficiaries' misunderstanding that the Panel's recommended awards are valid. This misunderstanding by the beneficiaries cannot be allowed to continue.

For the foregoing reasons, I am returning House Bill No. 1675 without my approval.

Respectfully,

/s/ Benjamin J. Cayetano

BENJAMIN J. CAYETANO
Governor of Hawaii

PROCLAMATION

WHEREAS, under Section 16 of Article III of the Constitution of the State of Hawaii, the Governor is required to give notice, by a proclamation, of his plan to return with his objections any bill presented to him less than ten days before adjournment sine die or presented to him after adjournment sine die of the Legislature; and

WHEREAS, House Bill No. 1675, entitled, 'A Bill for an Act Relating to Hawaiian Home Lands Trust Individual

Claims,' passed by the Legislature, was presented to the Governor within the aforementioned period; and

WHEREAS, House Bill No. 1675 is unacceptable to the Governor of the State of Hawaii;

NOW, THEREFORE, I, BENJAMIN J. CAYETANO, Governor of the State of Hawaii, do hereby issue this proclamation, pursuant to the provisions of Section 16 of Article III of the Constitution of the State of Hawaii, giving notice of my plan to return House Bill No. 1675 with my objections thereon to the Legislature as provided in said Section 16 of Article III of the Constitution.

DONE at the State Capitol,
Honolulu, State of Hawaii,
this 10th day of June, 1999

/s/ Benjamin J. Cayetano

BENJAMIN J. CAYETANO
Governor of Hawaii"

Gov. Msg. No. 242, returning House Bill No. 1296, without his approval and with his statement of objections relating to the measure, as follows:

"EXECUTIVE CHAMBERS
HONOLULU

June 15, 1999

STATEMENT OF OBJECTIONS
TO HOUSE BILL NO. 1296

Honorable Members
Twentieth Legislature
State of Hawaii

Pursuant to Section 16 of Article III of the Constitution of the State of Hawaii, I am returning herewith, without my approval, House Bill No. 1296, entitled, 'A Bill for an Act Relating to Kaneohe Bay.'

The purpose of House Bill No. 1296 is to require administrative rules governing commercial operations at Kaneohe Bay to be based on the provisions of the original Kaneohe Bay Master Plan, instead of a master plan as it may be amended by the Kaneohe Bay Regional Council, unless a rule is required to protect public health or safety or to ensure resource preservation or protection.

This bill is unnecessary, because the Kaneohe Bay Master Plan is in the process of being updated under the current raised in the committee reports on this bill regarding preserving the long-term integrity and beauty of Kaneohe Bay while addressing the needs of the commercial operators who utilize Kaneohe Bay as their place of business.

For the foregoing reasons, I am returning House Bill No. 1296 without my approval.

Respectfully,

/s/ Mazie K. Hirono

MAZIE K. HIRONO
Acting Governor of Hawaii

PROCLAMATION

WHEREAS, under Section 16 of Article III of the Constitution of the State of Hawaii, the Governor is required to give notice, by a proclamation, of his plan to return with his objections any bill presented to him less than ten days before

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEONA KALIMA, DIANE BONER,
RAYNETTE NALANI AH CHONG,
special administrator of the estate of
JOSEPH CHING, deceased, CAROLINE
BRIGHT, DONNA KUEHU, and JAMES
AKIONA, et al.,

Plaintiffs,

vs.

STATE OF HAWAI'I, STATE OF HAWAI'I
DEPARTMENT OF HAWAIIAN HOME
LANDS; et al.,

Defendants.

CIVIL NO. 99-4771-12 LWC
(Class Action)

**NOTICE OF COMBINED IN PERSON
AND REMOTE HEARING;
CERTIFICATE OF SERVICE**

NOTICE OF REMOTE HEARING

TO: ANNE E. LOPEZ 7609
Attorney General, State of Hawai'i
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AND

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Honolulu, Hawai'i 96813

NOTICE IS HEREBY GIVEN that the above-identified PLAINTIFFS' MOTION FOR
AWARD OF ATTORNEYS' FEES; shall come on for hearing before the Honorable Lisa W.

Cataldo, Judge of the above-entitled Court, via ZOOM video conferencing and in person, in her courtroom, at 1111 Alakea St. Honolulu, Hawai'i, on July 21, 2023, at 9:00 a.m., or as soon thereafter as counsel may be heard.

If you fail to appear at the hearing, the relief requested may be granted without further notice to you.

All parties appearing by Zoom are directed to appear at least **10 minutes** prior to the scheduled start time. The Zoom meeting ID is **808 538 5119**. No password is required.

Self-represented parties unable to appear by video may call **888-788-0099 (U.S. toll-free) or 646-558-8656** to participate by telephone. You must enter the above noted Zoom meeting ID when prompted. You must also notify the assigned judge's chambers that you intend to participate by telephone at least **48 hours** before the hearing and you must provide the court with the telephone number that you will be using to dial-in for the hearing.

Attorneys and self-represented parties must enter a user name that sets forth their full name, otherwise you will not be admitted into the hearing. Attorneys must also include the suffix "Esq."

All attorneys and parties shall dress appropriately for the hearing. **Recording court proceedings is strictly prohibited unless permission is granted by the court.** The court may impose sanctions for failure to comply with this notice.

DATED: Honolulu, Hawai'i, June 19, 2023.

/s/ Carl M. Varady

CARL M. VARADY
THOMAS R. GRANDE

CLASS COUNSEL

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing documents were served through the Court's JEFS system on the date indicated below.

DATED: Honolulu, Hawai'i, June 19, 2023.

/s/ Carl M. Varady

CARL M. VARADY

THOMAS R. GRANDE

CLASS COUNSEL