

DEPARTMENT OF THE ATTORNEY GENERAL

DAVID Y. IGE
GOVERNOR

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**ATTORNEY GENERAL ASKS 9th CIRCUIT COURT
TO LIFT INJUNCTION AGAINST MAUI HOSPITALS**

HONOLULU – Attorney General Doug Chin filed today a motion in the Ninth Circuit Court of Appeals asking the Court to lift or modify an order it issued three days ago that temporarily stops activities related to the transition of Maui Memorial Medical Center, Kula Hospital & Clinic, and Lanai Community Hospital to a new Kaiser entity.

Attorney General Chin explained, “We asked the Court to lift or modify the order now and allow the work necessary to implement the transition to go forward. The Court’s order came six weeks before the transfer to Kaiser. By all accounts that is not enough time to reverse course and run the hospitals as public facilities.”

In 2015, the state legislature passed a law ending the Hawaii Health Systems Corporation’s delivery of health care services at the three Maui facilities and transferring service delivery to a private operator. On January 14, 2016, the Hawaii Health Systems Corporation board and its regional board signed an agreement to transition to a new Kaiser entity, Maui Health Systems. United Public Workers, representing some of the Maui hospital employees, sued to stop the transition from taking place in the case of United Public Workers v. Ige. On February 19, 2016, United States District Court Judge Helen Gillmor ruled in favor of the State, and UPW appealed to the federal Ninth Circuit Court. On May 17, 2016, the Ninth Circuit Court ordered the State to temporarily stop all activities related to the transition until September 30, 2016, unless sooner terminated by the Court, and for the parties to submit a joint status report.

“Governor Ige’s top priority is to protect patients in the Maui region hospitals,” **Chin said**. “Our motion offers the Court a path to protect UPW members while the appeal is pending and simultaneously let the complex details of the implementation resume.”

It is not known when the Court will rule on this motion. The motion and certain supporting documents are attached.

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No. 16-15219

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED PUBLIC WORKERS,
Plaintiff-Appellant,

v.

DAVID Y. IGE, IN HIS OFFICIAL CAPACITY AS GOVERNOR
OF THE STATE OF HAWAI'I,
Defendant-Appellee.

On appeal from the United States District Court
for the District of Hawai'i

Civ. No. 1:15-CV-00303-HG-KSC (Hon. H. Gillmor, J.)

**GOVERNOR IGE'S EMERGENCY MOTION UNDER
CIRCUIT RULE 27-3 TO AT MINIMUM NARROW
THE INJUNCTION ISSUED BY THIS COURT ON MAY 17, 2016**

DECLARATION OF LINDA ROSEN AND EXHIBITS 1 - 4

DECLARATION OF DANIEL GOLDBERG

DECLARATION OF WESLEY LO

DECLARATION OF BRIAN TADASHI HIRAI

DECLARATION OF RONALD M. BOYD, M.D.

DECLARATION OF DOUGLAS S. CHIN AND EXHIBITS 5 - 9

DECLARATION OF TAMMY D. E. TAM

CERTIFICATE OF SERVICE

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CIRCUIT RULE 27-3 CERTIFICATE

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2. **Facts showing the existence and nature of the claimed emergency.**

On May 17, 2016, this Court issued an Order enjoining Governor Ige and "all persons acting in concert with the Governor" from "enforcing or implementing, or taking any steps to enforce or implement, 2015 Hawai'i Session Law, Act 103. See 5/17/16 Order (hereinafter "Order"). This motion seeking to dissolve or narrow that injunction is an emergency motion because "to avoid irreparable harm relief is needed in less than 21 days." Ninth Cir. R. 27-3(a).

As more fully explained in the motion, the process of transferring the Maui Region's three hospital facilities, from the State to Kaiser, requires multiple and complex preparatory actions that take significant time to complete. These preparatory steps, necessary to effectuate transition, cannot be halted without significant delay to the ultimate transition:

- As Dr. Linda Rosen explains in her attached declaration and exhibits, there are dozens of preparatory steps that include, for example, completing schedules, filing government and private program termination cost reports, transfer of inventory to Kaiser, consultation with unions, amendment or adoption of Medical Staff Bylaws, and multiple contractual assignments. Decl. of Rosen at ¶ 3 and attached Exh. 1.
- The injunction also prevents "completing negotiations and securing consents to the transfer by lease of the Maui Region's three Hospital

Facilities to Kaiser and modification of certain underlying documentation from some of the Region's lenders and its capital lessors." See Decl. of Hirai.

Moreover, the imposition of the injunction at this late date – three months after the district court denied UPW's motion for injunctive relief and less than 7 weeks before the planned transition date – has **increased** the harm to the State and severely threatens effective health care delivery and patient safety. These additional harms arise for the following reasons:

- Because the transition was planned for July 1, 2016, the Maui Regional System's new staff recruitment and hiring, new equipment acquisition, software maintenance contracts, and contracts for the acquisition of supplies past the transition date, were all suspended, not renewed, or cancelled. Decl. of Lo at ¶ 5. The injunction precludes Kaiser from fulfilling those duties, as expected. And because the injunction comes so late in the game, there is inadequate time left to find replacement doctors, staff, medical supplies and equipment, and computer software. Id. Specifically, without the transition, Maui Region will be left with inadequate physician coverage (e.g., without a medical oncologist), and with an exacerbated nursing staff shortage that "will potentially jeopardize patient safety." Id. at ¶¶ 6, 9.

- Failure to transition on July 1 will mean that Maui Region facilities may not have, and may not be able to obtain, adequate supplies after June 30, given the Maui Region's systematic reduction of ordering supplies, including medications, during the past few months. Decl. of Lo at ¶ 10. Hardware service and support contracts, including those for IV pumps, and critical diagnostic equipment, expire by June 30, 2016, and were not renewed because Kaiser would have assumed responsibility for the hardware upon the closing of the deal. Id. at ¶ 13. The injunction, by preventing the deal closing, jeopardizes Kaiser's post-transition assumption of responsibility for the hardware, software, medications, supplies, and supplementing of hospital staff. All this "will jeopardize safe patient care, and will have catastrophic consequences for the people of Maui." Id. at ¶ 16.
- The injunction creates the need for the Hawaii Hospital Systems Corporation to renegotiate its contract with vendors to commence an upgrade to its current electronic medical record system (e.g., its clinical and pharmacy technology applications) prior to July 1. Decl. of Rosen ¶ 11. The upgrade is necessary in order to comply with federal requirements, and because the vendor will not be supporting the current version after July 1. Id. HHSC did not contract for the upgrades to commence prior to July 1

because, prior to this Court's injunction, there would have been no need to upgrade the Maui facilities "once the transfer [to Kaiser] was completed."

Id. at ¶ 11.

- The belated injunction puts into limbo the status of hundreds of contracts for goods and services that Kaiser would assume from HHSC and the Maui Region upon transfer. Decl. of Rosen at ¶ 12. HHSC will need to contact each of these vendors to inform them that the transfer completion date will likely be delayed, but that it has no further information as to when the new transfer date might be, or to provide assurances that the transfer will take place at all. Id. at ¶ 11.
- The belated injunction also puts the Medicare-mandated change of ownership application process into jeopardy, by prohibiting HHSC from timely responding to requests for clarification or additional information regarding its already submitted applications regarding "change of ownership" from the State to Kaiser. Decl. of Rosen at ¶ 13-16.
- The belated injunction directly impacts patient care because it affects HHSC's ability to assure an adequate number of qualified physicians to staff the hospitals. Decl. of Rosen at ¶ 10. HHSC physicians who have already made plans based on the July 1 transfer date may not be able to change these plans, and the new uncertainty created by the belated

injunction may reasonably cause Kaiser-recruited physicians (anticipated to cover post-July 1 staffing needs) to change their employment commitments. Id. at ¶ 10.

- The belated injunction also affects patient safety because the uncertainty of transfer creates a new and dangerous distraction to staff who must be able to stay focused on their tasks with a minimum of distraction. Decl. of Rosen at ¶ 16.

As the State explains in its motion, the above facts create an emergency situation affecting patient care in Maui Region hospitals.

3. **Notification to the Court and Counsel.** On May 18, 2016, Attorney General Douglas S. Chin spoke by telephone with Scott A. Kronland, counsel for Plaintiff-Appellant United Public Workers, American Federation of State, County, and Municipal Employees, Local 646, AFL-CIO, and informed him that the Governor was considering the filing of a motion requesting this Court to modify the injunction. See Decl. of Chin at ¶ 2.

On May 20, 2016, Tammy Tam, Legal Assistant with the Appellate Division of the Hawai'i Department of the Attorney General, called the Ninth Circuit Court of Appeals Clerk's Office, and was transferred to and left a voicemail message for Allison Taylor, the motions attorney on duty today. See Decl. of Tam at ¶2. Ms. Tam's message informed Ms. Taylor that, pursuant to Circuit Rule 27-3, the State

wished to inform her that it would be filing, on May 20, 2016, State Defendants Emergency Motion to at Minimum Narrow the Injunction Issued by this Court on May 17, 2016. Id.

DATED: Honolulu, Hawaii, May 20, 2016.

DOUGLAS S. CHIN
Attorney General of Hawai'i

s/ Douglas S. Chin _____

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TABLE OF CONTENTS

I.	The existing injunction is causing irreparable harm to the State's interest in expeditiously improving the health care delivered to the affected communities, and is undermining the public interest in quality health care.....	2
II.	At the very least, the injunction must be substantially narrowed, because the broad scope of the current injunction is unnecessary to protecting any of UPW's alleged legal interests.....	5
III.	Changed factual and legal circumstances in the last three months -- causing the injunction to directly place patients' health at risk -- require dissolution of the injunction in its entirety.	9
IV.	Governor Ige's representatives are persistently initiating with UPW to prepare a Joint Status Report that sets forth any change in the status of the case, including resolution.	16
	CONCLUSION.....	19

TABLE OF AUTHORITIES

CASES

<u>E. & J. Gallow Winery v. Gallo Cattle Co.</u> , 967 F.2d 1280 (9th Cir. 1992)	6
<u>Salera v. Caldwell</u> , SCAP-15-0000106 (May 11, 2016)	15
<u>Skydive Arizona v. Quattrocchi</u> , 673 F.3d 1105 (9th Cir. 2012)	6
<u>System Federation No. 91 v. Wright</u> , 364 U.S. 642 (1961)	2, 15, 16

STATUTES and LEGISLATIVE HISTORY

42 CFR § 489.18(a)(4)	13
2015 Haw. Sess. L., Act 103	1, 2, 3, 5, 6, 7, 8, 13, 15, 19
Haw. Rev. Stat. § 323F-52 (Supp. 2015)	15
Haw. Rev. Stat. § 323F-54	15

Rules

Ninth Cir. R. 27-3(a)	1
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Governor Ige's Emergency Motion under Circuit Rule 27-3 to
at minimum Narrow the Injunction issued by this Court on May 17, 2016

On May 17, 2016, this Court issued an Order enjoining Governor Ige and "all persons acting in concert with the Governor" from "enforcing or implementing, or taking any steps to enforce or implement, 2015 Hawaii Session Law, Act 103." See 5/17/16 Order (hereinafter "Order"). This motion seeking to dissolve or narrow that injunction is an emergency motion because "to avoid irreparable harm relief is needed in less than 21 days." Ninth Cir. R. 27-3(a). Indeed, as more fully explained below, each and every day that passes since this Court issued its Order, irreparable harm is and will be done to Governor Ige's effort to expedite the safe transition of operations of the Maui Regional System's health care facilities from the State to the private entity, Maui Health Systems, a Kaiser Foundation Hospital, LLC ("Kaiser"). Delaying this transition delays the private entity's expected ability to use the health care facilities more economically and efficiently and to more cost-effectively deliver health care services to the affected communities. See Act 103 Section 1, Session Laws of Hawaii 2015 at 256-57 ("private entities may be able to use the corporation's health care facilities more economically and efficiently"). This in turn will jeopardize the health and welfare of the communities currently served by the Maui Regional System's health care facilities.

Furthermore, as explained in detail later, the belated nature of the injunction, less than 7 weeks before the planned transition, has created unique and severe threats (including, e.g., doctor and nursing shortages, and unavailability of critical medical equipment) to the ability of the Maui region hospitals to provide adequate medical services to the communities they serve.

Although the injunction should be dissolved **in its entirety** because of these unique and severe threats to public health, arising out of changed circumstances flowing from the belated injunction, see System Federation No. 91 v. Wright, 364 U.S. 642, 647 (1961) ("sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, ... have changed, or new ones have since arisen."), at minimum, the injunction should be substantially **narrowed** to only bar elimination of public employee status due to Act 103. Narrowing the injunction in that fashion will still prevent **all** of the alleged harm plaintiffs claim they may suffer, while furthering the State and public interest in adequate health care access for the Maui region. An injunction broader than needed to eliminate the alleged harms to plaintiffs is unwarranted.

I. The existing injunction is causing irreparable harm to the State's interest in expeditiously improving the health care delivered to the affected communities, and is undermining the public interest in quality health care.

The process of transitioning the delivery of health care services from a State-operated entity to a private entity takes a massive and complex combination of

preparatory actions to bring the transition into full fruition on the transfer completion date. These multiple and often complex preparatory actions must take place over a significant period of time. See Decl. of Rosen at ¶3 ("Interruption of the preparatory work will have serious consequences, including substantially delaying eventual transfer[,], because until these preparatory steps are completed, the transfer cannot occur.") These dozens of steps include, for example, completing schedules, filing government and private program termination cost reports, transfer of inventory to Kaiser, consultation with unions, amendment or adoption of Medical Staff Bylaws, and multiple contractual assignments. See Id. & Exh.1 attached to Decl. of Rosen.

Furthermore, the injunction will delay transition by prohibiting the completion of negotiations and the securing of consents to the transfer by lease of the Maui Region's three Hospital Facilities to Kaiser, and by preventing modification of certain underlying documentation from some of the Region's lenders and its capital lessors. See Decl. of Hirai.

The injunction issued pursuant to the Order, by enjoining all actions by the Governor and all persons acting in concert with the Governor, from "taking **any steps** to enforce or implement [Act 103]" means that all of the above-referenced preparatory activities, necessary to a successful ultimate transition of health care

delivery from the State to the private entity by the transfer completion date, must be halted.

Accordingly, because the injunction halts the preparatory activity needed to timely effectuate the transition by the transfer completion date, which is July 1, 2016, the injunction is frustrating the State's goal of improving as soon as possible the health care services to be delivered to the community served by the Maui Regional System. This harm is undeniably irreparable, because inadequate health care for any period of time cannot generally be undone by subsequent improvements. Patients who pass cannot be revived, and patients whose health is harmed often cannot have their health condition restored to what it would have been had better health care services been earlier provided. Moreover, even if a person's health can be restored, suffering poor health even temporarily is irreparable, as one can obviously never go back and relive the past period in better health.

For much the same reason, the existing injunction is damaging the **public interest** by delaying the ultimate eventual transfer to an even later date than if the injunction had not been imposed. The sooner the injunction is dissolved or narrowed, the sooner the preparatory activities can continue, and thus the earlier members of the community will have access to the enhanced health care the transition is expected to bring about.

II. At the very least, the injunction must be substantially narrowed, because the broad scope of the current injunction is unnecessary to protecting any of UPW's alleged legal interests.

Even if this Court ultimately concludes, despite the arguments above and in Section III, *infra* (regarding changed circumstances), that **plaintiffs'** (hereinafter, "UPW") alleged harms are sufficient to require some kind of injunction pending appeal, it is absolutely clear, as explained below, that the breadth of the current injunction is unnecessary to prevent the alleged harms to UPW. Because a substantially narrowed injunction can fully protect UPW from its alleged harm, yet help to mitigate the harm to Governor Ige and the health care needs of the served communities, Governor Ige respectfully requests that the injunction, at minimum, be appropriately narrowed in scope.

The critical fact is that all of UPW's alleged irreparable harm, if it exists at all, stems from the subject employees losing their status as state employees, and becoming employees of a private entity (and in some cases having their state job changed) due to Act 103. UPW emphasizes that such a shift of their members from state employees to private employees could entail potential loss of state civil service protections, and potential losses of, or changes in, state employment or retirement benefits, and other protections unique to state workers. See UPW's 2/17/16 Emergency Motion at p.8 (end of 1st full paragraph), at p.50 (top), p.51 (top half). This in turn could lead some to instead seek to enforce RIF rights to stay

in alternative state employment, which plaintiffs believe cause other potential harms. Id. at pp.10-11, 11-12. If, however, the workers do not lose their status as state employees (or have their state job changed) due to Act 103, then none of these alleged harms to UPW members comes to pass.

Accordingly, an injunction that simply and **only** precludes Governor Ige, and all persons acting in concert with the Governor, from actually changing the status of the Maui Regional System employees from state workers into private workers (or having their state job changed) due to Act 103 would eliminate all alleged harm to UPW. Because the alleged harm to UPW disappears with such an injunction, UPW is plainly not entitled to an injunction that goes a single step beyond that very narrow and limited scope. See Skydive Arizona v. Quattrocchi, 673 F.3d 1105, 1116 (9th Cir. 2012) ("An injunction should be 'tailored to eliminate only the specific harm alleged.>"). Indeed, an injunction that is not "tailored to eliminate only the specific harm alleged" is an "overbroad injunction" which "is an abuse of discretion." E. & J. Gallow Winery v. Gallo Cattle Co., 967 F.2d 1280, 1297 (9th Cir. 1992).

Moreover, such a narrow and limited injunction will eliminate a significant amount of irreparable harm to Governor Ige, and the public interest, that is caused by the broad injunction imposed by this Court's current May 17, 2016, Order. That is because the current broad injunction -- which enjoins "taking any steps" to

implement Act 103 -- prevents the State from taking any of the **preparatory** actions (discussed supra at pp.2-4) needed to ultimately effectuate the eventual transition from state to private provision of health care. Because this transition cannot simply happen overnight without these preparatory steps being taken to facilitate the transition, the current broad injunction that enjoins these preparatory steps from being taken means that when and if the injunction is lifted (in the event Governor Ige ultimately prevails on appeal on the merits of UPW's legal challenge), the transition will not be able to take place forthwith. Instead, the enjoined preparatory actions will have to commence at that point (rather than having already been completed had they not been enjoined). Therefore, the State will have to wait until all the necessary preparatory actions are subsequently completed, which could take months, thereby substantially delaying the ultimate transition.

Thus, the current broad injunction will cause irreparable harm to Governor Ige and the public interest by delaying the ultimate transition, and thereby delaying the community's access to the better health care services that the transition is expected to bring about.

In short, narrowing the injunction to the more limited form discussed above is a win-win for everyone. The narrow injunction eliminates all harm to UPW, while simultaneously lessening the harm to Governor Ige and the public interest,

by speeding up the eventual transition when and if this Court rejects the legal challenge raised by UPW. (If this Court ultimately upholds UPW's legal challenge, UPW's members will have suffered no harm in the meantime, because their status as state workers (or their particular state job) would have been fully protected in that interim period.)

Moreover, this narrowed injunction focused only on maintaining public employee status is actually more in line with the injunction UPW itself actually sought. See UPW's 2/17/16 Emergency Motion at p.47 (asking Governor Ige to wait until the CBA expires before **shifting employees "from public to private status"**) & p.50 (asking for "the **transition** [to be] postponed until the expiration of the CBAs"). UPW did **not** seek to prevent Governor Ige from taking "**any steps** to ... implement [Act 103]"; it merely sought to prevent its members from losing their status as state employees (or having their state job changed) due to Act 103, given the potential loss of benefits such a status change allegedly would entail.

For these reasons, this Court, respectfully, should **at minimum** narrow the current injunction to one that **only** precludes Governor Ige, and all persons acting in concert with the Governor, from actually changing the status of the Maui Regional System employees from state workers into private workers (or having their state job changed) due to Act 103. As with the current injunction, however, it should remain in effect only until September 30, 2016, unless sooner terminated by

the court.

III. Changed factual and legal circumstances in the last three months -- causing the injunction to directly place patients' health at risk -- require dissolution of the injunction in its entirety.

Furthermore, the imposition of the injunction at this late date has actually **increased** the harm to the State and threatens adequate health care delivery in many other ways, as will be detailed below. This is in addition to the substantial harm caused by the injunction's impact in delaying the ultimate transition, as discussed in Section I, *supra*. Moreover, as explained later, the legal landscape has also shifted in the last couple weeks against the validity of plaintiffs' legal challenge. For these reasons, the existing injunction should be lifted **in its entirety**.

Since UPW brought its emergency motion back in February seeking an injunction pending appeal, the harms to the State and the community from imposition of the current injunction **at this late date** have substantially multiplied even beyond the already substantial harm discussed in Section I. That is because ever since UPW filed their motion seeking an injunction pending appeal back in February, a multitude of changed circumstances have arisen, and new actions and events have occurred, **in anticipation of the July 1, 2016 transition occurring**. The *sua sponte* injunction issued on May 17th halts that transition, resulting in even more harm to the State's ability to deliver health care, and seriously

jeopardizing patient safety. Here's precisely why: Because the transition was planned for July 1, 2016, the Maui Regional System's new staff recruitment and hiring, new equipment acquisition, software maintenance contracts, and contracts for the acquisition of supplies past the transition date, were all suspended, not renewed, or cancelled. Decl. of Lo at ¶5. This made perfect sense in that the new private entity Kaiser was expected to soon take over these critical matters. The injunction, however, precludes Kaiser from fulfilling those duties, and worse, because the injunction comes so late in the game, there is inadequate time left to find replacement doctors, staff, medical supplies and equipment, and computer software. As Maui Region CEO Lo warns, "if the closing does not occur as scheduled, healthcare delivery in the Maui Region will be adversely affected." Id. at ¶5.

Specifically, "[w]ithout the transition, Maui Region will be left with inadequate physician coverage in certain areas," id. at ¶7, including having no medical oncologist. Id. at ¶8. The injunction will also "perpetuate if not exacerbate the already critical staff shortage, and will potentially jeopardize patient safety." Id. at ¶6. For example, "if the transition [to Kaiser] does not close on June 30, 2016, Maui Region will face an exacerbated nursing staff shortage, and may not have adequate staffing to safely care for [the] patients." Id. at ¶9.

Similarly, "the Maui Region has systematically reduced ordering supplies, including **medications**, so as to meet the needs through June 30, 2016," and thus failure to close the deal on June 30, 2016 will mean that the "Maui Region facilities may not have, and may not be able to obtain, adequate supplies after June 30, 2016." Id. at ¶10. Hardware service and support contracts, including those for IV pumps, and critical diagnostic equipment, expire by June 30, 2016, and were not renewed because Kaiser would have assumed responsibility for the hardware upon the closing of the deal. Id. at ¶13. But the injunction prevents the deal closing, and therefore potentially jeopardizes patient care and safety. Id.

As Maui Region CEO Lo explains: "[b]ut for the injunction, ... Kaiser and Maui Region were proceeding on schedule for the closing ... on June 30, 2016," with Maui Region hospitals proceeding to "wind down replacing equipment, ordering supplies including medication, recruiting new physicians and other medical staff, for a seamless transition of the operations to Kaiser on July 1, 2016." Id. at ¶15. Lo continues: "if Kaiser is not allowed to assume the responsibility for the hardware, software, medications, and supplies and to supplement [hospital] staff on June 30, 2016, it will be very difficult for the Maui Region to operate its three facilities after June 30, 2016," id., which "**will jeopardize safe patient care, and will have catastrophic consequences for the people of Maui.**" Id. at ¶16.

Similarly, Kaiser Senior Director for Merger and Acquisition Transitions

Daniel Goldberg has identified similar risks to patient safety and welfare if the transition on July 1, 2016 does not occur. See Declaration of Goldberg.

Linda Rosen, Chief Executive Officer of Hawaii Health Systems Corporation ("HHSC"), also details the grave and specific operational issues impacting patient care caused by the belated nature of the injunction. For example, the injunction creates the need for HHSC to expeditiously negotiate and commence an upgrade to its current electronic medical record system (e.g., its clinical and pharmacy technology applications) prior to July 1.¹ Decl. of Rosen at ¶11. Had an injunction been issued two months ago, HHSC could have taken steps to mitigate the impact of this systems upgrade. Id. at ¶11. As it stands, this Court's belated injunction not only requires HHSC to renegotiate its contract with the systems vendors to belatedly include the Maui facilities, but it requires HHSC to make plans to train Maui employees in July, "a time when the facilities are already struggling to remain properly staffed with employees who are able to remain focused on their jobs." Id. at ¶11.

As Rosen further explains, the belated injunction puts into limbo the status of hundreds of contracts for goods and services that Kaiser would assume from

¹ The upgrade is critical because it is federally required, and the systems vendor will not support the current version of the system (presently utilized by HHSC) after July 1. Decl. of Rosen at ¶11. HHSC did not contract for the upgrades to commence prior to July 1 because, prior to this Court's injunction, there would be no need to upgrade the Maui facilities "once the transfer [to Kaiser] was completed." Id. at ¶11.

HHSC and the Maui Region upon transfer. Decl. of Rosen at ¶12. HHSC will need to contact each of these vendors to inform them that the transfer completion date will likely be delayed, but that it has no further information as to when the new transfer date might be, or to provide assurances that the transfer will take place at all. Id. at ¶12.

The belated injunction also puts the Medicare-mandated change of ownership application process into jeopardy. Pursuant to 42 CFR § 489.18(a)(4), the Lease of the Maui Region hospitals constitutes a change of ownership ("CHOW") under Medicare rules. Decl. of Rosen at ¶13. The CHOW must be approved by the Centers for Medicare and Medicaid Services in order to ensure Kaiser's Medicaid provider status. Id. at ¶13. The CHOW process is currently pending, and Noridian, the company responsible for ensuring that all application requirements are met, is in the process of verifying the information that HHSC and Kaiser have submitted. Id. at ¶¶14-15. The injunction, which prohibits HHSC from taking any step towards implementation of Act 103, would prevent HHSC from timely responding to Noridian's requests for clarification or additional information, thus potentially risking rejection of HHSC and Kaiser's CHOW applications. Id. at ¶13-15.

As Rosen emphasized, the belated injunction also directly impacts patient care because it affects HHSC's ability to assure an adequate number of qualified

physicians to staff the hospitals. Decl. of Rosen at ¶10. HHSC physicians have made plans based on the July 1 transfer date, plans that they might not be able to easily change. Id. at ¶10. And the new uncertainty created by the belated injunction may reasonably cause Kaiser-recruited physicians (anticipated to cover post-July 1 staffing needs) to change their employment commitments. Id. at ¶10.

Likewise, the belated injunction affects patient safety because the uncertainty of transfer creates a new and dangerous distraction to the staff:

The most important element in patient safety is the human element, the workforce. Not only must staff be qualified and well-trained, **they must be able to stay focused on their tasks with a minimum of distraction.** Anything that negatively affects the smooth transition of operations from one responsible party to another has the potential to produce lapses in patient care. This concern cannot be overstated. This injunction does not in itself provide any benefit for the employees. Instead, it inserts a degree of uncertainty that is disturbing.

Decl. of Rosen at ¶16 (emphases added).

Finally, the Chief of the Medical Staff of Maui Memorial Medical Center has explained that provision of health care to the Maui community is threatened by the injunction, because physicians and staff have left or made commitments to leave Maui Memorial in anticipation of the transition, jeopardizing safe patient care because Kaiser doctors and staff cannot now replace them. See Decl. of Boyd at ¶¶5-7.

Indeed, the Legislature appreciated the fact that sudden termination of a planned transition could endanger the delivery of health care to the community.

See Haw. Rev. Stat. § 323F-54.²

Accordingly, the belated injunction has substantially exacerbated or multiplied the harms to the delivery of safe and effective health care to the affected communities. This significantly increased harm to Governor Ige, and severe harm to the public interest in having adequate health care services available in the Maui region, arising out of these critical **changed circumstances**, requires lifting the injunction in its entirety. See System Federation, 364 U.S. at 647 ("modification of ... injunctive decree" is warranted when "circumstances ... have changed, or new ones have since arisen.").

Moreover, besides the above **factual** changed circumstances, the **legal** landscape has become clearer as well. The Hawai‘i Supreme Court in Salera v. Caldwell, SCAP-15-0000106 (May 11, 2016), just last week ruled that:

If the State legislature expressly authorizes the termination of a public service, then that service may be duly privatized, and the job positions providing that service can be removed from the civil service system and no longer guaranteed the protections of HRS Chapter 76.

Slip. Op. at 30. That is precisely the situation involved in this case, as the legislature, through Act 103, indisputably expressly authorized any privatization

² Section 323F-54 provides:

- (b) At minimum, the lease shall include the following terms and conditions:
 - (1) The lease shall not be terminated other than for good cause and upon a minimum of three hundred sixty-five days prior written notice **to ensure that the delivery of health care services to the community served will not be disrupted**

that is alleged to have occurred here. Indeed, the Salera Court expressly referenced Act 103, stating that:

A more recent example of a legislative enactment **authorizing a specific privatization effort** is HRS § 323F-52 (Supp. 2015), which **expressly authorizes the privatization of one or more Maui medical facilities of the Maui regional system.**

Id. at 31 n.17. Therefore, to the extent that UPW argues that Act 103 amounts to an illegal privatization in violation of Hawai‘i constitutional and statutory civil service protections, that claim has been expressly refuted by the Hawai‘i Supreme Court in the last 10 days. That Court, of course, is the final arbiter of Hawai‘i state constitutional and statutory protections.

In sum, because both the factual and legal circumstances involved in this case have changed since this past February when UPW initially sought an injunction pending appeal, and those changes cut strongly against issuance of an injunction, the injunction should be dissolved in its entirety, even if an injunction would have been proper three months ago. See System Federation, 364 U.S. at 647 ("modification of ... injunctive decree" appropriate "if the circumstances, whether of law or fact, ... have changed.").

Accordingly, dissolution of the injunction is needed to eliminate the substantial harm the injunction will otherwise cause to the State's interest in provision of Maui region health care services, and to further the public's vital interest in access to adequate health care. The health and well-being of the people

in the Maui region is at stake. Governor Ige therefore respectfully asks that the injunction be lifted in its entirety.

IV. Governor Ige's representatives will work with UPW to prepare a Joint Status Report that sets forth any change in the status of the case, including resolution, on or before June 30, 2016.

The Order further states, "On or before June 30, 2016, the parties shall file a Joint Status Report setting forth any change in the status of the case." Governor Ige, by and through his representatives, are persistently initiating with UPW to prepare a Joint Status Report that sets forth any change in the status of the case, including resolution.

On May 17, 2016, shortly after the Order was filed, Hawai'i Attorney General Douglas S. Chin (the "Attorney General"), on behalf of Governor Ige, telephoned counsel for UPW to say that Governor Ige's representatives were ready to meet with UPW. Ex. 5.

That same day, the Attorney General wrote to UPW counsel, "Though Governor Ige is out of town today, please know his representatives are ready to meet with your client as soon as possible." Ex. 5.

On May 18, 2016, the day after the Order was filed, the Attorney General telephoned counsel for UPW a second time. Ex. 5. The Attorney General was told that UPW would send a follow-up letter requesting more information about 2016 Hawai'i Legislature, Senate Bill 2077, House Draft 1, Senate Draft 1, Conference

Draft 2, “Relating to Separation Benefits” (the “Separation Benefits Bill”). See Ex. 9. The Hawai‘i State Legislature introduced the Separation Benefits Bill on January 21, 2016 and after several committee hearings and drafts, passed it with conference amendments on May 5, 2016

On May 19, 2016, counsel for UPW wrote to the Attorney General and requested, in summation:

1. A current list of the UPW bargaining unit members employed in the Maui Region facilities by name, salary, years of service and age, and whether each worker would (a) be eligible for a voluntary severance benefit under the Separation Benefits Bill, (b) qualify for special retirement under the Separation Benefits Bill, and (c) qualify for the state contributions to the health benefits trust fund described in the Separation Benefits Bill.
2. A list of UPW members who participated in the Act 103 reduction in force and were or would be offered new civil service positions, including job title, location and salary.
3. A list of UPW members not working in the Maui Region facilities who would be displaced from their positions by Act 103 including the same information for the workers requested in the first request.

Ex. 7.

Also on May 19, 2016, the Attorney General asked again whether UPW would stipulate or not object to narrowing the scope of the Order. Ex. 6. After discussing the issue, counsel for UPW told the Attorney General that UPW would object. Id.

The day after the Order was filed, Hawai'i Health Systems Corporation Chief Executive Officer Linda Rosen, M.D., M.P.H., also wrote to UPW State Director Dayton Nakaneula to convey HHSC's concerns about the Court's Order:

While I understand and share the Court's concern for the welfare of our employees, this action has potentially serious consequences for safe operations of our Maui Region facilities in coming months. There is great urgency in resolving this matter as quickly as possible to avoid unintended harm to patients and the community. I hope you will agree that we should meet as soon as possible. I suggest 3:00 p.m. tomorrow at your offices.

Ex. 8.

The Separation Benefits Bill, about which UPW now inquires, has been available for public vetting and review since it was first introduced on January 21, 2016. The Separation Benefits Bill and communications set forth above are new factual circumstances that have arisen since UPW's motion for an injunction pending appeal was filed on February 17, 2016. The Court may exercise sound judicial discretion and modify the terms of the injunction or, in the alternative, lift the injunction altogether based upon these circumstances.

CONCLUSION

For the foregoing reasons, Governor Ige respectfully asks this Court to at minimum **narrow** the current injunction to one that **only** precludes Governor Ige, and all persons acting in concert with the Governor, from actually changing the status of the Maui Regional System employees from state workers into private workers (or having their state jobs changed) due to Act 103, and that it remain in

effect only until September 30, 2016, unless sooner terminated by the court.

However, in light of the factual actions and events that have occurred in the last three months in anticipation of the expected July 1, 2016 transition, the issuance of a belated injunction that at the last minute stops that transition severely threatens the State's and public interest in Maui area community access to adequate health care. The balance of harms, therefore, has radically changed, and Governor Ige, accordingly, respectfully requests that this Court dissolve the injunction in its entirety.

DATED: Honolulu, Hawaii, May 20, 2016.

DOUGLAS S. CHIN
Attorney General of Hawai'i

s/ Douglas S. Chin
GIRARD D. LAU
KIMBERLY TSUMOTO GUIDRY
CHARLEEN M. AINA
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Deputy Attorneys General

Attorneys for David Y. Ige,
in his capacity as Governor
of the State of Hawai'i

No. 16-15219

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED PUBLIC WORKERS,
Plaintiff-Appellant,

v.

DAVID Y. IGE, IN HIS OFFICIAL CAPACITY AS GOVERNOR
OF THE STATE OF HAWAI'I,
Defendant-Appellee.

On appeal from the United States District Court
for the District of Hawai'i

Civ. No. 1:15-CV-00303-HG-KSC (Hon. H. Gillmor, J.)

DECLARATION OF LINDA ROSEN

I, LINDA ROSEN, do declare and would competently testify as follows.

1. I am the Chief Executive Officer of the Hawaii Health Systems Corporation ("HHSC"), a body corporate and politic.
2. I make this declaration based on my professional knowledge of HHSC matters as Chief Executive Officer and my function as the Chief Medical Officer of HHSC. In addition my knowledge of hospital operations as an emergency and critical care physician, and my experience in health care systems operations in

public health as a Program Administrator and former Director of Health for the State of Hawaii inform my statements.

3. Upon the signing of the Transfer Agreement in January of 2016 HHSC began work for a safe transfer of the responsibility to operate its facilities in Maui County to Maui Health Systems, a Kaiser Foundation Hospitals LLC (“Kaiser”). The transfer of responsibility for hospital operations requires months of complex preparation much of which has already been set in motion, while key elements are not completed. Interruption of the preparatory work will have serious consequences, including substantially delaying eventual transfer because until these preparatory steps are completed, the transfer cannot occur. Attached as **Exhibit 1** is a copy of the closing checklist that lists all of the tasks that must be completed by HHSC, HHSC Maui Region Health System (“Maui Region”), and Kaiser prior to the Transfer Completion Date, under the Transfer Agreement (which is already a part of the record on appeal) and the Hospital Facilities Lease, attached hereto as **Exhibit 2**.

4. Act 103, which directs the transfer of operations, sets forth certain elements related to employees. It directed HHSC to meet with the unions to discuss ways to mitigate the impact of the change on the employees. After these meetings, Memorandums of Understanding were entered into that allowed HHSC employees access to government positions in other jurisdictions.

5. Over the past year, since Act 103 was passed, as shown in **Exhibit 3** attached hereto, 39 United Public Workers (“UPW”) Maui Region employees found continued government service elsewhere in the State, 44 retired, and 173 left HHSC employment for other reasons.

6. **Exhibit 4**, attached hereto, shows the number of UPW workers who were eligible in February when the Reduction in Force (“RIF”) commenced and also the number of workers who exercised their RIF rights. When the RIF process began in February of 2016, there were 559 UPW members employed in the Maui Region. Of these members, 457 had 24 or more retention points making them eligible to exercise their rights to positions in other HHSC Regions or the Corporate office of HHSC. Through the RIF process, 30 of these 457 UPW members opted to exercise their rights to other positions by completing questionnaires for placement. Based on the information provided in these placement questionnaires, 22 individuals received offers consistent with their preferences and no positions were available consistent with the preferences expressed by the remaining 8 individuals. Of the 22 offered placement, 8 accepted positions in the HHSC system. Of the 8 HHSC employees from other HHSC Regions who lost their positions through the RIF to the 8 Maui Region employees, one resigned, and all others either were placed in or were offered other vacant HHSC positions.

7. The vast majority of Maui Region employees have accepted employment with Kaiser. 1,538 Maui Region employees received job offers from Kaiser; 1,464 offers were accepted. It should be noted that employees who exercised their RIF rights could also accept a Kaiser offer as they are not mutually exclusive. This is likely the reason that many of the UPW members who initially asked to be placed in the RIF later declined.

8. As the planned Transfer Completion Date was July 1, 2016, the RIF process has been completed. All employees have been notified that their Maui Region positions will be terminated effective June 30, 2016. If the transfer date must be extended later, we cannot assume that simply extending the positions will assure an adequate workforce to safely operate the hospitals, especially if the length of that extension is uncertain. For those who chose to exercise their RIF rights and move, it will likely be a hardship to delay. We cannot expect those who have made plans to just change them without any knowledge of when the transfer will occur or whether the transfer will happen at all.

9. UPW members represent approximately one third of the total Maui Region workforce. Yet the Court's actions affect all employees. For example, the Employer-Union Health Benefits Trust Fund's ("EUTF") open enrollment period began April 1, 2016 and closed April 29, 2016 for benefits commencing on July 1, 2016. Employees who expected to be working for Kaiser as of July 1 did not apply

for benefits. The next EUTF open enrollment period is April 2017. In addition, the workforce has already shrunk almost 4%. New employees are not being hired in anticipation of the transfer. In addition, many employees have been using their sick leave, causing the available workforce to be severely reduced. The safe operation of the hospital requires an adequate workforce. Kaiser was aggressively hiring additional employees to fill gaps. Delays in the transfer date will make the operational challenges for Maui Region greater and delay the remediation and replacement of staff by Kaiser.

10. Assuring an adequate number of qualified physicians to staff the hospitals is also a concern. Like others, they have made plans based on the transfer date of July 1, 2016. It cannot be assumed that they can easily change their plans. Physicians who have been recruited by Kaiser to cover anticipated gaps in physician services may reasonably change their mind about commitment due to the uncertainty of the situation.

11. The injunction is causing very serious operational issues that could have been mitigated by HHSC had it been issued two months ago. For example, HHSC has been negotiating an amendment to its contract with the vendor that supports HHSC's electronic medical record ("EMR") system. The work under the amendment is critical for HHSC facilities to remain in compliance with federal regulations. The work involves an upgrade of the clinical and pharmacy

technology applications because (a) the new version is required for some HHSC facilities that are inpatient prospective payment system (“IPPS”) facilities to comply with the Centers for Medicare and Medicaid Services (“CMS”) rules, and (b) the vendor will not be supporting the current version after July 1, 2016. HHSC purposely did not contract to have the upgrade commence prior to July 1, 2016 because its information technology staff would be heavily involved with the Maui transition and because there would be no need to upgrade the Maui facilities once the transfer was completed. The cost and timing of the upgrade were negotiated based on not including the Maui facilities in the upgrade and not needing to train the Maui region employees on the upgrade. This amendment must now be renegotiated to include the Maui facilities. Training of Maui employees on the new version will need to occur during the month of July, a time when the facilities are already struggling to remain properly staffed with employees who are able to remain focused on their jobs. Not including the Maui facilities is not an option because HHSC must comply with the CMS rules.

12. Another operational issue involves the hundreds of contracts for goods and services that Kaiser will assume from HHSC and from the Maui Region upon the Transfer Completion Date. Of these contracts over 70 vendors have been contacted for the purpose of one of the following: providing notice of the assignment of the contract from HHSC to Kaiser, providing notice of the

assignment to Kaiser and requesting consent to the assignment, and providing notice of the assignment to Kaiser, and requesting consent to the assignment and the extension of the contract. HHSC will need to contact each of these vendors to inform them that the Transfer Completion Date will likely be delayed but that HHSC cannot provide any information as to when or if the Transfer Completion Date will occur. This uncertainty has already caused concern as the HHSC contracting managers began receiving calls from vendors on the day that the injunction was issued. At this time, all HHSC can tell its vendors is that we do not know what will happen.

13. The Maui Region hospitals operated by HHSC are certified Medicare providers. The lease of the Maui Region hospitals by HHSC to Kaiser constitutes a change of ownership (“CHOW”) under Medicare rules. 42 CFR § 489.18(a)(4). Upon the Transfer Completion Date, Kaiser will be able to bill for health care services provided to Medicare beneficiaries using HHSC’s Medicare provider numbers, pending approval of the CHOW by the CMS. 42 CFR § 489.18(c). Transferring the Medicare provider numbers is a common practice because it allows for uninterrupted reimbursement and permits the new owner to retain any grandfathered Medicare designations that are otherwise no longer available. CMS rules not only permit the transfer of the provider number, the transfer is automatic, provided that CMS approves the CHOW. 42 CFR § 489.18(c). If the approval is

not obtained, CMS could terminate Kaiser's Medicare provider status, and Kaiser would not be able to bill Medicare for services rendered to Medicare beneficiaries until it applied for and received its own provider numbers.

14. Both HHSC and Kaiser are required to submit 5 CHOW applications on form CMS-855A, one for each of 5 facilities (3 hospitals and 2 skilled nursing facilities). HHSC submitted all 5 applications on May 12, 2016, and Kaiser submitted the 3 hospital applications. I have been informed that Kaiser is ready to file the 2 skilled nursing facility applications. Noridian, a company responsible for ensuring that all application requirements are met, will contact Kaiser if its skilled nursing facility applications are not received within two weeks after HHSC's applications are received, and will give Kaiser 30 days to submit them or the applications for the skilled nursing facilities can be rejected. Medicare Program Integrity Manual ("MPIM"), 15.7.7.1.3.B.

15. As part of its process, Noridian must verify all of the information contained in the applications and, if it has questions that cannot be independently verified, follow-up with the applicants to obtain clarification of information or to request additional documents. Under the injunction, HHSC would be prohibited from responding to follow-up requests by Noridian because such a response likely constitutes steps toward implementation of Act 103, SLH 2015. Failure to timely

respond to Noridian's requests – normally within 30 days – can result in rejection of the applications. 42 CFR § 424.525(a); MPIM 15.8.2.

16. Hospital operations can be life-saving but it is also well known that it is a dangerous environment where errors can be fatal. Patient safety must always be a high priority. The most important element in patient safety is the human element, the workforce. Not only must staff be qualified and well-trained, they must be able to stay focused on their tasks with a minimum of distraction. Anything that negatively affects the smooth transition of operations from one responsible party to another has the potential to produce lapses in patient care. This concern cannot be overstated. This injunction does not in itself provide any benefit for the employees. Instead, it inserts a degree of uncertainty that is disturbing. The effect is not just on UPW workers but the entire Maui Region workforce.

17. The safe transition of responsibility for operations from HHSC to Kaiser requires a fixed target date and a minimum amount of time setting in motion changes in operations. Those changes take time, and more importantly, cannot be easily and safely reversed. Once they are set in motion they must proceed over several months for a safe and successful transition. By stopping the activities for transition, the Court has already assured that the July 1st transfer date is likely not feasible. While this may be a forgone conclusion after this week,

simply stopping all efforts towards the safe transition without any communication of when the Court will make their decision places patient care in jeopardy.

18. The three hospitals of the Maui Region are the only hospitals available to the residents and visitors of Maui County. Sick or injured patients cannot simply choose another hospital. The Maui community has lived with the uncertainty regarding hospital services brought by reduced State funding and service cuts in the past. Now that a solution to provide stable and enhanced services is imminent, this sudden uncertainty is a disservice to the community.

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

DATED: Honolulu, Hawaii, May 20, 2016.

A handwritten signature in black ink that reads "Linda Rosen". The signature is written in a cursive style with a horizontal line underneath it.

Linda Rosen
Chief Executive Officer, HHSC

No. 16-15219

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED PUBLIC WORKERS,
Plaintiff-Appellant,

v.

DAVID Y. IGE, IN HIS OFFICIAL CAPACITY AS GOVERNOR
OF THE STATE OF HAWAI'I,
Defendant-Appellee.

On appeal from the United States District Court
for the District of Hawai'i

Civ. No. 1:15-CV-00303-HG-KSC (Hon. H. Gillmor, J.)

DECLARATION OF DANIEL GOLDBERG

I, Daniel Goldberg, do declare and would competently testify as follows.

1. I submit this declaration in support of Defendant-Appellee's May 20, 2016, Motion for Reconsideration of this Court's May 17, 2016, Order granting in part Plaintiff-Appellant's motion for an injunction pending appeal. Except unless otherwise stated, I have personal knowledge of the following matters and could and would testify to those matters if called upon to do so.
2. I am employed by Kaiser Foundation Health Plan, Inc., as a Senior Director, Merger and Acquisition Transitions. I am the overall Program Management Lead for the Maui Health System Transition by which Maui Health System, a Kaiser Foundation Hospitals LLC ("Kaiser") will become the operator of Maui Memorial Medical Center, a 214-licensed bed acute care hospital, Kula Hospital, a 113-licensed bed long-term care facility, and Lana'i Community Hospital, a 14-licensed bed critical access hospital (collectively, the "Hospitals") upon the Maui Regional Health Care System ("Maui Region") ceasing to operate the Hospitals.
3. Maui Region has advised Kaiser to expect that there will be patients in the Hospitals when Kaiser assumes responsibility from Maui Region for operating the Hospitals. It is critical to the safety of those patients, to the

safety of those who come after them, and to the orderly operation of the Hospitals that the transition from Maui Region to Kaiser go smoothly.

4. For the past four months, Kaiser and Maui Region have planned for a July 1, 2016, transition date. The preparations for the transition are complex and time-sensitive, involving Kaiser personnel, Maui Region personnel, Kaiser vendors, and other third-parties, all of whom have worked to identify, manage, and complete the many tasks required to achieve a safe and successful transition.
5. For Kaiser to be ready to operate the Hospitals, equipment and supply deliveries and installations, training, information technology projects, recruitment, and regulatory compliance steps all must be scheduled and coordinated on interlinked tracks that culminate in a smooth transition. A delay on one front (such as halting the shipment of equipment) will have ripple effects across the preparation efforts (such as having to reschedule the installation of the equipment, the training of personnel on how to use the equipment, and the arranging of back-up personnel for the personnel who must attend the training).
6. Preparing for the transition consists of more than Maui Region employees on Maui ending their employment with Maui Region and, for those who wish

to do so and to whom Kaiser makes an employment offer, becoming Kaiser employees. There is a great deal of work to complete before, and independent of, employees' switching from the Maui Region payroll to the Kaiser payroll.

7. If all transition work is halted or otherwise delayed, it will not be possible to achieve a safe and successful transition on July 1, 2016. Moreover, Kaiser will have no way to know what alternative transition date to plan for, and thus Kaiser and its vendors will be unable to plan and manage the many interlinked tracks of work that must be completed for a transition to occur safely and smoothly. When a transition date becomes available pursuant to an order of this Court, it may not be the date on which the transition actually can occur, because Kaiser and its vendors first will need to rebuild the complicated plans and logistics of the transition planning and then determine the transition date that is safe for patients.
8. Halting or otherwise delaying transition preparations will have the following major, negative, consequences.

Staffing Shortages at the Hospitals

9. A hospital must have sufficient and stable staffing to operate safely. One aspect of Kaiser's preparations to assume operation of the Hospitals has been to address critical staffing shortages at the Hospitals.
10. Kaiser has been in the process of extending and completing job offers and otherwise preparing to "onboard" new employees, including trauma and orthopedic surgeons. Many of these specialists are extremely difficult to recruit. If we lose the incumbents it will take many months to recover. Currently Maui has significant gaps in on-call coverage which places patients at risk for timely access to life-saving services. The inability to continue to recruit these desperately needed critical employees and physicians to join the Hospitals poses a high risk to patient safety and welfare.
11. It is my understanding that Maui Region has had a hiring freeze in place at the Hospitals, that employees at the Hospitals, in aggregate, recently have been using sick time at unusually high levels, and that contracts for approximately 140 contingent workers will expire on June 30, which is scheduled to be the last day that Maui Region operates the Hospitals. Maui Region must be able to extend the contracts for the 140 contingent workers to avoid disruption in Hospital operations. For Maui Region employees who

have expressed interest in working for Kaiser upon the transition, Kaiser and Maui Region need to coordinate on pre-transition activities such as drug testing and proof of residency paperwork, all of which can be completed while an employee remains a Maui Region employee.

12. The Hospitals currently have vacancies in key positions in the information technology (“IT”) department and billing department. These vacancies hinder the Hospitals’ operation and Maui Region has asked Kaiser to provide staff, ahead of July 1, to support these departments because Maui Region cannot recruit or retain staff to fill these important positions. Kaiser also is prepared to bring in contracted IT workers who are familiar with Kaiser systems, but cannot secure those workers without a known start date.

Training on Critical Kaiser Systems

13. Kaiser Permanente has a powerful, widely acclaimed, electronic medical record system (“EMR”) and Kaiser plans to deploy that system, and related systems, in the Hospitals. Before it can do so, Kaiser must train physicians, nurses, and other staff on the EMR system. A halt to transition preparations will prevent Kaiser from conducting this essential training on a critical system.

14. The EMR is a critical tool for patient care and safety. Kaiser's EMR and related tools are designed to reduce the risk of human error, providing complex clinical pathways, protocols, safeguards, alerts, and decision support that promote the clinician's ability to provide safe and appropriate care. For example, the systems provide feedback if orders are not executed timely, alerts to ensure that the right medication is administered to the right patient in the right dosage at the right time, and alerts if incompatible medications are ordered. In these and other ways, the EMR and related tools would be a key protection for Hospital patients from human error that could potentially result in serious complications for patients, up to and including death.
15. Kaiser's ability to provide safe patient care is dependent on the full implementation of Kaiser's clinical information systems, including the EMR and related systems. Hospital staff and physicians will need to know how to work with the EMR and related systems from the first day that Kaiser operates the Hospitals. To know how to work with these systems, staff and physicians must be trained, before the transition, on the systems.
16. Kaiser likewise must also train employees on other systems, including timekeeping (essential for employees to be paid), human resources

information systems (critical to workforce management), and financial systems (key to controlling and monitoring revenue and costs).

17. Training of staff and physicians on systems or equipment is expensive and complicated. Training involves securing trainers, whether Kaiser staff or vendor staff, who need to travel to Hawai'i and who must be scheduled ahead of time. Training also involves arranging the schedules of those who are to be trained and those who will perform the duties of the employees who are in training. Finally, training requires scheduling a space for the training, including times in which systems or equipment can be accessed without disrupting the 365/24/7 Hospital operations. Canceling a training schedule and having to build a new schedule will cause at least a 2 to 4 week delay and, such as for specialty physician training, possibly even a longer delay. The only alternative will be to go live with staff and physicians who are insufficiently trained on the EMR system, which in itself could potentially result in bad patient outcomes, up to and including death.

Delivery of Equipment and Supplies

18. Kaiser has delivered or is awaiting delivery of millions of dollars' worth of equipment, including medical equipment (such as over 80 automated

medication dispensing machines) and technology hardware (including laptop and desktop computers) for the Hospitals. Kaiser needs access to the Hospitals to keep this equipment secure and to prepare to configure it for use in the Hospitals. If Kaiser were required to remove equipment that it already has placed at the Hospitals, it would be disruptive to the Hospitals (as movers remove equipment) and would require Kaiser to find secure off-Hospital storage facilities for expensive equipment. Likewise, if equipment that arrives on Maui or Lana`i cannot be delivered to the Hospitals, Kaiser will have to find alternative secured storage locations for that equipment.

19. Kaiser has over 900 vendors of various items who are in the course of preparing to deliver supplies to the Hospitals for Kaiser's use. One out of myriad examples is the radiographic and diagnostic imaging (e.g., x-rays) communication systems ("PACS"). PACS requires staff training, and Kaiser has arranged for PACS training based on a July 1 transition date. Canceling the PACS training could result in a several month delay in fully deploying the PACS, due to vendor trainer availability and the issues regarding training scheduling mentioned above. This may affect patient safety and quality of care because without the PACS system being timely installed and tested, clinicians will be unable to view images needed for diagnosis and treatment.

20. Suppliers have goods in transit to Maui and Lana‘i, have already delivered items, or are working to meet deadlines that flow from a July 1 transition date. It will be important for Kaiser and Maui Region to communicate regarding supplier deliveries and to cooperate on logistical issues regarding those deliveries.

Other Key Transition Preparations

21. Kaiser must ensure that properly credentialed physicians are in place at the Hospitals. This requires Kaiser personnel to visit the Hospitals to review physician credential files, and to do so with sufficient time to correct any credentialing issues or to recruit replacement providers. Without physicians being credentialed timely, they are prohibited by hospital regulations from practicing and providing care to patients in the Hospitals. Insufficient physician staffing may result in direct harm to patients.

22. Kaiser will apply for Drug Enforcement Agency licenses to dispense narcotics at the Maui Memorial and Kula Hospitals. To obtain those licenses, Kaiser and Maui Region must arrange for state Narcotics Enforcement Division (“NED”) personnel to visit those Hospitals. For a July 1 transition date to be

possible, the NED personnel must complete their site visits to Maui Memorial and Kula before May 31, 2016.

23. Kaiser needs Maui Region's cooperation to comply with Medicare requirements to give 30 days' notice to Kula long-term care patients that the Kula facility will become operated by Kaiser.

24. When the transition occurs, Kaiser will need to know where to find and how to access patient medical, financial, and contact information, administrative and financial books and records, and legacy systems that will continue to perform important functions or retain important historical data. Kaiser has been working with Maui Region to understand Maui Region's records and systems to ensure that the transition is seamless, without disruption or stress to patient care or Hospital operations.

25. Kaiser also has been working to complete an environmental site assessment, which is a key step in being able to close the transactions by which Kaiser will become the Hospitals' operator.

Kaiser cannot complete this critical project without access to the sites and to Maui Region personnel and facility records.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Oakland, California on May 20, 2016.

A handwritten signature in black ink, appearing to read "Daniel Goldberg", written over a horizontal line.

Daniel Goldberg

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED PUBLIC WORKERS,
Plaintiff-Appellant,

v.

DAVID Y. IGE, IN HIS OFFICIAL CAPACITY AS GOVERNOR
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Defendant-Appellee.

On appeal from the United States District Court
for the District of Hawai‘i

Civ. No. 1:15-CV-00303-HG-KSC (Hon. H. Gillmor, J.)

DECLARATION OF WESLEY LO

I, Wesley Lo, do declare and would competently testify as follows.

1. I am the Regional Chief Executive Officer for the Maui regional health care system (“Maui Region”), which is a division of the Hawaii Health Systems Corporation. Maui Memorial Medical Center (“MMMC”), Kula Hospital and Clinic (“KHC”), and Lanai Community Hospital (“LCH”) are the three facilities of the Maui Region. I have personal knowledge of the ongoing transition of the Maui Region to the Maui Health System, a Kaiser Foundation Hospitals LLC (“Kaiser”) pursuant to Act 103 passed by the Hawaii legislature.

2. I have grave concerns regarding the injunction halting the above referenced ongoing transition, by enjoining both the Maui Region and Kaiser from taking steps to enforce or implement Act 103. Health care is one of the most highly regulated and complex industries in this nation. Running a hospital is an extremely complex business. Transitioning the management and operations of such hospitals therefore involves a very complicated process. And the transition must be implemented seamlessly in order to minimize any disruption to patient care. Any such disruption will jeopardize patient safety. A seamless transition is necessary for continued provision of quality patient care.

3. The closing of the transition transaction – the day on which the operation and management of the facilities is turned over from the Maui Region to Kaiser -- is an event that occurs on a particular day. But the transition itself is not an isolated event. Rather, it is a long process involving a series of events and many deliberate and painstakingly carefully made decisions and plans executed and implemented over a course of many months. They all lead to that event, the closing of the transition transaction.

4. The work already completed in that transition process in this case, prior to the injunction, is extensive, involving thousands of person-hours of work. Those decisions and plans which have already been made and completed were made and completed so that the transition can close on June 30, 2016. But

for the injunction, to the best of my knowledge and belief, Kaiser and Maui Region were proceeding on schedule for the closing of the transition on June 30, 2016.

Many of those decisions and plans that had to be made and had to be completed for the transition closing to take place on June 30, 2016, cannot be undone without significant consequences.

5. The carefully planned and implemented transition process has involved, among many other things, the Maui Region's planned and orderly cessation of certain activities, as described in the following paragraphs. New staff recruitment and hiring have been suspended. New equipment acquisition, software maintenance contracts, and contracts for the acquisition of supplies past the closing date have all been suspended, not renewed, or cancelled. These facilitate the transition, and do not adversely affect healthcare delivery provided the closing occurs as scheduled. But if the closing does not occur as scheduled, healthcare delivery in the Maui Region, will be adversely affected. The injunction, if not lifted, prevents the closing to take place as scheduled.

6. The announcement of the transfer has exacerbated the natural attrition of staff, leaving many vacancies unfilled. Experienced staff, including nurses, have left the Maui Region in anticipation of the transfer under Act 103. As a result, the Maui Region is facing critical staffing shortages. MMMC had 356 vacancies as of May 18, 2016. KHC has 41 vacancies. LCH has 14 vacancies. It

requires time to process the employment of a healthcare worker, including running background checks, drug tests, and complying with other health requirements, not to mention on-boarding or orientation. Any processing initiated after May 1, 2016, will not be completed in time prior to June 30, 2016. Also, Kaiser had shared plans to actively recruit for staff to fill positions in the Maui Region as of July 1, 2016. Expending money and resources to recruit new staff that would not benefit the State, especially considering Kaiser already had plans for recruitment, would be contrary to the efficient management of already scarce State resources. For those reasons, the Maui Region ceased recruiting new staff on May 1, 2016. The injunction will perpetuate if not exacerbate the already critical staff shortage, and will potentially jeopardize patient safety.

7. Many staff and physicians have given notice to leave by June 30, 2016. Without the transition, Maui Region will be left with inadequate physician coverage in certain areas.

8. For example, Maui Region's medical oncologist is leaving prior to June 30, 2016, in anticipation of the transition closing. Maui Region has not initiated any recruitment process, because the Maui Region and Kaiser had agreed that oncology services would be provided for by Kaiser after June 30, 2016. Likewise, the Maui Region uses locum tenens cardiologists, and ceased recruiting for cardiologists despite the cost of providing cardiology services through locums,

because Kaiser will provide cardiology services after June 30, 2016. Without the transition, Maui Region is left with no medical oncologist, and continued expenditures for locums cardiologists. It can take up to two years to recruit physicians to the islands.

9. With respect to nurse staffing, MMMC has been using agency travelers to supply nurses and other staff. Because Kaiser planned to engage those services upon transition effective July 1, 2016, agency travelers placements end on June 30, 2016. Extensions of those placements may not be possible, and it is difficult to get appropriately trained travelers on short notice in the Maui Region due to our location and licensing requirements. Therefore, if the transition does not close on June 30, 2016, Maui Region will face an exacerbated nursing staff shortage, and may not have adequate staffing to safely care for our patients. It is very difficult to recruit new staff, and to train them quickly comes with the risk of jeopardizing patient care.

10. With respect to inventory of supplies, the Maui Region has systematically reduced ordering supplies, including medications, so as to meet the needs through June 30, 2016. If the transition does not close on June 30, 2016, and the Maui Region is required to continue to provide hospital services thereafter, the Maui Region facilities may not have, and may not be able to obtain, adequate supplies after June 30, 2016.

11. The Maui Region has contracts for supplies, including medications, that will expire prior to September 30, 2016. These contracts were not being renewed because upon the closing of the transition, Kaiser will have provided these supplies and medications. At this point, we may not be able to obtain short extensions of such existing contracts. We will not have sufficient supplies in our inventory, and will not be able to replenish them in a timely manner.

12. In addition, the Maui Region has contracts for healthcare provider services that will expire prior to September 30, 2016. These contracts were not being renewed because upon the closing of the transition, Kaiser will have provided these services. At this point, the Maui Region may not be able to obtain short extensions of such existing contracts.

13. Many hardware service and support contracts, including those for a VMware, IBM Servers, Pyxis machines, IV pumps, and critical diagnostic equipment, expire by June 30, 2016. They have not been renewed because upon closing of the transition, Kaiser will have assumed the responsibility for the maintenance of those hardware. Lack of adequate service and support to the hardware will compromise Maui Region's ability to maintain critical systems and equipment. If the Maui Region is to continue to manage the Hospitals after June

30, 2016, without adequate service and support for critical hardware, patient care and safety will be jeopardized.

14. Much of the software the Maui Region uses to support our operations is aging, but the Maui Region cancelled plans for upgrades in anticipation of the transition of its operations to Kaiser. Some software is end of life but are not being replaced because Kaiser has alternate solutions to these issues. Without the transition, Maui Region will be left with the aging and end of life software.

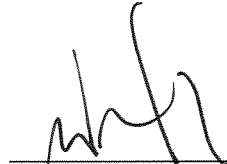
15. But for the injunction, to the best of my knowledge and belief, Kaiser and Maui Region were proceeding on schedule for the closing of the Transition on June 30, 2016. The Maui Region has therefore reasonably proceeded to wind down replacing equipment, ordering supplies including medication, recruiting new physicians and other medical staff, for a seamless transition of the operations to Kaiser on July 1, 2016. In sum, if Kaiser is not allowed to assume the responsibility for the hardware, software, medications, and supplies and to supplement our staff on June 30, 2016, it will be very difficult for the Maui Region to operate its three facilities after June 30, 2016.

16. If the injunction continues for more than a week, I am informed that Kaiser and the Maui Region will not be able to close the transition transaction on June 30, 2016. For all the reasons stated above, that will jeopardize safe patient

care, and will have catastrophic consequences for the people of Maui. It is therefore imperative that the process, the planning and work, continue toward the goals identified and set for the transition, so that patients continue to receive quality care and that any disruption to their care is minimized, if not eliminated.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, May 20, 2016.



WESLEY IO

No. 16-15219

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED PUBLIC WORKERS,
Plaintiff-Appellant,

v.

DAVID Y. IGE, IN HIS OFFICIAL CAPACITY AS GOVERNOR
OF THE STATE OF HAWAI'I,
Defendant-Appellee.

On appeal from the United States District Court
for the District of Hawai'i

Civ. No. 1:15-CV-00303-HG-KSC (Hon. H. Gillmor, J.)

DECLARATION OF BRIAN TADASHI HIRAI

I, Brian Tadashi Hirai, do declare and would competently testify as follows.

1. I am a partner in the law firm of McCorrison Miller Mukai MacKinnon LLP, Honolulu, Hawai'i. I am the responsible attorney for my law firm's engagement as bond counsel to the Hawai'i Health Systems Corporation (the "Corporation") and its Maui Regional System (the "Maui Region") in connection with the transfer by lease (the "Transaction") of the Maui Region's hospital facilities to a private entity (the "Transferee") pursuant to

2015 Hawai'i Session Law, Act 103. In its capacity as bond counsel, my law firm is assisting the Corporation and the Maui Region in obtaining the consent to the Transaction of certain parties with respect to the Maui Region's outstanding senior debt obligations (the "Senior Debt Obligations") and capital leases relating to the Maui Region's hospital facilities (the "Capital Leases").

2. The outstanding Senior Debt Obligations consist of long term debt obligations designated as the Hawai'i Health Systems Corporation (Maui Regional System) Revenue Bonds, Series 2012A (the "2012A Bonds"), the Hawai'i Health Systems Corporation (Maui Regional System) Revenue Bonds, Series 2012B (the "2012B Bonds") and the Hawai'i Health Systems Corporation (Maui Regional System) Master Indenture Revenue Bond No. 3 ("Bond No. 3"), of which approximately \$18,616,000 in aggregate principal amount will remain outstanding as of July 1, 2016, the anticipated completion date for the Transaction.
3. Pursuant to the applicable financing documents (the "Senior Debt Documents"), the outstanding Senior Debt Obligations are secured by, among other things, mortgage liens on the Maui Region's hospital facilities and a security interest in the revenues from certain of those facilities. The Transaction will result in the transfer by lease of the hospital facilities and

rights to receive revenues currently serving as collateral for the Senior Debt Obligations to the Transferee. Consequently, pursuant to the Senior Debt Documents, the Transaction will require the prior written consent of the following parties (collectively, the “Senior Debt Consenting Parties”): (i) The Bank of New York Mellon Trust Company, N.A., as master trustee for the Senior Debt Obligations; (ii) AGTexas, FLCA, as holder of the 2012A Bonds; (iii) First Hawaiian Bank, as holder of the Series 2012B Bonds and as servicer for the 2012A and 2012B Bonds; (iv) Regions Bank, as bond trustee for the 2012A and 2012B Bonds; and (v) The United States of America, acting through the Rural Housing Service, United States Department of Agriculture, as guarantor of the 2012A Bonds and as holder of Bond No. 3.

4. The Transaction will also require modifications to certain operating covenants under the Senior Debt Documents. Such modifications also require the prior written consent of the Senior Debt Consenting Parties.
5. The consent of the Senior Debt Consenting Parties has been requested with respect to the Transaction and related covenant modifications. The Senior Debt Consenting Parties have been furnished with documentation and information regarding the Transaction, the Transferee and the anticipated operations of the Maui Region’s hospital facilities following the

consummation of the Transaction. Discussions regarding Senior Debt Consenting Parties' consents to the Transaction and proposed covenant modifications, and the Senior Debt Consenting Parties' conditions to such consents, are currently in progress and documents regarding the same are currently being prepared. Consummation of the Transaction is subject to the successful completion of the foregoing and execution and delivery of the Senior Debt Consenting Parties' consents.

6. The Capital Leases consist of several leases entered into by the Corporation, as lessee, for the purpose of financing certain equipment, fixtures, improvements and facilities included within the hospital facilities to be transferred by lease to the Transferee pursuant to the Transaction. The aggregate outstanding principal amount of the Capital Leases will be approximately \$4,900,000 as of July 1, 2016, the anticipated completion date for the Transaction.
7. Upon consummation of the Transaction, the Transferee will assume operating control of the equipment, fixtures, improvements and facilities financed by the Capital Leases. Pursuant to the Capital Leases, such transfer of control will require the prior written consent of the lessors. The consent of the lessors has been requested and is being considered by the lessors, and forms of the consent documents are being prepared. Consummation of the

Transaction is subject to successful completion of the foregoing and execution and delivery of the lessors' consents.

8. The Capital Leases were entered into as tax-exempt leases for federal income tax purposes, and the proposed transfer of control of the financed equipment, fixtures, improvements and facilities is subject to the condition that the transfer does not adversely affect the tax-exempt status of the Capital Leases. As bond counsel with respect to the Transaction, my law firm will be required to issue a legal opinion to such effect. The issuance of the required legal opinion is subject to satisfactory completion of certain tax analyses currently in progress and to the preparation, execution and delivery of appropriate representations and warranties by appropriate parties as to the current and future operation of the financed equipment, fixtures, improvements and facilities.

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

DATED: Honolulu, Hawaii, May 20, 2016.



Brian Tadashi Hirai

No. 16-15219

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED PUBLIC WORKERS,
Plaintiff-Appellant,

v.

DAVID Y. IGE, IN HIS OFFICIAL CAPACITY AS GOVERNOR
OF THE STATE OF HAWAII,
Defendant-Appellee.

On appeal from the United States District Court
for the District of Hawai‘i

Civ. No. 1:15-CV-00303-HG-KSC (Hon. H. Gillmor, J.)

DECLARATION OF RONALD M. BOYD, M.D.

I, Ronald M. Boyd, M.D., do declare and would competently testify as follows:

1. I am the Chief of the Medical Staff at Maui Memorial Medical Center (MMMC), one of the three Maui Region Health System hospitals whose operations were in the process of being transitioned to the Maui Health System, Kaiser Foundation Hospitals LLC (“Kaiser”) on July 1, 2016 pursuant to Act 103, 2015 Hawaii Session Laws. I make this declaration as the Chief of the Medical Staff, to

express the deep concerns of the medical staff regarding the Order this Court entered in this appeal on May 17, 2016.

2. On May 17, 2016, the MMMC medical staff was informed that all efforts underway to transition MMMC to Kaiser had to stop because the Governor and anyone working at his direction to complete that transition had been ordered to stop doing anything that enforced or implemented Act 103.

3. We believe sufficient consideration has not been given to the common good of the citizens of Maui and their potential loss of access to safe medical care, and that the Order now enables the UPW to be in a position to blackmail the Governor, the State of Hawaii, and ultimately the citizens of Hawaii who will pay for any financial resolution. All of this is being done with no concern for the provision of health care to the local citizens and many visitors to Maui.

4. MMMC is far down the road in the transition process. This is not a manufacturing plant that can stop the production line for a day or two until the workforce and everything is ready for work again. We run a very busy emergency room and busy hospital. And, we are the only acute care hospital on Maui. There is no other option down the street.

5. Over 1,500 employees of MMC have been officially informed that they will be laid off at the end of the day on June 30, 2016. In response, some have retired, others have moved to other State jobs and some will just leave the

workforce or leave Maui. Many have signed contracts with Kaiser. It is not that simple a task to re-employ all of these individuals and ensure that all necessary jobs are then covered at the hospital. Some specialized departments in the hospital are today critically short of staff.

6. With a large number of employees no longer with us, the hospital has been relying heavily on “traveler” contracted staffing. This works on the understanding that come July 1, Kaiser has additional resources available. Without Kaiser there will be a crisis as many of these contracted nurses and technical staff have already made plans to return to the mainland for another position. Certainly some, including those that have signed contracts with Kaiser, may be available. But the hospital is at great risk of being completely understaffed to provide appropriate and safe care.

7. On the physician side, MMMC had on staff approximately 20 salaried physicians. This included a neurosurgeon, interventional cardiologists, cardiothoracic surgeons, oncologists, gastroenterologist, orthopedic surgeons etc. Nearly a dozen of these physicians have signed contracts with Kaiser. Several non-signees will be leaving Maui adding to our physician shortage. The whole cardiothoracic surgical program is in great jeopardy with this injunction now in place. It may be very dangerous to have a stroke or heart attack on Maui this summer.

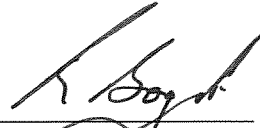
8. A large number of the contracted physicians including all of the Emergency Department doctors, radiologists, anesthesiologists, hospitalists, intensivists, pediatricians and pathologists have new contracts with Kaiser. A large number of the medical staff also will need to have their “on call” contracts reactivated in order to cover the needs of the Emergency Department. All of these physicians will need to be re-contracted with MMMC.

9. For a court and judicial system to put the health care of a whole community at risk is inexcusable. Serious consequences may result, and many of these may be unforeseen today. Turning this boat around is no easy matter. In spite of the good intent of all staff there is no guarantee that all critical positions can be filled 24/7 as is required in a hospital setting. Although this legal issue appears to be dealing with contract issues pertaining to UPW members, it is now violating signed contracts for hundreds of other staff including outside vendors, other hospital staff and the medical staff.

10. The medical staff implores the Court to reconsider this injunction. The Hospital must get on with the transition so that care can continue to be provided for the citizens of Maui. The community should not be held hostage to this legal wrangle between the State and the UPW members.

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

DATED: Wailuku, Hawaii, May 20, 2016.

A handwritten signature in black ink, appearing to read "R. Boyd", written over a horizontal line.

Ronald M. Boyd, M.D.

No. 16-15219

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED PUBLIC WORKERS,
Plaintiff-Appellant,

v.

DAVID Y. IGE, IN HIS OFFICIAL CAPACITY AS GOVERNOR
OF THE STATE OF HAWAI‘I,
Defendant-Appellee.

On appeal from the United States District Court
for the District of Hawai‘i

Civ. No. 1:15-CV-00303-HG-KSC (Hon. H. Gillmor, J.)

DECLARATION OF DOUGLAS S. CHIN

I, Douglas S. Chin, declare as follows:

1. I am the Attorney General of the State of Hawai‘i, and an attorney of record for Defendant-Appellee David Ige, the Governor of the State of Hawai‘i.

2. On May 17 and 18, 2016, I spoke by telephone with Scott A. Kronland, counsel for Plaintiff-Appellant United Public Workers, American Federation of State, County, and Municipal Employees, Local 646, AFL-CIO, and on May 18 informed him that the Governor was considering the filing of a motion requesting

this Court to modify the injunction. See Ltr dated May 18, 2016, to Mr. Kronland, a true and complete copy of which is attached as Exhibit 5.

3. Mr. Kronland and I spoke by telephone again on May 19, 2016. During this phone conversation, I reiterated the Governor's interest in resolving this matter and asked again whether Mr. Kronland's client would agree to narrowing the scope of the Order to enjoin transfer contemplated in 2015 Hawai'i Session Law, Act 103, and allow implementation steps to continue. Mr. Kronland told me that unless I heard otherwise, I should presume that his client objects to such an action. I have not heard otherwise from Mr. Kronland. See Ltr dated May 19, 2016 to Mr. Kronland, a true and complete copy of which is attached as Exhibit 6, and Ltr dated May 19, 2016 to me from Mr. Kronland, a true and complete copy of which is attached as Exhibit 7.

4. Also, attached as Exhibit 8 is a true and complete copy of the May 18, 2016 letter from Linda Rosen, the Chief Executive Officer of the Hawai'i Health Systems Corporation, to UPW State Director Dayton Nakanelua, referred to at page 19 of the memorandum in support of this emergency motion, expressing HHSC's concerns about the Order and requesting a meeting as soon as possible to address its impact on safe operations of Maui's three hospitals.

5. And, attached as Exhibit 9 is a true and complete copy of S.B. No. 2077, SD1, HD2, CD2 (2016), Relating to Separation Benefits, which is referenced at page 17 of the memorandum in support of this emergency motion.

I declare the foregoing to be true and correct under penalty of perjury.

DATED: Honolulu, Hawai'i, May 20, 2016.

s/ Douglas S. Chin
Attorney General
Attorney for Defendant-Appellee
Governor David Ige

DAVID Y. IGE
GOVERNOR



DOUGLAS S. CHIN
ATTORNEY GENERAL

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY
GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586 -1282

May 18, 2016

VIA E-MAIL: skronland@altshulerberzon.com

Scott A. Kronland, Esq.
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, California 94108

Re: UPW v. Ige (No. 16-15219)

Dear Scott:

I called you shortly after the 9th Circuit Court of Appeals Order dated May 17, 2016 was filed in the above case. Thank you for speaking with me yesterday and for calling me back today. I understand you will send me a follow-up letter requesting more information about a bill passed during the Hawai'i State Legislature's recently concluded session. I look forward to hearing from you.

As I explained to you over the phone, the current language of the Order has potentially serious consequences for the safe operations of the Maui Region facilities in coming months. There is great urgency in resolving this matter as quickly as possible to avoid unintended harm to patients and the community. Though Governor Ige is out of town today, please know his representatives are ready to meet with your client as soon as possible.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Doug Chin".

DOUG CHIN
Attorney General

DAVID Y. IGE
GOVERNOR



DOUGLAS S. CHIN
ATTORNEY GENERAL

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY
GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
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(808) 586-1282

May 19, 2016

VIA E-MAIL: skronland@altshulerberzon.com

Scott A. Kronland, Esq.
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, California 94108

Re: UPW v. Ige (No. 16-15219)

Dear Scott:

Regarding the 9th Circuit Court of Appeals Order dated May 17, 2016 in the above case, I phoned you this morning to ask again whether your client might stipulate or not object to narrowing the scope of the Order to enjoin the transfer contemplated in 2015 Hawai'i Session Law, Act 103, but allow implementation steps to continue. After our discussion, you told me unless I hear otherwise to presume your client objects to such an action. Please call me directly at (808) 586-1282 if I can answer other questions for you or your client, but otherwise, it appears we have met and conferred on this issue.

I believe it would be more productive to focus on discussions between the parties than on further briefing and hope your client reconsiders.

Sincerely,

A handwritten signature in black ink, appearing to read "Doug Chin".

DOUG CHIN
Attorney General

ALTSHULER BERZON LLP

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JONATHAN WEISSGLASS

FRED H. ALTSHULER
FOUNDING PARTNER EMERITUS

PETER D. NUSSBAUM
PARTNER EMERITUS

TONY LOPRESTI
FELLOW

May 19, 2016

By Electronic and United States Mail

Douglas S. Chin
Attorney General
State of Hawai'i
425 Queen Street
Honolulu, Hawai'i 96813

Re: *United Public Workers, American Federation of State, County, Municipal
Employees, Local 646, AFL-CIO v. Ige,*
U.S. Court of Appeals, 9th Cir., No. 16-15219
USDC, D. Haw. No. 1:15-cv-00303-HG-KSC

Dear Attorney General Chin:

As we discussed by telephone yesterday, it would facilitate discussions by the parties and assist in preparing a joint status report if the State would provide the Union with the following information about the potential impact of SB 2077 as soon as possible:

1. A current list of the United Public Workers ("UPW") bargaining unit members employed in the HHSC Maui Facilities that shows the worker's name, current annual base salary, years of service and age on June 30, 2016, and shows whether that worker a) would be eligible to elect the SB 2077 voluntary severance benefit; b) would qualify to elect the SB 2077 special retirement (and would otherwise be penalized for early retirement); and c) would qualify upon retirement for the state contributions to the health benefits trust fund described in SB 2077, Part II.

Letter to Attorney General
Re: UPW v. IGE
May 19, 2016
Page 2

2. A list of the UPW bargaining unit members who participated in the Act 103 reduction in force (RIF) and were or would be offered new civil service positions, including the job title, location, and salary of the new position.

3. A list of the UPW bargaining unit members not working in the Maui facilities who would be displaced from their positions by the Act 103 RIF that includes the same information for those workers that is requested by paragraph 1.

If any of this information is not immediately available, please send the information that is available as soon as possible.

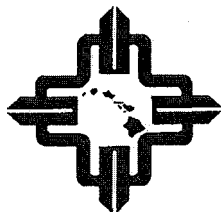
Additionally, during our telephone call, you said the State was contemplating a request to Ninth Circuit to modify the injunction to avoid interference with patient care. Before the State acts unilaterally, I ask that the State share the specifics as to how the State believes the injunction would interfere with patient care if it is not modified, so that I can determine my client's position and we can meet and confer about the issue. It would be more productive to focus on discussions between the parties than on further briefing.

Sincerely,



Scott A. Kronland

cc: Rebecca Covert (by email only)



HAWAII HEALTH SYSTEMS
C O R P O R A T I O N
Quality Healthcare For All

May 18, 2016

CEO - 16 - 046

Mr. Dayton Nakanelua, State Director
United Public Workers
Local 646 AFL-CIO
1426 N. School Street
Honolulu, HI 96817

RE: In the matter of UNITED PUBLIC WORKERS, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, LOCAL 646, AFL-CIO, Plaintiff - Appellant, v. DAVID Y. IGE, in his capacity as Governor of the State of Hawaii, Defendant - Appellee.

Dear Mr. Nakanelua:

I am writing regarding the above-referenced matter and yesterday's Order by the Ninth Circuit Court of Appeals issuing an injunction and ordering a joint status report to be filed with the Court on or before June 30, 2016. While I understand and share the Court's concern for the welfare of our employees, this action has potentially serious consequences for safe operations of our Maui Region facilities in coming months. There is great urgency in resolving this matter as quickly as possible to avoid unintended harm to patients and the community. I hope you will agree that we should meet as soon as possible. I suggest 3:00 p.m. tomorrow at your offices. I look forward to your favorable response.

Sincerely,

A handwritten signature in black ink that reads "Linda Rosen" followed by a stylized monogram.

Linda Rosen, M.D., M.P.H.
Corporate Chief Executive Officer

3675 KILAUEA AVENUE • HONOLULU, HAWAII 96816 • PHONE: (808) 733-4020 • FAX: (808) 733-4028

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1 "Actuarial present value" means the difference in value
2 between a member's benefit reflecting termination of service
3 without the special retirement provision and the value of the
4 member's benefit reflecting the special retirement benefit.

5 "Agency" or "attached agency" means the Hawaii health
6 systems corporation.

7 "Directly affected" refers to when an employee receives
8 official reduction-in-force notification of displacement from
9 the employee's position because of a senior employee exercising
10 reduction-in-force rights, or because the employee's position is
11 part of a workforce restructuring plan, including privatization.

12 "Employee" means an individual:

- 13 (1) Employed by the state government or an attached agency
14 in a position subject to chapters 88 and 89;
- 15 (2) Whose position has been identified for abolishment or
16 directly affected because of a reduction-in-force or
17 workforce restructuring plan, including privatization;
18 and
- 19 (3) Whose employment is subject to Act 103, Session Laws
20 of Hawaii 2015.



1 "Exclusive representative" has the same meaning as defined
2 in section 89-2.

3 "Public employer" has the same meaning as defined in
4 section 89-2.

5 "Reduction-in-force" includes layoffs under chapter 89.

6 § -2 **Voluntary severance benefit.** (a) Any employee
7 entitled to reduction-in-force rights under chapter 89 and who
8 receives official notification that the employee's position is
9 being abolished or who is directly affected by a reduction-in-
10 force or workforce restructuring plan, including privatization,
11 may elect to receive a voluntary severance benefit provided
12 under this section in lieu of exercising any reduction-in-force
13 rights under chapter 89 and in lieu of receiving any special
14 retirement benefit under section -3.

15 (b) A one-time lump sum cash bonus severance benefit shall
16 be calculated at five per cent of the employee's base salary for
17 every year of service worked, not to exceed ten years, and shall
18 not exceed fifty per cent of the employee's annual base salary.

19 For the purposes of this section, "annual base salary"
20 means an employee's annual salary for the position from which
21 the employee is to be separated, excluding all other forms of



1 compensation paid or accrued, whether a bonus, allowance,
2 differential, or value of leave or compensatory time off
3 credits. Compensation excluded from base salary includes
4 shortage category differential, night shift differential,
5 overtime, compensatory time off credits, vacation or sick leave
6 credits, and workers' compensation benefits.

7 (c) A severance benefit shall be in addition to any
8 payment owing to the employee upon separation from service,
9 including accumulated unused vacation allowances or compensatory
10 time credits.

11 (d) All severance benefits paid under this section shall
12 be subject to applicable state income tax laws and rules.

13 (e) A severance benefit provided under this section shall
14 not be considered as a part of a discharged employee's salary,
15 service credit, or a cost item as defined in section 89-2 when
16 calculating retirement benefits or sick and vacation leave.

17 § -3 **Special retirement benefit.** (a) Notwithstanding
18 section 88-99 or any other law to the contrary, the employees'
19 retirement system may provide, regardless of whether the
20 actuarial value of the system's assets is one hundred per cent
21 of the system's actuarial accrued liability, the benefits



S.B. NO. 2077
S.D. 1
H.D. 2
C.D. 2

1 authorized under this section. Any employee who receives
2 official notification that the employee's position is being
3 abolished or who is directly affected by a reduction-in-force or
4 workforce restructuring plan, including privatization, proposed
5 by an agency may elect, if the employee is eligible to receive
6 benefits from the employees' retirement system and meets any of
7 the criteria specified in subsection (c), the special retirement
8 benefit provided by this section in lieu of exercising any
9 reduction-in-force rights under chapter 89 and in lieu of
10 receiving any severance benefits under section -2. To
11 receive the special retirement benefit offered under this
12 section, the employee shall comply with the application and time
13 frame requirements specified in subsection (b).

14 (b) Any employee who elects to retire and receive the
15 special retirement benefit under this section shall notify the
16 employee's employing agency and file a formal application for
17 retirement with the employees' retirement system not less than
18 thirty days or more than one hundred fifty days prior to the
19 date of retirement.

20 (c) Notwithstanding the age and length of service
21 requirements of sections 88-73, 88-281, and 88-331, an employee



1 shall qualify for the special retirement benefit if, on the
2 employee's retirement date, the employee meets any one of the
3 following criteria:

- 4 (1) Has at least five years of credited service as a
5 contributory class A or B member and is at least fifty
6 years of age;
- 7 (2) Has at least twenty years of credited service as a
8 contributory class A or B member, irrespective of age;
- 9 (3) Has at least ten years of credited service as a
10 noncontributory class C member and is at least fifty-
11 seven years of age;
- 12 (4) Has at least twenty-five years of credited service as
13 a noncontributory class C member, irrespective of age;
- 14 (5) A class H member who became a member prior to July 1,
15 2012, has at least five years of credited service and
16 is at least fifty-seven years of age;
- 17 (6) A class H member who became a member prior to July 1,
18 2012, and has at least twenty-five years of credited
19 service, irrespective of age;



S.B. NO. 2077
S.D. 1
H.D. 2
C.D. 2

1 (7) A class H member who became a member after June 30,
2 2012, has at least ten years of credited service and
3 is at least sixty years of age; or

4 (8) A class H member who became a member after June 30,
5 2012, has at least twenty-five years of credited
6 service and is at least fifty-five years of age.

7 (d) Any employee who exercises the option of the special
8 retirement benefit under this section because the employee does
9 not qualify with respect to the age and length of service
10 requirements under section 88-73, 88-281, or 88-331, to receive
11 a retirement benefit without penalty, shall not have the
12 retirement benefit reduced in accordance with the actuarial
13 formula normally used by the employees' retirement system for
14 the calculation of early retirement benefits.

15 (e) The head of the agency shall transmit a list of
16 employees who elected and received the special retirement
17 benefit to the board of trustees of the employees' retirement
18 system not less than thirty days but not more than one hundred
19 fifty days prior to the employee's retirement date. The head of
20 the agency shall certify that the employees on the list have in
21 fact selected the special retirement benefit in lieu of



1 receiving the severance benefit under section -2 and
2 exercising any reduction-in-force rights under chapter 89.
3 (f) The board of trustees of the employees' retirement
4 system shall make payments with respect to all eligible
5 employees who retire pursuant to this section. The board shall
6 determine the portion of the additional actuarial present value
7 of benefits to be charged to the State based upon retirements
8 authorized under this section. If necessary, the State shall
9 make additional payments to the employees' retirement system in
10 the amounts required to amortize the additional actuarial
11 present value of benefits over a period of five years. The
12 unfunded actuarial present values of benefits payable under this
13 section shall be considered part of the unfunded accrued
14 liability of the employees' retirement system under sections
15 88-122 and 88-123.

16 § -4 Restrictions. No severance benefit or special
17 retirement benefit under this chapter shall be payable to an
18 employee discharged for lawful disciplinary reasons or for
19 reasons other than a reduction-in-force or workforce
20 restructuring plan.



1 § -5 Reemployment. Any employee who has received either
2 a severance benefit or a special retirement benefit under this
3 chapter and returns to public service within two years as an
4 employee or contractor shall repay the severance benefit or the
5 special retirement benefit to the State or the employees'
6 retirement system, as the case may be, within thirty days of
7 reemployment with a public employer.

8 § -6 Payments; lapse of unexpended funds. After
9 payments of all costs associated with the severance benefits and
10 special retirement benefits, the public employer's remaining
11 payroll balances shall not be expended for any purpose and shall
12 be lapsed into the appropriate fund.

13 § -7 Reporting requirements; reduction in personnel
14 counts. The head of the agency that provided benefits under
15 this chapter shall:

16 (1) Transmit a report of every position identified for
17 abolishment and vacated under this chapter to the
18 directors of finance and human resources development,
19 who shall abolish these positions from the appropriate
20 budget and personnel files. The governor shall report
21 this information to the legislature no later than



S.B. NO. 2077
S.D. 1
H.D. 2
C.D. 2

1 twenty days prior to the convening of each regular
2 session beginning with the regular session of 2017;
3 (2) Reduce its personnel count by every position
4 identified for abolishment and vacated under this
5 chapter, whether the former incumbent vacated the
6 position as a result of accepting a severance benefit
7 or special retirement benefit authorized under this
8 chapter or of exercising reduction-in-force rights;
9 and
10 (3) Transmit a list that includes each employee who
11 received benefits under this chapter and the benefit
12 received by the employee to the directors of finance
13 and human resources development.

14 § -8 **Guidelines; development and administration.** The
15 departments of human resources development and budget and
16 finance shall develop and administer guidelines and time frames
17 with the exclusive representatives of affected public employees
18 to implement the voluntary severance benefits and special
19 retirement benefits under this chapter. The department of human
20 resources development, the department of labor and industrial
21 relations, the employees' retirement system, and the Hawaii



1 employer-union health benefits trust fund shall work
2 cooperatively to ensure that briefings are provided prior to the
3 implementation of any workforce restructuring plan to educate
4 the employees whose positions are being abolished or who are
5 directly affected by a reduction-in-force or workforce
6 restructuring plan.

7 The department of human resources development and the
8 department of budget and finance shall report to the legislature
9 on any restructuring activities initiated as a consequence of
10 this chapter no later than twenty days prior to the convening of
11 each regular session beginning with the regular session of 2017.

12 The report shall include a description of the abolished
13 positions, an explanation as to how the new workforce structure,
14 including resulting service delivery changes, will more
15 efficiently serve the needs of the agency's clients, the cost of
16 the benefit per participant, and the total cost to the State.

17 § -9 **Matching funds.** The governor may provide funds to
18 obtain matching federal moneys to retrain employees in the state
19 executive branch who separated from service under this chapter.

20 § -10 **Review by employee.** Employees offered a severance
21 benefit or a special retirement benefit shall be given



1 sufficient time to make an informed decision from the date of
2 receiving accurate and complete information about the offer."

3 PART II

4 SECTION 3. State contributions; Hawaii health system
5 corporation employees hired after June 30, 1996, and retired.

6 (a) This section shall apply to state contributions to the
7 Hawaii employer-union health benefits trust fund for Hawaii
8 health systems corporation employees hired after June 30, 1996,
9 and who were separated from service as a result of Act 103,
10 Session Laws of Hawaii 2015.

11 (b) The State, through the department of budget and
12 finance, shall pay to the Hawaii employer-union health benefits
13 trust fund:

14 (1) For retired employees based on the self plan with at
15 least nine years but fewer than twelve years of
16 service, a monthly contribution equal to one-half of
17 the base medicare or non-medicare monthly contribution
18 set forth under section 87A-33(b), Hawaii Revised
19 Statutes; provided that retired employees who were
20 hired after June 30, 1996, but before July 1, 2001,
21 with dependent-beneficiaries, as that term is defined



1 in section 87A-1, Hawaii Revised Statutes, shall be
2 eligible for a monthly contribution equal to one-half
3 of the base medicare or non-medicare monthly
4 contribution for two-party or family plans, as
5 applicable, set forth in section 87A-33(b), Hawaii
6 Revised Statutes;

7 (2) For retired employees based on the self plan with at
8 least twelve years but fewer than twenty years of
9 service, a monthly contribution equal to seventy-five
10 per cent of the base medicare or non-medicare monthly
11 contribution set forth under section 87A-33(b), Hawaii
12 Revised Statutes; provided that retired employees who
13 were hired after June 30, 1996, but before July 1,
14 2001, with dependent-beneficiaries, as that term is
15 defined in section 87A-1, Hawaii Revised Statutes,
16 shall be eligible for a monthly contribution equal to
17 seventy-five per cent of the base medicare or non-
18 medicare monthly contribution for two-party or family
19 plans, as applicable, set forth in section 87A-33(b),
20 Hawaii Revised Statutes;



S.B. NO. 2077
S.D. 1
H.D. 2
C.D. 2

- 1 (3) For retired employees based on the self plan with
2 twenty or more years of service, a monthly
3 contribution equal to one hundred per cent of the base
4 medicare or non-medicare monthly contribution set
5 forth under section 87A-33(b), Hawaii Revised
6 Statutes; provided that retired employees who were
7 hired after June 30, 1996, but before July 1, 2001,
8 with dependent-beneficiaries, as that term is defined
9 in section 87A-1, Hawaii Revised Statutes, shall be
10 eligible for a monthly contribution equal to one
11 hundred per cent of the base medicare or non-medicare
12 monthly contribution for two-party or family plans, as
13 applicable, set forth in section 87A-33(b), Hawaii
14 Revised Statutes; and
- 15 (4) Upon the death of a retired employee hired after
16 June 30, 1996, but before July 1, 2001, for the
17 dependent-beneficiary who becomes eligible as an
18 employee-beneficiary, a monthly contribution equal to
19 paragraphs (1), (2), or (3), as applicable; and upon
20 the death of a retired employee hired after June 30,
21 2001, for the dependent-beneficiary who becomes



S.B. NO. 2077
S.D. 1
H.D. 2
C.D. 2

1 eligible as an employee-beneficiary, a monthly
2 contribution equal to one-half of paragraphs (1), (2),
3 or (3), as applicable.

4 PART III

5 SECTION 4. If any provision of this Act, or the
6 application thereof to any person or circumstance, is held
7 invalid, the invalidity does not affect other provisions or
8 applications of the Act that can be given effect without the
9 invalid provision or application, and to this end the provisions
10 of this Act are severable.

11 SECTION 5. This Act shall take effect upon its approval,
12 and shall apply to employees of the Hawaii health systems
13 corporation who are separated from service as a consequence of
14 Act 103, Session Laws of Hawaii 2015.



S.B. NO. 2077
S.D. 1
H.D. 2
C.D. 2

Report Title:

ERS; HHSC; Separation Benefits; Early Retirement; EUTF

Description:

Authorizes HHSC employees facing position abolishment, reduction-in-force, or workforce restructuring to opt to receive either severance benefits or a special retirement benefit in lieu of exercising any reduction-in-force rights. Requires the State to pay a monthly contribution for employees separated from service as a result of Act 103, Session Laws of Hawaii 2015.
(CD2)

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2016-2410 SB2077 CD2 SMA.doc

