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Attorneys for Defendant  
PANKAJ BHANOT, in his official  
capacity as the Director of the Hawaii  
Department of Human Services

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

PATRICIA SHEEHEY, PATRICK  
SHEEHEY, RAYNETTE AH CHONG,  
individually and on behalf of the class  
of licensed foster care providers in the  
state of Hawaii,

Plaintiffs,

vs.

PANKAJ BHANOT, in his official  
capacity as the Director of the Hawaii  
Department of Human Services,

Defendant.

CIVIL NO. CV13-00663 LEK-KSC

**MOTION FOR PRELIMINARY  
APPROVAL OF AMENDED  
SETTLEMENT; MEMORANDUM IN  
SUPPORT OF MOTION;  
DECLARATION OF DONNA H.  
KALAMA; EXHIBITS A - C;  
CERTIFICATE OF SERVICE**

**MOTION FOR PRELIMINARY  
APPROVAL OF AMENDED SETTLEMENT**

Defendant Pankaj Bhanot, in his official capacity as the Director of the Hawaii Department of Human Services, by and through his undersigned counsel, respectfully moves this Honorable Court for entry of an order preliminarily approving the amended settlement reached with Plaintiffs in this matter, and approving the form of class notice included with this Motion. Plaintiffs do not oppose this Motion.

The Amended Federal Lawsuit Class Action Settlement Agreement executed by counsel for the parties is attached as Exhibit A. The proposed form of class notice is Exhibit 1 to the Settlement Agreement. A proposed form of Order Preliminarily Approving Amended Class Action Settlement, Approving Notice Plan, and Scheduling Date for Fairness Hearing is attached as Exhibit 2 to the Settlement Agreement. If the Court grants this Motion, counsel will submit for the Court's consideration a Word version of the proposed Order with applicable dates filled in.

If the amended settlement is preliminarily approved by the Court, Class Members will be provided with the opportunity to review the terms of the amended settlement and to object to said terms. A fairness hearing has not been scheduled but the parties have proposed that it be held May 7, 2018, or on another date set by the Court. *See* Dkt 385.

By March 30, 2018, Plaintiffs will separately file a request for attorneys' fees and costs that supports the amount the parties have agreed to for purposes of the amended settlement, \$850,000.00, and a request to approve service awards for the Named Plaintiffs.

This Motion is made pursuant to Federal Rules of Civil Procedure Rules 7 and 23, and is supported by the attached memorandum in support of motion and exhibits, the entire file in this matter, and such other matters as may be brought to the Court's attention at the hearing on this Motion if one is held.

If the Court schedules a hearing on this Motion, the Parties agree that the hearing may be held as soon as the Court is able to schedule it, without regard to the requirements of Local Rule 7.2.

DATED: Honolulu, Hawaii, March 23, 2018.

/s/ Donna H. Kalama  
CARON M. INAGAKI  
DONNA H. KALAMA  
Deputy Attorneys General

Attorneys for Defendant  
PANKAJ BHANOT, in his  
official capacity as the Director of  
the Hawai'i Department of  
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**MEMORANDUM IN SUPPORT OF  
MOTION**

**MEMORANDUM IN SUPPORT OF MOTION**

Defendant respectfully asks for this Court's preliminary approval of the amended Settlement in this case, for approval of the form of the Class Notice<sup>1</sup> to be sent to members of the certified class, and to set the hearing on the Motion for Final Approval of Settlement (the Fairness Hearing).

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<sup>1</sup> Capitalized terms such as "Class Notice" are intended to have the same meaning as they have in the Federal Settlement Agreement unless the context indicates otherwise.

The detailed history of this case and the companion State Lawsuit was included in the original motion for preliminary approval of settlement filed March 14, 2017, Dkt 340. A copy of the original motion and memorandum in support, without exhibits, is attached hereto as Exhibit C for the Court's convenience. Defendant respectfully incorporates the content of the original memorandum in support of motion, Dkt 340-1. Set forth below is updated information that describes how the terms of the Settlement have been amended.

Plaintiffs' counsel were provided with a draft of this Motion in advance of its filing and have no opposition to the requested relief.

#### **I. DESCRIPTION OF AMENDED SETTLEMENT**

The original settlement of this case failed when the Hawaii Legislature did not provide the money needed to fund the settlement during the 2017 regular legislative session. The parties thereafter engaged in further discussions and agreed to amend the Settlement.

The essential terms of the amended Settlement were placed on the record on March 7, 2018, during a hearing with Magistrate Judge Kevin S.C. Chang. Dkt 384. The amended Settlement has since been incorporated into written agreements attached hereto as Exhibit A (Amended Federal Lawsuit

Class Action Settlement Agreement), and Exhibit B (Amended State Lawsuit Class Action Settlement Agreement).

**A. Material Amendments to the Settlement**

There are two material changes to the Settlement:

- (1) The agreed-upon attorneys' fees and costs for the Federal Lawsuit have been reduced from \$1,100,000 to \$850,000. *See* Exhibit A (Federal Settlement Agreement), section VI.1.
- (2) Key dates/deadlines have been moved back by a year:
  - a. The Legislative Enactment Deadline is now June 30, 2018, *see* Exhibit A, section I.J; Exhibit B (State Settlement Agreement), section I.13.
  - b. The increases in the board rates and clothing allowance provided for in the Federal Settlement Agreement take effect July 1, 2018, instead of July 1, 2017. Exhibit A, section II.1.
  - c. The termination date for the Federal Settlement Agreement will be 10 years from March 16, 2018, the new effective date. Exhibit A, section IV.4.

Conforming changes to other deadlines were also made, along with corrections to typographical errors and the like.

**B. Summary of Unchanged Terms**

**1. Terms Applicable to Both the Federal and State Lawsuits**

The Settlement continues to include both the Federal Lawsuit and the State Lawsuit; unless both Lawsuits settle on the terms set forth in their respective agreements, with Court approval, neither Lawsuit will be settled. Legislative appropriation for the payments required by both Lawsuits continues to be a condition of the Settlement.

**2. Terms of the Federal Settlement Agreement**

The agreed-upon basic board rate and clothing allowance increases are unchanged, as is the methodology by which DHS is to calculate whether, during its periodic review of rates, it is required to seek additional appropriations to increase the rates.

There is no change to DHS' agreement that, until planned changes in the difficulty of care system go into effect, the current monthly cap of 120 hours per month may be waived by DHS in appropriate circumstances. The parties also continue to agree to cooperatively prepare a benefits summary to provide to resource caregivers.

The terms relating to court enforcement remain unchanged, with notice to Defendant and opportunity to cure being a condition of seeking the

Court's assistance. The Release provision is unchanged. Defendant admits no liability or wrongdoing.

### **3. Terms of the State Settlement Agreement**

Except for the extension of the Legislative Enactment Deadline and other conforming date changes, the terms of the State Settlement Agreement are unchanged.

## **II. CLASS NOTICE**

### **A. Class Definition and Class Mailing List**

By order filed August 17, 2015, the Court certified the following class:

[A]ll currently licensed foster care providers in Hawaii who are entitled to receive foster care maintenance payments pursuant to the Child Welfare Act when they have foster children placed in their homes[.]

Dkt 156 at 33.

For purposes of generating the mailing list to send out the Class Notice, DHS has included Hawaii-licensed resource caregivers from August 17, 2015 (the date of the class certification order), through March 15, 2018 (the date the mailing list was generated). Defendant submits that the date range for the mailing list fairly represents “currently” licensed resource caregivers in that it includes persons who were licensed at any time from the date the class was certified up through the approximate date of the



preliminary approval of the amended Settlement. The total number on the mailing list is 2,846.<sup>2</sup> Mailing envelopes will be addressed to each licensed resource caregiver on the list. Where two people in a home are licensed as a resource family (e.g., a married couple), the mailing envelope will be addressed solely to the person identified in DHS' system as the "Owner", which is the individual to whom checks are made payable when payments are made for the care of foster children. Thus, as before, the Class Notice program contemplates *individual notice to each Class Member by mail*.

The parties have agreed upon the form of Class Notice attached as Exhibit 1 to the Federal Settlement Agreement, and respectfully ask for the Court's approval thereof. DHS is responsible for copying and mailing the approved Class Notice at its expense. DHS may utilize outside vendors for preparing the copies and completing the mailings.

Class Counsel will continue to maintain the previously-established website for class members until December 31, 2019. *See* Federal Settlement Agreement, Exhibit A, section VII.4 and Exhibit 1. Class Counsel also have a telephone number that Class Members can call for information. This information is contained in the proposed Class Notice.

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<sup>2</sup> As the list is finalized just before mailing of the notice, this number may change slightly to account for possible errors or duplications, but DHS does not anticipate any significant changes.

Direct mailing to individual Class Members as proposed here is the best practicable notice, is reasonably calculated to apprise Class Members of the pendency of the Federal Lawsuit and the terms of the amended Settlement, including the right to object, and meets due process standards of notice and opportunity to be heard at a meaningful time and in a meaningful manner.

**B. Objection Procedure**

As before, the proposed Class Notice instructs Class Members to send to this Court any objections they may have to the Settlement. The parties propose that objections be postmarked within one (1) month of the mailing of the Class Notice. Dkt 385. The Class Notice informs Class Members of their right to appear at the Fairness Hearing themselves or through separately retained counsel at their own expense, and what steps to take to do so.

Because the class in this case was certified under FRCP Rule 23(b)(2), and the relief provided is prospective in nature only, class members do not have the right to opt out of the settlement. Although class members may object, if the settlement is approved, all members will be bound.

In response to the notice that was mailed to Class Members in March 2017 pursuant to the original settlement, an individual wrote to the Court indicating that she wished to remain neutral and not be listed on any class

action lawsuit. Dkt 356. Out of respect for this individual's request, Defendant asks that DHS be permitted to remove the individual's name from the mailing list for the upcoming notice, and/or that Plaintiffs' counsel be permitted to contact the individual to inform her that she need not participate in this case, or that the individual in some other manner deemed appropriate by the Court be informed that no action is required of her.

### **III. FAIRNESS HEARING**

The parties propose that a Fairness Hearing be held on May 7, 2018, or on another date set by the Court. Dkt 385. The parties will file a Motion for Final Approval of Settlement as directed by this Court; the parties propose a due date of April 30, 2018, based on a proposed fairness hearing date of May 7, 2018. The settlement will become final once this Court has finally approved the settlement, and the time to appeal (by any Class Members who may have objected) has expired or any appeals have been resolved and the order approving settlement has not been modified, amended, or reversed in any way. *See* Federal Settlement Agreement, Exhibit A, section I.I (definition of "Final Approval"). The Settlement is subject to necessary appropriations being made.

#### **IV. NOTICE UNDER CLASS ACTION FAIRNESS ACT**

Defendant will be responsible for sending out the notices required under 28 U.S.C. § 1715.

#### **V. THE AMENDED SETTLEMENT SHOULD BE PRELIMINARILY APPROVED**

For the reasons previously articulated in the motion to preliminarily approve the original settlement, Dkt 340-1 at 29-32, this amended Settlement is fair, reasonable, and adequate. The bases for the Court's preliminary approval of the original settlement as being within the range of possible approval as fair, reasonable, and adequate within the meaning of FRCP Rule 23 and the Class Action Fairness Act of 2005, Dkt 345 at 6, have not changed.

#### **VI. STAY AND PRELIMINARY INJUNCTION PENDING FINAL APPROVAL**

As before, Defendant respectfully requests that this Court enter an order staying any actions or proceedings pending in any state or federal court – *but not including the State Lawsuit* – involving the State of Hawaii's foster care maintenance payments or components thereof pending the Fairness Hearing and the issuance of the order of final approval and an order dismissing the Federal Lawsuit with prejudice. Other than the State

Lawsuit, Defendant is not aware of the existence of other such pending actions or proceedings at this time.

Defendant also requests that the Court issue a preliminary injunction, pending the final Fairness Hearing and the issuance of a final order and dismissal with prejudice, enjoining all members of the Class from filing, commencing, prosecuting, maintaining, intervening in, participating in (as class member or otherwise), or receiving benefits from any other lawsuit, arbitration or administrative, regulatory or other proceeding or order in any jurisdiction arising out of or relating to the State of Hawaii's foster care maintenance payments or any component thereof or the facts and circumstances at issue in this Federal Lawsuit, except for the State Lawsuit.

Defendant requests this relief under the All Writs Act, to ensure that this Court's jurisdiction over this action will be preserved and the Court has the ability to provide the Parties with the benefit of the hard-fought settlement. Defendant submits that no bond should be required under the circumstances.

## **VII. CONCLUSION**

Based on the foregoing, Defendant respectfully requests the Court grant this Motion, make the preliminary finding that the proposed amended Settlement is within the range of possible approval as fair, reasonable, and

adequate within the meaning of Rule 23 and the Class Action Fairness Act, and that the Federal Settlement Agreement is sufficient to warrant sending notice to the Class. Defendant also requests that the Court approve the proposed form of Class Notice, and specify its procedure for obtaining its final approval of the Settlement, including the deadlines by which Class Member objections shall be made and the motion for final approval of settlement shall be filed, and the date of the final Fairness Hearing. A proposed form of order is attached as Exhibit 2 to the Federal Settlement Agreement.

DATED: Honolulu, Hawaii, March 23, 2018.

/s/ Donna H. Kalama  
CARON M. INAGAKI  
DONNA H. KALAMA  
Deputy Attorneys General

Attorneys for Defendant  
PANKAJ BHANOT, in his  
official capacity as Director of the  
Hawai'i Department of  
Human Services

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PATRICIA SHEEHEY, PATRICK  
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individually and on behalf of the class  
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Defendant.

CIVIL NO. CV13-00663 LEK-KSC

**DECLARATION OF DONNA H.  
KALAMA; EXHIBITS A - C**

**DECLARATION OF DONNA H. KALAMA**

I, Donna H. Kalama, do hereby state and declare as follows:

1. I am a Deputy Attorney General employed by the Department of the Attorney General and I am assigned to represent the Defendant in this case.

2. Attached as Exhibit A is a true and correct copy of the Amended Federal Lawsuit Class Action Settlement Agreement executed by counsel for the parties. Attached as Exhibit 1 and Exhibit 2, respectively, to Exhibit A are a proposed form of class notice and a proposed form of Order

Preliminarily Approving Amended Class Action Settlement, Approving Notice Plan, and Scheduling Date for Fairness Hearing.

3. Attached as Exhibit B is a true and correct copy of the Amended State Lawsuit Class Action Settlement Agreement, which all counsel have agreed to but the parties have not yet signed.

4. Attached as Exhibit C is a true and correct copy of the original motion for preliminary approval of settlement filed herein on March 14, 2017, Dkt 340, and the memorandum in support, Dkt 340-1, without exhibits.

5. Plaintiffs' counsel were provided an opportunity to review this Motion for Preliminary Approval of Amended Settlement before it was filed and indicated they do not oppose the Motion.

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

DATED: Honolulu, Hawaii, March 23, 2018.

/s/ Donna H. Kalama  
DONNA H. KALAMA



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

PATRICIA SHEEHEY, PATRICK  
SHEEHEY, RAYNETTE AH CHONG,  
individually and on behalf of the class  
of licensed foster care providers residing  
in the state of Hawai'i,

Plaintiffs,

vs.

PANKAJ BHANOT, in his official  
capacity as the Director of the Hawai'i  
Department of Human Services,

Defendant.

Case No. CV13-00663 LEK-KSC

**AMENDED FEDERAL LAWSUIT  
CLASS ACTION SETTLEMENT  
AGREEMENT**

**AMENDED FEDERAL LAWSUIT CLASS ACTION  
SETTLEMENT AGREEMENT**

This Amended Federal Lawsuit Class Action Settlement Agreement (“**Federal Settlement Agreement**”) is entered into by and between Raynette Ah Chong (the “Named Plaintiff”), on behalf of herself and members of the class certified by the United States District Court for the District of Hawai'i, and Patrick Sheehey and Patricia Sheehey, on the one hand (collectively “**Plaintiffs**”), and Pankaj Bhanot, in his official capacity as the Director of the Hawaii Department of Human Services<sup>1</sup> (“**Defendant**”), on the other hand. Plaintiffs and Defendant are collectively referred to as the “**Parties**.”

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<sup>1</sup> The Federal Lawsuit named Defendant Patricia McManaman, in her official capacity as the then-Director of the Hawai'i Department of Human Services. Pankaj Bhanot is the current Director of Human Services, and has been automatically substituted as Defendant pursuant to Fed. R. Civ. P. Rule 25(d).

Subject to Court approval as required by the Federal Rules of Civil Procedure (“FRCP”) Rule 23, the Parties hereby stipulate and agree that, in consideration of the mutual promises, covenants, and consideration set forth in this Federal Settlement Agreement, the above-captioned action shall be settled and compromised in accordance with the terms herein.

The Parties acknowledge and agree that although this Federal Settlement Agreement sets forth the terms and conditions by which the Federal Lawsuit will be settled, this Federal Settlement Agreement is part of a larger settlement that includes the State Lawsuit (defined below), and that unless both Lawsuits settle on the terms set forth in their respective settlement agreements, neither lawsuit will be settled.

The Parties further acknowledge and agree that the settlement of the Federal Lawsuit and the State Lawsuit is contingent upon the appropriation of funds to make the payments described herein and in the State Settlement Agreement. If such legislation is not enacted on or before the Legislation Enactment Deadline as defined in this Federal Settlement Agreement and the State Settlement Agreement, unless such date is mutually agreed to be extended by the parties to both Agreements, this Federal Settlement Agreement shall automatically become null and void and trial in the Federal Lawsuit shall resume.

## RECITALS

WHEREAS, on December 3, 2013, Plaintiff Raynette Ah Chong filed a class action complaint for declaratory and permanent injunctive relief against Patricia McManaman, in her official capacity as the Director of the Hawaii Department of Human Services, entitled *Ah Chong v. McManaman*, Civ. No. 13-00663 LEK-KSC, in the United States District Court for the District of Hawai‘i (the “**Federal Lawsuit**”); and

WHEREAS, a First Amended Complaint was filed in the Federal Lawsuit on April 30, 2014, adding Patricia Sheehey and Patrick Sheehey as Plaintiffs; and

WHEREAS, the First Amended Complaint asserts a single claim under 42 U.S.C. § 1983, seeking a declaratory ruling that Defendant is failing to pay the proper amounts owed to resource caregivers (foster parents) in Hawai‘i under the Adoption Assistance and Child Welfare Act of 1980, as amended, codified as Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679c (the “**Child Welfare Act**”) and injunctive relief prohibiting Defendant from allegedly continuing to violate the rights of resource caregivers under the Child Welfare Act by (1) failing to make

foster care maintenance payments adequate to cover the costs enumerated under the Child Welfare Act, (2) failing to set appropriate foster care maintenance payment rates; and (3) failing to update the foster care maintenance payment rates to assure their continuing appropriateness; but does not seek damages, and

WHEREAS, Plaintiffs and others, on behalf of a separate putative class of Hawaii-licensed foster care providers and children, also filed a Complaint for Damages against the State of Hawaii in the First Circuit Court, State of Hawai'i, in an action entitled *Sheehey, et al. v. State of Hawaii*, Civ. No. 14-1-1709-08 VLC (the “**State Lawsuit**”), asserting claims for damages on behalf of resource caregivers and children and young adults who were removed from their home and placed under DHS’ care, based on alleged inadequate foster care maintenance payment rates under contract and state law; and

WHEREAS, some of the issues in the State Lawsuit overlap with the issues in the Federal Lawsuit (primarily, whether DHS provides foster care maintenance payments adequate to cover the cost of and the cost of providing basic necessities to children in Hawaii’s foster care system); and

WHEREAS, the Child Welfare Act defines “foster care maintenance payments” as payments sufficient to “cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, reasonable travel to the child’s home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement” (42 U.S.C. § 675(4)(A)), and Plaintiffs contend that DHS is required by federal law to make sufficient foster care maintenance payments and conduct periodic reviews to assure the continuing appropriateness of foster care maintenance payment rates (42 U.S.C. § 671(a)(11)); and

WHEREAS, from approximately 1990 until June 2014, Hawaii’s basic foster board rate was \$529 per child, per month for all foster children; and

WHEREAS, effective July 1, 2014, DHS increased the basic foster board rate (“**Basic Board Rate**”), based on the age of the foster child, to: \$576 (children ages 0-5); \$650 (children ages 6-11); and \$676 (children ages 12+); and

WHEREAS, in addition to the Basic Board Rate, there are additional payments and benefits available for the care of foster children (“**Foster Care Related Payments and Benefits**”), depending on the needs of the child; and

WHEREAS, DHS' position is that its existing system of a Basic Board Rate plus Foster Care Related Payments and Benefits complies with the Child Welfare Act, and DHS also takes the position that having certain payments or benefits available only if the child needs them, and requiring resource caregivers (foster parents) to apply for certain payments and benefits complies with the Child Welfare Act; and

WHEREAS, Plaintiffs' position is that the DHS' Basic Board Rates are still inadequate because they were set in 2014 using a 2011 government study (USDA report) on the cost of raising children across the United States (and used cost estimates for families living in the Urban West region rather than Hawai'i), and because the Basic Board Rates utilized less than 100% of the estimated costs of food; housing; and miscellaneous expenses rather than all eight items listed in the Child Welfare Act; and

WHEREAS, Plaintiffs' position is that DHS' system of providing Foster Care Related Payments and Benefits is inadequate because the payments and benefits (1) are not provided to all foster children, (2) are subject to eligibility requirements, (3) are subject to availability of funds, and (4) many foster families simply are not aware that these additional payments and benefits exist or that DHS is required to cover certain costs that DHS claims are covered through the Foster Care Related Payments and Benefits; and

WHEREAS, the Parties to the Federal Lawsuit do not agree on (1) the extent of DHS' obligations under the Child Welfare Act; (2) the sufficiency of the Basic Board Rates; (3) the value or adequacy of the Foster Care Related Payments and Benefits; (4) whether DHS provides adequate information to resource caregivers regarding the availability of the Foster Care Related Payments and Benefits; (5) whether DHS provides adequate opportunity for resource caregivers to apply for the Foster Care Related Payments and Benefits; and (6) whether DHS conducts periodic reviews that assure the continuing appropriateness of its foster care maintenance payment rates; and

WHEREAS, the Parties have engaged in substantial discovery (including depositions, the production of thousands of pages of documents, as well as expert discovery); and

WHEREAS, in August 2015, the Federal Court certified a class of all currently licensed foster care providers in Hawai'i who are entitled to receive foster care maintenance payments pursuant to the Child Welfare Act when they have foster

children placed in their homes (the “**Class**”)<sup>2</sup> and appointed the Hawai`i Appleseed Center for Law and Economic Justice, Alston Hunt Floyd & Ing, and Morrison & Foerster LLP as counsel for the class (“**Class Counsel**”); and

WHEREAS, in December 2015, the Federal Court ruled that federal law did not prohibit DHS’ system of providing foster care maintenance payments through a Basic Board Rate plus additional Foster Care Related Payments and Benefits, and that the foster care maintenance payment system could possibly be sufficient if DHS provides resource caregivers with sufficient information about the foster care related payments and benefits and sufficient opportunities to apply for them; and

WHEREAS, the Federal Court also ruled that the “shelter” expense in the Child Welfare Act’s definition of “foster care maintenance payments” need not include mortgage payments, rent, property taxes, or other similar expenses<sup>3</sup>; and

WHEREAS, the Federal Court did not rule on certain key issues, and saved them for trial, including:

- (1) whether DHS adequately conducts periodic reviews of the foster care maintenance payments to assure their continuing appropriateness;
- (2) whether DHS provides adequate information to resource caregivers about the Foster Care Related Payments and Benefits;

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<sup>2</sup> The Class was certified under Fed. R. Civ. P. 23(b)(2) and Class Counsel appointed by order filed August 17, 2015. Dkt. 156 at 24-25, 33-34. No notice of class certification was provided to class members at the time of certification, nor was notice required, because of the nature of the class and the relief sought, which is solely prospective injunctive relief.

<sup>3</sup> It is Defendant’s position that the Federal Court’s ruling on “shelter expense” significantly lessened Plaintiffs’ chances of prevailing on their assertion that DHS does not pay enough for the items enumerated in the Child Welfare Act because, while the ruling confirmed that DHS need not pay for rent, mortgage, or similar expenses, DHS’ calculation of the Basic Board Rates in fact took such costs into account because a large portion of the “housing” category of the USDA report includes such costs.

(3) whether DHS provides adequate opportunities to resource caregivers to apply for the Foster Care Related Payments and Benefits;

and, if the Court answered (2) and (3) in the affirmative<sup>4</sup>, then

(4) whether DHS' foster care maintenance payment system of Basic Board Rate-plus-Foster Care Related Payments and Benefits adequately covers the cost of (and the cost of providing) the items enumerated in the Child Welfare Act; and

WHEREAS, in July and August 2016, shortly before trial in the Federal Lawsuit was scheduled to commence, the Parties engaged in settlement discussions through their respective counsel, with the assistance of the Honorable Kevin S.C. Chang, Magistrate Judge of the United States District Court for the District of Hawai'i; and

WHEREAS, the Parties reached a proposed comprehensive settlement of the State and Federal Lawsuits and, on August 26, 2016, the Parties in the Federal Lawsuit and the parties in the State Lawsuit agreed to the essential terms of a valid and binding settlement agreement, which was placed on the record before the Honorable Kevin S.C. Chang; and

WHEREAS, the settlement placed on the record on August 26, 2016, was subsequently memorialized in written settlement agreements dated effective March 14, 2017; and

WHEREAS, those written settlement agreements stated that the settlement was contingent upon the appropriation of funds to make the payments described therein, and if such legislation was not enacted on or before June 30, 2017, unless such date was mutually agreed to be extended by the parties, the agreements shall automatically become null and void; and

WHEREAS, the Hawaii Legislature did not appropriate the funds for the settlement on or before the June 30, 2017 deadline; and

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<sup>4</sup> If the Court found at trial that DHS did not provide all resource caregivers with sufficient information about and opportunities to apply for the Foster Care Related Payments and Benefits, then it is Plaintiffs' position that DHS would only be able to rely upon the Basic Board Rates, and not the Foster Care Related Payments and Benefits, to demonstrate the adequacy of its foster care maintenance payment rates.



WHEREAS, the Parties desire to extend the deadline by which the Hawaii Legislature may fund the settlement as amended by this Federal Settlement Agreement and the Amended State Lawsuit Class Action Settlement Agreement; and

WHEREAS, Defendant denied and continues to deny any and all liability and damages to Plaintiffs with respect to the claims or causes of action asserted in the Federal Lawsuit and the State Lawsuit, but nonetheless acknowledges that bringing the cases to a close now through settlement—rather than after years of litigation and appeals, with uncertain outcomes and concomitant attorneys’ fees and costs that would be incurred by both sides—would help move the Parties toward a better working relationship for the benefit of all children in Hawaii’s foster care system, and the relief Defendant agrees to provide under this Federal Settlement Agreement is offered solely as a compromise, and not because Defendant believes DHS has any obligation to Plaintiffs to provide said relief; and

WHEREAS, Plaintiffs and Class Counsel have analyzed, evaluated, and extensively litigated the merits of the claims made against Defendant in the Federal Lawsuit and the impact of settlement (as well as the impact of not settling) on Plaintiffs and the members of the Class, and, recognizing the substantial risks of continued litigation—including the possibility that the Federal Lawsuit, if not settled now, might result in an outcome that is less favorable or that a fair and final judgment may not occur for several years—Plaintiffs and Class Counsel are satisfied that the terms and conditions of this Agreement are fair, reasonable, and adequate, and that this Agreement is in the best interests of the Class;

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

### **TERMS OF AGREEMENT**

#### **I. Definitions**

In addition to the definitions contained in the Recitals, the following definitions shall apply.

- A. “**Administration Costs**” shall mean the reasonable cost to typeset, print, and mail the Class Notice to the Class.
- B. “**Class Members**” shall mean the members of the Class.

- C. **“Class Notice”** shall mean a document substantially in the form of the Notice attached hereto as Exhibit 1 which has been agreed to by the Parties subject to Court approval and which the Notice Administrator will mail to each Class Member explaining the terms of the Settlement and the objection process.
- D. **“Class Representative”** shall mean Plaintiff Raynette Ah Chong. The Class Representative is also referred to as the **“Named Plaintiff.”**
- E. **“Contact Information”** shall mean the most current information DHS then has available of a Class Member’s name and mailing address.
- F. **“Day”** shall mean a calendar day.
- G. **“Fairness Hearing”** shall mean the hearing on the Motion for Final Approval of Settlement.
- H. **“Federal Court”** shall mean the United States District Court for the District of Hawaii, the Honorable Leslie E. Kobayashi, presiding.
- I. **“Final Approval”** shall mean the occurrence of the following:  
Following the Fairness Hearing, the Federal Court has issued an order approving the Settlement, and
  - i. The time for appellate review has expired, and no notice of appeal has been filed; or
  - ii. If appellate review is sought, after any and all avenues of appellate review have been exhausted, and the order approving settlement has not been modified, amended, or reversed in any way.
- J. **“Legislation Enactment Deadline”** shall mean June 30, 2018, or such later time period as the Parties may agree to in writing.
- K. **“Motion for Final Approval of Settlement”** shall mean the motion to be filed by Defendant seeking the Federal Court’s final approval of the Settlement.
- L. **“Notice Administrator”** shall mean DHS (or, if DHS is unable or unwilling to perform the duties of the Notice Administrator, such other mutually agreed-upon entity). The Notice Administrator shall be responsible for sending the court-approved Class Notice to the Class, and may utilize the services of a copy/mailing vendor.
- M. **“Preliminary Approval”** shall mean that the Court has entered a Preliminary Approval Order.



- N. **“Preliminary Approval Order”** shall mean an order entered by the Federal Court substantially in the form attached hereto as Exhibit 2 preliminarily approving the terms set forth in this Federal Settlement Agreement, including the manner and timing of providing notice to the Class, the time period for objections, and the date, time and location for a Fairness Hearing.
- O. **“Releasees”** shall mean Defendant, DHS, the State of Hawai`i, other Hawaii departments, agencies, directors, officers, agents, employees, representatives, insurers, attorneys, administrators, and all other persons acting on behalf of the State of Hawaii.
- P. **“Resource caregiver”** shall mean an individual or couple licensed by the DHS as a resource caregiver or resource family pursuant to Hawaii Administrative Rules chapter 17-1625, as may be amended from time to time.
- Q. **“Settlement”** means the compromise and settlement of the Federal Lawsuit as contemplated by this Federal Settlement Agreement.
- R. **“USDA Report”** means the report periodically published by the United States Department of Agriculture titled Expenditures on Children by Families.
- S. **“CPI”** means the Consumer Price Index for All Urban Consumers (CPI-U) for the U.S., as reported by the Bureau of Labor Statistics, United States Department of Labor.

## **II. Payment Amounts Starting Next State Fiscal Year**

1. The Federal Lawsuit shall be administratively closed<sup>5</sup> (until the end of June 2018, or such later time as the Parties may agree to in writing) while DHS, with support and cooperation from the Class and Class Counsel, requests appropriations from the Hawaii Legislature in the DHS budget for state fiscal year 2019 (July 1, 2018 to June 30, 2019 sufficient to fund:

(a) an increase in the monthly basic foster care maintenance board rates (the “Basic Board Rates”) to the following amounts: \$649 for ages 0-5, \$742 for ages 6-11, and \$776 for ages 12+; and

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<sup>5</sup> The Parties understand that administrative closure may include dismissal of the case by the Court, with the ability to reopen the case if the Settlement is not completed.

(b) an increase in the annual clothing allowance to the following amounts: \$810 for ages 0-5, \$822 for ages 6-11, and \$1026 for ages 12+. These amounts are in lieu of the current clothing allowance of \$600 per year plus \$125 for special circumstances. At DHS' option, it may choose to increase the clothing allowance without seeking an additional appropriation if it has determined that such an increase can be funded with its existing budget.

2. The increases in the Basic Board Rates were calculated by using 95% of the 2013 USDA report, overall United States, middle income category, expenditures on Food, Housing, and Miscellaneous, with an adjustment for inflation to January 2016 dollars using changes in the CPI<sup>6</sup> from the year of the USDA report (2013), with an adjustment equal to the average of the 2014 Regional Price Parity Index ("**RPP**"), as reported by the Bureau of Economic Analysis, United States Department of Commerce, for (a) Hawaii ("Hawaii RPP") (116.8) and (b) Hawaii Metropolitan Statistical Area ("Hawaii-Metro") (120.2), which is referred to herein as the "Average Hawaii RPP" (118.5).

3. The increases in the clothing allowance were calculated by using 100% of the 2013 USDA report, overall United States, middle income category, expenditures on Clothing, with an adjustment for inflation to January 2016 dollars using changes in the CPI<sup>7</sup> from the year of the USDA report (2013), with an adjustment based on the Average Hawaii RPP.

4. Collectively, paragraphs II.1(a) and II.1(b) are referred to herein as the "**Budget Request.**" DHS has exercised its option to increase the clothing allowance in State fiscal year 2019 without seeking an additional appropriation, having determined that such an increase can be funded with its existing budget. The amount necessary to fund the increase for the Basic Board Rates has been submitted to the 2018 Legislature as part of the Executive Budget.

5. DHS will take all reasonable steps available to it as an executive agency to recommend, promote, and endorse the Budget Request.

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<sup>6</sup> The Housing CPI series was used to calculate the Housing adjustment. The Food CPI series was used to calculate the Food adjustment. An average of the Recreation and Personal Care CPI series was used to calculate the Miscellaneous adjustment.

<sup>7</sup> The Apparel CPI series was used to calculate the Clothing adjustment.

6. If DHS fails to submit a Budget Request in accordance with paragraph II.1, above, or if funds as requested in the Budget Request are not appropriated by the Legislation Enactment Deadline, Plaintiffs shall reopen the Federal Lawsuit, trial to commence immediately on a date set by Judge Kobayashi prior to the administrative closure. To the extent permitted by the Federal Court, the Parties agree that, prior to trial, they may update pre-trial submissions (including expert reports and written direct testimony statements) consistent with ongoing obligations under the Federal Rules of Civil Procedure and consistent with the Court's existing pre-trial rulings, and as necessary to account for the passage of time and changes to the facts and law, if any.

7. If the Budget Request is appropriated, the Parties will submit to the Federal Court a stipulated dismissal with prejudice, which shall be filed no later than 14 days after DHS issues the first payments based on the newly-established Basic Board Rates described in paragraph II.1(a), above.

### **III. Periodic Review**

1. Defendant agrees that DHS will conduct periodic reviews of its Basic Board Rates and the annual clothing allowance, consistent with its administrative rules, using the following review process:

DHS shall calculate benchmark rates based on procedures outlined in paragraph II.2, above, using the most recent USDA report, with an adjustment for inflation based on changes in the CPI for the U.S. from the year of the USDA report to the most recently available month, and an adjustment using the most recent Average Hawaii RPP ("**Benchmark Rates**").

DHS shall calculate a "**Benchmark Clothing Allowance**" rate based on procedures outlined in paragraph II.3, above, using the most recent USDA report, with an adjustment for inflation based on changes in the CPI for the U.S. from the year of the USDA report to the most recently available month, and an adjustment using the most recent Average Hawaii RPP.

2. DHS shall seek appropriations from the Hawaii Legislature sufficient to increase the Basic Board Rates to the Benchmark Rates if the difference between the then-existing Basic Board Rates and the Benchmark Rates is more than 5%. DHS shall notify Class Counsel of its intent to seek appropriations prior to the start of the legislative session to enable the Class to prepare testimony to the Legislature supporting DHS' budget request.

3. Similarly, DHS shall seek appropriations from the Hawaii Legislature sufficient to increase the clothing allowance to the Benchmark Clothing Allowance rate if the difference between the then-existing clothing allowance and the Benchmark Clothing Allowance is more than 5%. DHS shall notify Class Counsel of its intent to seek appropriations prior to the start of the legislative session to enable the Class to prepare testimony to the Legislature supporting DHS' budget request.

4. Defendant cannot and does not agree to raise the Basic Board Rates or the clothing allowance automatically when the 5% benchmark threshold is met. Moreover, the 5% threshold is a figure agreed upon for settlement purposes only. Nothing in this Federal Settlement Agreement constitutes an admission by Defendant that 5% represents the threshold for substantial compliance with the Child Welfare Act. In other words, by agreeing to seek an increase when the 5% threshold is met, Defendant in no way admits that should the Legislature choose not to fund a requested increase, then Defendant is in violation of the Child Welfare Act. On the contrary, it is the Defendant's position that Defendant is in compliance with the Child Welfare Act, and that the payment increases agreed upon for purposes of this Settlement are not required by law.

#### **IV. Other Terms**

1. **Difficulty of Care ("DOC") Payments:** Subject to the promulgation of any required administrative rule and/or internal policy change, as of the date the Federal Court approves the Settlement Agreement, DHS agrees that the monthly DOC cap of 120 hours may be waived by DHS in appropriate circumstances until it implements planned changes to the current DOC system, which may require rulemaking. DHS agrees to take all reasonable steps necessary to implement this paragraph (including reasonable steps in advance of the Fairness Hearing). Any requests by resource caregivers to increase the number of hours over 120 per month will be subject to DHS procedures (other than the 120-hour cap) and can be approved only if it is in the best interest of the foster child and other children in the resource family home to do so. Nothing in this Federal Settlement Agreement shall impair the ability of DHS to impose conditions on the receipt of DOC payments that it deems appropriate for the protection of foster children or other children in a resource caregiver's home.

2. **Availability of Resources:** The Parties agree to work cooperatively on providing a short summary of the payments and benefits (including a mileage log reimbursement form, DOC calculation information, and information about foster parent liability insurance) available to resource caregivers, to be provided at least

semi-annually and to all newly-licensed resource caregivers. The summary may be sent to resource caregivers by DHS' contractors and will be made available on Class Counsel's website.

3. **Court Enforcement:** The Federal Court retains jurisdiction to enforce the terms of this Federal Settlement Agreement. If a Class Member believes the Defendant to be in material breach of this Federal Agreement, the Class Member, through Class Counsel, will provide the Defendant notice and a reasonable opportunity to cure prior to enforcing the agreement in Federal Court. The Parties will agree on a time period for cure depending on the particular nature of the claimed breach.

4. **Termination of this Agreement:** This Federal Settlement Agreement will terminate 10 years from the effective date of this Agreement, at which time it will no longer be enforceable.

5. **No Admission of Liability.** This Federal Settlement Agreement is not an admission of liability or wrongdoing by Defendant. Nor is it an admission by the Class regarding the sufficiency or appropriateness of the payments and procedures agreed to for purposes of this Settlement.

Defendant asserts that he has meritorious defenses in response to Plaintiffs' allegations. Furthermore, nothing in this Federal Settlement Agreement shall be construed as an admission of liability under any legal or factual theory propounded by the Plaintiffs. Defendant enters into this Federal Settlement Agreement solely for the purposes of settling, compromising, and terminating Plaintiffs' claims, and avoiding the expense and diversion of resources caused by protracted litigation.

6. **Subject to Federal Law.** This Federal Settlement Agreement is subject to any changes in applicable federal law. The State is not required to do more than federal law mandates and may make adjustments to its payments, policies, or procedures consistent with federal law.

7. **Court Approval and Legislative Appropriations.** Settlement of the Federal Lawsuit and the State Lawsuit and the obligation of Defendant to make the payments provided for herein are conditioned on (1) approval of the Federal Settlement Agreement and the State Settlement Agreement by both the United States District Court for the District of Hawaii and the Circuit Court of the First Circuit, State of Hawaii, respectively, and (2) appropriation of funds by the Legislature of the State of Hawaii to fund the amounts required to be paid under the Federal Settlement Agreement and the State Settlement Agreement.

8. **Notice under CAFA.** Within 10 days of submission of the Motion for Preliminary Approval to the Federal Court, Defendant shall serve any notices to federal and state officials required under 28 U.S.C. § 1715.

## **V. Releases**

1. The Plaintiffs, including all Class Members, hereby release, acquit, and discharge Releasees from any and all claims, causes of action, rights, obligations, liabilities, penalties, demands, damages, costs (other than those costs to be paid pursuant to this Federal Agreement), requests for declaratory relief, or requests for injunctive relief of any and every kind that were alleged, sought, or litigated, or that could have been alleged, sought, or litigated against Defendant in the Federal Lawsuit. The foregoing does not preclude any Class Member from enforcing this Federal Agreement in Federal Court (after notice and opportunity to cure as set forth in paragraph IV.3, above) or commencing any other litigation concerning the claims alleged in the Federal Lawsuit after the termination of this Federal Settlement Agreement (paragraph IV.4, above).

## **VI. Attorneys' Fees and Costs**

1. Class Counsel has provided defense counsel with materials supporting requested attorneys' fees and costs for review. The Parties have met and conferred in good faith and, subject to Federal Court approval, hereby agree to an award of \$850,000, inclusive of all attorneys' fees, costs, non-taxable expenses, and taxes.

Plaintiffs shall seek the Federal Court's approval of such amounts by renewing and updating Plaintiffs' Notice of Unopposed Motion and Unopposed Motion for Award and Approval of Settlement Regarding Attorneys' Fees and Service Awards (Dkt. 348) pursuant to FRCP Rule 23(h), which shall be filed no later than 7 days after the Motion for Preliminary Approval is filed or by such other date as the Court may direct. Notice shall be provided to the Class informing Class Members of the right to object. Such notice shall be given as part of the Class Notice described below. Defendant will not object to the motion so long as it does not seek attorneys' fees and costs in excess of the amounts set forth in this paragraph VI.1.

No separate award of attorneys' fees and costs shall be sought by or made to Plaintiffs or their counsel for claims not certified for class treatment in the Federal Lawsuit.

2. The payment of the amount of attorneys' fees and costs approved by the Federal Court is subject to the Hawaii Legislature's appropriation process. No



interest shall accrue on an award of attorneys' fees and costs. Any award of attorneys' fees and costs shall be paid within a reasonable time after the start of the state fiscal year following the legislative session during which the appropriation is made, in accordance with the State's policies and procedures for payments by the State of appropriated settlements.

3. Class Counsel agree that they are responsible for allocating the attorneys' fees and costs approved or awarded by the Federal Court among themselves and any other counsel that may have any other agreement with them. Class Counsel warrant and represent that there are no liens on the amounts to be paid pursuant to the terms of this Federal Settlement Agreement and that no assignments of the claims to be released or the attorneys' fees and costs to be paid pursuant to this Federal Settlement Agreement have been made or attempted.

Named Plaintiffs may seek the Court's permission to be paid a service award of up to \$5,000 each, provided that if any such payment is approved, it shall only come from any attorneys' fees and costs approved by the Court and appropriated by the Legislature, and under no circumstances will Defendant or the State be responsible for paying any moneys whatsoever to Plaintiffs.

4. In the event the Federal Court approves the motion for attorneys' fees and costs in an amount less than the amount requested by Class Counsel, that shall not be a basis for rendering the entire Settlement or this Federal Settlement Agreement null, void, or unenforceable. If the Legislature refuses to appropriate Class Counsel's fees and costs as approved by the Federal Court, the Settlement shall be null and void.

## **VII. Court Approval of Settlement; Process for Objections by Class Members**

1. **Motion for Preliminary Approval.** Defendant shall file an updated motion for preliminary approval of the Settlement and this Federal Settlement Agreement by the Federal Court and attach a copy of this Federal Settlement Agreement and such other documents Defendant determines are necessary for the Federal Court's consideration. The motion shall request preliminary approval of the Settlement and approval of the Class Notice and notice procedure, and shall request that the Federal Court specify the procedure required for the Federal Court's final consideration of the Settlement, including the scheduling of the Fairness Hearing. Although Defendant is responsible for filing the motion, it is intended that Plaintiffs will have reviewed the motion before it is filed and that the motion will be unopposed.

2. **Class Notice.** By such date as the Court shall direct, the Notice Administrator, in cooperation with Class Counsel and defense counsel, shall send the approved Class Notice to each Class Member by U.S. mail postage prepaid in accordance with the terms of the Preliminary Approval Order. DHS shall provide the Notice Administrator (if not DHS) and Class Counsel with Contact Information for each Class Member. DHS shall pay the Administrative Expenses incurred in copying and mailing the Class Notice to the Class Members. For purposes of generating the mailing list for the Class Notice, DHS will identify Hawaii licensed resource caregivers for the time period August 17, 2015 through a cut-off date that is approximately two to three weeks prior to the date on which Class Notice is mailed, or as otherwise determined by the Court.

3. **Content of Class Notice.** The Class Notice shall contain: the definition of the certified Class; a general description of the Federal Lawsuit and its claims, issues, and defenses; material terms of this proposed Federal Settlement Agreement; Class Counsel's request for attorney's fees and costs; Plaintiffs' request for a Service Award; options available to Class Members, including the manner, time limits, forum and form of an objection to this Settlement; the right of any Class Member to enter an appearance *pro se* or through an attorney to object to the Federal Agreement or any of its terms; the website address for the website required to be maintained by Class Counsel; the date, time, and location of the Fairness Hearing; a statement that Class Members cannot opt out of the Class; and the binding effect of the Federal Agreement on Class Members. The notice shall also inform Class Members that they may also be members of the settlement class certified in the State Lawsuit and state that members of the settlement class in the State lawsuit may opt out of that class.

4. **Establishment of Website.** Class Counsel shall, at their own expense, publish information regarding the Settlement on a website, including information on how to object to the Settlement of the Federal Lawsuit and the deadline to do so. The website shall also include a copy of this Federal Agreement, the motion for attorneys' fees and costs, the motion for service award; key pleadings, and information regarding the State Lawsuit and State Agreement. The web address for the website shall be included in the Class Notice. The website shall remain available starting 7 days after Preliminary Approval through at least December 2019.

5. **Objections.** A Class Member who wishes to object to this Federal Settlement Agreement, the Settlement, Class Counsel's motion for attorneys' fees and costs, or the motion for service award must timely submit to Judge Kobayashi



a statement of their objection, and whether the Class Member intends to appear at the Fairness Hearing.

Any Class Member may appear at the Fairness Hearing to object to any aspect of this Federal Agreement, the Settlement, Class Counsel's motion for attorneys' fees and costs, or the motion for service award.

Class Members may act either on their own or through counsel employed at their own expense.

To be considered timely, a Class Member's objection must be postmarked or received on or before the date determined by the Court.

Class Members who fail to submit timely written objections or who do not appear at the Fairness Hearing and make objections shall be deemed to have waived any objections and shall be foreclosed from making any objections (whether by appeal or otherwise) to the Settlement.

6. **No Right to Opt Out.** Class Members do not have the right to request exclusion from (opt out of) the Settlement. All Class Members are bound by the Settlement and by this Federal Settlement Agreement if approved by the Federal Court and if the other conditions of this Federal Settlement Agreement are met.

7. **Fairness Hearing.** On a date to be determined by the Federal Court, the Federal Court shall hold a Fairness Hearing. At the Fairness Hearing, the Parties will request that the Court:

- a. Consider any objections by Class Members;
- b. Give Final Approval to the Settlement as fair, reasonable, adequate, and binding on all Class Members;
- c. Determine whether to award reasonable attorneys' fees and costs for Class Counsel and/or service awards for Plaintiffs, and if so, the amount thereof.

Defendant shall file a Motion for Final Approval of Settlement no later than the date established by the Federal Court.

8. **Effect of Failure to Grant Final Approval.** In the event the Settlement and this Federal Settlement Agreement are not granted Final Approval, they shall be deemed null, void, and unenforceable and shall not be used or admissible in any subsequent proceedings against the Parties either in Federal Court or in any other

judicial, arbitral, administrative, investigative, or other forum. In the event the Settlement and this Federal Agreement are not approved by the Federal Court, or otherwise fail to become effective and enforceable, the Parties will not be deemed to have waived, limited, or affected in any way their claims, objections, or defenses in the Federal Lawsuit.

### **VIII. Additional Provisions**

1. The rule of construction that an agreement is to be construed against the drafting party is not to be applied in interpreting this Federal Settlement Agreement. The Class Representative, Plaintiffs, and Defendant acknowledge that they have each read this Federal Settlement Agreement, that they understand its meaning and intent, that they have executed it voluntarily and with opportunity to consult with legal counsel, and have participated and had an equal opportunity to participate in the drafting and approval of drafting of this Federal Settlement Agreement. No ambiguity shall be construed against any party based upon a claim that the party drafted the ambiguous language. This Federal Settlement Agreement contains all essential terms of the settlement the Parties have reached. While other documents may be prepared hereafter to further effectuate the provisions hereof, the Parties intend that this Federal Settlement Agreement is a valid, binding agreement, enforceable by the Court.

2. **Cooperation Between the Parties.** The Parties shall cooperate fully with each other and shall use their best efforts to obtain the Federal Court's approval of this Federal Settlement Agreement and all of its terms.

3. **No Third-Party Beneficiaries.** This Agreement shall not be construed to create rights in, or to grant remedies to, or delegate any duty, obligation or undertaking established herein to any third party as a beneficiary of this Agreement.

4. The respective signatories to this Federal Settlement Agreement each represent that they are fully authorized to enter into this Federal Settlement Agreement and bind the respective Parties to its terms and conditions. This Agreement may be executed in counterparts.

### **SIGNATURES**

Wherefore, intending to be legally bound in accordance with the terms of this Agreement, the Parties hereby execute this Agreement, effective on Friday, March 16, 2018, which is the date on which the last signatory signed this Federal Settlement Agreement.

**FOR PLAINTIFFS:**



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Alston Hunt Floyd & Ing,  
Class Counsel

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Hawai'i Appleseed Center  
for Law and Economic Justice,  
Class Counsel

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Morrison & Foerster LLP,  
Class Counsel

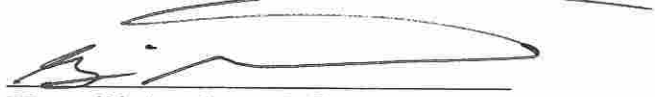
**FOR DEFENDANT:**

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Donna H. Kalama  
Caron M. Inagaki  
Deputy Attorneys General

**FOR PLAINTIFFS:**

\_\_\_\_\_  
Alston Hunt Floyd & Ing,  
Class Counsel



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Hawai'i Appleseed Center  
for Law and Economic Justice,  
Class Counsel

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Morrison & Foerster LLP,  
Class Counsel

**FOR DEFENDANT:**

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Donna H. Kalama  
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**FOR PLAINTIFFS:**

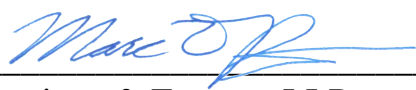
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Alston Hunt Floyd & Ing,  
Class Counsel

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Hawai'i Appleseed Center  
for Law and Economic Justice,  
Class Counsel

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Morrison & Foerster LLP,  
Class Counsel

**FOR DEFENDANT:**

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Alston Hunt Floyd & Ing,  
Class Counsel

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Hawai`i Appleseed Center  
for Law and Economic Justice,  
Class Counsel

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Morrison & Foerster LLP,  
Class Counsel

**FOR DEFENDANT:**



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Donna H. Kalama  
Caron M. Inagaki  
Deputy Attorneys General

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII  
*The federal court authorized this notice. This is not a solicitation from a lawyer.*

## **NOTICE OF AMENDED SETTLEMENT OF THE FEDERAL FOSTER CARE PAYMENTS LAWSUIT**

In 2017, a notice was sent to Hawaii-licensed foster care providers about a settlement in a federal class action lawsuit over Hawaii's foster care payments. The 2017 settlement would have increased the monthly basic board rates and annual clothing allowance starting July 1, 2017; required DHS to ask for money to raise the board rates when certain costs of living increased by 5% or more; and provided other benefits to foster families. The 2017 settlement failed because the Hawaii Legislature did not provide the money needed to fund the settlement.

In March 2018, the Parties agreed to amend the settlement. The 2018 settlement is similar to the 2017 settlement in that:

- It increases the amounts to be paid to resource caregivers for the monthly basic board rates and for the annual clothing allowance starting July 1, 2018.
- It requires that, over the next ten years, DHS periodically monitor increases in Hawaii's cost of living, and ask the Hawaii Legislature for funds to increase the basic board rates when those costs increase 5% or more.
- DHS will increase Difficulty of Care payments in appropriate circumstances by waiving the current cap of 120 hours per month.

There are two main changes in the 2018 settlement. First, the 2018 settlement increases the board rate and clothing allowance beginning in July 2018 instead of July 2017. Second, Class Counsel (the attorneys for the foster parents) agreed to reduce their attorneys' fees to \$850,000.00.

The settlement does not require the Legislature to provide money for the settlement. If the Legislature chooses not to fund the settlement again, the lawsuit will continue.

**You may object to the 2018 settlement if you disagree with any of the terms, which are described below and available at a website created by Class Counsel: <http://www.hawaiiclassaction.com/fostercare>. Deadlines to object and other important information are described in this Notice.**

### Differences Between this Lawsuit (the Federal Lawsuit) and the State Lawsuit

This lawsuit (in federal court) focuses on how DHS should calculate and increase the foster board rates *going forward* and how much DHS should pay foster parents *in the future*. There is a separate lawsuit in Hawaii state court that focuses on the adequacy of payments made to foster and adoptive families and children in the past. The state lawsuit has also settled. *If you are also part of the state lawsuit, you will receive another notice describing that settlement. **Your legal rights and options in the federal lawsuit and the state lawsuit are different.** If you receive both notices (federal and state), please carefully note the differences.*

Summary of Your Legal Rights and Options in the Amended Federal Settlement	
<b>DO NOTHING</b>	If the 2018 settlement is approved by the Court and money is provided by the Legislature, the increased payments will take effect July 1, 2018.
<b>OBJECT TO THE SETTLEMENT</b>	Tell the Court about your concerns and objections to the settlement by sending a <b>letter postmarked by MM/DD/YYYY</b> .
<b>GO TO THE COURT HEARING</b>	Tell the Court that you want to speak at the Court hearing on MM/DD/YYYY about the fairness of the proposed settlement by sending a letter postmarked by MM/DD/YYYY.

**Your legal rights are affected whether or not you act. Read this notice carefully.**

**QUESTIONS? CALL (808) 524-1800 OR VISIT <http://www.hawaiiclassaction.com/fostercare>**

## BACKGROUND INFORMATION

### What is this federal lawsuit about?

Foster parents filed this lawsuit claiming that DHS violates federal law because:

- The foster care maintenance payments paid by DHS to resource caregivers are too low;
- DHS does not conduct adequate periodic reviews of its foster care maintenance payments; and
- DHS does not provide enough information to resource caregivers about the kinds of additional payments and benefits that are available to support foster children.

Plaintiffs calculated that if DHS had increased its foster payments to keep up with changes in Hawaii's cost of living, the payments would be over \$1,000 per month. Plaintiffs asked the Court to require DHS: (1) to increase the payments going forward; and (2) to change the way DHS calculates its payments going forward.

DHS contends that the way Plaintiffs are calculating the amount of the payments is flawed. DHS believes it is complying with the law and has no legal obligation to increase the payments, change the way it periodically reviews the payments, or change the way it provides information to resource caregivers about payments and benefits for foster children.

The name of this lawsuit is *Ah Chong v. Bhanot*, Civ. No. 13-00663 LEK-KSC. Judge Leslie E. Kobayashi, of the United States District Court for the District of Hawaii (the Court), is overseeing this case.

You received this notice because DHS' records show that you were licensed as a resource caregiver between the time period relevant for this case, August 17, 2015, to \_\_\_\_\_, 2018, even if you don't have any foster children in your care now.

### What does the Settlement provide?

The settlement will do two main things:

- (1) Beginning July 1, 2018, the monthly basic board rate and clothing allowance paid to resource caregivers for the care of foster children will increase.

Monthly board payments are paid **after** the month of care provided. Therefore, the new increased board rate payments below will begin with the payments that are made at the beginning of August 2018 for care provided in July 2018.

Ages	Current Monthly Board Rate	New Monthly Board Rate
0-5	\$576	<b>\$649</b>
6-11	\$650	<b>\$742</b>
12+	\$676	<b>\$776</b>

The annual clothing allowance will increase from a single rate of \$600 per year plus \$125 for special circumstances for foster children of all ages to an age-tiered system. The settlement does not change the ways that a clothing allowance can be obtained from DHS.

Ages	Current Clothing Allowance	New Clothing Allowance
0-5	\$600 (+ \$125 for special circumstances)	<b>\$810</b>
6-11		<b>\$822</b>
12+		<b>\$1026</b>

- (2) The proposed settlement also requires DHS to conduct periodic reviews of the basic board rates, and to ask the Legislature for additional money to increase the board rates if Hawaii's cost of living increases five percent or more. The settlement requires DHS to do this for ten years. And even though DHS must ask the Legislature to provide money to raise the board rates, the Legislature could refuse to fund any increases that DHS requests.

**QUESTIONS? CALL (808) 524-1800 OR VISIT <http://www.hawaiiclassaction.com/fostercare>**



In addition, DHS will work with the Class Representative and Class Counsel to provide more information to resource caregivers about the kinds of payments and benefits that are available to help support foster children.

Separate from this lawsuit, DHS has been looking into changing its difficulty of care (DOC) payments. Until it implements the changes, DHS has agreed to waive the current DOC payment cap of 120 hours per month in appropriate circumstances. Resource caregivers must request an increase in the number of hours over 120 per month, requests will be subject to current DHS procedures, and requests can be approved only if it is in the best interest of the foster child and other children in the resource family home.

**Will I be paid any money under the Federal Settlement for foster children currently in my care or for foster children I cared for in the past?**

No. This settlement sets future monthly basic board rates and clothing allowances beginning July 1, 2018. It does not increase payments right now for foster children currently in your care, and does not provide any payments for foster children who were in your care in the past. This settlement provides for what is called prospective, or future, relief only.

There is a possibility that you may be entitled to a payment for foster children you cared for in the past under a different lawsuit in state court. If you are part of the state lawsuit, you will receive a separate notice about that lawsuit and settlement. **The state lawsuit notice will tell you whether or not you will receive back payments.** Information about the state lawsuit is available at <http://www.hawaii.classaction.com/fostercare>.

**Are there any conditions to this Settlement?**

This settlement will not become final until the federal court approves this settlement, the state court approves the settlement of the state lawsuit, and the Hawaii Legislature approves the money that will be needed to pay for both settlements.

**BEING PART OF THE SETTLEMENT**

**Do I need to do anything to get the benefits of the Settlement?**

No. You do not have to do anything to be part of the Class or to get the benefits of the settlement of this federal lawsuit. If you have received this notice, you are part of the Class and automatically part of the settlement.

**What if I don't want to be in the Settlement?**

By law, you cannot exclude yourself from this settlement. But you can object to the settlement. If the Court approves this settlement, you will not be able to sue the State (including DHS) about the adequacy of the prior and current foster care maintenance payments, or the increased payments embodied in the Parties' settlement agreement, for the 10 years that this settlement remains in effect.

**THE LAWYERS REPRESENTING THE CLASS**

**Do I have lawyers in the case?**

Yes. The Court has appointed these lawyers to represent you and other Class Members as Class Counsel:

Paul Alston J. Blaine Rogers Claire Wong Black Alston Hunt Floyd & Ing 1001 Bishop Street, Ste. 1800 Honolulu, HI 96813	Victor Geminiani Gavin Thornton Hawaii Appleseed Center for Law and Economic Justice 119 Merchant St., Ste. 605 Honolulu, HI 96813	Marc D. Peters James R. Hancock Alessa Hwang Morrison & Foerster LLP 755 Page Mill Road Palo Alto, CA 93404
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You will not be charged personally for these lawyers. If you want to be represented by another lawyer to object to the proposed settlement, you may hire one to appear in Court for you at your own personal expense.

**QUESTIONS? CALL (808) 524-1800 OR VISIT <http://www.hawaii.classaction.com/fostercare>**

**How will the lawyers be paid? Do the plaintiffs get paid?**

Plaintiffs will apply to the Court for an award of attorneys' fees, costs, and expenses (the "Fee Application") of not more than \$850,000.00. Copies of the Fee Application will be made available online at <http://hawaiiiclassaction.com/fostercare>.

You may object to the request for attorneys' fees and costs. After considering the objections of Class Members, the Court will determine the amount of attorneys' fees and costs to be paid to Class Counsel.

Neither you nor any other member of the Class is or will be personally liable for the Attorneys' Fee Award.

Class Counsel will ask the Court to allow Service Awards for the plaintiffs who brought this lawsuit. These Service Awards are intended to recognize the Named Plaintiffs for the extensive services they performed for the class, the time they spent on this case, and the risks they assumed in connection with this litigation. The amount of the Service Awards, if any, will be deducted from any award of attorneys' fees and costs by the Court.

**OBJECTING TO THE SETTLEMENT**

**How can I object to the Settlement?**

You may send a letter to the Court objecting to the settlement if you don't like any part of it. This includes the amount of the basic board rate increase, the clothing allowance increase, the Fee Application, or the Service Award for the Class Representative and Named Plaintiffs. The Court will consider your views.

**Send objections to:** The Honorable Leslie E. Kobayashi  
United States District Court for the District of Hawai'i  
300 Ala Moana Boulevard, Room C-338  
Honolulu, HI 96850-0338

**Your objection must include the following information:**

**Title:** Objection to Class Settlement in *Ah Chong v. Bhanot*, Civil No. 13-00663 LEK-KSC

**Contact Information:** your name, address, and telephone number or email.

**Objections:** Tell the Court the reasons why you object to the settlement.

**Deadline:** Your objection must be **postmarked no later than** \_\_\_\_\_, 2018.

**THE FAIRNESS HEARING**

**When and where will the Court decide whether to approve the Settlement?**

The Court will hold a Fairness Hearing on \_\_\_\_\_, at \_\_\_\_\_, at the United States District Court for the District of Hawaii, 300 Ala Moana Boulevard, Honolulu, Hawaii, in Courtroom Aha Nonoi on the fourth floor. The hearing may be moved to a different date or time without additional notice, so it is a good idea to check Class Counsel's website (<http://www.hawaiiiclassaction.com/fostercare>) or the federal court's calendar (<http://www.hid.uscourts.gov/base.cfm?pid=0&mid=2>) before you attend in person. You must bring government issued photo ID in order to get into the Courthouse.

At this hearing, the Court will consider whether the settlement is fair, reasonable, and adequate. If there are objections, the Court will consider them. The Judge will listen to people who have asked to speak at the hearing. The Court may also decide how much to pay Class Counsel. After the hearing, the Court will decide whether to approve the settlement. We do not know how long these decisions will take.

**Do I have to come to the Fairness Hearing?**

No. Class Counsel will answer questions the Judge may have. But you are welcome to come at your own expense. If you send an objection, you don't have to come to Court to talk about it. As long as you mailed your written objection on time, the Court will consider it. You may also pay another lawyer to attend on your behalf, but it's not necessary.

**QUESTIONS? CALL (808) 524-1800 OR VISIT <http://www.hawaiiiclassaction.com/fostercare>**

**May I speak at the Fairness Hearing?**

You may ask the Court for permission to speak in person or through a lawyer at the Fairness Hearing by sending a letter to Judge Kobayashi (at the same address you can send objections) saying that it is your “Notice of Intention to Appear in *Ah Chong v. Bhanot*, Civil No. 13-00663 LEK-KSC.” Be sure to include your name, address, and telephone number, and if a lawyer will attend for you, also include your lawyer’s name, address, and telephone number. Your Notice of Intention to Appear must be **postmarked** no later than \_\_\_\_\_.

**GETTING MORE INFORMATION**

**How do I get more information?**

This notice summarizes the proposed settlement. You can call Class Counsel at (808) 524-1800; email Class Counsel at [fostercare@ahfi.com](mailto:fostercare@ahfi.com); or visit Class Counsel’s website for this litigation at <http://www.hawaiiclassaction.com/fostercare>, where you will find other information about the federal lawsuit and the proposed settlement.

**PLEASE DO NOT CALL THE COURT WITH YOUR QUESTIONS.**

March \_\_, 2018

**QUESTIONS? CALL (808) 524-1800 OR VISIT <http://www.hawaiiclassaction.com/fostercare>**

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

PATRICIA SHEEHEY, PATRICK  
SHEEHEY, RAYNETTE AH CHONG,  
individually and on behalf of the class of  
licensed foster care providers in the state  
of Hawai‘i,

Plaintiffs,

vs.

PANKAJ BHANOT, in his official  
capacity as the Director of the Hawai‘i  
Department of Human Services,

Defendant.

CIVIL NO. CV13-00663 LEK-KSC

ORDER PRELIMINARILY  
APPROVING AMENDED CLASS  
ACTION SETTLEMENT,  
APPROVING NOTICE PLAN, AND  
SCHEDULING DATE FOR  
FAIRNESS HEARING

**ORDER PRELIMINARILY APPROVING AMENDED  
CLASS ACTION SETTLEMENT, APPROVING NOTICE  
PLAN, AND SCHEDULING DATE FOR FAIRNESS HEARING**

Upon consideration of the unopposed Motion for Preliminary Approval of Amended Class Action Settlement filed by Defendant, Dkt \_\_\_\_ (the “Motion”), the hearing before this Court on \_\_\_\_\_, and the entire record herein, the Court grants preliminary approval of the Settlement embodied in the Amended Federal Lawsuit Class Action Settlement Agreement, Exhibit A to the Motion (hereinafter the “Federal Settlement Agreement”), upon the terms and conditions set forth in this Order. Capitalized terms and phrases in this Order shall have the same meaning as they have in the Federal Settlement Agreement.

The Court makes the following FINDINGS OF FACT:

1. Defendant Pankaj Bhanot, in his official capacity as the Director of the Hawaii Department of Human Services (“DHS”), filed the unopposed Motion on \_\_\_\_\_.

2. Plaintiff Ah Chong filed the complaint herein against Defendant on December 3, 2013, in the United States District Court for the District of Hawaii (the “Federal Lawsuit”). On April 30, 2014, Plaintiffs Ah Chong and Patrick Sheehey and Patricia Sheehey filed a First Amended Complaint. Dkt 47.

3. Plaintiffs bring this case pursuant to 42 U.S.C. § 1983, seeking declaratory judgment and injunctive relief on the grounds that DHS’ foster care maintenance payments and adoption assistance payments are inadequate, which they allege violates the Child Welfare Act, Title IV-E of the Social Security Act, §§ 670-679c. Dkt 47, First Amended Complaint at ¶¶ 1-3.

4. By order entered August 17, 2015, this Court certified the following class:

[A]ll currently licensed foster care providers in Hawai‘i who are entitled to receive foster care maintenance payments pursuant to the Child Welfare Act when they have foster children placed in their homes – (“the Class”)[.]

Dkt 156 at 33.

5. Plaintiff Ah Chong was appointed as representative of the Class. Dkt 156 at 34.

6. The attorneys from Hawaii Appleseed Center for Law and Economic Justice; Alston, Hunt, Floyd & Ing; and Morrison & Foerster LLP who are the current attorneys of record for Plaintiffs were appointed as Class Counsel. Dkt 156 at 34.

7. The Court denied a request to certify an adoption assistance subclass, and all claims not prosecuted by the Class were ordered to be prosecuted on behalf of the Named Plaintiffs only. Dkt 156 at 33-34.

8. The Named Plaintiffs, along with other individuals, also filed a putative class action lawsuit in the Circuit Court of the First Circuit, State of Hawaii, titled *Sheehey, et al. v. State of Hawaii*, Civ. No. 14-1-1709-08 VLC (the “State Lawsuit”). The State Lawsuit claims that the State did not pay enough for monthly foster care maintenance payments, permanency assistance, adoption assistance, and higher education payments. The plaintiffs in the State Lawsuit contend that they are entitled to damages equal to the shortfall between the amounts they claim DHS should have paid them, and the amounts DHS actually paid.

9. In this case, the Parties conducted an extensive and thorough investigation and evaluation of the relevant laws, facts and allegations to assess the merits of the potential claims to determine the strength of defenses and liability asserted by the Parties.

10. As part of their investigation, Class Counsel engaged in substantial discovery about the cost of caring for children in Hawaii, DHS' foster care maintenance payment rates, DHS' process for setting and increasing those rates, additional benefits and payments that are available for the benefit of children in foster care and how many resource caregivers actually request or receive these additional benefits and payments, and the number of people affected by DHS' foster care maintenance payment rates.

11. Class Counsel received over 10,000 pages of hard copy documents from DHS and electronic databases with hundreds of thousands of payments made by DHS to resource caregivers. Both the Class Representative and Plaintiff Patricia Sheehey were deposed. Named Plaintiffs responded to written discovery requests from DHS.

12. Class Counsel was advised by various consultants and experts, including individuals with expertise in Hawaii's cost of living, and with expertise in foster care maintenance payment costs, payment systems, and payment rates in other States. Numerous expert reports were generated in this case, and depositions of the Parties' experts were taken.

13. On August 26, 2016, the Parties placed the essential terms of a binding settlement of both the Federal Lawsuit and the State Lawsuit on the record before Magistrate Judge Kevin S.C. Chang. Dkt 327. The settlement was

subsequently memorialized in written settlement agreements filed with this Court on March 14, 2017 (referred to collectively herein as the “original settlement”). Dkt 340-3 and 340-4.

14. The original settlement was conditioned on funding of required settlement payments by the Hawaii Legislature by a deadline of June 30, 2017. The Parties reported to the Court that the Legislature did not appropriate the required funds by that date.

15. The Parties subsequently agreed to amend the terms of the settlement to extend the Legislative Enactment Deadline by one year, to reduce the amount of attorneys’ fees to be sought by Class Counsel, and to make other conforming changes to the dates and deadlines previously agreed upon.

16. On March 7, 2018, the Parties placed the essential terms of the amended settlement on the record before Magistrate Judge Kevin S.C. Chang. Dkt 384.

17. The Parties have now executed an Amended Federal Lawsuit Class Action Settlement Agreement (“Federal Settlement Agreement”), Exhibit A to the Motion, in which the Parties formally document the settlement, as amended, of this Federal Lawsuit, subject to the approval and determination by the Court as to the fairness, reasonableness, and adequacy of the Settlement, which, if approved, will result in dismissal of the Federal Lawsuit with prejudice. A copy of the Amended



State Lawsuit Class Action Settlement Agreement (“State Settlement Agreement”), Exhibit B to the Motion, was also provided to the Court.

18. Because the proposed Settlement is a global settlement of both this Federal Lawsuit and the State Lawsuit, the parties to the State Lawsuit are separately seeking the State Court’s consent to the settlement of the State Lawsuit.

19. Under the terms of the Settlement, unless both Lawsuits are finally settled and approved by the respective courts, neither Lawsuit will be settled.

20. Because the State of Hawaii, through its designated DHS official in this Federal Lawsuit and as party-Defendant in the State Lawsuit, must seek appropriations from the Hawaii Legislature to pay for certain of the payments provided for under the Federal Settlement Agreement and the State Settlement Agreement, this Lawsuit will not be settled if the described appropriations are not made.

The Court having reviewed the Federal Settlement Agreement, and being familiar with the prior proceedings herein, and having found good cause based on the record, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. Stay of the Action. All non-settlement-related proceedings in this Federal Lawsuit are hereby stayed and suspended until further order of the Court.

2. Class, Class Representative, Class Counsel. The Class previously certified by this Court shall continue to be the Class for purposes of the Settlement.

Raynette Ah Chong shall continue to serve as Class Representative. Previously appointed counsel shall continue to serve as Class Counsel.

3. Preliminary Settlement Approval. The Court preliminarily approves the Settlement set forth in the Federal Settlement Agreement (Exhibit A to the Motion) as being within the range of possible approval as fair, reasonable, and adequate within the meaning of Rule 23 and the Class Action Fairness Act of 2005, subject to final consideration at the Fairness Hearing provided for below.

Accordingly, the Federal Settlement Agreement is sufficient to warrant sending notice to the Class.

4. Jurisdiction. The Court has subject-matter jurisdiction over this action pursuant to 28 USC § 1331 and has personal jurisdiction over the Parties before it. Additionally, venue is proper in this District pursuant to 28 USC § 1391.

5. Fairness Hearing. A Fairness Hearing will be held on \_\_\_\_\_, at \_\_\_\_\_, at the United States District Court for the District of Hawaii, 300 Ala Moana Boulevard, Honolulu, Hawaii, in Courtroom Aha Nono on the fourth floor, to determine, among other things: (a) whether the settlement of the Federal Lawsuit should be finally approved as fair, reasonable, and adequate pursuant to Rule 23(e); (b) whether the Federal Lawsuit should be dismissed with prejudice pursuant to the terms of the Federal Settlement Agreement; (c) whether Class Members should be bound by the releases set forth

in the Federal Settlement Agreement; (d) whether Class Members and related persons should be permanently enjoined from pursuing lawsuits based on the transactions and occurrences at issue in the Federal Lawsuit; (e) whether the request of Class Counsel for attorneys' fees and costs should be approved pursuant to Rule 23(h); and (f) whether the application of the Named Plaintiffs for a Service Award should be approved.

6. Administration. The Parties are authorized to establish the means necessary to administer the proposed Settlement in accordance with the Federal Settlement Agreement.

7. Class Notice. The proposed Class Notice and the notice methodology described in the Federal Settlement Agreement are hereby approved.

a. DHS is appointed Notice Administrator, meaning only that it is responsible for generating the mailing list of Class Members, based on its records, who are to be sent the Class Notice, and for mailing the approved Class Notice to Class Members. DHS may utilize the services of a copy/mailing service to copy and mail the approved Class Notice, at its expense. The following persons shall be sent a copy of the Class Notice: DHS-licensed foster care providers in Hawaii who were licensed between August 17, 2015 (the date of entry of the order granting class certification) through \_\_\_\_\_ (the date on which the mailing list was generated by DHS).

b. Class Counsel shall continue to maintain the internet website relating to the Settlement, which shall inform Class Members of the terms of the Federal Settlement Agreement, their rights, dates and deadlines, and related information. The website shall include (but not be limited to), in Portable Document Format (“PDF”), materials agreed upon by the Parties and as further ordered by this Court. Class Counsel will also provide a telephone number that Class Members may call for information about the Settlement. Both the website and telephone number shall continue to be made available by Class Counsel through at least December 31, 2019.

c. Beginning not later than \_\_\_\_\_, 2018, and subject to the requirements of this Order and the Federal Settlement Agreement, DHS shall commence sending the Class Notice by U.S. mail to each Class Member described in paragraph 7.a., above, as identified through DHS’ records, at the Class Member’s last known address reflected in DHS’ records. DHS shall: (a) re-mail any Class Notices returned by the U.S. Postal Service with a forwarding address that are received by DHS within ten (10) days of receipt of the returned Class Notices that contain a forwarding address; and (b) by itself or using one or more address research firms, as soon as practicable following receipt of any returned Class Notices that do not include a forwarding address, research any such returned

mail for better addresses and promptly mail copies of the Class Notices to the addresses so found.

d. Not later than \_\_\_\_\_, 2018, counsel for DHS shall file with the Court details outlining the scope, methods, and results of the notice program, and compliance with the obligation to give notice to each appropriate State and Federal Official, as specified in 28 U.S.C. § 1715.

8. Findings Concerning Notice. The Court finds that the form, content, and method of giving notice to the Class as described in paragraph 7 of this Order: (a) will constitute the best practicable notice; (b) are reasonably calculated, under the circumstances, to apprise the Class Members of the pendency of the Federal Lawsuit, the terms of the proposed Settlement, including but not limited to the right to object to the proposed Settlement and other rights under the terms of the Federal Settlement Agreement; (c) are reasonable and constitute due, adequate, and sufficient notice to all Class Members and other persons entitled to receive notice; and (d) meet all applicable requirements of law, including but not limited to 28 U.S.C. § 1715, Rule 23(c) and (e), and the due process clause of the United States Constitution. The Court further finds that the Class Notice is written in simple terminology, is readily understandable by Class Members, and is materially consistent with the Federal Judicial Center's illustrative class action notices. Non-

material changes and corrections may be made to the Class Notice as the Parties deem appropriate or necessary.

9. No Exclusion from Class. Class Members cannot exclude themselves from the Settlement. The Class was certified under Rule 23(b)(2), and both the relief sought by Plaintiffs, and the payments and other terms under the Federal Settlement Agreement, are prospective in nature. Exclusion of individual Class Members is not consistent with the prospective, injunctive nature of the relief to be provided.

10. Objections and Appearances. Any Class Member or counsel hired at any Class Member's own expense who complies with the requirements of this paragraph may object to any aspect of the proposed Settlement. Class Members may object either on their own or through an attorney retained at their own expense. Any Class Member who fails to comply with the provisions of this paragraph 10 shall waive and forfeit any and all rights he or she may have to object, and shall be bound by all terms of the Federal Settlement Agreement, this Order, and by all proceedings and orders, including but not limited to the release in the Federal Settlement Agreement.

a. Any Class Member who wishes to object to the fairness, reasonableness, or adequacy of the Federal Settlement Agreement, the proposed Settlement, the request for attorneys' fees and cost, or the proposed Service

Awards to Plaintiffs, must submit the objection to the Court, with a postmarked date of no later than \_\_\_\_\_, 2018. The Court will provide copies of any such objection to counsel for the Parties.

b. The written objection must include: (i) the name and current address of the objector, and a caption or title that identifies it as “Objection to Class Settlement in *Ah Chong v. McManaman*, Civil No. 13-00663 LEK-KSC”; (ii) a written statement of objections, as well as the specific reasons for each objection. It shall be the responsibility of DHS to verify for the Court that an objector is a Class Member.

c. Any Class Member, including Class Members who file and serve a written objection as described above, may appear at the Fairness Hearing, either in person or through personal counsel hired at the Class Member’s expense, to object to or comment on the fairness, reasonableness, or adequacy of the Federal Settlement Agreement or proposed Settlement, or to the request for attorneys’ fees and costs or the proposed Service Awards to the Plaintiffs. Class Members who intend to make an appearance at the Fairness Hearing must submit a “Notice of Intention to Appear” to the Court, listing the name, address, and phone number of the attorney, if any, who will appear, with a postmarked date of no later than \_\_\_\_\_, 2017, or as the Court may otherwise direct.

d. Class Counsel and Defendant shall have the right to respond to any objections no later than \_\_\_\_\_, 2018, or as the Court may otherwise direct. The Party so responding shall file a copy of the response with the Court, and shall serve a copy, by regular mail, hand or overnight delivery, to the objecting Class Member or to the individually-hired attorney for the objecting Class Member; to all Class Counsel; and to counsel for Defendant.

11. Disclosures. Counsel for the Parties shall promptly furnish to each other copies of any and all objections that might come into their possession.

12. Termination of Settlement. This Order shall become null and void and shall not prejudice the rights of the Parties, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if: (a) the Settlement is not finally approved by the Court, or does not become final, pursuant to the terms of the Federal Settlement Agreement; or (b) the Settlement does not become effective as required by the terms of the Federal Settlement Agreement for any other reason. In such event, the Settlement and Federal Settlement Agreement shall become null and void and be of no further force and effect, and neither the Federal Settlement Agreement nor the Court's orders, including this Order, relating to the Settlement, shall be used or referred to for any purpose.



13. Stay and Preliminary Injunction. Other than the State Lawsuit, which is not affected by this paragraph, effective immediately, any actions or proceedings pending in any state or federal court in the United States involving the State of Hawaii's foster care maintenance payments or components thereof are stayed pending the final Fairness Hearing and the issuance of the order of final approval and an order dismissing the Federal Lawsuit with prejudice. Other than the State Lawsuit, the Parties are not aware of the existence of other pending actions or proceedings.

In addition, pending the final Fairness Hearing and the issuance of a final order and dismissal with prejudice, all members of the Class are hereby preliminarily enjoined from filing, commencing, prosecuting, maintaining, intervening in, participating in (as class members or otherwise), or receiving benefits from any other lawsuit, arbitration or administrative, regulatory, or other proceeding or order in any jurisdiction arising out of or relating to the State of Hawaii's foster care maintenance payments or any component thereof or the claims at issue in this Federal Lawsuit, except that nothing in this paragraph shall affect the State Lawsuit.

Under the All Writs Act, the Court finds that issuance of this nationwide stay and injunction is necessary and appropriate in aid of the Court's jurisdiction

over this action. The Court finds that no bond is necessary for issuance of this injunction.

14. Effect of Settlement Agreement and Dismissal with Prejudice. Class Counsel, on behalf of the Class, and Defendant entered into the Federal Settlement Agreement solely for the purpose of compromising and settling the disputed claims. This Order shall be of no force and effect if the Settlement does not become final and shall not be construed or used as an admission, concession, or declaration by or against Defendant of any fault, wrongdoing, breach, or liability. The Federal Settlement Agreement, and this Order, are not, and should not in any event be (a) construed, deemed, offered or received as evidence of a presumption, concession or admission on the part of Plaintiffs, Defendant, or any member of the Class or any other person; or (b) offered or received as evidence of a presumption, concession, or admission by any person of any liability, fault, or wrongdoing, or that the claims in the Federal Lawsuit lack merit or that the relief requested is inappropriate, improper, or unavailable for any purpose in any judicial or administrative proceeding, whether in law or in equity.

15. Retaining Jurisdiction. This Court shall maintain continuing jurisdiction over these settlement proceedings to assure the effectuation thereof for the benefit of the Class.

16. Continuance of Hearing. The Court reserves the right to adjourn or continue the Fairness Hearing without further written notice.

17. The Court sets the following schedule for the Fairness Hearing and the actions which must precede it:

a. Plaintiffs or Defendant shall file a Motion for Final Approval of the Settlement by no later than \_\_\_\_\_, 2018.

b. Plaintiffs shall file their motion for attorneys' fees and costs, and/or the Motion for Service Awards by no later than \_\_\_\_\_, 2018.

c. Class Members must submit to the Court any objections to the Settlement and the motion for attorneys' fees and costs and/or the Motion for Service Awards postmarked no later than \_\_\_\_\_, 2018.

d. Class Members who intend to appear at the final Fairness Hearing must submit to the Court a Notice of Intention to Appear at the Final Fairness Hearing postmarked no later than \_\_\_\_\_, 2018.

e. Counsel for Defendant shall file: (i) the details outlining the scope, methods, and results of the notice program; and (ii) compliance with the obligation to give notice to each appropriate State and Federal official, as specified in 28 U.S.C. § 1715, and any other applicable statute, law, or rule, including, but not limited to the due process clause of the United States Constitution, by no later than \_\_\_\_\_, 2018.

f. Class Counsel and counsel for Defendant shall have the right to respond to any objection by no later than \_\_\_\_\_, 2018.

g. The Fairness Hearing will take place on \_\_\_\_\_, at \_\_\_\_\_, at the United States District Court for the District of Hawaii, in Courtroom Aha Nonoi.

SO ORDERED.

DATED: Honolulu, Hawai‘i, \_\_\_\_\_, 2018.

/s/  
\_\_\_\_\_  
LESLIE E. KOBAYASHI  
United States District Judge

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In the United States District Court for the District of Hawaii, *Sheehey, et al. v. Bhanot*, Civ. No. CV13-00663 LEK-KSC; Order Preliminarily Approving Amended Class Action Settlement, Approving Notice Plan, and Scheduling Date for Fairness Hearing.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PATRICK SHEEHEY; PATRICIA SHEEHEY; RAYNETTE NALANI AH CHONG; SHERRY CAMPAGNA; MICHAEL HOLM; and TIARE HOLM, *individually, and on behalf of a class of Hawai'i-licensed resource families; B.S.; and T.B., a Minor, by her Next Friend N.A., individually and on behalf of a class of persons similarly situated;*

Plaintiffs,

vs.

STATE OF HAWAII,

Defendant.

CIVIL NO. 14-1-1709-08 VLC  
(Civil Action; Contract; Class Action)

**AMENDED STATE LAWSUIT CLASS ACTION SETTLEMENT AGREEMENT**

HEARING ON PRELIMINARY  
APPROVAL OF SETTLEMENT

JUDGE: Hon. Virginia L. Crandall  
DATE: April 5, 2018

**AMENDED STATE LAWSUIT CLASS ACTION SETTLEMENT AGREEMENT**

This Amended State Lawsuit Class Action Settlement Agreement ("**State Settlement Agreement**") is entered into by and between Patrick Sheehey, Patricia Sheehey, Raynette Nalani Ah Chong, Sherry Campagna, Michael Holm, Tiare Holm, B.S., and T.B., a minor by her next friend, N.A. (collectively, the "**Named Plaintiffs**"), on behalf of themselves and members of the Classes defined in this Agreement (collectively, "**Plaintiffs**"), on the one hand, and the State of Hawaii, including its departments, agencies, officials, and employees (collectively the "**State**"), on the other hand. Named Plaintiffs and the State are collectively referred to as the "**Parties.**"

Subject to Court approval as required by Rule 23 of the Hawai'i Rules of Civil Procedure ("**HRCP**"), the Parties hereby stipulate and agree that, in consideration of the mutual promises, covenants, and consideration set forth in this State Settlement Agreement, the above-captioned action ("**State Lawsuit**") shall be settled and compromised in accordance with the terms herein.

The Parties acknowledge and agree that although this State Settlement Agreement sets forth the terms and conditions by which the State Lawsuit will be settled, this State Settlement Agreement is part of a larger settlement that includes the Federal Lawsuit (defined below), and that unless

both Lawsuits settle on the terms set forth in their respective settlement agreements, neither Lawsuit will be settled.

The Parties further acknowledge and agree that the settlement of the State Lawsuit and the Federal Lawsuit is contingent on the enactment of legislation by the Hawaii Legislature to authorize the appropriation of funds to make the payments described herein and in the Federal Settlement Agreement. If such legislation is not enacted on or before the Legislation Enactment Deadline as defined in this State Settlement Agreement and the Federal Settlement Agreement, unless such date is mutually agreed to be extended by the parties to both Agreements, this State Settlement Agreement shall automatically become null and void, trial in the Federal Lawsuit shall resume, and the State Lawsuit shall also proceed.

### RECITALS

WHEREAS, on August 7, 2014, a Complaint for Damages against the State of Hawaii was filed in an action entitled *Sheehey, et al. v. State of Hawaii*, Civ. No. 14-1-1709-08 VLC (the “State Lawsuit”), a First Amended Complaint for Damages was filed on February 6, 2015, and a Second Amended Complaint for Damages was filed on June 8, 2015; and

WHEREAS, the Second Amended Complaint in the State Lawsuit is pled as a class action lawsuit and asserts claims on behalf of three general categories of people:

a. individuals who have taken in abused or neglected children by serving as resource caregivers (foster parents) for such children, by adopting such children (these children are referred to under the law as “children with special needs”), or by becoming the permanent custodians/legal guardians for such children, and who were entitled to receive foster care maintenance payments, adoption assistance, or permanency assistance under state or federal law (collectively, referred to herein as the “**Parent Group**”)<sup>1</sup>;

b. former foster youth who receive higher education board allowance payments from the Hawaii Department of Human Services (“**DHS**”) (collectively, the former foster youth are referred to herein as the “**Higher Education Group**”); and

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<sup>1</sup> Because of the application of the statute of limitations to any claims by the Parent Group, the Parties acknowledge that the Court presiding over the State Lawsuit, if presented with the issue, would likely have limited the people in the Parent Group to those adults who have provided care to foster children, adoptive children with special needs, or children in permanent custody/legal guardianships on or after August 7, 2012.

c. foster children, adoptive children with special needs, and children in permanent custody/legal guardianships who were under the age of 20 on August 7, 2014 (collectively referred to herein as the “**Beneficiary Group**”); and

WHEREAS, the Second Amended Complaint alleges that the foster care maintenance payments paid by the State (through DHS) to members of the Parent Group who are resource caregivers were and are inadequate under state and federal law, and are flawed because they fail to take into account Hawaii’s cost of living; and further alleges that if the monthly payment rate set in 1990 (and not changed until 2014) had been adjusted to keep up with inflation, the required foster care maintenance payment at the time of the filing of the Complaint would exceed \$950 per month; and

WHEREAS, because by DHS policy the amount of the foster care basic board rate is also the amount paid by the State to adoptive parents of children with special needs, legal guardians/permanent custodians and former foster youth receiving higher education benefits, the Second Amended Complaint also alleges that the payments made to the remaining members of the Parent Group and payments made to the Higher Education Group are also inadequate<sup>2</sup>; and

WHEREAS, the Second Amended Complaint asserts seven claims for relief, based on the following allegations

a. failure to pay amounts required to be paid under written agreements entered into by the State and individual members of the Parent Group (which agreements require the State to make certain payments to these individuals), resulting in damages suffered by individual members of the Parent Group equal to the shortfall between the amounts required to be paid and the amounts actually paid;

b. failure to pay amounts required to be paid under written agreements entered into by the State and individual members of the Parent Group, resulting in damages to the Beneficiary Group (who are the intended beneficiaries of the written agreements described in the first claim for relief);

c. violation by the State of Chapter 17-1617 of the Hawaii Administrative Rules by failing to pay foster care maintenance payments sufficient to comply with its obligations under the Adoption Assistance and Child Welfare Act of 1980, as amended, codified as Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679c (the “**Child Welfare Act**”), resulting in damages to resource caregivers and foster children;

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<sup>2</sup> Members of the Beneficiary Group do not directly receive maintenance payments from the State.

d. violation by the State of Chapter 17-1620 of the Hawaii Administrative Rules by failing to pay adequate monthly adoption assistance payments as a result of DHS' policy of limiting its adoption assistance payments to the amount of its foster care maintenance payment rates;

e. violation by the State of Chapter 17-1621 of the Hawaii Administrative Rules by failing to pay adequate permanency assistance payments as a result of DHS' policy of limiting permanency assistance payments to the amount of its foster care maintenance payment rates;

f. violation by the State of Haw. Rev. Stat. § 346-17.4 by failing to pay adequate higher education board payments as a result of DHS' policy and practice of limiting higher education board payments authorized by Section 346-17.4 to the amount of its foster care maintenance payment rates, resulting in damages to eligible members of the Higher Education Group equal to the shortfall in payments; and

g. failure by the State to assure the continuing appropriateness of its foster care maintenance payment rates by conducting periodic reviews but knowingly failing to establish adequate payment rates, resulting in the denial of Plaintiffs' rights under federal and state law; and

WHEREAS, the Second Amended Complaint seeks damages from the State for the alleged contract breaches and statutory and rules-based violations described therein; and

WHEREAS, Raynette Ah Chong, on behalf of a separate putative class of Hawaii-licensed foster care providers, filed a class action complaint for declaratory and permanent injunctive relief against Patricia McManaman,<sup>3</sup> in her official capacity as the Director of the Hawaii Department of Human Services, in an action entitled *Ah Chong v. McManaman*, Civ. No. 13-00663 LEK-KSC, in the United States District Court for the District of Hawai'i (the "Federal Lawsuit"), on December 3, 2013, as amended on April 30, 2014; and

WHEREAS, some of the issues in this State Lawsuit overlap with the issues in the Federal Lawsuit (primarily, whether DHS provides foster care maintenance payments adequate to cover the cost of and the cost of providing basic necessities to children in Hawaii's foster care system and whether DHS' periodic review of the foster care maintenance payments results in the establishment of appropriate payment rates); and

WHEREAS, from approximately 1990 until June 2014, Hawaii's basic foster board rate was \$529 per child, per month for all foster children; and

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<sup>3</sup> Pankaj Bhanhot has been substituted as defendant in the Federal Lawsuit pursuant to Federal Rules of Civil Procedure ("FRCP") Rule 25(d).



WHEREAS, effective July 1, 2014, DHS increased the basic foster care board rate ("Basic Board Rate"), based on the age of the foster child, to: \$576 (children ages 0-5); \$650 (children ages 6-11); and \$676 (children ages 12+); and

WHEREAS, in addition to the Basic Board Rate, there are additional payments and benefits available for the care of foster children ("Foster Care Related Payments and Benefits"), depending on the needs of the child; and

WHEREAS, DHS' position is that its existing system of a Basic Board Rate plus Foster Care Related Payments and Benefits complies with the Child Welfare Act, and DHS also takes the position that having certain payments or benefits available only if the child needs them, and requiring resource caregivers (foster parents) to apply for certain payments and benefits complies with the Child Welfare Act; and

WHEREAS, Plaintiffs' position is that the DHS' Basic Board Rates are still inadequate because they were set in 2014 using a 2011 government (USDA) study on the cost of raising children across the United States (and used cost estimates for families living in the Urban West region rather than Hawai'i), and because the Basic Board Rates utilized less than 100% of the estimated costs of food; housing; and miscellaneous expenses rather than all eight items listed in the Child Welfare Act; and

WHEREAS, Plaintiffs position is that DHS' system of providing Foster Care Related Payments and Benefits is inadequate because the payments and benefits (1) are not provided to all foster children, (2) are subject to eligibility requirements, (3) are subject to availability of funds, and (4) many foster families simply are not aware that these additional payments and benefits exist or that DHS is required to cover certain costs that DHS claims are covered through the Foster Care Related Payments and Benefits; and

WHEREAS, the Parties do not agree on (1) the extent of DHS' obligations under the Child Welfare Act; (2) the sufficiency of the Basic Board Rate; (3) the value or adequacy of the Foster Care Related Payments and Benefits; (4) whether DHS provides adequate information to resource caregivers regarding the availability of the Foster Care Related Payments and Benefits; (5) whether DHS provides adequate opportunity for resource caregivers to apply for the Foster Care Related Payments and Benefits; and (6) whether DHS conducts periodic reviews that assure the continuing appropriateness of its foster care maintenance payment rates; and

WHEREAS, because of the overlapping issues in the State Lawsuit and the Federal Lawsuit, the State Lawsuit was placed on hold while the parties in the Federal Lawsuit extensively litigated the issue of the adequacy of DHS' foster care maintenance payments (among other things, engaging in substantial

discovery, including production of thousands of pages of documents, depositions, and expert discovery); and

WHEREAS, in December 2015, the Federal Court ruled that federal law did not prohibit DHS' system of providing foster care maintenance payments through a Basic Board Rate plus additional Foster Care Related Payments and Benefits, and that the foster care maintenance payment system could possibly be sufficient if DHS provides resource caregivers with sufficient information about the Foster Care Related Payments and Benefits and sufficient opportunities to apply for them; and

WHEREAS, the Federal Court also ruled that the "shelter" expense in the Child Welfare Act's definition of "foster care maintenance payments" need not include mortgage payments, rent, property taxes, or other similar expenses;<sup>4</sup> and

WHEREAS, the Federal Court did not rule on certain key issues, and saved them for trial in the Federal Lawsuit, including:

- (1) whether DHS adequately conducts periodic reviews of the foster care maintenance payments to assure their continuing appropriateness, as required by law;
- (2) whether DHS provided and provides adequate information to resource caregivers about the Foster Care Related Payments and Benefits;
- (3) whether DHS provided adequate opportunities to resources caregivers to apply for the Foster Care Related Payments and Benefits;

and, if the Court answered (2) and (3) in the affirmative, then

- (4) whether DHS' foster care maintenance payment system of Basic Board Rate-plus-Foster Care Related Payments and Benefits adequately covered the cost of (and the cost of providing) the basic necessities of children in Hawaii's foster care system, as required by the Child Welfare Act; and

WHEREAS, Plaintiffs in the Federal Lawsuit strenuously disagreed with the Federal Court's rulings and strongly believe that these rulings would be reversed on appeal; and

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<sup>4</sup> It is Defendant's position that the Federal Court's ruling on "shelter expense" significantly lessened Plaintiffs' chances of prevailing on their assertion that DHS does not pay enough for the items enumerated in the Child Welfare Act because, while the ruling confirmed that DHS need not pay for rent, mortgage, or similar expenses, DHS' calculation of the Basic Board Rates in fact took such costs into account because a large portion of the "housing" category of the USDA report includes such costs.

WHEREAS, the State's position is that if Plaintiffs in the Federal Lawsuit could not show that the foster care maintenance payments were inadequate, then the Parent Group and Higher Education Group in the State Lawsuit also could not show that their respective payments were inadequate; and

WHEREAS, the State's position is that discovery in the Federal Lawsuit indicated that even if resource caregivers could prove that the foster care maintenance payments were inadequate, the Beneficiary Group were unlikely to be able to prove damages separate from the resource caregivers (because resource caregivers likely supplemented the shortfall in the State's alleged inadequate foster care maintenance payments from their own income in order to lessen the damages suffered by their foster, adoptive, and permanency placements due to the alleged inadequate payments); and

WHEREAS, the State believes it has meritorious defenses, including sovereign immunity, failure of the Plaintiffs to state a claim upon which relief can be granted, statute of limitations, and lack of standing; and

WHEREAS, the ultimate outcome of the Federal Lawsuit was uncertain and the Parties disagree on the impact and effect of the Federal Court's rulings on the State Lawsuit; and

WHEREAS, shortly before trial in the Federal Lawsuit was scheduled to commence on August 23, 2016, the Parties engaged in settlement discussions through their respective counsel, with the assistance of the Honorable Kevin S.C. Chang, Magistrate Judge of the United States District Court for the District of Hawai'i; and

WHEREAS, the State insists that both the Federal Lawsuit and State Lawsuit must be resolved together; and

WHEREAS, the State denied and continues to deny any and all liability and damages to Plaintiffs with respect to the claims or causes of action asserted in the State Lawsuit and the Federal Lawsuit, but nonetheless acknowledges that bringing the cases to a close now through settlement—rather than after years of litigation and appeals, with uncertain outcomes and concomitant attorneys' fees and costs that would be incurred by both sides—would help move the Parties toward a better working relationship for the benefit of all children in Hawaii's foster care system, and the relief Defendant agrees to provide under this State Settlement Agreement is offered solely as a compromise, and not because Defendant believes DHS has any obligation to Plaintiffs to provide said relief; and

WHEREAS, in light of the Federal Court's rulings and their uncertain impact on the State Lawsuit, the opinions of the parties' experts, and the attorneys' fees and costs that all Parties would continue to expend, and in the interest of bringing these matters to a resolution, the Parties and counsel agree that a

limited, one-time payment to be made only to certain Settlement Class Members (the Payment Recipients), is an appropriate means of settling this case; and

WHEREAS, Plaintiffs and their counsel have analyzed, evaluated, and extensively litigated the merits of the claims made against Defendants in the State Lawsuit and the Federal Lawsuit and the impact of settlement (as well as the impact of not settling) on Plaintiffs, the members of the Federal Class, and members of the putative State Class and—recognizing the substantial risks of continued litigation, including the possibility that the State Lawsuit, if not settled now, might result in an outcome that is less favorable or that a fair and final judgment may not occur for several years—Plaintiffs and their counsel are satisfied that the terms and conditions of this Agreement are fair, reasonable, and adequate, and that this Agreement is in the best interests of all the members of the putative class; and

WHEREAS, the Parties reached a proposed comprehensive settlement of the State and Federal Lawsuits and, on August 26, 2016, the Parties in the State Lawsuit and the parties in the Federal Lawsuit agreed to the essential terms of a valid and binding settlement agreement, which was placed on the record before the Honorable Kevin S.C. Chang at a hearing held in the Federal Lawsuit; and

WHEREAS, the settlement placed on the record on August 26, 2016, was subsequently memorialized in written settlement agreements dated effective March 14, 2017; and

WHEREAS, the written settlement agreements stated that the settlement was contingent upon the appropriation of funds to make the payments described therein, and if such legislation was not enacted on or before June 30, 2017, unless such date was mutually agreed to be extended by the parties, the agreements shall automatically become null and void; and

WHEREAS, the Hawaii Legislature did not appropriate the funds for the settlement on or before the June 30, 2017 deadline; and

WHEREAS, the Parties desire to extend the deadline by which the Hawaii Legislature may fund the Settlement, as amended by this State Settlement Agreement and the Amended Federal Lawsuit Class Action Settlement Agreement;

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

## **TERMS OF AGREEMENT**

### **I. Definitions**

A. In addition to the definitions contained in the foregoing Recitals, the following definitions shall apply:

1. **“Administration Costs”** shall mean only the reasonable cost to typeset, print, and mail the Class Notice to the Settlement Classes; the reasonable cost to process requests to opt-out of the Settlement Classes; and the reasonable cost to prepare and mail Settlement Payments to the Payment Recipients.

2. **“Amount Payable to Each Payment Recipient”** shall mean the amount prescribed in section IV.b. below.

3. **“Class Counsel”** shall mean:

Alston Hunt Floyd & Ing, 1001 Bishop Street, Suite 1800,  
Honolulu, Hawaii 96813; and

Hawaii Appleseed Center for Law and Economic Justice, 119  
Merchant Street, Suite 605, Honolulu, Hawaii 96813.

Plaintiffs’ counsel shall request that the Court appoint them as class counsel (or order that they continue to serve as class counsel) pursuant to HRCP Rule 23 to represent the Settlement Classes for purposes of this State Settlement.

4. **“Class Notice”** shall mean a document substantially in the form of the Notice attached hereto as Exhibit 1 which has been agreed to by the Parties subject to Court approval and which the Notice Administrator will mail to each Settlement Class Member explaining the terms of the Settlement, and the opt-out and objection processes.

5. **“Class Settlement Amount”** shall mean an amount no greater than \$2,341,103.10. The Class Settlement Amount is based on \$35 per month per foster child, child in permanent custody/legal guardianship, adoptive child with special needs, and former foster youth in the higher education program, for whom DHS made monthly payments for the time period July 1, 2013 to June 30, 2014 (which is the State’s 2014 fiscal year), pro rated for actual days in care. The Class Settlement Amount is the maximum amount the State is required to pay under this State Settlement Agreement.

6. **“Contact Information”** shall mean the most current information DHS then has available of a Settlement Class Member’s name and mailing address.

7. **“Court”** shall mean the Circuit Court of the First Circuit, State of Hawaii, the Honorable Virginia L. Crandall, presiding (or her successor).

8. **“Day”** shall mean a calendar day.

9. **“Fairness Hearing”** shall mean the hearing on the Motion for Final Approval of Settlement.

10. **“Federal Settlement Agreement”** shall mean the Amended Federal Lawsuit Class Action Settlement Agreement that embodies the terms of the settlement of the Federal Lawsuit.

11. **“Federal Court”** shall mean the United States District Court for the District of Hawaii. The presiding Judge in the Federal Lawsuit is the Honorable Leslie E. Kobayashi.

12. **“Final Approval”** shall mean the occurrence of the following:

Following the Fairness Hearing, the Court has issued an order approving the Settlement, and

- i. The time for appellate review and review by petition for certiorari has expired, and no notice of appeal has been filed; or
- ii. If appellate review or review by petition for certiorari is sought, after any and all avenues of appellate review have been exhausted, and the order approving settlement has not been modified, amended, or reversed in any way.

13. **“Legislation Enactment Deadline”** shall mean June 30, 2018, or such later time period as the Parties may agree to in writing.

14. **“Monthly Adoption Assistance Payments”** shall mean monthly subsidy payments made by DHS to adoptive parents of children with special needs under 42 U.S.C. § 673(a) and/or under Haw. Admin. R. § 17-1620-9.

15. **“Monthly Foster Care Maintenance Payments”** shall mean monthly payments made by DHS to licensed resource caregivers under 42 U.S.C. § 672 and/or under Haw. Admin. R. § 17-1617-3.

16. **“Monthly Higher Education Payments”** shall mean monthly payments made by DHS to or on behalf of eligible former foster youth under Haw. Rev. Stat. § 346-17.4

17. **“Monthly Permanency Assistance Payments”** shall mean monthly payments made by DHS to legal guardians or permanent custodians under 42 U.S.C. § 673(d) or Haw. Admin. R. § 17-1621-9.



18. **“Motion for Final Approval of Settlement”** shall mean the motion to be filed by Plaintiffs, the State, or the Parties jointly, seeking the Court’s final approval of the Settlement, which shall include a report on requests to opt-out of and on objections to the Settlement.

19. **“Named Plaintiffs”** shall mean the named plaintiffs in the State Lawsuit: Patrick Sheehey, Patricia Sheehey, Raynette Nalani Ah Chong, Sherry Campagna, Michael Holm, Tiare Holm, B.S., and T.B., a minor, by her Next Friend N.A.

20. **“Net Settlement Amount”** shall mean the Class Settlement Amount minus the combined total of any attorneys’ fees and costs approved by the Court and actual Administration Costs. The Net Settlement Amount is the amount that shall be distributed to Payment Recipients on a pro rata per child/per day basis pursuant to section IV, below.

21. **“Notice Administrator”** shall mean DHS (or, if DHS is unable or unwilling to perform the duties of the Notice Administrator, such other mutually agreed-upon entity). The Notice Administrator shall be responsible for sending the court-approved Class Notices to the Settlement Classes, and may utilize the services of a copy/mail vendor.

22. **“Opt-Out Letter”** refers to a written request to opt-out or exclude oneself from the Settlement sent by any Settlement Class Member who elects to be excluded from a Settlement Class. A Settlement Class Member must submit a valid and timely Opt-Out Letter to exclude himself or herself from the Settlement and from the release of claims pursuant to this Settlement.

23. **“Parties”** shall mean the Named Plaintiffs, Settlement Class Members, and the State.

24. **“Payment Administrator”** shall mean the Hawaii Department of Accounting and General Services, the agency that the Parties agree will issue checks for Settlement Payments to each Payment Recipient under this State Agreement (unless DAGS determines the funds should be distributed through some other entity)

25. **“Payment Recipients”** shall mean those Settlement Class Members who have not opted out of the Settlement and who are entitled to receive a payment pursuant to section IV below.

26. **“Preliminary Approval”** shall mean that the Court has entered a Preliminary Approval Order or orally granted Plaintiffs’ Motion for Preliminary Approval.

27. **“Preliminary Approval Order”** shall mean an order entered by the Court substantially in the form attached hereto as Exhibit 2 preliminarily

approving the terms set forth in this State Settlement Agreement, including the manner and timing of providing notice to the Classes, the time period for opting out or for submitting objections, and the date, time and location for a Fairness Hearing.

28. **“Releasees”** shall mean the State of Hawaii, DHS, the Director of Human Services, other Hawaii departments, agencies, directors, officers, agents, employees, representatives, insurers, attorneys, administrators, and all other persons acting on behalf of the State of Hawaii.

29. **“Settlement”** shall mean the compromise and settlement of the State Lawsuit as contemplated by this State Settlement Agreement.

30. **“Settlement Classes”** shall mean the two classes identified for the purposes of this State Agreement: the Parent Settlement Class and the Higher Education Settlement Class, subject to class certification by this Court.

31. **“Settlement Class Members”** shall mean the members of the Settlement Classes.

32. **“Settlement Payment”** shall mean the pro rata portion of the Net Settlement Amount that is to be paid to each Payment Recipient pursuant to this State Settlement Agreement.

33. **“State Settlement Agreement”** shall mean this Amended State Lawsuit Class Action Settlement Agreement.

## **II. Settlement Classes**

There shall be two Settlement Classes: the Parent Settlement Class, and the Higher Education Settlement Class. Although the Second Amended Complaint does not set forth a Higher Education Class, the Higher Education class is separately established because the interests of the Higher Education Settlement Class are different from the interests of the putative class of beneficiaries pleaded in the Second Amended Complaint in that the Higher Education Settlement Class members are likely to be Payment Recipients.

### **1. Parent Settlement Class**

The Parent Settlement Class shall consist of

(a) all licensed resource caregivers in Hawaii (foster parents) who received Monthly Foster Care Maintenance Payments from DHS from August 7, 2012 (two years prior to the filing of the State Lawsuit) through March 20, 2018; and



(b) all legal guardians and permanent custodians who received Monthly Permanency Assistance from DHS from August 7, 2012 through March 20, 2018; and

(c) all adoptive parents of children with special needs who received Monthly Adoption Assistance Payments from DHS from August 7, 2012 through March 20, 2018.

The representatives of the Parent Settlement Class shall be Patrick Sheehy, Patricia Sheehy, Raynette Nalani Ah Chong, Sherry Campagna, Michael Holm, and Tiare Holm. Plaintiffs' counsel shall seek the Court's appointment (or the continued appointment) of these individuals to be the representatives of the Parent Settlement Class.

## 2. Higher Education Settlement Class

The Higher Education Settlement Class shall consist of all individuals who received Monthly Higher Education Payments from DHS from August 7, 2012 (two years prior to the filing of the State Lawsuit) through March 20, 2018.

The representative of the Higher Education Settlement Class shall be Brittany Sakai, the individual identified in the Second Amended Complaint by the initials "B.S." Class Counsel shall seek the Court's appointment (or the continued appointment) of Ms. Sakai to be the representative of the Higher Education Settlement Class.

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

The Parties and Class Counsel agree that, if approved, certification of the Settlement Classes for settlement purposes is in no way an admission by the State that class certification is proper in any other litigation against the State.

## **III. Legislation**

The Parties agree that this State Settlement Agreement is contingent on the enactment of legislation by the Hawaii Legislature to authorize the

appropriation of monies to fund the Class Settlement Amount in order to fund the Settlement Payments to the Payment Recipients pursuant to this State Settlement Agreement. The Parties agree that enactment of this legislation is material and essential to this Agreement and that if such legislation is not enacted into law by the Legislation Enactment Deadline, unless such date is mutually agreed by the Parties in writing to be extended, the global settlement of the State Lawsuit and the Federal Lawsuit shall automatically become null and void, trial in the Federal Lawsuit shall commence, and the State Lawsuit shall also proceed. In the event this State Settlement Agreement becomes null and void, nothing herein may be used against any Party for any purpose.

#### **IV. Payments**

1. Subject to other terms and conditions of this State Settlement Agreement, and in consideration of the releases and dismissals set forth in this Agreement, and subject to Court approval, the State agrees that the Class Settlement Amount shall be a maximum of \$2,341,103.10, which shall be paid as follows:

- a. Attorneys' fees and costs approved by the Court and Administration Costs shall first be deducted from the Class Settlement Amount to determine the Net Settlement Amount.
- b. The Net Settlement Amount shall be paid to the following individuals who have not validly and timely opted out of this Settlement in the following amounts: those members of the Parent Settlement Class and the Higher Education Settlement Class who received monthly foster care maintenance payments, monthly adoption assistance payments, monthly permanency assistance payments, or monthly higher education payments from DHS during the time period July 1, 2013 to June 30, 2014, prorated by actual days that the foster child, adoptive child, or child in permanent placement/legal custody was in care or a young adult was receiving higher education payments. The records of DHS shall be the source of information to determine which Settlement Class Members are eligible to receive payments under this State Agreement. The individuals eligible to receive payments pursuant to this sub-paragraph are referred to as the Payment Recipients. In the event a child was placed in the care of more than one person (e.g., a married couple) at a given time, nevertheless notice shall only be provided and any payments shall be made solely to the individual who is listed in DHS' records as the payee for that household (i.e., the person to whom checks are made payable when made to that household). Negotiation of the payment

check by one shall constitute a full and final discharge of the State's responsibility to both persons in that household.

- c. Payment checks issued to Payment Recipients pursuant to this State Settlement Agreement shall remain negotiable for the amount of time stated on the check. Any checks not negotiated within the time stated on the check will be subject to DAGS' usual procedures for handling uncashed checks. Payment Recipients who fail to negotiate their check(s) in a timely fashion shall, like all Settlement Class Members who did not validly and timely opt out of the Settlement, remain subject to the terms of the Settlement, including the releases set forth herein.

2. Other than the Settlement Payments described in sub-paragraph IV.1.b, above, no other payments to Settlement Class Members shall be made. ***In other words, there are members of the Settlement Classes who will not receive any payments under the terms of this Settlement.***

## **V. Releases**

The Plaintiffs, including all Settlement Class Members, hereby release, acquit, and discharge Releasees from any and all claims, causes of action, rights, obligations, liabilities, penalties, demands, damages, costs (other than those costs to be paid pursuant to this State Settlement Agreement), requests for declaratory relief, or requests for injunctive relief of any and every kind that were alleged, sought, or litigated, or that could have been alleged sought, or litigated against the State in the State Lawsuit.

## **VI. Attorneys' Fees and Costs**

1. By such date as the Court directs, Class Counsel may file a motion for an award of attorneys' fees and costs, which shall be paid from the Class Settlement Amount. Class Counsel may include the request for fees and costs within the Motion for Preliminary Approval. The State shall not oppose Class Counsel's application for an award of attorneys' fees and costs so long as it does not exceed 20% of the Class Settlement Amount, which amount is intended to cover all attorneys' fees and costs necessary to settle the State Lawsuit and administer this Settlement. The amount of attorneys' fees and costs that may be requested by Class Counsel is based on the agreement between Class Counsel and Plaintiffs ("**Retainer Agreement**"), a true and correct copy of which is attached as Exhibit 3, and does not exceed said agreement in that it reflects 20% of the Class Settlement Amount, whereas the Retainer Agreement expressly sets 25% of the total recovery as the presumptive "benchmark" against which the value of Class Counsel's services is to be

evaluated. See Exhibit 3 at Statement of Client Service and Billing Policies in Contingency Litigation Matters at Section A.

2. Class Counsel agree that they are responsible for allocating the attorneys' fees and costs approved by the Court among themselves and any other counsel that may have any other agreement with them. Class Counsel warrant and represent that there are no liens on the amounts to be paid pursuant to the terms of this State Agreement and that no assignments of the claims to be released or the attorneys' fees and costs to be paid pursuant to this State Agreement have been made or attempted.

In addition to class member relief, Named Plaintiffs may request approval to be provided reasonable service awards for themselves and former named plaintiff T.B. in recognition of the services each rendered on behalf of the class ("Service Award"). These Service Awards are intended to recognize the Named Plaintiffs for the extensive services they performed for the class, the time they spent on this case, and the risks they assumed in connection with this litigation. The amount of the Service Awards will be deducted from the Court's award of attorneys' fees and costs to Class Counsel. In other words, the Service Awards will not reduce the Net Settlement Amount. Defendant will not in any way be responsible for making any service payments or other payments to the Named Plaintiffs.

3. In the event the Court does not approve in full the amount requested by Class Counsel for attorneys' fees and costs, that finding shall not be a basis for rendering the entire Settlement or this State Settlement Agreement null, void, or unenforceable.

## **VII. Court Approval of Settlement; Processes for Settlement Class Members to Opt-Out of or Object to Settlement**

1. **Motion for Preliminary Approval.** Plaintiffs shall file a motion for preliminary approval by the Court of the Settlement and this State Settlement Agreement at such time as the Court may direct, and attach a copy of this State Settlement Agreement and such other documents the Parties determine are necessary for the Court's consideration. The motion shall request preliminary approval of the Settlement, the State Settlement Agreement, and the Class Notice, and shall request that the Court certify the Settlement Classes, appoint the Class Representatives and Class Counsel, and specify the procedure required for the Court's final consideration of the Settlement, including the scheduling of the Fairness Hearing. The motion for preliminary approval may, but need not, include Class Counsel's request for attorneys' fees and costs.

Although Plaintiffs are responsible for filing the motion, it is intended that the Defendant will have reviewed the motion in advance and that the motion will be unopposed.

2. **Class Notice.** Within a reasonable time after Preliminary Approval, the Notice Administrator, in cooperation with Class Counsel and defense counsel, shall send the approved Class Notices to each Settlement Class Member by U.S. mail postage prepaid in accordance with the terms of the Preliminary Approval Order. DHS shall provide the Notice Administrator (if not DHS) and Class Counsel with Contact Information for all Settlement Class Members in each Settlement Class (the “Class List”).

DHS shall send to Payment Recipients and non-Payment Recipients a different form of Class Notice, depending on which category the Class Member falls into.

In the event a child was placed in the care of more than one person (e.g., a married couple) at a given time, Class Notice shall be sent to one address addressed to the person who is designated in DHS’ records as the payee, i.e., the person to whom payments are made when checks are issued by DHS to that household. Notice to the one member of a two-person household shall constitute sufficient and adequate notice to the household.

The determination of who is within each Settlement Class (and therefore entitled to notice) shall be made by DHS based on the data kept by DHS in the ordinary course of its business. The Parties agree that the contents of the Class List are confidential and shall not be shared with third parties other than the Notice Administrator (if not DHS) and any vendor retained by DHS to perform copying and mailing functions, and shall not be filed in Court unless the Court so orders.

Prior to mailing the Notices, the Notice Administrator shall process the Class List against the National Change of Address Database maintained by the United States Postal Service (“USPS”). If a Notice is returned as undeliverable, and if a forwarding address is provided by the USPS, the Notice Administrator shall re-mail the Notice within three (3) business days. If an undeliverable Notice is returned without a forwarding address, the Notice Administrator need attempt to obtain updated addresses only for Payment Recipients by using skip tracing services agreed to by Class Counsel and defense counsel. All re-mailings to skip traced Payment Recipients must be completed no later than 20 days prior to the Opt-Out deadline. Notices shall only be re-mailed once.

Reasonable Administrative Costs incurred in typesetting, printing, and mailing the Class Notice to Settlement Class Members, processing the Class List by USPS, and performing skip tracing services shall be deducted from the Class Settlement Amount.

3. **Content of Class Notice.** The Class Notice shall contain: the definitions of the certified Settlement Classes; a general description of the State Lawsuit and its claims, issues, and defenses; material terms of this proposed State Settlement Agreement including who will and will not be Payment Recipients; Class Counsel's request for attorneys' fees and costs; Service Awards; options available to Settlement Class Members, including the manner, time limits, forum and form of an objection to this Settlement; the right of any Settlement Class Member to enter an appearance *pro se* or through an attorney to object to the State Settlement Agreement or any of its terms; the manner, time limits, and forum and form of a request to opt out of this Settlement; the website address required to be maintained by Class Counsel; the date, time, and location of the Fairness Hearing; and the binding effect of the State Settlement Agreement on Settlement Class Members who do not opt out of the Settlement. The notice shall also inform Class Members that they may also be members of the class certified in the Federal Lawsuit, which has different opt out provisions.

4. **Establishment of Website.** Class Counsel shall, at their own expense, publish information regarding the Settlement on a website, including information on how to object to or opt out of the Settlement of the State Lawsuit and the deadline to do so. The website shall also include a copy of this State Settlement Agreement, the motion for attorneys' fees and costs including a copy of the agreement between Class Counsel and Plaintiffs, key pleadings, and information regarding the Federal Lawsuit and Federal Settlement Agreement. The web address for the website shall be included in the Class Notice. The website shall remain available starting 7 days after Preliminary Approval through December 31, 2019.

5. **Opt-Out Process.** A Settlement Class Member not wanting to participate in this Settlement and not wanting to release claims pursuant to this Settlement shall submit a valid and timely Opt-Out Letter.

a. To be valid, the Opt-Out Letter shall contain a statement which clearly conveys a request to be excluded from the Settlement Class, the individual's full name, mailing address, telephone number, and must be signed and dated.

b. To be timely, the Opt-Out Letter must be postmarked by the date indicated in the Notice, sixty (60) days after the Notice is first mailed to Settlement Class Members. However, those Settlement Class Members who are mailed a new Notice after their original Notice was returned to sender shall have until the later of 14 calendar days from the date that the new Notice was postmarked or the original opt-out deadline to submit an Opt-Out Letter. No Opt-Out Letter will be honored if postmarked after the deadline set forth in this paragraph.



All Opt-Out Letters shall be sent to Class Counsel, who shall compile a list of the persons who have validly and timely opted out and submit the list to the Court under seal prior to the Fairness Hearing, with a copy to counsel for the State. Opt-Out Letters shall be made available for inspection by the Court or counsel for the State promptly upon request.

A Settlement Class Member who is entitled to a payment under this State Settlement Agreement because that person meets the definition of "Payment Recipient" but who submits an Opt-Out Letter shall not be paid, and forever waives their right to receive, a share of the Net Settlement Amount. In the event a child was placed in the care of more than one person (e.g., a married couple) at a given time, the submission of a valid and timely Opt-Out Letter by one of those persons shall constitute the submission of a valid and timely Opt-Out Letter by both persons, and both will be deemed to have waived their right to receive a share of the Net Settlement Amount.

No Opt-Out by any Settlement Class Member shall be the basis for rendering settlement of the State Lawsuit or Federal Lawsuit null and void.

**6. Objections to Settlement or to Request for Attorneys' Fees and Costs.** A Settlement Class Member who wishes to object to this State Agreement, the Settlement, to Class Counsel's request for attorneys' fees and costs, or to the Service Awards must timely file with the Clerk of the Court and serve on the Parties a statement of their objection, and whether the Settlement Class Member intends to appear at the Fairness Hearing. Settlement Class Members who are minors may submit their objections through Class Counsel, who shall file the objections under seal, and submit the substance of the objections (without identifying information) in a filed document.

Any Settlement Class Member may appear at the Fairness Hearing to object to any aspect of this State Settlement Agreement, the Settlement, or Class Counsel's motion for attorneys' fees and costs. Settlement Class Members may act either on their own or through counsel employed at their own expense.

To be considered timely, a Settlement Class Member's objection must be postmarked on or before the date that is 45 days after the Notice is first mailed to the Settlement Classes. Those Settlement Class Members who are mailed a new Notice after their original Notice was returned to sender shall have the later of 14 calendar days from the date that the new Notice was postmarked, or the original objections deadline, to submit their objections. Nothing in this paragraph requires the Notice Administrator to send a new Notice if the original Notice is returned to sender.

Settlement Class Members who fail to file and serve timely written objections or who do not appear at the Fairness Hearing and make objections shall be

deemed to have waived any objections and shall be foreclosed from making any objections (whether by appeal or otherwise) to the Settlement.

7. **Fairness Hearing.** On a date to be determined by the Court, the Court shall hold a Fairness Hearing. At the Fairness Hearing, the Parties will request that the Court:

- a. Consider any objections by Settlement Class Members;
- b. Give Final Approval to the Settlement as fair, reasonable, and adequate, and binding on those Settlement Class Members who did not validly and timely submit Opt-Out Letters.
- c. Determine the amount of the award of attorneys' fees and costs for Class Counsel;
- d. Determine the Net Settlement Amount to be distributed to Payment Recipients.

8. **Effect of Failure to Grant Final Approval.** In the event the Settlement and this State Settlement Agreement are not granted Final Approval, they shall be deemed null, void, and unenforceable and shall not be used or admissible in any subsequent proceedings against the State either in State Court or in any other judicial, arbitral, administrative, investigative, or other forum; trial in the Federal Lawsuit shall commence, and the State Lawsuit shall proceed. In the event the Settlement and this State Settlement Agreement are not approved by the Court, or otherwise fail to become effective and enforceable, the State will not be deemed to have waived, limited, or affected in any way its objections or defenses to the State Lawsuit.

9. **Court Enforcement:** The State Court retains jurisdiction to enforce the terms of this State Settlement Agreement.

## **VIII. Distribution Process**

1. No claim form shall be required of Payment Recipients to be entitled to payments. Their entitlement to a settlement payment shall be based on DHS' records and eligibility under the definition of "Payment Recipients" set forth herein, provided they do not submit a valid and timely Opt-Out Letter.

2. Payments to Payment Recipients as provided in this State Settlement Agreement shall be dispersed by the State by check within a reasonable time after the funds are appropriated and allotted, if the funds to be paid under this State Settlement Agreement are appropriated, bearing in mind the overall number of checks that must be processed and the time of year, shortly after the start of the new state fiscal year. Payments may be processed in manageable batches, rather than all at once.



3. Likewise, payment to Class Counsel of attorneys' fees and costs that have been approved by the Court shall be dispersed by the State within a reasonable time after the funds have been appropriated, bearing in mind the overall number of checks to be processed for this Settlement and the time of year, shortly after the start of the new state fiscal year. Class Counsel shall deliver to counsel for the State written instructions signed by Class Counsel (by an authorized representative of each law firm) that describe to whom a check for attorneys' fees and costs shall be made payable, and a fully-executed Form W-9 with respect to the entity to whom the attorneys' fees and costs shall be paid (along with other documents or information the Department of Accounting and General Services may require to lawfully effectuate the payment). The State will issue to Class Counsel an IRS Form 1099 for such amounts paid for attorneys' fees and costs under this Settlement. If there is a reduction in the amount of attorneys' fees and/or costs sought by or awarded to Class Counsel, any such reduction shall revert to the Net Settlement Fund.

4. No later than 14 days after the Net Settlement Fund is distributed by the initial mailing of checks to Payment Recipients (whether or not the payment checks are received by or negotiated by Payment Recipients), the Parties will submit to the Court a stipulated dismissal with prejudice, which shall include a dismissal of Named Plaintiff T.B.'s claims, including any claims that are asserted on behalf of a putative class of beneficiaries, which class will not be certified.

5. No interest shall accrue on any payments to be made under this State Settlement Agreement.

## **IX. Additional Provisions**

1. The rule of construction that an agreement is to be construed against the drafting party is not to be applied in interpreting this State Settlement Agreement. The Parties acknowledge that they have read this State Settlement Agreement, that they understand its meaning and intent, that they have executed it voluntarily and with opportunity to consult with legal counsel, and have participated and had an equal opportunity to participate in the drafting and approval of drafting of this State Settlement Agreement. No ambiguity shall be construed against any party based upon a claim that the party drafted the ambiguous language. This State Settlement Agreement contains all essential terms of the settlement the Parties have reached. While other documents may be prepared hereafter to further effectuate the provisions hereof, the Parties intend that this State Settlement Agreement is a valid, binding agreement, enforceable by the Court.

2. **Cooperation Between the Parties.** The Parties shall cooperate fully with each other and shall use their best efforts to obtain the Court's approval of this State Settlement Agreement and all of its terms.

3. **No Third-Party Beneficiaries.** This Agreement shall not be construed to create rights in, or to grant remedies to, or delegate any duty, obligation or undertaking established herein to any third party as a beneficiary of this State Settlement Agreement.

4. The respective signatories to this State Settlement Agreement each represent that they are fully authorized to enter into this State Settlement Agreement and bind the respective Parties to its terms and conditions. This Agreement may be executed in counterparts.

### **SIGNATURES**

Wherefore, intending to be legally bound in accordance with the terms of this State Settlement Agreement, the Parties hereby execute this State Settlement Agreement, effective on \_\_\_\_\_, 2018, which is the date on which the last signatory signed this State Settlement Agreement.

#### **FOR PLAINTIFFS:**

\_\_\_\_\_  
Alston Hunt Floyd & Ing,  
Class Counsel

\_\_\_\_\_  
Hawai'i Appleseed Center  
for Law and Economic Justice,  
Class Counsel

#### **FOR DEFENDANT:**

\_\_\_\_\_  
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Attorneys for Defendant  
PANKAJ BHANOT, in his official  
capacity as the Director of the Hawaii  
Department of Human Services

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

PATRICIA SHEEHEY, PATRICK  
SHEEHEY, RAYNETTE AH CHONG,  
individually and on behalf of the class  
of licensed foster care providers in the  
state of Hawaii,

Plaintiffs,

vs.

PANKAJ BHANOT, in his official  
capacity as the Director of the Hawaii  
Department of Human Services,

Defendant.

CIVIL NO. CV13-00663 LEK-KSC

**MOTION FOR PRELIMINARY  
APPROVAL OF SETTLEMENT;  
MEMORANDUM IN SUPPORT OF  
MOTION; DECLARATION OF  
DONNA H. KALAMA;  
EXHIBITS A - C; CERTIFICATE OF  
WORD COUNT; CERTIFICATE OF  
SERVICE**

HEARING

DATE: March 17, 2017

TIME: 10:00 a.m.

JUDGE: Hon. Leslie E. Kobayashi

## **MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT**

Defendant Pankaj Bhanot, in his official capacity as the Director of the Hawaii Department of Human Services, by and through his undersigned counsel, respectfully moves this Honorable Court for entry of an order preliminarily approving the settlement reached with Plaintiffs in this matter, and approving the form of class notice included with this Motion. The Settlement Agreement executed by counsel for the parties is attached as Exhibit A. The proposed form of class notice is Exhibit 1 to the Settlement Agreement. A proposed form of Order Preliminarily Approving Class Action Settlement, Approving Notice Plan, and Scheduling Date for Fairness Hearing is attached as Exhibit 2 to the Settlement Agreement.

If the settlement is preliminarily approved by the Court, Class Members will be provided with the opportunity to review the terms of the settlement and to object to said terms. A fairness hearing is currently scheduled to be held on April 24, 2017, at 10:30 a.m., for the Court to consider final approval of the Settlement. The parties will jointly move to reschedule the fairness hearing to a date one to two weeks later to accommodate the preparation and mailing of class notices.

Plaintiffs will be separately filing, by a date to be determined by the Court, a request for attorneys' fees and costs that supports the amount the parties have

agreed to for purposes of settlement, \$1,100,000.00. Plaintiffs will also be separately filing a Motion for Service Awards by a date to be determined by this Court.

This Motion is made pursuant to Federal Rules of Civil Procedure Rules 7 and 23, and is supported by the attached memorandum in support of motion and exhibits, the entire file in this matter, and such other matters as may be brought to the Court's attention at the hearing on this Motion.

DATED: Honolulu, Hawaii, March 14, 2017.

/s/ Donna H. Kalama  
CARON M. INAGAKI  
DONNA H. KALAMA  
Deputy Attorneys General

Attorneys for Defendant  
PANKAJ BHANOT, in his  
official capacity as Director of the  
State of Hawai'i, Department of  
Human Services

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

PATRICIA SHEEHEY, PATRICK  
SHEEHEY, RAYNETTE AH CHONG,  
individually and on behalf of the class  
of licensed foster care providers in the  
state of Hawaii,

Plaintiffs,

vs.

PANKAJ BHANOT, in his official  
capacity as the Director of the  
Hawaii Department of Human Services,

Defendant.

CIVIL NO. CV13-00663 LEK-KSC

**MEMORANDUM IN SUPPORT OF  
MOTION**

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## **MEMORANDUM IN SUPPORT OF MOTION**

Defendant respectfully asks for this Court's preliminary approval of the Settlement of this matter, for approval of the form of the Class Notice<sup>1</sup> to be sent to members of the class certified in this case, and to confirm or re-set the hearing on the Motion for Final Approval (the Fairness Hearing). Set forth below is a history of both this case and the companion State Lawsuit, a summary of the Settlement terms, a description of the proposed notice program and objection procedure, and a discussion of why the settlement is fair, reasonable and adequate. Plaintiffs do not oppose this Motion.

### **I. SUMMARY OF FEDERAL AND STATE LAWSUITS**

#### **A. Federal Lawsuit**

##### **1. Plaintiffs' Allegations**

Plaintiff Raynette Ah Chong commenced this action on December 3, 2013, by the filing of the putative class action Complaint for Declaratory Judgment and Permanent Injunctive Relief. Dkt 1.

On April 30, 2014, Plaintiff Ah Chong along with Patricia Sheehey and Patrick Sheehey filed a First Amended Complaint for Declaratory Judgment and

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<sup>1</sup> Capitalized terms such as "Class Notice" are intended to have the same meaning as they have in the Federal Settlement Agreement unless the context indicates otherwise.

Permanent Injunctive Relief (the FAC). Dkt 47. The FAC sought a declaratory ruling as to the proper amounts owed to foster care providers under the Adoption Assistance and Child Welfare Act of 1980, as amended, codified as Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679c (the “CWA” or “Child Welfare Act”). The FAC also sought an injunction prohibiting Defendant from allegedly continuing to violate the rights of resource caregivers under the CWA by failing to make foster care maintenance payments<sup>2</sup> adequate to cover the costs of foster care, and by failing in the future to employ a proper methodology for determining foster care maintenance rates and to update the rates periodically. The FAC also alleged that the amounts paid by DHS for adoption assistance under federal law were inadequate because they cannot exceed the amount set for foster care maintenance payments, which were themselves allegedly inadequate. Plaintiffs asserted a claim asserted under 42 U.S.C. § 1983. Dkt 47.

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<sup>2</sup> Under the CWA, the term “foster care maintenance payments” means “payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, reasonable travel to the child’s home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement.” 42 U.S.C. § 675(4)(A).

Early motions in the case focused on standing, whether the Plaintiffs' allegations adequately stated a claim, and discovery issues. E.g., Dkt 45, Dkt 77, Dkt 93, Dkt 98, Dkt 104, Dkt 105.

## **2. Class Certification**

By order filed August 17, 2015, the Court certified the following class:

[A]ll currently licensed foster care providers in Hawaii who are entitled to receive foster care maintenance payments pursuant to the Child Welfare Act when they have foster children placed in their homes[.]

Dkt 156 at 33. The Court also appointed Plaintiff Raynette Ah Chong to be representative of the Class. Dkt 156 at 34. Patrick Sheehey and Patricia Sheehey were not appointed as representatives of the Class. Plaintiffs' attorneys of record from Hawaii Appleseed Center for Law and Economic Justice; Alston, Hunt, Floyd & Ing; and Morrison & Foerster LLP, were appointed as Class counsel. Dkt 156 at 34. The Court denied Plaintiffs' request to certify a subclass for adoption assistance. Dkt 156 at 33.

For purposes of generating the mailing list to send out the Class Notice, DHS is including on the list Hawaii-licensed resource caregivers from August 17, 2015 (the date of the class certification order), through March 5, 2017 (the date the mailing list was generated, which is less than two weeks from the scheduled hearing date for this Motion). Defendant submits that the date range for the mailing list fairly represents "currently" licensed resource caregivers in that it

includes persons who were currently licensed at the time of the class certification, through the lawsuit to the settlement, and through the approximate date of the preliminary approval. The total number on the mailing list is 2,184.<sup>3</sup> Mailing envelopes will be addressed to each licensed resource caregiver within the pertinent time period. Where two people in a home are licensed as a resource family (e.g., a married couple), the mailing envelope will be addressed solely to the person identified in DHS' system as the "Owner", which is the individual to whom checks are made payable when payments are made for the care of foster children.

### **3. Investigation and Discovery**

Class Counsel conducted what they believe is a thorough investigation of the allegations in this lawsuit.<sup>4</sup> They engaged in discovery about the cost of caring for children in Hawaii, DHS' foster care maintenance payment rates, DHS' process for

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<sup>3</sup> As the list is finalized just before mailing of the notice, this number may change slightly to account for possible errors or duplications, but DHS does not anticipate any significant changes.

<sup>4</sup> Representations about the work of Class Counsel in this Motion are based on representations that Class Counsel have made about the scope of their work as part of preparing the settlement documents, and the information in the records of this case which reflect the nature of the discovery conducted, the pleadings, the motions work, the expert reports, the proffered trial testimony and documentary evidence. The undersigned counsel for Defendant is not making representation about the adequacy of Class Counsel's representation of the Named Plaintiffs or the Class. Class Counsel can provide the Court with any other information the Court may need to that end.

setting and increasing those rates, additional benefits and payments that are available for the benefit of children in foster care and how many resource caregivers actually request or receive those additional benefits and payments, and the number of people affected by DHS' foster care maintenance payment rates. Class Counsel received over 10,000 pages of hard copy documents from DHS and electronic databases with hundreds of thousands of payments made by DHS to resource caregivers. Both Class Representative Ah Chong and Plaintiff Patricia Sheehey were deposed. Plaintiffs' counsel also deposed several people from DHS, including Rule 30(b)(6) representatives and the former Director of Human Services.

Class Counsel were advised in this case by their retained consultants and experts to assist with the numerous issues, including Hawaii's cost of living, foster care maintenance payment costs, payment systems, and payment rates in other States. Many expert reports were generated by both sides, Plaintiffs' experts were deposed by Defendant, and Class Counsel deposed Defendant's experts.

Based on their investigation, discovery, and analysis, Class Counsel believe that had the case gone to trial and had Plaintiffs prevailed, DHS would have been required to pay over \$1,000 per month for foster care maintenance payments. Defendant disagrees, and believes that Plaintiffs would not have prevailed at trial

and, even if they had, they would not have been required to pay the amounts for which Plaintiffs were arguing.

#### **4. Rulings on Cross-Motions for Summary Judgment**

By order filed December 31, 2015, the Court granted in part and denied in part the Parties' cross motions for summary judgment, made certain legal rulings, and set forth the issues for trial. Dkt 194. The Court found that there were genuine issues of material fact precluding summary judgment as to the alleged inadequacy of the amount of DHS' foster care maintenance payments and its alleged failure to conduct periodic reviews. Dkt 194 at 16. The issue of whether the current foster care maintenance payments were adequate would have required the Court to weigh the competing expert testimony, including credibility determinations. The adequacy of the periodic review system would also have involved weighing of expert testimony and credibility determinations regarding DHS personnel who gave testimony. Dkt 194 at 16. Thus, to the extent Plaintiffs and Defendant sought a final ruling on the merits of Plaintiffs' foster care maintenance payment claim, the motions were denied. Dkt 194 at 17.

To assist the parties for purposes of trial preparation, the Court made certain legal rulings. The Court noted that the CWA does not set foster care maintenance rates, or tell states how they are supposed to cover the items listed in section 675(4)(A), or require that a particular index be used. Dkt 194 at 18. Congress



contemplated that states could provide for the cost of the items through multiple sources. Dkt 194 at 18. Inasmuch as the CWA does not require that a state cover all of the items through a single payment and does not require that a state employ any particular methodology to determine how the enumerated costs will be covered, the Court concluded that DHS can rely collectively on the basic board rate, the difficulty of care payment (where applicable), foster care related payments, and foster care related benefits to meet its obligation to cover the section 675(4)(A) items. Thus, to the extent Plaintiffs argued that DHS' basic board rates were inadequate as a matter of law, the Court denied Plaintiffs' motion and granted Defendant's motion. Dkt 194 at 20-21.

The Court further noted that although states are free to provide more payments, reimbursements and benefits than what is required under section 675(4)(A), those other benefits are not counted as part of the minimum that a state with a Title IV-E program must provide if they are not among the items enumerated in section 675(4)(A). Thus, to the extent Defendant was asking the Court to consider payments, reimbursements, and benefits for non-enumerated items, the Court rejected that argument. Dkt 194 at 21-22. Moreover, the Court determined that Defendant cannot average foster care related payments, which only some resource caregivers receive, among all resource caregivers. Dkt 194 at 28.

The Court did not conclude that DHS was required to pay a standard rate for all expenses for all resource caregivers, and that it was appropriate for DHS to implement reasonable application requirements to ensure that a foster child actually needs certain foster care related payments or benefits. Dkt 194 at 29. Thus, if DHS has made fact-specific foster care related payments or benefits reasonably available and DHS has informed resource caregivers about them, DHS should not be penalized if some resource caregivers choose not to apply for them. Dkt 194 at 29.

The Court found that there were genuine issues of material fact regarding whether DHS' use of the 2011 USDA report (at 95% of Urban West figures) to calculate the basic board rates was adequate. Dkt 194 at 32. The Court declined to grant summary judgment for Plaintiffs regarding the adequacy of difficulty of care payments. Dkt 194 at 33.

One of the significant points of contention in the cross summary judgment motions was whether the "shelter" expense enumerated in the CWA must include a resource family's mortgage payments, rent, property taxes, and similar costs. The Court found it was reasonable for the State to require a potential resource family to be financially self-sufficient. Dkt 194 at 35-36. The Court also noted that Plaintiffs had not presented authority that requires all states to pay rent, mortgage, property taxes, and other similar costs as part of the shelter costs. Thus, to the

extent Plaintiffs were asking the Court to rule that the basic board rates were inadequate, as a matter of law, because they do not cover the cost of rent, mortgage payments, property taxes, and other similar expenses, Plaintiffs' motion was denied. Dkt 194 at 36.

The Court denied Plaintiffs' motion with regard to the adequacy of DHS' payments for school supplies, liability insurance, and transportation, finding that there were genuine issues of material fact. Dkt 194 at 37.

As to the Plaintiffs' claim that adoption assistance payments were inadequate (a claim that was not certified for class purposes), the Court concluded that DHS improperly limited the amount of the adoption assistance payment to the amount of the basic board rate, rather than the foster care maintenance payment. However, there were genuine issues of material fact as to whether there are any foster care related payments or foster care benefits that can be considered as part of the maximum amount of the named Plaintiffs' adoption assistance payments.<sup>5</sup> Dkt 194 at 38-37.

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<sup>5</sup> DHS does in fact pay adoptive parents of children with special needs difficulty of care payments (where an adoptive child is eligible) in addition to the basic board rate. Other supplemental payments that are not made across-the-board (such as for clothing or child care) cannot be paid to adoptive parents of children with special needs. DSSH Child Welfare Policy Manual, 8.2D.4 Q&A 5. Defendant intended to present evidence and argument at trial to address this issue, which Defendant respectfully believes was wrongly decided.

The Court then set out the issues for trial to provide guidance to the parties in their trial preparation. The Court described those issues as follows:

- 1) Is the basic board rate, which each Class member receives when he or she has a current foster child placement, adequate to cover the cost of – and the cost of providing – a foster child’s food, shelter, and miscellaneous expenses?
- 2) As to each of the other expense categories enumerated in § 675(4)(A), does DHS have a foster care related payment or foster care related benefit that is available to resource caregivers when it is necessary based on a foster child’s individual circumstances?
  - a) For each foster care related payment or benefit described in Question 2, does DHS employ a reasonable methodology to ensure that a resource caregiver who applies for the foster care related payment or benefit receives what is necessary to cover the cost of – and the cost of providing – the CWA expense relevant to that payment or benefit?
  - b) For each foster care related payment or benefit described in Question 2, does DHS provide resource caregivers with sufficient information and opportunities to apply for the foster care related payment or benefit?

c) For each foster care related payment or benefit described in Question 2, are the resource caregivers who apply for the foster care related payment or benefit receiving what is necessary to cover the cost of – and the cost of providing – the CWA expense relevant to that payment or benefit.

3) Does DHS have a reasonable mechanism in place to conduct periodic reviews of all components of its foster care maintenance payments.

Dkt 194 at 39-41.

## **5. Pre-Trial Evidentiary Rulings**

The trial in this federal case was scheduled for August 23, 2016. Motions in limine were presented to the Court in anticipation of trial. Among the issues raised by the motions, Defendant sought to preclude Plaintiffs from re-litigating their contention that rent, mortgage, and real property taxes should be included in the board rate (Dkt 236), and sought to preclude Plaintiffs' expert, Dr. Hansen, from providing testimony regarding implicit and lost opportunity costs (Dkt 234).

The Court granted Defendant's motion to preclude Plaintiffs from re-litigating the shelter issue insofar as the Court reaffirmed its conclusion in the summary judgment order (Dkt 194 at 34-36) that "shelter" expense in 42 U.S.C. § 675(4)(A) need not include mortgage payments, rent, property taxes, or other similar costs. Dkt 311 at 1. The Court also ruled that the amount a resource family

could earn commercially for a room instead of using it for a foster child was not a valid measure of the cost of shelter expense. However, Plaintiffs would be allowed to present evidence and argument at trial regarding other methods to measure the cost of shelter for a foster child. Dkt 311 at 2. The Court granted Defendant's motion to preclude Dr. Hansen from providing testimony at trial regarding implicit cost of supervision, implicit cost of shelter and transportation, and opportunity costs. Dkt 304, 307.

Plaintiffs would, however, be permitted to pursue at trial other theories regarding the alleged inadequacy of DHS's payments, as well as the alleged inadequacy of DHS's periodic review of its foster care maintenance payments. Plaintiffs strenuously disagreed with the Court's rulings on shelter costs, and believed that even if they did not prevail at trial, they would be successful on appeal in having the Court's rulings reversed. As the Court knows, the case did not proceed to trial, but was settled, subject to Court approval.

## **B. State Lawsuit**

On August 7, 2014, a complaint was filed in the Circuit Court of the First Circuit, State of Hawaii, Civil No. 14-1-1709-08 VLC (the "State Lawsuit"), as a putative class action against the State of Hawaii. The complaint was not served on the State.

On February 6, 2015, a First Amended Complaint was filed in the State Lawsuit by Patrick Sheehey, Patricia Sheehey, Raynette Nalani Ah Chong, Sherry Campagna, Michael Holm, and Tiare Holm, individually, and on behalf of a class of Hawaii-licensed resource families; B.S.; and T.B., a minor, by her next friend N.A., individually and on behalf of a class of persons similarly situated. The First Amended Complaint was served on the State.

The First Amended Complaint sought damages (which could not be sought against the State in federal court) on behalf of not just resource caregivers (foster parents), but also permanent custodians/legal guardians, and adoptive parents of children with special needs; former foster youth in the State's higher education payment program; as well as children and young adults under age 20 at the time the State Lawsuit was commenced who were entitled to receive the benefits of foster care maintenance, adoption assistance, permanency assistance, and higher education board payments. The theory asserted by Plaintiffs was that because foster care maintenance payments were inadequate, and these other payments were capped at the amount of the foster care maintenance payment, the other payments were also inadequate and the ultimate beneficiaries of those payments (foster children, adoptive children, children in guardianships, higher education youth) were not being adequately cared for.

The First Amended Complaint asserted in Count 1 that the State breached the Title IV-E State Plan and/or contracts with resource caregivers, guardians, and adoptive parents (the “Parent Group”) by failing to provide payments in accordance with the Child Welfare Act, and that the Parent Group members are being denied their rights to those benefits, and have suffered damages equal to the shortfall in payments.

Count 2 alleged that the State enters into agreements with the Parent Group regarding foster care maintenance, adoption, and permanency assistance, that the State is required by contract to pay monthly assistance sufficient to satisfy the requirements of the Child Welfare Act, that the Beneficiary Group members are third party beneficiaries of the contracts between the Parent Group and the State, and as a result of the State’s alleged failure to pay the required amounts, the Beneficiary Group has suffered damages equal to the shortfall.

Defendant moved to dismiss the First Amended Complaint. The Circuit Court granted the motion in part, concluding that a breach of contract theory predicated on Plaintiffs’ alleged status as third-party beneficiaries of the Title IV-E State Plan was foreclosed by *Armstrong v. Exceptional Child Center, Inc.*, \_\_ U.S. \_\_, 135 S. Ct. 1378 (2015). The Court denied the motion with respect to any claim predicated upon breach of the provider agreements between the State and the



Parent Group members, and gave Plaintiffs leave to file a Second Amended Complaint.

Plaintiffs filed their operative Second Amended Complaint on June 8, 2015. Count 1 asserts a breach of contract claim on behalf of the Parent Group, based on the provider agreements between the State and members of the Parent Group, due to alleged inadequate monthly payments. Count 2 asserts a breach of contract claim on behalf of the Beneficiary Group as alleged beneficiaries of the agreements with the Parent Group. Count 3 asserts a claim for violation of Hawaii Administrative Rules (HAR) chapter 1617, which Plaintiffs allege mandate foster payments sufficient to comply with the Child Welfare Act. Count 4 asserts a claim for violation of HAR chapter 1620 (as it relates to adoption assistance), which Plaintiffs allege requires compliance with the Child Welfare Act. Count 5 asserts a claim for violation of HAR chapter 17-1621 (as it relates to permanency assistance), which Plaintiffs allege requires compliance with the Child Welfare Act. Count 6 asserts a claim for violation of HRS § 346-17.4 (higher education). According to Plaintiffs, because the foster care maintenance payments are allegedly inadequate, the higher education monthly payments are inadequate as well. Count 7 asserts a claim for violation of the periodic review requirement set forth in HAR § 17-1617-22. A copy of the Second Amended Complaint is attached as Exhibit C.

No proposed classes or sub-classes have been certified in the State Lawsuit, although class certification will be sought in support of the settlement of that case.

Although a stay was not entered by the Court in the State Lawsuit, the case was put on hold while the parties focused their efforts on discovery, motions, and expert reports in the Federal Lawsuit.

## **II. SETTLEMENT OF FEDERAL AND STATE LAWSUITS**

During the course of the Federal Lawsuit, the parties made periodic, unsuccessful attempts at settlement. As the trial neared, the parties, with the assistance of Magistrate Judge Kevin Chang, again engaged in settlement discussions to settle both cases. The start of the trial in the Federal Lawsuit was extended so that the parties could continue their settlement discussions with Judge Chang. Dkt 315, Dkt 319.

The parties thereafter did agree to the essential terms of a valid and binding Settlement which (subject to Court approval), resolves both the Federal Lawsuit and State Lawsuit. Dkt 327. The terms are set forth in the attached Federal Lawsuit Class Action Settlement Agreement (the “Federal Settlement Agreement”), Exhibit A, and the State Lawsuit Class Action Settlement Agreement (the “State Settlement Agreement”), Exhibit B.

The proposed Settlement of both this case and the State Lawsuit is the product of hard-fought, lengthy negotiations between Class Counsel on behalf of

Plaintiffs, and DHS and their counsel, with the direct assistance of Magistrate Judge Chang.

A summary of the terms of the Settlement is presented below.

**A. Terms Common to Both Lawsuits**

***The Settlement covers both Lawsuits.*** The Settlement includes both the Federal Lawsuit and the State Lawsuit, and unless both Lawsuits settle on the terms set forth in their respective agreements, neither Lawsuit will be settled.

***Court approval is required.*** Both Lawsuits are pled as class actions. A class has already been certified for the Federal Lawsuit, and the plaintiffs in the State Lawsuit will seek class/sub-class certification as part of the Settlement. Accordingly, for the Settlement to be valid, both the State and Federal Courts must approve the Settlement Agreements applicable to their respective Lawsuits.

***Legislative appropriation of the monetary portions of the Settlement is required.*** The Settlement requires the State to make certain payments, described below. These payments are subject to enactment of legislation by the Hawaii Legislature to authorize the appropriation of funds to make the payments. If such legislation is not enacted by the end of June 2017 (unless the parties agree to extend the deadline), then the Settlement will automatically be null and void.

## **B. Terms of the Federal Settlement Agreement**

***Increase in the board rates starting next fiscal year.*** The Federal Lawsuit shall be administratively closed until the end of June 2017 (or later agreed-upon date), while DHS, with support and cooperation from the Class and Class Counsel, requests appropriations from the Hawaii Legislature in the DHS budget for state fiscal year 2018 (July 1, 2017 to June 30, 2018) sufficient to fund:

- An increase in the monthly basic foster care maintenance board rates from the following amounts to the following amounts:
  - o Ages 0-5: from \$576 to \$649
  - o Ages 6-11: from \$650 to \$742
  - o Ages 12+: from \$676 to \$776
- An increase in the annual clothing allowance from \$600 per year plus \$125 for special circumstances for all ages, to an age-tiered system of the following annual amounts:
  - o Ages 0-5: \$810
  - o Ages 6-11: \$822
  - o Ages 12+: \$1026

The increases in the board rates were calculated using 95% of the 2013 USDA report titled Expenditures on Children by Families, overall United States, middle income category, expenditures on Food, Housing, and Miscellaneous,<sup>6</sup> with

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<sup>6</sup> Although not stated explicitly in the Federal Settlement Agreement, the applicable age groupings from the USDA report were averaged to create the

an adjustment for inflation to January 2016 dollars using changes in the consumer price index (CPI) from the year of the USDA report (2013),<sup>7</sup> and an adjustment equal to the average of the most recently available Regional Price Parity Index (“RPP”), as reported by the Bureau of Economic Analysis, U.S. Department of Commerce, for (a) Hawaii (the “Hawaii RPP”) (116.8) and (b) Hawaii Metropolitan Statistical Area (“Hawaii-Metro”) (120.2), which the parties referred to as the “Average Hawaii RPP” (118.5).<sup>8</sup> The amount needed to fund this proposed increase, \$7,013,627, was in fact included in the executive budget for fiscal year 2018, and as of today, continues to be included in the budget.

The increases in the clothing allowance were calculated by using 100% of the 2013 USDA report, overall United States, middle income category, expenditures on Clothing, with an adjustment for inflation and an adjustment for cost of living, as was done for the basic board rates. DHS had the option to fund this increase with its existing budget and has decided to do so. Thus, it did not

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age groupings that are being used for settlement purposes. These are the same age groupings used by DHS in 2014 when it increased the basic board rates.

<sup>7</sup> January 2016 was the time period used by Defendant in proposing the CPI adjustment at the time the settlement was negotiated.

<sup>8</sup> In other words, the CPI-adjusted figures from the 2013 USDA report were increased by a cost-of-living adjustment of 18.5 percent.

seek an appropriation for this increase. *See* Federal Settlement Agreement, Exh. A, Part II.

***Periodic Review.*** DHS will conduct periodic reviews of the basic board rates and the clothing allowance, consistent with its administrative rules, using the following process:

- DHS shall calculate benchmark rates based on the same procedures used to calculate the fiscal year 2018 increases for the basic board rates and the clothing allowance, utilizing updated USDA information and updated inflation and cost of living adjustments.
- If the difference between the then-existing rates and the benchmark rates is more than 5%, DHS will seek appropriations from the legislature to increase the rates.
- DHS does not agree to raise the rates automatically just because the 5% threshold is met.

*See* Federal Settlement Agreement, Exh. A, Part III.

***Difficulty of Care.*** DHS is currently in the process of planning changes to its Difficulty of Care (DOC) system. Until those changes go into effect, DHS agrees that the current monthly cap of 120 hours per month may be waived by DHS in appropriate circumstances, but only if it is in the best interest of the foster

child and other children in the resource family home to do so. *See* Federal Settlement Agreement, Exh. A, Part IV.1.

***Availability of resources.*** The parties have agreed to work cooperatively on providing to resource caregivers a short summary of the payments and benefits available to them on at least a semi-annual basis, and to all newly-licensed resource caregivers. *See* Federal Settlement Agreement, Exh. A, Part IV.2.

Other than as described in the Settlement Agreement, Defendant did not agree to increases in or restructuring of benefits or payments for other items enumerated in the Child Welfare Act.

***Court enforcement.*** The parties have agreed that this Court will retain jurisdiction to enforce the terms of the Federal Settlement Agreement. If a Class Member believes Defendant to be in material breach, notice and an opportunity to cure shall be provided before relief from this Court may be sought. *See* Federal Settlement Agreement, Exh. A, Part IV.3.

***Termination of Agreement.*** The Federal Settlement Agreement terminates 10 years from its effective date, after which time it will no longer be enforceable. *See* Federal Settlement Agreement, Exh. A, Part IV.4.

***No admission of liability.*** Defendant does not admit liability or wrongdoing. *See* Federal Settlement Agreement, Exh. A, Part IV.5.

***Releases.*** Under the terms of the settlement, Plaintiffs release, acquit, and discharge Releasees<sup>9</sup> from any and all claims, causes of action, rights, obligations, liabilities, penalties, demands, damages, costs (other than those costs to be paid pursuant to the Federal Settlement Agreement), requests for declaratory relief, or requests for injunctive relief of any and every kind that were alleged, sought, or litigated, or that could have been alleged, sought, or litigated, against Defendant in the Federal Lawsuit. The release does not preclude any Class Member from enforcing the Federal Settlement Agreement in Federal Court after giving the appropriate notice and opportunity to cure, or from commencing other litigation after the termination of the Agreement. *See* Federal Settlement Agreement, Exh. A, Part V.

### **C. Terms of the State Settlement Agreement**

DHS will pay to resource caregivers, adoptive parents of children with special needs, legal guardians/permanent custodians, and higher education participants who received payments from DHS during the period July 1, 2013 to June 30, 2014 (the state fiscal year prior to the increase in the basic board rates), a

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<sup>9</sup> The term “Releasees” is defined in the Federal Settlement Agreement as “Defendant, DHS, the State of Hawai‘i, other Hawaii departments, agencies, directors, officers, agents, employees, representatives, insurers, attorneys, administrators, and all other persons acting on behalf of the State of Hawaii.”



payment of \$35 per month per child pro rated for actual days in care after deduction of attorneys' fees and costs and administration expenses. The State will request an appropriation of \$2,341,103.10 from the Legislature. The amount was calculated by multiplying the total number of payments made to resource caregivers, adoptive parents of children with special needs, permanent custodians/legal guardians, and higher education participants during the applicable time period (July 1, 2013 to June 30, 2014) by \$35. After notice and opportunity to object or opt out is provided, if the settlement is approved and the requested amount is appropriated, pro rata distributions will be made to those entitled to payments. Plaintiffs' Second Amended Complaint includes class members who will not be receiving payments under the terms of the settlement. The putative class of "beneficiaries" will not be certified; rather the claims of the individual plaintiff beneficiary will be dismissed with prejudice. *See* State Settlement Agreement, Exh. B, Part VIII.4.

### **III. ATTORNEYS' FEES AND COSTS AND INCENTIVE AWARDS IN THIS CASE**

As part of the settlement the parties agreed to negotiate in good faith to try and come to an agreement on attorneys' fees and costs for Plaintiffs' counsel in this case, subject to approval by this Court. *See* Federal Settlement Agreement,

Exh. A, Part VI.<sup>10</sup> Class Counsel provided defense counsel with spreadsheets containing descriptions of work performed by Class Counsel as well as information on costs. Defendant carefully reviewed the supporting documents, and the parties engaged in substantial negotiations, including with the assistance of Magistrate Judge Chang.

As a result of those negotiations, counsel for both sides agree that an award to Class Counsel of \$1,100,000, inclusive of all attorneys' fees, costs, non-taxable expenses, and taxes, is reasonable and consistent with applicable law. In order to seek this Court's approval of the \$1.1 million, Plaintiffs will file a motion or request for attorneys' fees and costs by a date to be determined by the Court, in which they will ask for approval of such amount at the Fairness Hearing. If Class Counsel's request for fees and costs is approved by this Court, any such amount is still conditioned on appropriation by the Legislature. Information on Class Counsel's request for attorneys' fees and costs will be included in the class notice so that class members have an opportunity to object if they so choose.

Class Counsel will be asking this Court for permission to utilize a portion of their fees and costs award for "Service Awards" to be paid to the Named Plaintiffs of up to \$5,000 each in recognition of the services each rendered on behalf of the Class. Service Awards for Plaintiffs were not agreed upon as part of the settlement

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<sup>10</sup> The state lawsuit has a separate attorneys' fees provision.

put on the record. If Class Counsel wish to utilize their eventual fees and costs award, if any, for Service Awards, they can only be permitted to do so if Defendant is under no obligation whatsoever to make such payments under any conditions. That is an agreement between Named Plaintiffs and their Counsel, subject of course to Court approval after notice to Class Members.

#### **IV. PROPOSED NOTICE, OBJECTION, AND APPROVAL PROCEDURE**

##### **A. Class Notice**

The Class Notice program contemplated by the Federal Settlement Agreement is *individual notice to each Class Member by mail*. Because the Class consists of licensed resource caregivers during a specific time period, all Class Members are known to DHS (it has records of all licensed resource families for the time period involved in this case). In addition, resource caregivers have their specific homes licensed, so if they are keeping up their licensed homes, DHS will have an address for them. If they have moved without having their new home licensed, then their license terminates.

For purposes of this Settlement, DHS has taken on the role of “Notice Administrator,” meaning it is responsible for generating the mailing list of Class Members, based on its records, who are to be sent the approved Class Notice, at DHS’ expense, and for copying and mailing the Class Notice. DHS may utilize outside vendors for preparing the copies and completing the mailings.

If this Court grants preliminary approval of the Settlement, DHS will, within the time specified by the Court, mail the Court-approved form of Class Notice to each Class Member. *See* Federal Settlement Agreement, Exh. A, Part VII. The Parties propose to use the form of Class Notice attached to the Federal Settlement Agreement as Exhibit 1. DHS shall re-mail Notices returned by the U.S. Postal Service with a forwarding address that are received by DHS within ten (10) days of receipt of the returned Class Notices that contain a forwarding address, and (b) by itself or using one or more address research firms, as soon as practicable following receipt of any returned Class Notices that do not include a forwarding address, research any such returned mail for better addresses and promptly mail copies of the Class Notices to the addresses so found.

The proposed form of the Class Notice contains a description of this lawsuit, the material terms proposed by the Settlement, class counsel's request for fees and costs and the request for Service Awards, how to object to the settlement or to the request for fees and costs/Service Awards, the fact that class members cannot opt out, the binding effect of the settlement, the right of class members to enter an appearance, how to get more information, and the date, time and location of the fairness hearing. Exhibit 1. The Class Notice is easy to understand and straightforward.

Class Counsel will set up and will be maintaining at least until December 31, 2018, a website where class members can obtain more information about the settlement: <http://hawaiiclassaction.com/fostercare>. Key documents will be available there. *See* Federal Settlement Agreement, Exh. A, Part VII.4, Exhibit 1. Class Counsel have also provided a telephone number that people can call for information. This information will be contained in the Class Notice.

Under the circumstances, direct mailing to individual Class Members is the best practicable notice, is reasonably calculated to apprise Class Members of the pendency of the Federal Lawsuit and the terms of the Settlement, including the right to object, and meets due process standards of notice and opportunity to be heard at a meaningful time and in a meaningful manner.

#### **B. Objection Procedure**

Pursuant to this Court's instructions during a status conference held March 6, 2017, the proposed Class Notice instructs those who wish to object to the settlement to send their objections to this Court. Objections are to be postmarked by a date to be established by this Court, and should conform to the requirements set forth in the proposed Class Notice, including the content of the objection. The Class Notice informs Class Members of their right to appear at the Fairness Hearing themselves or through their own counsel at their own expense, and what steps to take in order to do so.

Because the class in this case was certified under FRCP Rule 23(b)(2), and the relief provided is prospective in nature only, class members do not have the right to opt out of the settlement. Although class members may object, if the settlement is approved, all members will be bound.

### **C. Fairness Hearing**

The fairness hearing at which the Court will consider whether to approve the settlement is currently scheduled for April 24, 2017, at 10:30 a.m. The parties will file a Motion for Final Approval of Settlement as directed by this Court. The settlement will become final once this Court has finally approved the settlement, and the time to appeal (by any class members who may have objected) has expired or any appeals have been resolved and the order approving settlement has not been modified, amended, or reversed in any way. *See* Federal Settlement Agreement, Exh. A, Part I.I (definition of “Final Approval”). The settlement is subject to necessary appropriations being made.

### **V. NOTICE UNDER CLASS ACTION FAIRNESS ACT**

Defendant will be responsible for sending out the notices required under 28 U.S.C. § 1715. There are class members who currently reside in other states. Notice will be provided to the appropriate state officials of those states, as well as the Attorney General of the United States.

## **VI. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED**

### **A. Applicable Legal Standard**

Through its prior class certification order, Dkt 156, the Court has already determined that the certified class is appropriate under FRCP Rule 23(b)(2). The parties are not requesting any amendments to the class definition.

FRCP 23(e) states, in pertinent part:

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

- (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
- (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
- (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

\* \* \*

- (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

“The purpose of Rule 23(e) is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights.” *Blake v. Nishimura*, No. CIV.08-00281 LEK, 2010 WL 363203, at \*1 (D. Haw. Jan. 29, 2010) (citing to *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir.2008)). In determining whether to grant approval, the Court must balance the following factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of

further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. *Id.* (citations omitted).

**B. The Settlement Reached Is Fair, Reasonable, and Adequate**

The proposed settlement reflects hard-fought compromise by the parties after extensive litigation. Defendant believes, based on the Court's summary judgment and pretrial rulings, that DHS' payments are already adequate and that DHS need not provide any increase or any of the other compromises that are part of the settlement. Plaintiffs believe the compromise amounts are not high enough; that Defendant should be paying 100% of the USDA report for Food, Housing, and Miscellaneous expenses; and that Defendant should be paying more for other items listed in the Child Welfare Act. Plaintiffs also contend that the Hawaii-Metro RPP, rather than the Average Hawaii RPP, should be used.

If the parties were to proceed to trial, there was a risk that Plaintiffs would not prevail, or would obtain rulings less favorable than the settlement provided here, particularly given their positions on shelter costs as compared to the Court's summary judgment and pretrial rulings on that issue. Regardless of the outcome at trial, the "loser" would probably have appealed, with both sides believing they



have solid appealable issues. If Defendant were to appeal, he would pursue not just any factual determinations from the trial, but whether Plaintiffs are entitled to even maintain their claims under section 1983 in the first instance. Plaintiffs would have appealed the Court's decisions on shelter costs, among other rulings.

The parties also believe that bringing the case to a close now through settlement, rather than after more years of litigation, with the uncertain outcomes, and the concomitant attorneys' fees and costs that would be incurred by both sides, would help move the parties toward a better working relationship for the benefit of foster children and other youth served by DHS. The benefit to foster children of putting this settlement into effect within the next fiscal year (if the Legislature appropriates the funds) is a primary motivator of the parties to resolve this case and the state case at this time. The settlement is thus fair, reasonable, and adequate. FRCP 23(e)(2).

**C. The Other Prerequisites for Preliminary Approval Have Been Met**

The parties are proposing a form of class notice (Exhibit 1 to the Federal Settlement Agreement), and Defendant will mail the notice in the form approved by this Court to all class members after approval within the time period specified by the Court. FRCP 23(e)(1).

As discussed above, the settlement is fair, reasonable and adequate.  
FRCP 23(e)(2).

The Federal Settlement Agreement and the State Settlement Agreement have been provided as exhibits for this Court's review. FRCP 23(e)(3).

FRCP 23(e)(4) does not apply to this case.

The notice to class members informs them that they may object to the settlement and how to do so. FRCP 23(e)(5).

## **VII. STAY AND PRELIMINARY INJUNCTION PENDING FINAL APPROVAL**

Defendant respectfully requests that this Court enter an order staying any actions or proceedings pending in any state or federal court – *but not including the State Lawsuit* – involving the State of Hawaii's foster care maintenance payments or components thereof pending the Final Fairness Hearing and the issuance of the order of final approval and an order dismissing the Federal Lawsuit with prejudice. Other than the State Lawsuit, Defendant is not aware of the existence of other such pending actions or proceedings at this time.

Defendant also requests that the Court issue a preliminary injunction, pending the final Fairness Hearing and the issuance of a final order and dismissal with prejudice, enjoining all members of the Class from filing, commencing, prosecuting, maintaining, intervening in, participating in (as class member or otherwise), or receiving benefits from any other lawsuit, arbitration or

administrative, regulatory or other proceeding or order in any jurisdiction arising out of or relating to the State of Hawaii's foster care maintenance payments or any component thereof of the facts and circumstances at issue in this Federal Lawsuit, except for the State Lawsuit.

Defendant requests this relief under the All Writs Act, to ensure that this Court's jurisdiction over this action will be preserved and the Court has the ability to provide the Parties with the benefit of the hard-fought settlement. Defendant submits that no bond should be required under the circumstances.

## **VIII. CONCLUSION**

Based on the foregoing, Defendant respectfully requests the Court grant this Motion, make the preliminary finding that the proposed settlement is within the range of possible approval as fair, reasonable, and adequate within the meaning of Rule 23 and the Class Action Fairness Act, and that the Federal Settlement Agreement is sufficient to warrant sending notice to the Class. Defendant also requests that the Court approve the proposed form of Class Notice, and specify its procedure for obtaining its final approval of the Settlement, including the deadlines by which Class Member objections shall be made, and the motion for final approval of settlement shall be filed, and the date of the Final Fairness Hearing if different from April 24, 2017. A proposed form of order is attached as Exhibit 2 to the Federal Settlement Agreement.

DATED: Honolulu, Hawaii, March 14, 2017.

/s/ Donna H. Kalama  
CARON M. INAGAKI  
DONNA H. KALAMA  
Deputy Attorneys General

Attorneys for Defendant  
PANKAJ BHANOT, in his  
official capacity as Director of the  
State of Hawai‘i, Department of  
Human Services

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In the United States District Court for the District of Hawaii, *Sheehey, et al.*,  
v. *Bhanot*, Civ. No. 13-00663 LEK-KSC; Memorandum in Support of  
Motion.

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

PATRICIA SHEEHEY, PATRICK  
SHEEHEY, RAYNETTE AH CHONG,  
individually and on behalf of the class  
of licensed foster care providers in the  
state of Hawaii,

Plaintiffs,

vs.

PANKAJ BHANOT, in his official  
capacity as the Director of the  
Hawaii Department of Human Services,

Defendant.

CIVIL NO. CV13-00663 LEK-KSC

**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the date and by the method of  
service noted below, a true and correct copy of the foregoing was served on  
the following parties at their last-known addresses:

Served electronically through CM/ECF:

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DATED: Honolulu, Hawaii, March 23, 2018.

/s/ Donna H. Kalama

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