

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I**

RAYNETTE AH CHONG, PATRICIA
SHEEHEY, PATRICK SHEEHEY,
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 Settlement filed by Defendant, Dkt 386 (the “Motion”), the hearing before this Court on March 27, 2018, 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 his unopposed motion for preliminary approval on March 23, 2018, with the consent of Plaintiffs.

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 judgments 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 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 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 May 21, 2018, at 9:45 a.m., 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, 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 March 15, 2018 (the date on which the mailing list was generated by DHS).

b. Class Counsel shall continue to maintain the internet website to 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 April 3, 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 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 April 23, 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 May 3, 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. Bhanot*, 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 Class Member or the attorney, if any, who will appear, with a postmarked date of no later than May 3, 2018, or as the Court may otherwise direct.

d. Class Counsel and Defendant shall have the right to respond to any objections no later than May 3, 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 May 3, 2018.

b. Plaintiffs shall file their motion for attorneys' fees and costs, and/or the Motion for Service Awards by no later than March 30, 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 May 3, 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 May 3, 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 April 23, 2018.

f. Class Counsel and counsel for Defendant shall have the right to respond to any objection by no later than May 3, 2018.

g. The Fairness Hearing will take place on May 21, 2018, at 9:45 a.m., at the United States District Court for the District of Hawaii, in Courtroom Aha Nonoi.

SO ORDERED.

DATED: Honolulu, Hawai‘i, March 30, 2018.



/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

In the United States District Court for the District of Hawaii, *Ah Chong, 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.