

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 Services¹ (“**Defendant**”), on the other hand. Plaintiffs and Defendant are collectively referred to as the “**Parties.**”

¹ 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**”)² and appointed the Hawai`i Applesseed 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 expenses³; 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;

² 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.

³ 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 affirmative⁴, 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

⁴ 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 closed⁵ (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

⁵The 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 CPI⁶ 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 CPI⁷ 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.

⁶ 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.

⁷ 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:



Alston Hunt Floyd & Ing,
Class Counsel

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

Morrison & Foerster LLP,
Class Counsel

FOR DEFENDANT:

Donna H. Kalama
Caron M. Inagaki
Deputy Attorneys General

FOR PLAINTIFFS:

Alston Hunt Floyd & Ing,
Class Counsel

A handwritten signature in black ink, appearing to be 'B. Inagaki', written over a horizontal line.

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

Morrison & Foerster LLP,
Class Counsel

FOR DEFENDANT:

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