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CLASS COUNSEL

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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

Plaintiffs,

vs.

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

Defendants.

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

SECOND AMENDED PAYMENT  
DISTRIBUTION PLAN AND ORDER

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

SETTLEMENT JUDGE: HON. GARY W.B.  
CHANG

**SECOND AMENDED PAYMENT DISTRIBUTION PLAN AND ORDER**

Plaintiffs hereby submit the following Second Amended Payment Distribution Plan to direct the method by which Settlement Payments will be made to individual living Class Members and to the estates of deceased Class Members, and for procedures following Final Approval.



## **I. The Settlement Agreement Requires the Court to Approve a Payment Distribution Plan**

The Settlement Agreement requires that a Payment Distribution Plan be approved by the Court (Settlement Agreement ¶ VIII.F.) and defines the Payment Distribution Plan as “the plan that requires the Claims Administrator to pay the Net Settlement Amount in the form of settlement payments to Payment Recipients after Final Approval.” Settlement Agreement ¶ I.21. “Settlement payments” refer to the individual payments to Payment Recipients. Settlement Agreement ¶ I.33. All Settlement Class members are “Payment Recipients” except individuals excluded from receiving payment by ¶ VIII. C. of the Settlement Agreement. *See*, ¶ IV. *infra*. The Net Settlement Amount is “the amount available for settlement payments to Payment Recipients pursuant to the Payment Distribution Plan,” *i.e.*, the amount remaining after deductions for claims administration costs and attorneys’ fees. Settlement Agreement ¶ I.17.

Final Approval means the occurrence of the following:

Following the Fairness Hearing, the Court has entered a final appealable order or judgment approving the Settlement, and

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

Settlement Agreement ¶ I.12.

## **II. The Settlement Distribution Plan Defines the Rules for Determining Claims**

Pursuant to the January 5, 2023 *Order Adopting First Amended Findings and Recommendations of the Special Master to Approve Proposed Settlement Distribution Plan and Revised Class Notices* (the “Settlement Distribution Plan Order”)[Dkt 1589], this Court adopted and approved Plaintiffs’ Proposed Settlement Distribution Plan attached as Revised Exhibit 1 to

the Settlement Distribution Plan Order (the “Settlement Distribution Plan”) and incorporated herein by reference. The Settlement Distribution Plan contains guidelines and rules used to validate the claims of Settlement Class Members and to compute the value of validated claims.

The Settlement Distribution Plan implements the Settlement Agreement’s mandate that “[a]ll Settlement Class Members are Payment Recipients” unless they fall into one or more of the specifically identified exceptions. Settlement Agreement ¶ VII.C. The Plan describes and provides the methodology for computing the value of two categories of valid claims: (1) waiting list or delay claims; and (2) construction or infrastructure claims.

### **III. Rules for Calculating Settlement Payments**

Individual settlement payments for Payment Recipients have been calculated through the following process, in accordance with the Settlement Agreement, Settlement Distribution Plan, and prior orders of this Court.

Settlement payments to Class Members for delays in receiving homestead awards will be calculated by the Claims Administrator based on each Class Member’s individual circumstances. Delays in residential, agricultural, and pastoral awards will be calculated using the interval between the date of application or attempted application as the claim start date, and the date of an award, or, if no award was made, the date of the Class Member’s death, or date of settlement (April 14, 2022), whichever is earliest, as the claim end date.

Payment amounts are calculated using the matrices prepared by Defendants’ experts and approved by the Court to establish the net Fair Market Rental Value (“FMRV”) for the length of delay, calculated incrementally from the claim start date to the claim end date. The net FMRV includes a deduction of \$1 per year that would have been paid by the Class Member if a Department of Hawaiian Home Lands (“DHHL”) lease had been awarded.

Settlement payments to Class members for construction and infrastructure claims were calculated by the Construction Expert based upon the reasonable cost to repair at the time the claim was submitted. *See*, June 8, 2023, *Settlement Special Master's Submission Of Construction Expert Report* [Dkt. 1677] & *Exhibit A (filed in camera)* [Dkt. 1688]. These calculations were approved by the Court's June 15, 2023, *Order Approving Construction Expert Report; Exhibit A* [Dkt. 1699].

In the event that the Gross Settlement Amount of \$328 million, less attorneys' fees, class representative incentive awards, and claims administration costs, is not sufficient to pay each claim at 100% of calculated value, all claims will be calculated and paid as set forth in paragraph VI. *infra*.

#### **IV. Determination of Valid Claims**

Notice to Settlement Class Members was provided as required by the Settlement Agreement and by the Court, and all of the Settlement Class Members' claims have been reviewed.<sup>1</sup> Based on that review, a determination has been made as to which claims are valid under the principles and rules set forth in the Settlement Distribution Plan. The settlement value of each valid claim has been computed by applying the principles and rules in the Settlement Distribution Plan.

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<sup>1</sup> A final individualized notice setting forth the estimated amount of the settlement payment for each Payment Recipient based on this Payment Distribution Plan was mailed on June 13, 2023, to the Settlement Class Members. Reports describing the complete Notice Plan were submitted by the Claims Administrator, Epiq, on June 19, 2023 [Dkt. 1709] and July 13, 2023 [Dkt. 1754, 1756, 1758, 1760, 1762, 1764].

The Court has reviewed *in camera*<sup>2</sup> and approves Exhibit 2 attached hereto, which is a list of 2,515 Class Members with valid claims that will be paid from the Settlement Fund, listed by Tracking Number and total amount of each Class Member's Settlement Payment. These Class Members are "Payment Recipients." There are 1,351 living class members who are Payment Recipients and 1,164<sup>3</sup> deceased class members' estates who are Payment Recipients.

The Court has reviewed *in camera* and approves Exhibit 3 attached hereto, which is a list of 224 class members who are excluded from receiving a Settlement Payment because they have no claim, listed by Tracking Number, Name and category of their exclusion.

The Court has reviewed *in camera* and approves Exhibit 4 attached hereto, which is a list of 30 class members who are excluded from receiving a Settlement Payment because they have settled all<sup>4</sup> of their claims, listed by Tracking Number and Name.

The Court has reviewed *in camera* and approves Exhibit 5 attached hereto, which is a list of 28 class members who are excluded from receiving a Settlement Payment because they have opted out of this lawsuit, listed by Tracking Number, Name and year they opted out.

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<sup>2</sup> Exhibits 2 – 5 were submitted and reviewed *in camera* pursuant to this Court's February 26, 2014, *Amended Order Granting Plaintiffs' Motion for Release of Confidential Information* filed March 1, 2007 [Dkt. 713], and State of Hawai'i Department of Hawaiian Home Lands, Hawai'i Administrative Rules § 10-1-3(d) which requires personal information of DHHL applicants to be held in "absolute confidence."

<sup>3</sup> Plaintiffs previously estimated a total of 1,354 deceased "class members", which at the time of submission was an accurate estimate of *all* deceased class members, including those with no claim, those who settled and those opted out. Unlike a typical case, at State Defendants' insistence, those who settled, those with no claim, and those who opted out are nevertheless considered "class members."

<sup>4</sup> One class member with two claims settled one but not the other and is not excluded from receiving a settlement payment for the non-settled claim.

The Court has reviewed *in camera* and approves Exhibit 10 to the Payment Distribution Plan, which is a list of 2,797 class members comprising the Settlement Class List.

## **V. Nature of the Settlement Payments**

Settlement Class Members' claims were filed under Hawai'i Revised Statutes Chapter 674 for purposes of this Settlement and the methods and rules of computing the value of Payment Recipients' claims were structured to comport with the intent and definitions of Hawai'i Revised Statutes Chapter 674 as interpreted by the Hawai'i Supreme Court in *Kalima v. State of Hawai'i*, 148 Hawai'i 129, 468 P.3d 143 (2020) ("*Kalima I*"). Thus, settlement payments are intended to adhere as closely as possible to the definition of "actual damages". Under section 674-2, "actual damages" are defined as:

...direct, monetary out-of-pocket loss, excluding noneconomic damages as defined in section 663-8.5 and consequential damages sustained by the claimant individually rather than the beneficiary class generally, arising out of or resulting from a breach of trust, which occurred between August 21, 1959, and June 30, 1988, and was caused by an act or omission by an employee of the State with respect to an individual beneficiary in the management and disposition of trust resources.

HRS § 674-2. In accordance with this definition, calculated settlement values exclude personal injury damages, consequential damages such as lost profits, noneconomic damages such as pain and suffering, and punitive damages. Moreover, in accordance with *Kalima II*, the fair market rental value measure for waiting claims (the "best fit curve") does not include interest payments.

## **VI. Method for Calculating Payment Recipients' Settlement Payments**

In order to determine the specific amount each Payment Recipient is to receive, the value of each validated claim will be calculated as follows:

1. The aggregate value of all claims for all Payment Recipients were added together to calculate the "Total Claims Amount."

2. Payment Recipients' **individual** claim amounts were compared to the "Total Claims Amount" to calculate each Class Member's "Proportional Share Percentage" of the "Net Settlement Amount."
3. The "Net Settlement Amount" was calculated by deducting attorneys' fees, class representative incentive payments, and estimated claims administration costs from the \$328,000,000 Class Settlement Amount. For purposes of calculating the Net Settlement Amount, Class Counsel will seek attorneys' fees award of 12.19% of the Class Settlement Amount (\$40 million), which is the maximum amount permitted in the Settlement Agreement. Class Representative Incentive Awards total \$75,000 (\$25,000 for the three Settlement Class Representatives). Estimated **current and future** class claims administration costs are currently calculated at 0.63% of the Gross Settlement Amount (\$2,073,043.78). Payment Recipients' estimated Settlement Payments are then calculated by multiplying the Net Settlement Amount by their Proportional Share Percentage.

## **VII. Distribution of Settlement Payments**

If Final Approval is granted on July 21, 2023, and no appeals are filed, it is expected that distribution of settlement payment checks can begin on or around September 1, 2023.

Consistent with the terms of the First Amended Joint Order Approving Probate Plan and Qualified Settlement Trust filed on or about June 23, 2023, the Chief Clerk, First Circuit Court, State of Hawai'i, is hereby ordered to transfer, 31 days after Final Approval as that term is defined in the Settlement Agreement, all settlement funds in the Kalima Settlement Fund trust account to "Sylvius H. Von Saucken, General Manager - Mass Torts, EPIQ Class Action &

Claims Solutions, Inc., Trustee of the Kalima Class Action Settlement Trust dated June 23, 2023.” (“Trustee”)

Consistent with the terms of the June 21, 2022, *Stipulation Regarding Settlement Claims Administration Costs and Order* [Dkt. 1500] and June 8, 2023, *Second Stipulation Regarding Settlement Claims and Administration Costs and Order* [Dkt. 1675], the Accountant for the Settlement Claims Administration Fund is hereby ordered to transfer, 31 days after Final Approval as that term is defined in the Settlement Agreement, all remaining funds in the Settlement Claims Administration Fund, to the Trustee.

The Trustee shall administer the settlement funds pursuant to the terms of the Trust, including the investment authority as set forth in Article 2-6.5 of the Trust, and as provided in the Hawai‘i Uniform Trust Code.

The Claims Administrator shall issue settlement payments from the Net Settlement Amount to each Payment Recipient via check. All settlement payment checks issued to Settlement Class Members will expire and become void 120 days after they are issued. Payment to each Payment Recipient is deemed made at the moment the settlement payment check for a Payment Recipient is issued, *i.e.*, prepared and signed by the Trustee of the Qualified Settlement Trust described in paragraph VIII. *infra*, payable to the Payment Recipient and mailed to the Payment Recipient’s last known address; private delivery services may be used for payment amounts larger than \$25,000. Each Settlement Payment check will include a statement explaining any adjustments to the estimated payment amounts previously provided to Payment Recipients in Mailed Notice #3.



The Claims Administrator shall make reasonable efforts to locate all living class members for whom there is no valid address, and any costs will be treated as claims administration costs.

The Claims Administrator shall make reasonable efforts to redistribute settlement payments to Payment Recipients whose settlement payment checks expired and shall apportion costs incurred in doing so individually to those Payment Recipients.

The Claims Administrator will not incur unreasonable expenses to locate living class members or Payment Recipients whose checks have expired and will report to the Court when reasonable efforts and expenses have been exhausted.

The Trustee of the Qualified Settlement Trust (“Trustee”), described in paragraph VIII. *infra*, will make distributions to living Class Members, without Court approval. The Trustee will make distributions to those with beneficial interests derived from deceased Class Members, upon approval of the Probate Court. The estimated time period for distribution of settlement payments to those who have beneficial interests in the Qualified Settlement Trust (“QST”) derived from deceased Class Members is expected to extend to at least December 2024.

### **VIII. Qualified Settlement Trust and Deceased Class Members**

There are approximately 1,164 Class Members who are known to be deceased. A June 23, 2023, Amended Probate Plan has been approved to efficiently and fairly distribute settlement payments to and among the parties who have a legitimate interest in the respective estates of the deceased Class Members [Dkt. 1724].

The Court has established the Kalima Class Action Settlement Trust, which is a Qualified Settlement Trust within the meaning of Treasury Regulation Section 1.468B. The Beneficiaries of the QST are defined as those “parties who have a valid claim and or interest in the proceeds of

the settlement funds derived from the Civil Matter, including parties who are entitled to the estates of deceased Class Members.” Article 1-2.1 of the QST. The method of distributions from the QST to all of the beneficiaries of the QST is set forth in Article 1-5 of the QST.

Upon petition to the Probate Court by Probate Special Counsel and with the oversight and recommendations of the Probate Special Master, the Probate Court will provide instructions to the Trustee to make proper distributions to the QST beneficiaries whose interests are derived from deceased Settlement Class Members’ estates.

Costs and fees associated with the probate process will be charged to the estates of the deceased Settlement Class Member both as a group, for common administrative probate services and costs, and individually for specific probate petitions, subject to the Probate Court’s approval.

The Trustee will be responsible for administration and distribution of the settlement funds, will be subject to the Court’s ongoing oversight, and for complying with federal reporting requirements.

Interim and final reports will be submitted for approval to the Probate Court by the Probate Special Master, Probate Special Counsel and QST Trustee. The Trustee will provide a Final Accounting at the conclusion of the Payment Distribution process.

## **IX. Claims Administration Costs, Probate Costs, Budgeting and Accounting**

### **A. Current and Future Class Costs.**

The total estimated class claims administration costs by Claims Administrator Epiq Class Action and Claims Solutions, Inc.’s (“Epiq”), fees and costs for the Settlement Special Master, Construction Expert, Tax Expert, Accountant, bank fees and other costs through August 31, 2023, are \$1,290,336.78. Revised Exhibit 6: Kalima Class Fund Cost by Payee.

The Court finds these costs to be reasonable and were and will be necessarily incurred in implementing the claims administration process approved by the Court and that these costs are “authorized uses of the class settlement amount” as defined by the Settlement Agreement, ¶ 4.B.

Future class claims administration costs for Epiq, the Settlement Special Master, Accountant, and other costs are estimated to be \$782,707. Revised Exhibit 6: Kalima Class Fund Cost by Payee; Exhibit 7: Epiq Redacted Budget Estimate for Class Costs. Total estimated class claims administration costs through December 31, 2024 are \$2,073,043.78.

The Court finds these cost estimates to be reasonable and will be necessarily incurred in implementing the claims administration process approved by the Court and that these costs are “authorized uses of the class settlement amount” as defined by the Settlement Agreement, ¶ 4.B.

The Court approves a Final Claims Calculation based upon total and estimated current and future costs of \$2,073,043.78. These accrued and estimated future costs will be deducted from the Class Settlement Amount in calculating the Net Settlement Amount. Any estimated costs not expended will be included in the Supplemental Payment of Undistributed Funds to Class Members, if such Supplemental Distribution is made pursuant to paragraph XI. *infra*.

Any requests for payment of future class Claims Administration costs in excess of this amount will be made through application and approval of the Settlement Special Master.

B. Current and Future Probate Fees and Costs

Estimated probate claims administration costs by Epiq, the Probate Special Master, and Probate Special Counsel through August 31, 2023, are \$568,052.49. Exhibit 8: Kalima Class Fund Cost by Payee. Future Probate claims administration costs for Epiq are estimated to be \$884,002.00. Exhibit 9: Epiq Redacted Budget for Probate Costs. Total estimated probate

claims administrative costs through December 31, 2024 are \$1,452,054.49. These costs will be apportioned *pro rata* among all deceased Class Members' estates' Net Settlement Amounts.

The Court finds these cost estimates to be reasonable and will be necessarily incurred in implementing the claims administration process approved by the Court and that these costs are “authorized uses of the class settlement amount” as defined by the Settlement Agreement, ¶ 4.B.

Future probate fees and costs by the Probate Special Master and Probate Special Counsel will be incurred and will be paid upon application to and approval by the Probate Court. These costs and fees will be apportioned directly to the estates being probated as explained in paragraph IX.C *infra*. Any estimated probate costs not expended will be included in the Supplemental Payment of Undistributed Funds to Class Members, if such Supplemental Distribution is made pursuant to paragraph XI. *infra*.

C. Accounting

Claims administration costs for the class as a whole and claims administration fees and costs for probate matters will be billed and accounted for separately.

1. Claims Administration Services for All Class Members

There are 2,515 living and deceased class members who are Payment Recipients. Post-Final Approval claims administration costs for all Payment Recipients will be deducted from the Gross Settlement amount and are apportioned among all Class Members.

2. Claims Administration Services for Deceased Class Members

There are an estimated 1,164 deceased class members. Post-Final Approval Claims Administration Services for deceased class members will be apportioned among all deceased Class Members. Each estate will be charged pro-rata, subject to Probate Court approval.

3. Individual Services by Probate Special Master/ Probate Special Counsel.

Pre-Final Approval fees incurred by the Probate Special Master and Probate Special Counsel for the development of the Probate Plan and QST will be apportioned among all deceased Class Members. Each estate will be charged general probate administration costs *pro rata* based on the estate's Net Settlement Amount, subject to Probate Court approval.

Post-Final approval fees and costs incurred by the Probate Special Master and Probate Special Counsel for the resolution of individual estates or on a group basis will be charged to the individual or grouped estates, subject to Probate Court approval.

**X. Supplemental Payment of Undistributed Funds**

At the conclusion of the Probate Plan and Settlement Payment distribution, in the case where Settlement Class Members received a payment that is less than 100% of their Proportional Share of the Total Claims Amount, and the remaining undistributed QST funds, including any estimated but unexpended claims administration or probate administration costs, are sufficient to pay the claims administration costs thereof, the Claims Administrator will make supplemental payments as follows:

1. Calculate all outstanding unpaid claims administration costs, if any; and
2. After first deducting unpaid claims administration costs incurred up to and including the supplemental payment and estimated claims administration costs in making the supplemental payments, calculate and distribute supplemental payments on a *pro rata* basis to all located Class Members and located Class Members' estates, based on the value of their individual claims up to 100% of their Proportional Share of the Total Claims Amount.

If the remaining Settlement Funds are not sufficient to fund the claims administration costs necessary to distribute such supplemental payments, the remainder of the Settlement Funds

will be used to pay outstanding Claims Administration costs and then distributed as set forth in paragraph XI, *infra*.

**XI. Disposition of Residual Funds**

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

**XII. Continuing Court Oversight**

Pursuant to the Settlement Agreement, ¶ IX.B, the Court shall retain jurisdiction over this matter to ensure that payments are made in accordance with this Payment Distribution Plan. Such jurisdiction shall terminate upon final distribution of all funds, including payment of residual funds, if any, pursuant to the Settlement Agreement, ¶ VI.E, or 60 days after the submission of the final report by the Special Master, whichever is later.

**XIII. Final Report**

At the conclusion of the distribution of settlement payments, the Trustee will submit a Final Accounting to the Court with details of the claims distribution process and status.

This Payment Distribution Plan shall be incorporated into and be a part of the Probate Plan; the Probate Plan also is incorporated into this Payment Distribution Plan.

[SIGNATURES ON THE NEXT PAGE]

APPROVED AS TO FORM:

BY: /s/ Craig Y. Iha  
ANNE E. LOPEZ  
Attorney General, State of Hawai'i

July 28, 2023  
DATED

CRAIG Y. IHA  
JORDAN A.K. CHING  
Deputy Attorneys General

LINDA LEE K. FARM  
DONNA H. KALAMA  
Special Deputy Attorneys General

ATTORNEYS FOR STATE DEFENDANTS

APPROVED AND SO ORDERED:

/s/ Lisa W. Cataldo



HON. LISA W. CATALDO  
JUDGE OF THE ABOVE-ENTITLED COURT

August 1, 2023  
DATED