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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

CIVIL BEAT LAW CENTER FOR THE PUBLIC INTEREST, INC., Plaintiff, vs. DEPARTMENT OF PUBLIC SAFETY, Defendant.	Civil No. 1CCV-22-0000735 DEFENDANT DEPARTMENT OF PUBLIC SAFETY'S MOTION FOR SUMMARY JUDGMENT; DECLARATION OF LISA M. ITOMURA; EXHIBITS A TO C; NOTICE OF HEARING; CERTIFICATE OF SERVICE HEARING: Time: 9:00 a.m. Date: December 29, 2022 Judge: Honorable John Tonaki

DEFENDANT DEPARTMENT OF
PUBLIC SAFETY'S MOTION FOR SUMMARY JUDGMENT

Defendant Department of Public Safety (PSD) by and through its attorneys Holly T. Shikada, Attorney General, State of Hawai‘i, and Deputy Attorneys General Craig Y. Iha and Lisa M. Itomura, hereby submits this Motion for Summary Judgment. This motion is made pursuant to Rules 7 and 56 of the Hawaii Rules of Civil Procedure (HRCP), and is supported by

the Memorandum in Support of the Motion, the declarations, and the records and files in this case.

DATED: Honolulu, Hawai‘i, November 18, 2022.

//s// Lisa M. Itomura
LISA M. ITOMURA
Deputy Attorney General

Attorney for Defendant
DEPARTMENT OF PUBLIC SAFETY

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

CIVIL BEAT LAW CENTER FOR THE PUBLIC INTEREST, INC., Plaintiff, vs. DEPARTMENT OF PUBLIC SAFETY, Defendant.	Civil No. 1CCV-22-0000735 MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

During the COVID-19 pandemic PSD worked to provide healthcare and protect inmates and staff in overcrowded correctional facilities. The department was sued for declaratory and injunctive relief by several inmates and negotiated a settlement which included the formation of an "Agreement Monitoring Panel" (AMP) to inspect its facilities, review its policies and procedures, and make recommendations. In order to quickly respond to the ongoing global health emergency, PSD needed to be free to share information and access with the AMP without threat of future litigation. The AMP's reports may therefore be withheld from disclosure under the work product privilege and in order to avoid the frustration of a legitimate government function.

As discussed below, PSD's motion for summary judgment should be granted as there are no disputes as to any material facts and PSD is entitled to judgment as a matter of law.

II. BACKGROUND

On April 28, 2021, inmates Brenon Nash, Robert Gibson, Chauncy Hata, Garth Coleman, Wayne J. Ancheta, Francisco Alvarado, Robert Walsh, Jonathan Carter, and Duane Bertlemann

filed a class action lawsuit in the Circuit Court of the First Circuit under Civil No. 1CCV-21-0000541 with as plaintiffs. The lawsuit alleged that the State of Hawai‘i, Department of Public Safety, David Y. Ige, Josh Green, Nolan Espinda, and Max Otani had failed to prevent and properly respond to outbreaks of COVID-19 in the prisons and failed to follow its Pandemic Response Plan (PRP). Counsel for the Defendants removed the complaint to the United States District Court for the District of Hawai‘i on June 8, 2021, becoming Civil No. CV-21-00268 JAO-KJM. Plaintiffs' attorneys then filed a First Amended Complaint in federal court with new plaintiffs inmates Anthony Chatman, Francis Alvarado, Zachary Granados, Tyndale Mobley, and Joseph Deguair, becoming Chatman et. al., v. Otani, et. al..

On September 2, 2021, after multiple attempts, the parties executed a "Settlement Agreement and General Release" (Settlement Agreement), which included among its terms the establishment of an "Agreement Monitoring Panel" (AMP). The AMP, made up of five individuals (two chosen by Plaintiffs, two chosen by Defendant, and one individual chosen by agreement of both parties), were to provide "non-binding, informed guidance and recommendations to aid DPS[PSD] in its continuing effort to implement the PRP, as well as evolving public health guidance that may require a change to DPS's COVID-19 response." See Exhibit A, a true and accurate copy of the Chatman "Settlement Agreement And General Release," pg. 3-4.

The Settlement Agreement signed by counsel for Plaintiffs and PSD required that all "non-public information obtained by the AMP" be maintained in a confidential manner and "the parties agreed[d] to keep AMP reports confidential and not disseminate such reports to third parties, except as in accordance with a protective order." Exhibit A, pg. 6. Counsel for Plaintiffs, counsel for PSD, and all members of the AMP were required to sign a confidentiality

agreement before being provided with "any documents that implicate safety and security, or medical privacy or any other confidential documents." Exhibit A, pg. 6. See Exhibit B, a true and accurate copy of the confidentiality agreement signed by counsel for the Plaintiffs, counsel for PSD, and all AMP members.

After a hearing on November 8, 2021, the court approved of the Settlement Agreement. As Chatman only sought declaratory and injunctive relief, claims for monetary relief were not released or waived as part of the settlement. In fact, at the November 8, 2021, hearing Plaintiffs' counsel represented that he was going to file a COVID-19 damages lawsuit in state court in January 2022. See Exhibit C, a true and accurate copy of the court's order approving of the Settlement Agreement issued on November 10, 2021, p. 6 fn. 6; p. 9-10. Although the case was dismissed with prejudice, the court retained jurisdiction "regarding all matters relating to the administration, consummation, and enforcement of the Settlement Agreement and Fee Settlement Agreement and for any other necessary purpose relating to the settlement." Exhibit C, p. 10.

Pursuant to the Settlement Agreement, the AMP visited all PSD correctional facilities in Hawai‘i, reviewed PSD policies and procedures, PRPs for each facility, and were given access to confidential information such as medical records and security protocols. They were also free to have confidential conversations with PSD staff and individuals housed in the facilities. The panel produced six reports, from October 1, 2021, to March 22, 2022, which set out their observations and recommendations.

Plaintiff Civil Beat Law Center for the Public Interest sent an email to PSD on March 17, 2022, requesting copies of all AMP reports. On March 31, 2022, PSD stated that the AMP

reports were confidential and not discoverable and denied the request. Complaint, p. 3-4. Plaintiff then filed the instant lawsuit on June 24, 2022, seeking copies of the AMP reports.

III. STANDARD OF REVIEW

Summary judgment should be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Hawaii Rules of Civil Procedure (HRCP) Rule 56(c). "A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Critchfield v. Grand Wailea Co., 93 Hawai'i 477, 482-3, 6 P.3d 349, 354-5 (2000) (citations omitted).

In determining whether a genuine issue of material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. Tradewind Ins. Co., Ltd. v. Stout, 85 Haw. 177, 180, 938 P.2d 1196, 1199 (1997). When the defendant is the moving party, summary judgment is proper as a matter of law if, after viewing the record in a light most favorable to the plaintiff, there is no genuine issue of material fact regarding one or more of the essential elements of the defense which the motion seeks to establish and it is clear that the plaintiff would not be entitled to recover under any discernible theory. Giulani v. Chuck, 1 Haw. App. 379, 383, 620 P.2d 733, 736 (1980).

III. ARGUMENT

A. The AMP Reports Are Protected Under Section 92F-13(2), HRS

As the exhibits show, PSD was involved in litigation in Chatman and only resolved the

case in a settlement after much negotiation. Exhibit A; Exhibit C, p. 3-4. The AMP reports were part of that agreement, and are therefore protected from disclosure under section 92F-13(2), HRS.

HRS section 92F-13(2) states in relevant part:

> This part shall not require disclosure of:
> * * *
> (2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable[.]

The Office of Information Practices (OIP) has previously stated that HRS section 92F-13(2) prevents disclosure of any government records that would be protected by HRCP Rule 26, such as the attorney-client, work product and any other judicially-recognized privileges. See OIP Opinion Letter No. (Op.Ltr.No.) 89-10 at 5; Op.Ltr.No. 92-14 at 6-9. HRCP Rule 26(b)(4) states that "the court shall protect against disclosure of mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation.[emphasis added]" The work product privilege has been defined to cover materials "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)[.]" HRCP Rule 26 (b)(4). The key issues then is whether the materials were prepared in anticipation of litigation or trial. Anastasi v. Fidelity Nat. Title Ins.Co., 137 Hawaii 104, 113 (2016).

Here, the AMP was required to be formed and "operational" within two weeks of the signing of the Settlement Agreement on September 2, 2021. The panel was to provide "non-binding, informed guidance and recommendations to aid DPS[PSD] in its continuing efforts to implement the PRP, as well as evolving health guidance that may require change to

DPS's[PDS's] COVID-19 response." Exhibit A, pg. 3-4. The AMP was thus receiving, reviewing, and accessing confidential information from PSD pursuant to the Settlement Agreement well before the agreement was approved by the court on November 8, 2021, and its reports reflect the members' mental impressions and opinions of PSD's compliance with its PRP and the safety protocols to prevent and control COVID-19 infections in its facilities, which are the basis of the Chatman lawsuit. See Exhibit A. Although Chatman has since been dismissed, Plaintiffs' counsel represented to Judge Otake that he would be filing a COVID-19 damages lawsuit in state court. Exhibit C, at 6, fn.6. The AMP reports were thus prepared in anticipation of litigation and are protected from disclosure by the work product privilege. See OIP Op.Ltr.No. 92-14 at 6-7 (lawsuit need not have been filed yet for work product privilege to attach as long as the documents were prepared in anticipation of litigation).

The fact that the AMP members are not attorneys does not mean that the work product privilege cannot apply. As set out in HRCP Rule 26(b)(4), materials "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)" are covered by the work product privilege (emphasis added). Lewis v. Wells Fargo & Co., 266 F.R.D. 433, 439-441 (N.D.Cal.2010) (work product privilege applies to work by non-attorneys).

The fact that the AMP reports were shared with both counsel for Plaintiffs and for Defendant also does not prevent the work product privilege from attaching. OIP has not faced a fact pattern such as this, but in the past has turned to the caselaw concerning the federal Freedom of Information Act (FOIA) to assist in its analysis of the issues. See e.g. OIP Op.Ltr.No. 91-09[FOIA Exemption 7 caselaw used as guidance in interpreting section 92F-13(3)].

In 100Reporters LLC v. United States Department of Justice, 248 F.Supp.3d 115 (D.C.2017), the plaintiffs, a non-profit organization of journalists, requested copies of documents from the U.S. Department of Justice (DOJ) concerning an independent compliance monitor program for Siemens Corporation. Siemens had agreed to the independent compliance monitor (Monitor) program as part of settlement agreements with the DOJ and the Securities Exchange Commission (SEC). The agreements required Siemens to provide the Monitor, paid by Siemens, access to its confidential records, conduct on-site observations of the company's internal procedures, and meet and talk with officers, directors, and staff, along with other tasks. The Monitor was to write reports, shared with Siemens and the DOJ and SEC, concerning his assessment of the effectiveness of Siemens' compliance with anti-corruption laws, make recommendations, and ensure compliance with the settlement agreements. Siemens was allowed to review and adopt or contest the Monitor's recommendations.

The DOJ eventually authorized a termination of the monitoring, concluding that Siemens had satisfied its obligations under the settlement agreements. 100Reporters, 248 F.Supp.3d at 127-129. Plaintiffs then requested from the DOJ various documents concerning the Siemens monitoring program under FOIA. DOJ produced some documents but withheld others, based in part on FOIA Exemption 5. 100Reporters, 248 F.Supp.3d at 129-131.

FOIA Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5). Documents that are covered by the attorney-client privilege, the work product privilege and what is called the "deliberative process" privilege may be protected from disclosure under this exemption. 100Reporters, 248 F.Supp.3d at 145.

There are two factors that must be met for FOIA Exemption 5 to apply: 1) the document must be "inter-agency or intra-agency memorandums or letters" and 2) the documents must not be available by law to a party other than an agency in litigation with the agency. 5 U.S.C. §552(b)(5). Ordinarily for Exemption 5 to apply the document at issue must have come from a government agency. However, under what is known as the consultant corollary, Exemption 5 can apply to "protect certain communications between an agency and an outside consultant." 100Reporters, 248 F.Supp.3d at 146.

The United States Supreme Court confirmed the "consultant corollary" to Exemption 5 in Department of Interior v. Klamath Water Users Protective Association, 532 U.S. 1, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001). In a "typical" case, "the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done." 100Reporters, 248 F.Supp.3d at 146-147, quoting Klamath, 532 U.S. at 10 (discussing deliberative process privilege). The key issue in deciding whether the consultant corollary applied was whether the outside consultant was advocating for any interests or only for "truth and its sense of what good judgment calls for." 100Reporters, 248 F.Supp.3d at 148, quoting Klamath, 532 U.S. at 11. In 100Reporters, the court found the Monitor to be covered by the consultant corollary as he was exercising independent judgment and not advocating for any interests, and his documents were deemed "intra-agency" documents under Exemption 5. 100Reporters, 248 F.Supp.3d at 149.

Although the court initially found that DOJ had not submitted sufficient evidence to justify the withholding of the Monitor's reports and other documents under the deliberative process privilege, it allowed DOJ another opportunity to submit evidence on the issue. 100Reporters, 248 F.Supp.3d at 150-154. The DOJ later submitted further evidence, and the

court ruled that DOJ had shown that it was justified in withholding most of the Monitor's yearly reports and other documents from disclosure based on the deliberative process privilege, even though both counsel for DOJ and Siemens shared the Monitor's reports, based on FOIA Exemption 5. 100Reporters, 316 F.Supp.3d 124 (2018), 137, 143-158.

FOIA Exemption 5 is almost identical to section 92F-13(2), HRS, in protecting government records in litigation to the extent they are not discoverable. Here, like the Monitor in 100Reporters, the Plaintiffs and PSD had agreed to the formation of the AMP as part of a settlement agreement. The agreement gave the AMP broad powers to inspect all PSD facilities, talk to staff and inmates, and review policies and medical information. Like the Monitor, the AMP exercised independent judgment in assessing PSD's compliance with its PRP and making recommendations and was not advocating for itself or a client. PSD was free to adopt or contest the AMP's recommendations. Exhibit A. Thus, even though members of the AMP were not government employees and their reports were accessed by both counsel for Plaintiffs and PSD, their reports are government records pertaining to litigation in which the State is a party. Section 92F-13(2), HRS; 100Reporters, 248 F.Supp.3d at 149.

As the AMP reports are government records pertaining to litigation in which the State is a party, they are protected from disclosure by the work product privilege as shown earlier. PSD therefore properly denied Plaintiff's request for the AMP reports.

B. The AMP Reports Are Protected Under Section 92F-13(3), HRS

The AMP reports need to be kept confidential in order to encourage open communication and to provide free access and information to the AMP. Keeping the reports confidential further allowed PSD to properly consider whether it could, whether it should, and how to implement the

AMP's recommendations, before any final decision was made. The AMP reports may therefore be withheld from disclosure under section 92F-13(3), HRS.

HRS section 92F-13(3) states in relevant part:

> This part shall not require disclosure of:
> * * *
> (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function[.]

OIP has previously stated that

> The UIPA's frustration exception does not describe a specific type of information that may be withheld. Rather, it categorically provides an agency with the right to withhold information whose disclosure would frustrate a legitimate government function – in other words, it gives an agency a legal basis for withholding information to protect its ability to do its job. See Haw. Rev. Stat. § 92F-13(3). The exceptions to disclosure found in the federal Freedom of Information Act ("FOIA") on which UIPA is indirectly based, generally are more specific and apply to specific types of records described in the law, but under the UIPA many of the situations covered by a specific FOIA exception would fall under the general umbrella of frustration.

OIP Op.Ltr.No. 07-05, p. 2. For example, in OIP Op.Ltr.No. 07-05, the Department of Business, Economic Development, and Tourism could withhold from disclosure information provided to it by energy companies concerning "the physical security of Hawaii's critical energy infrastructure," under section 92F-13(3), HRS.

Section 92F-13(3), HRS, also allows for the withholding of documents that are government records that are pre-decisional and deliberative work product in certain circumstances. See OIP Op.Ltr.No. 04-15 at 1-3(tax forecasts produced by government staff). Although the Hawai'i Supreme Court narrowed the deliberative process privilege in Peer News LLC v. City and County of Honolulu, 143 Hawai'i 472, 431 P.3d 1245 (2018), it did not eliminate it altogether:

> This is not to say that certain types of deliberative communications will not qualify for withholding when the government can identify a concrete connection between disclosure and frustration of a particular legitimate government function. For instance, if disclosed prior to a final agency decision, many pre-decisional draft documents may impair specific agency or administrative processes in addition to inhibiting agency personnel from expressing candid opinions. However, an agency must clearly describe what will be frustrated by disclosure and provide more specificity about the impeded process than simply "decision making." See infra Section III.D.

Peer News, 143 Hawai'i at 480, n.15, 431 P.3d at 1253 n.15.

In this case, PSD agreed to allow various experts to tour its facilities and offer advice (as codified in the AMP reports) on how to respond to an unprecedented pandemic now and in the future as part of settlement of a federal class action lawsuit. PSD was interested in the AMP's assessment of its efforts to handle COVID-19 and its recommendations, and has considered those assessments and recommendations when deciding where and how to spend funds, a process which continues to this day. To require disclosure of such expert recommendations before final decisions have been made would impair PSD's decision-making and discourage its staff from being candid, and chill efforts to seek expert assistance during a dynamic, unprecedented public health emergency.

Judge Otake, in approving the settlement agreement in Chatman, noted that

> In the interests of the class and Defendant, the parties have mutually agreed that this is the best mechanism under the circumstances to timely address COVID-19 issues at DPS[PSD] facilities. Indeed, AMP includes representatives from both sides who will engage with DPS[PSD] staff to identify and rectify any existing shortcomings. At the hearing [on the motion for approval of the settlement], class counsel expressed his satisfaction with the AMP process so far. The Court believes that this collaborative model will facilitate change in a far more expeditious and economical manner than continued litigation.

Exhibit C, p. 15. In stating that "this collaborative model will facilitate change in a far more expeditious and economical manner than continued litigation," the court accepted that the

settlement was in the interests of the class and would "timely address COVID-19 issues" at PSD facilities. The court's approval of the Chatman settlement thus also approved of the parties' agreement to keep confidential the AMP reports and the information provided to the panel and confirmed the parties' intent to "identify and rectify any shortcomings" through this confidential process.

To recap, the Centers for Disease Control and Prevention (CDC) dates the first cluster of cases of what has been identified as COVID-19 from December 12, 2019, in Wuhan, China. See https://www.cdc.gov/museum/timeline/covid19.html (last visited November 4, 2022). Since then COVID-19, which is virulently infectious, has infected more than 97 million Americans and killed more than 1 million. See https://www.covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited November 4, 2022). In Hawai'i, COVID-19 has to date infected over 362,000 people and killed over 1711. See https://health.hawaii.gov/coronavirusdisease2019/ (last visited November 4, 2022). "[E]fforts to contain COVID-19" are complicated by a host of complex factors, including "the fact that individuals who are 'infected but asymptomatic may unwittingly infect others." Carmichael v. Ige, 470 F.Supp.3d at 1130 (D. Hawai'i 2020) (quotation and alteration omitted). While many individuals who suffer from COVID-19 symptoms fully recover, some suffer from long-term complications. See https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html (last visited November 4, 2022). And since December 2020, new variants of the COVID-19 virus have been detected in the United States. See https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-classifications.html (last visited November 4, 2022).

As set out in the Settlement Agreement, PSD is making its "best efforts" to implement its Pandemic Response Plan (PRP), in coordination with guidelines from the CDC

and assistance from the Hawai‘i Department of Health and adjusted for the layout of its facilities, the size of the population and staffing in the facilities, and other resources. The AMP was an advisory panel, providing non-binding, informed guidance and recommendations to aid PSD in its continuing efforts to implement the PRP, as well as evolving health guidance that may require change to PSD's COVID-19 response. Exhibit A, p. 3-4.

Both counsel for the Plaintiffs and PSD agreed to the confidentiality of the reports produced by the AMP. Counsel for the Plaintiffs also agreed to not use any information provided to the AMP or included in the reports in any future litigation. Settlement Agreement, pg. 6-7. Without these conditions, PSD would not have provided to the AMP unfettered, candid access to its facilities, staff, and information. Faced with the need to act quickly – and to rely on all resources and expertise available – respond to the COVID-19 emergency, agencies such as PSD must have the ability to provide such access without the specter of future litigation.

Disclosure of the AMP reports at this time under these circumstances would thus inhibit the honest input of PSD staff and frustrate PSD's attempt to implement its PRP and handle COVID-19 in its facilities. It would also have a chilling effect on government efforts to respond to the still-ongoing COVID-19 pandemic, as well as future unprecedented emergencies requiring quick action without the specter of potential litigation.

Here, in the midst of an unprecedented pandemic which literally shut down businesses and required the public to stay home for almost two years and facing a class action federal lawsuit, PSD chose to seek expert advice through settlement of a federal class action lawsuit. The department should not then have its ability to seek expert advice or to consider how to implement it thwarted by the disclosure of the AMP reports

IV. CONCLUSION

For all of the foregoing reasons, PSD respectfully requests that the Court grant its Motion For Summary Judgment.

DATED: Honolulu, Hawai‘i, November 18, 2022.

STATE OF HAWAI‘I

HOLLY T. SHIKADA
Attorney General
State of Hawai‘i

/s/ Lisa M. Itomura
LISA M. ITOMURA
Deputy Attorney General

Attorney for Defendant
DEPARTMENT OF PUBLIC SAFETY

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

CIVIL BEAT LAW CENTER FOR THE PUBLIC INTEREST, INC., Plaintiff, vs. DEPARTMENT OF PUBLIC SAFETY, Defendant.	Civil No. 1CCV-21-0000735 DECLARATION OF LISA M. ITOMURA

DECLARATION OF LISA M. ITOMURA

Comes now LISA M. ITOMURA, and DECLARES:

1. I am an attorney licensed to practice law in the State of Hawai'i, and I am the deputy attorney general representing Defendant Department of Public Safety (PSD) herein. I have personal knowledge of the affirmations made herein or reviewed the documents herein and ask the Court to take judicial notice of the attached Exhibits A and C, which can be easily verified via the United States District Court for the District of Hawaii PACER website.

2. Exhibit A attached here in is a true and accurate copy of the "Settlement Agreement And General Release," dated September 2, 2021, executed by counsel for the Plaintiffs and the Defendant in Chatman et. al. v. Otani, Civil No. 21-00268 JAO-KJM, and attached as Exhibit A to the "Joint Motion For Preliminary Approval Of Settlement And For Order Setting Fairness Hearing," ECF 93, filed on September 3, 2021, in the United States District Court for the District of Hawaii.

3. Exhibit B attached herein is a true and accurate copy of the confidentiality agreement executed by members of the Agreement Monitoring Panel (AMP) created by the Chatman

settlement agreement, counsel for the Plaintiffs in Chatman, and members of PSD. I obtained and reviewed Exhibit B as part of my representation of PSD herein.

4. Exhibit C is a true and accurate copy of the Honorable United States District Court Judge Jill A. Otake's "Order Granting (1) Joint Motion For Final Settlement Approval And (2) Plaintiffs' For Approval Of Attorneys Fees And Costs Settlement Agreement," filed on November 10, 2021, in Chatman et.al. v. Otani, Civil No. 21-00268 JAO-KJM.

I do declare under penalty of the law of perjury that the forgoing is true and correct.

Dated: Honolulu, Hawaii, November 18, 2022.

/s/ Lisa M. Itomura
LISA M. ITOMURA

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ANTHONY CHATMAN, FRANCISCO ALVARADO, ZACHARY GRANADOS, TYNDALE MOBLEY, and JOSEPH DEGUAIR, individually and on behalf of all others similarly situated, Plaintiffs, v. MAX N. OTANI, Director of the State of Hawai'i Department of Public Safety, in his official capacity, Defendant.	CIVIL NO. 21-00268 JAO-KJM

SETTLEMENT AGREEMENT AND GENERAL RELEASE

Whereas the parties agree that both the plaintiffs and the defendant are interested in resolving the present litigation and providing reasonable and appropriate measures for the health and safety of inmates and staff; and

Whereas, on March 23, 2020, the Centers for Disease Control and Prevention ("**CDC**") promulgated interim guidelines for the management of coronavirus disease 2019 ("**COVID-19**") in correctional and detention facilities ("**CDC guidelines**"), which it has periodically updated as additional information

EXHIBIT A

has become available;[1]

Whereas, on March 23, 2020, the State of Hawai'i Department of Public Safety ("**DPS**") adopted a Pandemic Response Plan ("**Response Plan**" or "**PRP**") based on a draft prepared by a private Kansas-based health care contractor and consulting firm called VitalCore Health Strategies and for the purpose of incorporating CDC guidance to assist DPS in its response to the COVID-19 pandemic;

Whereas, the CDC guidelines expressly state that "The guidance may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions";

Whereas, the parties acknowledge DPS's efforts to comply with the CDC guidelines and, where appropriate, to obtain clarification or guidance from the State of Hawai'i Department of Health ("**DOH**"); and

Whereas, DPS asserts that it has made significant efforts to combat COVID-19, including, but not limited to, increasing sanitation and hygiene, testing, vaccination of staff and inmates, and reduction of inmate populations through the release of eligible inmates safely and appropriately to the community; and

---

[1] *See* Centers for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, June 9, 2021, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html.

Whereas, on July 13, 2021, the Honorable Jill A. Otake issued a preliminary injunction compelling DPS to take certain specified actions regarding its plans and efforts to combat COVID-19 in state correctional and detention facilities.

Now therefore, the parties agree to resolve their differences as follows:

A. CDC GUIDELINES AND DPS'S PANDEMIC RESPONSE PLAN ("PRP")

1. DPS will make best efforts to implement the PRP and adapt it to the CDC guidelines based on best practices and recommendations from DOH, and based on the individual facilities' physical space, staffing, population, operations, and other resources and conditions.

B. MONITORING

2. A five-person, independent Agreement Monitoring Panel ("**AMP**") shall be established.

3. The AMP shall be formed and operational within two (2) weeks of the signing of this Agreement and consist of five persons with appropriate knowledge and expertise in correctional health care and managing infectious disease in a correctional setting or in the management of correctional systems.

4. The panel shall be selected as follows: two people chosen by defendant, who may be employed by DPS, two people chosen by plaintiffs, and one person who does not currently work for DPS, who has significant expertise or

experience in the management of correctional systems, and is chosen by agreement of the parties. The individuals on the AMP (other than the DPS employees) will be paid as provided in this Agreement. The fees of the AMP panel members will be subject to approval by, and payment will be processed through, the Department of the Attorney General. Approval and payment of the AMP panel members' costs (including the DPS employees), as well as for any staff and resources necessary to support the AMP, will be processed through the Department of the Attorney General. The total fees for the duration of the Agreement shall be capped at $75,000 per panel member unless the Agreement is extended pursuant to Section G, *infra*, in which case additional fees shall only be approved by mutual written agreement of the parties. If a panel member becomes unavailable or is unable to continue as a member of the panel, the party that appointed that panel member will appoint a replacement panel member within 10 days. If the panel member chosen by agreement of the parties becomes unavailable or is unable to continue as a member of the panel, a replacement will be chosen by agreement of the parties.

5. The AMP is an advisory panel. Its role is to provide non-binding, informed guidance and recommendations to aid DPS in its continuing effort to implement the PRP, as well as evolving public health guidance that may require a change to DPS's COVID-19 response. The AMP's areas of focus shall be limited to the following:

a. Quarantining/cohorting/isolation of inmates (including developing strategies and proposing guidelines to assist DPS in the identification and housing of inmates who are "high risk" due to age and/or underlying medical conditions as defined herein);

b. Sanitation/sanitization;

c. Social distancing strategies;

d. Testing (subject to the availability of resources and in coordination with DOH and/or Hawai'i National Guard);

e. Providing inmate information to DOH for contact tracing; and

f. Inmate vaccination and health hygiene education.

The AMP's recommendations shall not include measures related to the conditions of confinement unrelated to COVID-19 or matters beyond DPS' control, including mandatory release of inmates to alleviate overcrowding, moratoriums on arrests or pretrial detention of offenders, or mandatory structural improvements to DPS facilities such as the construction of additional facilities or housing units.

6. The AMP shall devise procedures for the monitoring of this Agreement and the standards for developing its guidance and recommendations. In doing so, it shall apply professionally acceptable public health, epidemiological, and correctional healthcare and security standards for correctional facilities in responding to COVID-19, with the recognition that these will evolve over time.

7. Upon seventy-two hours notice to DPS, the AMP should be given prompt access to DPS facilities to conduct onsite visits. Upon seventy-two hours notice, the AMP shall also have access to all DPS policies, procedures and records detailing its COVID-19 response, as well as access to all staff, inmates and consulting physicians and experts with respect to DPS's COVID-19 response. DPS shall direct all employees to cooperate fully with the AMP. All non-public information obtained by the AMP shall be maintained in a confidential manner. The individuals on the AMP, as well as Plaintiffs' counsel and all members of any class certified by the Court, must sign a confidentiality agreement prior to being provided with any documents that implicate safety and security, or medical privacy, or any other confidential documents. The confidentiality agreement shall further prohibit re-dissemination of such documents and public comment on their work for the AMP. Furthermore, the parties agree to keep AMP reports confidential and not disseminate such reports to third parties, except as in accordance with a protective order. The proceedings of the AMP shall be subject to the mediation privilege. *See* HRS § 658H-4.

8. Other than in this lawsuit, information and documents obtained, as well as any reports issued by the AMP, shall not be admissible against the State, its agencies, and/or employees, in any proceeding for any reason, including in any subsequent litigation for damages. In this lawsuit, the admissibility into evidence

of any information or documents provided to the AMP, or of any AMP reports, or portions thereof, shall be governed by the federal rules of evidence, and the parties reserve all rights to either seek admissibility or object to admissibility of those reports. Reports shall be admitted into evidence only after entry of an appropriate protective order and the filing party shall seek leave to file any such report under seal in accordance with the Local Rules of Practice for the United States District Court for the District of Hawai'i.

9. Unless such conflict is waived by the parties, the individuals on the AMP shall not accept employment or provide consulting services that would present a conflict of interest with their responsibilities under this Settlement Agreement, including being retained (on a paid or unpaid basis) by any current or future litigant or claimant, or such litigant's or claimant's attorney, in connection with a claim or suit against the State or its departments, officers, agents or employees relating to DPS's COVID-19 response.

10. The AMP shall provide the defendant and counsel for the parties with reports describing the steps taken by DPS to implement its PRP and/or the AMP's guidance or recommendations focusing on areas described in Paragraph 5. The AMP shall issue reports every month, unless the parties agree otherwise, in a format to be agreed upon by the AMP and the parties provided, however, that the reports shall not include ultimate findings of fact or conclusions. The reports

should address each facility's efforts to follow the PRP and identify areas needing improvement. If desired by the AMP, the reports may identify where members of the AMP are in disagreement. These may be reduced to quarterly reports upon mutual agreement of the parties and theAMP.

11. The AMP may not alter, amend or change the provisions of the Agreement, except as provided in Paragraph 27 of this Agreement.

C. QUARANTINE AND ISOLATION

12. DPS will screen and quarantine people newly admitted to a correctional facility as provided in the PRP, and subject to any conditions, modifications and/or exceptions set forth therein.

13. Unless the AMP decides otherwise, DPS will immediately isolate those who exhibit COVID-19 symptoms and those who test positive for COVID-19 infection as medically appropriate and in accordance with the PRP. DPS will comply with this provision to the best of its ability taking into account available space, structural limitations, and staffing and other resources within each facility.

14. Placement in quarantine and medical isolation units shall not be punitive. Regarding inmates who have been medically isolated and subsequently cleared of COVID-19 according to the PRP and thus released from medical isolation, DPS will make best efforts to return such inmates to their pre-medical isolation facility unless there are safety and security concerns, or health concerns

with this return. DPS also will make best efforts to reinstate such inmates who previously held jobs or were in programsto these assignments, recognizing that this may not always be possible due to safety and security concerns, health concerns, available space, and other correctional management issues. Inmates in isolation and/or quarantine will be provided regular telephone calls in accordance with PSD policy COR.15.03 to their family members and attorneys and DPS will not unnecessarily delay any appearances in court or before the parole board, recognizing that this may not always be possible due to safety and security concerns, health concerns, and/or limitations with technology, infrastructure, or staffing. DPS will make best efforts to communicate to inmates this policy when moving inmates to medical isolation.

D. VACCINATION AND TESTING

15. Pursuant to the Emergency Proclamation Related to the COVID-19 Response signed by Governor David Y. Ige on August 5, 2021, DPS staff members must attest to their vaccination status and DPS staff who are not fully vaccinated must undergo regular COVID-19 testing. Recognizing the need for DPS and individual DPS facilities to remain flexible and adaptable to developing health and security concerns, DPS will continue to screen staff and any others entering DPS facilities consistent with CDC guidelines and DOH recommendations.

16. DPS will make COVID-19 vaccines available to every inmate and to

both promote and educate inmates and staff regarding COVID-19 vaccination.

17. Defendant agrees to report to the AMP every week, with Plaintiffs' counsel copied, providing the number of prisoners at each facility who are tested for COVID-19 and those who test positive for COVID-19, those who are hospitalized due to COVID-19, and those who die as a result of COVID-19.

E. SANITATION

18. DPS will distribute soap to each person housed in a DPS facility ("**Facility**") as provided in the PRP.

19. All common areas of the facilities, including but not limited to bathrooms, dayrooms, and showers, shall be cleaned as provided in the PRP.

20. Prisoners will be provided reasonably sufficient non-alcohol cleaning agents and equipment for the purpose of cleaning their cells, cubicles, or sleeping areas, as provided in the PRP.

21. All people in DPS custody shall be allowed to shower—in running water—no less than once every other day, regardless of COVID-19 symptoms, test results, or housing. This may be suspended when required for reasons consistent with Paragraph 14 above (*i.e.* security concerns, available space, correctional management issues, and staffing issues), for maintenance issues, or inmate refusals.

22. DPS will provide reasonably sufficient cleaning supplies to allow all

inmates in its custody in correctional facilities to wipe down phones before they use them.

23. DPS will provide a minimum of two cloth or other appropriate face masks per person, as provided in the PRP.

24. DPS will require staff to wear appropriate face masks where necessary within the correctional facilities as provided for in the PRP.

F. DIRECTIVE PROHIBITING RETALIATION

25. Within 10 days of the execution of this Agreement, Defendant will issue a formal directive prohibiting DPS staff from retaliating against any inmate or staff member for their participation in this lawsuit.

G. MODIFICATION OF THE AGREEMENT

26. This Agreement may be modified only by the mutual written agreement of all parties or as provided in Paragraph 27 of this Agreement. The Court shall be notified in writing of all such modifications but need not approve such modifications.

H. TERMINATION OF THE AGREEMENT

27. The parties intend that this Agreement will remain in place until January 31, 2022, provided that upon the mutual consent of the parties or by written agreement of a majority of the AMP, it may be extended. However, the parties agree that any extension of this Agreement shall not extend beyond

March 31, 2022. The Agreement may also be terminated by mutual consent of the parties.

28. Upon termination, without the need for any further order of any state or federal court, all jurisdiction of any court to enforce this Agreement shall end except in the event any motions or proceedings are pending, in which case the Court shall retain jurisdiction to resolve or dismiss any such motions or proceedings.

I. GENERAL RELEASE OF CLAIMS

29. The named plaintiffs, individually and on behalf of their heirs, beneficiaries, successors and assigns, in consideration of the benefits of this Agreement, release and forever discharge the Defendant, the State of Hawai'i, all agencies of the State of Hawai'i, all present and former officers, employees and agents of the State of Hawai'i, (including all current and former employees of the State of Hawai'i), in both their official and individual capacities, their heirs, successors and assigns, from all claims and liabilities of any kind which Plaintiffs or Defendant had, have, or may have for declaratory or injunctive relief or for attorneys' fees and costs arising from acts or omissions alleged in this lawsuit. Said liability includes such actions as may have been or may in the future be brought in the federal courts, the courts of the State of Hawai'i, or any state or federal administrative agency. Furthermore, all class members as defined in the Order

entered in the District Court on July 13, 2021, individually and on behalf of the Class, their heirs, beneficiaries, successors and assigns, in consideration of the benefits of this Agreement, release and forever discharge the Defendant, the State of Hawai'i, all agencies of the State of Hawai'i, and all present and former officers, employees and agents of the State of Hawai'i (including all current and former employees of the State of Hawai'i), in both their official and individual capacities, their heirs, successors and assigns, from all claims and liabilities of any kind for declaratory or injunctive relief or for attorneys' fees and costs arising from acts or omissions alleged in this lawsuit, or from acts or omissions that could have been litigated by the class in this action. Said liability includes such actions as may have been or may in the future be brought in the federal courts, the courts of the State of Hawai'i, or any state or federal administrative agency. Notwithstanding the prior sentence, this release does not include criminal matters. This release does not apply to the ability of class members to seek and/or qualify for discretionary release due to COVID-19 under Defendant's discretionary authority or to seek release due to COVID-19 in criminal proceedings within the courts of the State of Hawai'i. This release does not apply to any habeas corpus petition seeking any relief due to the COVID-19 pandemic that is pending as of the date of this Agreement.

J. NO ADMISSION OF LIABILITY

30. The parties represent and warrant to each other that the parties

specifically understand and agree that this Agreement is a settlement and compromise of their differences to resolve any and all claims for declaratory and injunctive relief that were raised in this action and is a compromise of disputed claims without any adjudication of the rights, claims and defenses of the parties.

31. The existence of this Agreement shall not be construed as an admission of liability or of the truth of the allegations, claims, or contentions of any party. There are no covenants, promises, undertakings, or understandings between the parties outside of this Agreement except as specifically set forth herein.

32. This Agreement is not a consent decree and shall not be incorporated into any judgment of the Court. To the contrary, this is a settlement agreement which the parties respectfully submit is a fair, reasonable and adequate resolution of this case.

33. Defendant agrees not to contest this Settlement Agreement as non-compliant with 18 U.S.C. § 3626.

K. DISMISSAL

34. Plaintiffs and Defendant shall jointly sign and submit to the Court a Fed. R. Civ. P. 41 Stipulated Dismissal of this action, with prejudice and without costs after final approval of this Agreement. The parties will file a joint motion for

an order to give notice to the members of the two provisionally-certified classes, and for a fairness hearing, pursuant to Fed. R. Civ. P. 23(e), and Plaintiffs and Defendant shall immediately withdraw any pending motions in the appellate and district courts. Upon final approval of the settlement and dismissal of this action, Defendant shall dismiss any appeals relating to the entry of the preliminary injunction and the denial of Defendant's motions to modify that injunction.

35. Defendant shall provide notice of the proposed settlement to the appropriate federal and state officials as required by 28 U.S.C. § 1715.

36. Throughout the duration of the Agreement, the parties agree to resolve disputes, and Plaintiffs may seek to enforce the Agreement, only pursuant to the procedures outlined in Section L of this Agreement ("Dispute Resolution"). The parties understand and agree that, if approved, and the Court consents, the Court will maintain jurisdiction of this action throughout the duration of the Agreement to resolve any disputes which cannot be amicably resolved between the parties pursuant to the Dispute Resolution procedures set forth in Section L. If the parties are unable to resolve any such disputes with the assistance of the Settlement Judge, despite the Stipulated Dismissal, the Court may retain jurisdiction to enforce the provisions of the Agreement and the Plaintiffs may seek specific performance of the Agreement. As outlined in Section G, *supra*, if at the time of termination of the Agreement there are any pending motions or proceedings, the Court will maintain

jurisdiction to resolve or dismiss any such motions or proceedings.

37. The parties also agree that, if the Court approves this Agreement, after Notice to the class, and a fairness hearing pursuant to Fed. R. Civ. P. Rule 23(e), the Court will order a dismissal with prejudice pursuant to Fed. R. Civ. P. Rule 41 (a). The Court will not incorporate this Agreement into any Order of Dismissal, but will nevertheless remain available to the parties to resolve disputes, and if necessary, to order specific performance, after all of the procedures of Section L have been exhausted.

L. DISPUTE RESOLUTION

38. At any time, the parties may attempt an informal and private dispute resolution mediation with the Honorable Kenneth J. Mansfield, United States Magistrate Judge, or another available recall Magistrate Judge (**"Settlement Judge"**) to resolve any disputes that may arise under this Agreement.

39. If, while this Agreement is in effect, Plaintiffs' counsel have reasonable grounds to believe that there is a systemic pattern or practice of non-compliance with this Agreement in one or more DPS Facilities, or if DPS proposes or enacts revisions or changes to its COVID-19 policies and procedures that are materially inconsistent with the Agreement and the CDC guidelines, and to the detriment of the class, Plaintiffs' counsel will provide

DPS and the Settlement Judge with a written detailed notice of potential noncompliance, setting forth the factual basis for such claim. This notice will identify, with particularity, the basis of the claim that DPS is not in compliance; why such facts constitute a systemic pattern or practice of non-compliance; and the specific material provision of the Agreement or CDC guidelines that is implicated.

40. Within fifteen (15) calendar days of receipt of the notification, DPS shall provide a good faith written response to the Plaintiffs' notification to Plaintiffs' counsel and the Settlement Judge with a full factual explanation as to why DPS believes it is in compliance with the specified material provisions, an explanation of DPS's plans to achieve full compliance with the specified material provisions, or an explanation of the bona fide medical, security, or other reasons for the alleged non-compliance.

41. It is understood between the parties that certain unforeseeable events or conditions, including but not limited to long-term lockdowns in DPS, and changes to established treatment practices and the standard of care for treatment of COVID-19 infection, may prevent compliance with this Agreement. If so, DPS shall notify Plaintiffs' counsel of the event or condition within seventy-two hours, and the parties shall enter into good-faith discussions to resolve the issues.

42. If the parties are unable to resolve the dispute within ten calendar days of DPS's response, the parties shall notify the Settlement Judge. The Settlement Judge may, in the Court's discretion, establish such mediation procedures the Court deems appropriate.

43. Plaintiffs' Counsel may seek intervention from the Court only after all efforts for resolving the dispute with the assistance of the Settlement Judge have been unsuccessful. They may do so by filing a motion for specific performance of the material provision identified. The Court may, after appropriate notice, filing of moving and opposing papers, submission of evidence and an evidentiary hearing, order specific performance of the material provision specified in the notice upon a showing of a systemic pattern or practice of non-compliance with this Agreement in one or more DPS facilities.

44. Plaintiffs agree they shall not file a motion for contempt. The Court may not entertain a motion for contempt and the Court may not grant any remedial relief in the nature of a contempt of court finding against Defendant. If Plaintiffs prevail on their claim of non-compliance, the sole remedy shall be specific performance of this Agreement and such costs and fees as the Court may award.

45. Other than in connection with a motion for specific performance as provided in Paragraph 43, the Plaintiffs agree not to seek any attorneys' fees

and/or costs for time spent in any other portion of dispute resolution, including, but not limited to, the drafting and sending of the notice of noncompliance, reviewing DPS's response, and dispute resolution with the Settlement Judge.

M. GENERAL PROVISIONS

46. The provisions of this Agreement may be suspended or modified in part or in entirety at a specific DPS facility only if the Defendant or his designees determine that a "genuine emergency" exists at that DPS facility. Genuine emergency means any special circumstances under which it is reasonable to conclude that there is any actual or potential threat to the security of that DPS facility, or to the safety of the staff, prisoners or other persons within such facility. If a "genuine emergency" lasts longer than twenty-four hours, or occurs more than once in a one-week period, Defendant shall report to the AMP, with Plaintiffs' counsel copied, within forty-eight hours except for good cause, the date of the emergency, the nature of the emergency, and what provisions of this Agreement have been temporarily suspended.

47. This Agreement constitutes the entire understanding of the parties on the subjects covered. The parties acknowledge that neither of them, nor their agents or attorneys, have made any promise, representation or warranty whatsoever, either express or implied, written or oral, which is not contained in this Agreement, for the purpose of inducing the other party to execute this

Agreement, and the parties acknowledge that they have executed this Agreement in reliance only upon such promises, representations and warranties as are contained herein, and are executing this Agreement voluntarily and free of any duress or coercion.

48. This Agreement shall be construed and the rights of the parties determined in accordance with the laws of the State of Hawai'i.

49. If any term, provision or covenant of this Agreement is held by a court of competent jurisdiction to be invalid, void or otherwise unenforceable, the remaining terms, provisions, and covenants of this Agreement shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

50. In the event of any future action or proceedings relating to this Agreement none of the parties shall be considered to have drafted this Agreement for purposes of construing the intent of this Agreement. No ambiguity shall be construed against any party based upon a claim that the party drafted the ambiguous language.

51. The Agreement may be executed and delivered by way of electronic signature and transmission or facsimile transmission, and may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. In making proof of this Agreement, it shall not be necessary to produce or account for more than a

single counterpart containing the respective signatures of each of the parties.

52. 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.

53. The parties represent and warrant that they have the authority to agree to, and to execute, the terms specified herein.

N. ATTORNEYS' FEES

54. Defendant agrees to pay counsel for the plaintiff classes the reasonable attorneys' fees and costs incurred in connection with this litigation in full and final settlement of this action. This sum shall include all claims of any kind for monetary payments of any kind for attorneys' fees, costs and expenses related to this litigation of any kind that could be claimed in this action, either now or in the future, including but not limited to attorneys' fees, costs and expenses. If the parties are unable to stipulate and agree to an amount of attorneys' fees, the parties agree to follow the procedures set forth in LR54.2 of the Local Rules of Practice for the United States District Court for the District of Hawai'i.

55. Except as provided in Sections K and L of this Agreement, Plaintiffs' counsel further agrees not to seek any prospective fees and/or costs for any time spent in any future work on this case of any kind.

DATED: Honolulu, Hawai'i, September 2, 2021.

CLARE E. CONNORS
Attorney General of the State of Hawai'i
CARON M. INAGAKI
KENDALL J. MOSER
SKYLER G. CRUZ
Deputy Attorneys General

Attorneys for Defendant MAX N. OTANI, Director of the State of Hawai'i Department of Public Safety, in his official capacity

DATED: Honolulu, Hawai'i, September 2, 2021.

ERIC A. SEITZ
GINA SZETO-WONG
JONATHAN M.F. LOO
KEVIN A. YOLKEN

Attorneys for Plaintiffs ANTHONY CHATMAN, FRANCISCO ALVARADO, ZACHARY GRANADOS, TYNDALE MOBLEY, and JOSEPH DEGUAIR, individually and on behalf of all other similarly situated

EXHIBIT B

CONFIDENTIALITY AGREEMENT

This CONFIDENTIALITY AGREEMENT ("Confidentiality Agreement") shall govern the disclosure of all documents and information provided by the Department of Public Safety ("DPS") pursuant to the Settlement Agreement and General Release ("Settlement Agreement") dated September 2, 2021 in *Chatman v. Otani*, Civil No. 21-00268 JAO-KJM. The Settlement Agreement is attached as Exhibit "A".

WHEREAS, Plaintiffs' Second Amended Complaint filed in the above-referenced lawsuit challenged the adequacy of mitigation measures and DPS's efforts to reduce the risk of contracting the SARS-CoV-2 virus that causes COVID-19 in its correctional facilities;

WHEREAS, on September 2, 2021, after negotiations under the supervision of the Honorable Kenneth J. Mansfield, the parties reached a Settlement Agreement;

WHEREAS, the terms of the Settlement Agreement provide for the establishment of a five-person Agreement Monitoring Panel ("AMP") to serve as an advisory panel and provide non-binding, informed guidance and recommendations to aid DPS in its continuing efforts to implement and update its Pandemic Response Plan ("PRP") to the COVID-19 emergency;

WHEREAS, as stated in paragraph 7 of the Settlement Agreement, in performing its functions, and in an effort to assist DPS in its response to the COVID-19 pandemic, the AMP will have access to all DPS's policies, procedures and records detailing its COVID-19 response, as well as access to all staff, inmates and consulting physicians and experts with respect to DPS's COVID-19 response;

WHEREAS, the AMP is required to provide the defendant and counsel for the parties with reports describing the steps taken by DPS to implement its PRP and/or the AMP's guidance or recommendations focusing on the areas described in Paragraph 5 of the Settlement Agreement;

WHEREAS, the terms of Settlement Agreement require the individuals on the AMP, as well as Plaintiffs' counsel, and all members of any class certified by the Court to sign a confidentiality agreement prior to being provided with any documents that implicate safety and security, or medical privacy, or any other confidential documents ("Confidential Information").

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES AND THE RESPECTIVE PROMISES HEREIN, IT IS AGREED AS FOLLOWS:

1. This Confidentiality Agreement governs the confidential treatment and use of Confidential Information provided to the AMP and Plaintiffs' counsel and their staff (collectively, "Recipients"), including all reports prepared and issued by the AMP.

EXHIBIT B

2. Recipients agree that Confidential Information provided pursuant to the terms of the Settlement Agreement shall be used by the AMP in order to fulfill its duties and responsibilities as provided for in the Settlement Agreement. Except as provided under Paragraph 8 of the Settlement Agreement, Confidential Information shall not be used for any other purpose.

3. Recipients agree to protect and prevent Confidential Information, or any part thereof, from disclosure to any person who is not authorized under this Confidentiality Agreement to receive Confidential Information. Under no circumstances shall Confidential Information be given or disclosed to any person who is not entitled to receive Confidential Information.

4. Recipients agree to take all steps necessary to protect the Confidential Information, and to prevent the Confidential Information from falling into the public domain or into the possession of unauthorized persons.

5. The obligations under this Confidential Agreement are independent from the terms of the Settlement Agreement and shall remain in effect after the dissolution of the AMP and/or termination of the Settlement Agreement.

6. This Confidentiality Agreement may be executed in counterparts and by facsimile or any electronic means; each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

7. Recipients acknowledge that they have read and understand this Confidentiality Agreement and voluntarily accepts the duties and obligations set forth herein.

Daniel R. Foley

_____ Date: 9/18/21

Honorable Daniel Foley

_____ Date: _____

Dr. Homer Venters

_____ Date: _____

Dr. Kim Thorburn

_____ Date: _____
Tommy Johnson

_____ Date: _____
Gavin K. Takenaka

_____ Date: _____
Eric A. Seitz, Esq.
Counsel for Plaintiffs' and
on behalf of all Class Members

_____ Date: _____
Max N. Otani
Director, State of Hawai'i Department of
Public Safety

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_____ Date: _____
Honorable Dan Foley

_____ Date: 9/13/21
Dr. Homer Venters

_____ Date: _____
Dr. Kim Thorburn

_____ Date: _____
Tommy Johnson

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WHEREAS, as stated in paragraph 7 of the Settlement Agreement, in performing its functions, and in an effort to assist DPS in its response to the COVID-19 pandemic, the AMP will have access to all DPS's policies, procedures and records detailing its COVID-19 response, as well as access to all staff, inmates and consulting physicians and experts with respect to DPS's COVID-19 response;

WHEREAS, the AMP is required to provide the defendant and counsel for the parties with reports describing the steps taken by DPS to implement its PRP and/or the AMP's guidance or recommendations focusing on the areas described in Paragraph 5 of the Settlement Agreement;

WHEREAS, the terms of Settlement Agreement require the individuals on the AMP, as well as Plaintiffs' counsel, and all members of any class certified by the Court to sign a confidentiality agreement prior to being provided with any documents that implicate safety and security, or medical privacy, or any other confidential documents ("Confidential Information").

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_____ Date: _____
Honorable Dan Foley

_____ Date: _____
Dr. Homer Venters

Kim Marie Thorburn Date: 9-18-2021
Dr. Kim Thorburn

_____ Date: _____
Tommy Johnson

Gavin K. Takenaka

Date: _____

Eric A. Seitz, Esq.
Counsel for Plaintiffs' and
on behalf of all Class Members

Date: 9/12/2021

Max N. Otani
Director, State of Hawai'i Department of
Public Safety

Date: _____

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WHEREAS, the terms of the Settlement Agreement provide for the establishment of a five-person Agreement Monitoring Panel ("AMP") to serve as an advisory panel and provide non-binding, informed guidance and recommendations to aid DPS in its continuing efforts to implement and update its Pandemic Response Plan ("PRP") to the COVID-19 emergency;

WHEREAS, as stated in paragraph 7 of the Settlement Agreement, in performing its functions, and in an effort to assist DPS in its response to the COVID-19 pandemic, the AMP will have access to all DPS's policies, procedures and records detailing its COVID-19 response, as well as access to all staff, inmates and consulting physicians and experts with respect to DPS's COVID-19 response;

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7. Recipients acknowledge that they have read and understand this Confidentiality Agreement and voluntarily accepts the duties and obligations set forth herein.

_____ Date: _____
Honorable Dan Foley

_____ Date: _____
Dr. Homer Venters

_____ Date: _____
Dr. Kim Thorburn

_____ Date: 9/25/21
Tommy Johnson

Gavin K. Takenaka

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Date: 9/27/2021

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ANTHONY CHATMAN, FRANCISCO ALVARADO, ZACHARY GRANADOS, TYNDALE MOBLEY, and JOSEPH DEGUAIR, individually and on behalf of all others similarly situated, Plaintiffs, vs. MAX N. OTANI, Director of State of Hawai‘i, Department of Public Safety, in his official capacity, Defendant.	CIVIL NO. 21-00268 JAO-KJM ORDER GRANTING (1) JOINT MOTION FOR FINAL SETTLEMENT APPROVAL AND (2) PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS SETTLEMENT AGREEMENT

ORDER GRANTING (1) JOINT MOTION FOR FINAL SETTLEMENT APPROVAL AND (2) PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS SETTLEMENT AGREEMENT

Before the Court are (1) the parties' Joint Motion for Final Settlement Approval, ECF No. 117; and (2) Plaintiffs' Motion for Approval of Attorneys' Fees and Costs Settlement Agreement, ECF No. 116. For the reasons set forth below, the Court GRANTS the motions.

BACKGROUND

In this class action, Plaintiffs Anthony Chatman ("Chatman"), Francisco Alvarado ("Alvarado"), Zachary Granados ("Granados"), Tyndale Mobley

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("Mobley"), and Joseph Deguair ("Deguair") (collectively, "Plaintiffs"), individually and on behalf of the classes, challenge the conditions in Hawaii's prisons and jails that have contributed to multiple COVID-19 outbreaks. They contend that the Department of Public Safety ("DPS"), headed by Defendant Max Otani ("Defendant"), has mishandled the pandemic and failed to implement its Pandemic Response Plan ("Response Plan") in violation of their Eighth and Fourteenth Amendment rights.

On July 13, 2021, the Court issued an Order (1) Granting Plaintiffs' Motion for Provisional Class Certification and (2) Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order ("PI Order"). ECF No. 37; *see also Chatman v. Otani*, Civil No. 21-00268 JAO-KJM, 2021 WL 2941990 (D. Haw. July 13, 2021). The Court provisionally certified the following classes pursuant to Federal Rule of Civil Procedure ("FRCP") 23:

> **Post-Conviction Class**: All present and future sentenced prisoners incarcerated in a Hawai'i prison.
>
> > Post-Conviction Medical Subclass: Includes all present and future Post-Conviction Class members whose medical condition renders them especially vulnerable to COVID-19 as determined by guidelines promulgated by the CDC.
>
> **Pretrial Class**: All present and future pretrial detainees incarcerated in a Hawai'i jail.

> Pretrial Medical Subclass: Includes all present and future Pretrial Class members whose medical condition renders them especially vulnerable to COVID-19 as determined by guidelines promulgated by the CDC.

Chatman, 2021 WL 2941990, at *4, 12 (citations omitted). The Court also granted injunctive relief and ordered Defendant "to *fully comply* with the Response Plan, focusing in particular on" specific sections. *Id.* at *24 (footnote omitted).

On July 29, 2021, Defendant filed a Motion to Clarify and/or Modify Preliminary Injunction, *see* ECF No. 45, followed by a Second Motion to Modify Preliminary Injunction on August 8, 2021, *see* ECF No. 51. The Court denied both motions. ECF Nos. 61, 79.

After participating in multiple settlement conferences with Magistrate Judge Kenneth J. Mansfield, the parties settled the case. ECF Nos. 11, 82, 84, 90–92. On September 2, 2021, the parties executed a Settlement Agreement and General Release ("Settlement Agreement"). ECF No. 117-6. The Settlement Agreement includes the following key terms:

- Implementation of the Response Plan, with adaptations based on CDC guidelines, best practices and recommendations from the State of Hawai'i Department of Health, and each facility's physical space, staffing, population, operations, and other resources and conditions, *id.* ¶ 1;

- Establishment of a five-person, independent Agreement Monitoring Panel ("AMP") — consisting of individuals with knowledge and expertise in correctional health care and management of infectious diseases in a correctional setting or in the management of correctional systems — that will provide non-binding, informed guidance and recommendations to aid DPS with the implementation of the Response

Plan and any necessary changes to DPS's COVID-19 response, *id.* ¶¶ 2–3, 5;

- Implementation of quarantine and isolation, vaccination and testing, and sanitation procedures, *id.* ¶¶ 12–24;

- Issuance of a formal directive prohibiting DPS staff from retaliating against any inmate or staff member for participation in this lawsuit, *id.* ¶ 25;

- Release of all claims for declaratory and injunctive relief, and attorneys' fees and costs arising from the acts or omissions alleged in this lawsuit, or acts or omissions that could have been litigated in this lawsuit, *id.* ¶ 29;

- Understanding that the Settlement Agreement is a compromise to resolve the claims asserted in this action and of the disputed claims without adjudication of the parties' rights, claims, or defenses, and does not constitute an admission of liability or truth of the parties' allegations, claims or contentions, *id.* ¶¶ 30–31;

- Dismissal of all claims and pending appeals with prejudice, following the final approval of the settlement, *id.* ¶ 34;

- Payment of reasonable attorneys' fees and costs to class counsel, *id.* ¶ 54.

On September 3, 2021, the parties filed a (1) Joint Motion for Preliminary Approval of Settlement and for Order Setting Fairness hearing, ECF No. 93; and (2) Joint Motion for Order Approving Notice and Directing Giving Notice to the Class, ECF No. 94. The Court granted the motions on September 9, 2021, finding that the Settlement Agreement met the standard for preliminary approval under FRCP 23(e), and that the manner and form of the proposed notice was proper. ECF No. 97 at 2–6.

The parties engaged in settlement discussions regarding attorneys' fees throughout the month of September. ECF Nos. 99, 103, 108, 111. On October 1, 2021, the parties executed an Attorneys' Fees and Costs Settlement Agreement and Release ("Fee Settlement Agreement"). ECF No. 117-7.

On October 6, 2021, the Court issued an Order Granting the Parties' Joint Motion to Request Deadlines for (1) the Motion for Final Approval of the Settlement Agreement and General Release and (2) Motion for an Award of Attorneys' Fees and Costs. ECF No. 114. In addition to establishing motions and briefing deadlines, the Court required a revised notice to be posted in each correctional facility, informing the class members of the new final fairness hearing date, the deadline to object to the pending motions (with copies of the motions made available to the class members), and the deadline to file a request to appear at the final fairness hearing. *Id.* at 2. On the same day, class counsel filed the objections received from class members. ECF No. 115.

On October 7, 2021, Plaintiffs filed a Motion for Approval of Attorneys' Fees and Costs Settlement Agreement. ECF No. 116. On October 8, 2021, the parties filed a Joint Motion for Final Settlement Approval. ECF No. 117.

Five class members timely filed requests to appear at the hearing. ECF Nos. 120, 122–25.

On November 8, 2021, the Court held a final fairness hearing, at which it heard the pending motions. ECF No. 130.

DISCUSSION

The parties ask the Court to grant final approval of the settlement. ECF No. 117. Plaintiffs request $250,540.00 in attorneys' fees. ECF No. 116. Defendant does not oppose the fee request. ECF No. 119. After carefully considering the motions, the Settlement Agreement and Fee Settlement Agreement (collectively, "the [proposed] settlement"), and the applicable law, the Court GRANTS the motions and approves the settlement.

A. Class Certification

In the PI Order, the Court provisionally granted class certification, finding that FRCP 23(a)'s requirements were satisfied. *See Chatman*, 2021 WL 2941990, at *7–10. The Court also determined that Plaintiffs met FRCP 23(b)(2)'s requirements for an injunctive relief class. *Id.* at *10. The Court confirms that certification is proper pursuant to FRCP 23(a) and (b).

B. Notice

The Court previously approved the parties' notice to the class members. ECF No. 97 at 6. Between September 10 and 14, 2021, copies of the notice were posted at DPS facilities in each housing unit, dormitory, or other areas where it could be seen by class members. ECF No. 117-1 at 10. It was also posted on

DPS's website on September 10, 2021. *Id.* A reminder notice was subsequently posted at DPS facilities. *Id.* at 11. DPS staff then posted a revised notice — with an updated hearing date, objection deadline, and request to appear at the hearing — and copies of the pending motions available for class members' review. *Id.*

Pursuant to the Class Action Fairness Act ("CAFA"), Defendant also served the Attorney General of the United States with a notice of the proposed class settlement, which included the items set forth in 28 U.S.C. § 1715(b).[1] *Id.* Defendant did not provide notice to Hawaii's Attorney General because she was aware of this case and has actively participated in the litigation. *Id.* at n.2.

C. Fairness, Reasonableness, and Adequacy of Settlement

FRCP 23(e)(2) authorizes district courts to approve class settlements that are

> fair, reasonable and adequate after considering whether:
>
> **(A)** the class representatives and class counsel have adequately represented the class;
>
> **(B)** the proposal was negotiated at arm's length;

[1] CAFA does not appear to apply here because jurisdiction is not based on CAFA. *See* 28 U.S.C. § 1332(d)(2)(A) ("[D]istrict courts . . . have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant."); *Adams v. W. Marine Prods., Inc.*, 958 F.3d 1216, 1220 (9th Cir. 2020).

> **(C)** the relief provided for the class is adequate, taking into account:
>
> > **(i)** the costs, risks, and delay of trial and appeal;
> >
> > **(ii)** the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > **(iii)** the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > **(iv)** any agreement required to be identified under Rule 23(e)(3); and
>
> **(D)** the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). Courts also evaluate the following factors to determine whether FRCP 23(e)(2) is satisfied:

> "(1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement."

Kim v. Allison, 8 F.4th 1170, 1178 (9th Cir. 2021) (quoting *In re Bluetooth Headset Prods. Liab.*, 654 F.3d 935, 946 (9th Cir. 2011)).

Here, the Court finds that the proposed settlement, taken as a whole, is fundamentally fair, adequate, and reasonable. The Court reaches this conclusion after comprehensively exploring and considering all of the applicable factors

identified above, as well as the parties' and objectors' positions at the final fairness hearing.

1. Adequacy of Class Counsel and Class Representatives; Settlement Negotiation; Treatment of Class Members Relative to One Another

The Court finds that Plaintiffs and class counsel adequately represented the class; the settlement was negotiated at arm's length through settlement conferences with Magistrate Judge Mansfield; and class members are treated equitably relative to one another under the settlement. *See* Fed. R. Civ. P. 23(e)(2)(A), (B), (D).

2. Adequacy of Relief

The Court similarly finds that the relief accorded to the class is adequate under FRCP 23(e)(2)(C) and the factors listed above, *see Kim*, 8 F.4th at 1178 (citation omitted).

a. Risks, Costs, Length of Further Litigation, Strength of Plaintiffs' Case, Stage of Proceedings

Because victory in litigation is never guaranteed for either side, regardless of the strength of a plaintiff's case, resolution by settlement is favorable. The parties accurately recognize the complexity of the case and that they face risks and challenges if the case were to proceed. Not only would the parties incur substantial costs from further litigation, trial, and any appeal, but continued litigation would also delay relief to the class members for COVID-19 issues that need to be addressed now. Therefore, the benefits of present resolution outweigh the risks of

further litigation. And although the case is still in a relatively preliminary stage, the parties engaged in extensive discussions, exchanged significant amounts of information, and collaborated in an effort to implement a process that would make a meaningful impact during a critical time in the pandemic.

b. Settlement Amount

This case only involves injunctive and declaratory relief, so there is no monetary settlement amount. However, at the hearing, defense counsel explained that $5 million in Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") and American Rescue Plan Act ("ARPA") funds have been set aside to fund AMP[2] and to implement its recommendations regarding compliance with the Response Plan and other improvements to DPS's COVID-19 response.

c. Experience and Views of Counsel/Presence of Governmental Participant

Counsel for the parties are seasoned and class counsel have extensive experience with class actions. As such, class counsel could reasonably and fairly evaluate the settlement, and they seek final approval. The Court also notes that defense counsel included deputies from the State Attorney General's Office, as well as Hawaii's Attorney General herself. At the hearing, counsel for both sides

[2] For example, the Settlement Agreement authorizes up to $75,000.00 in fees per AMP member for the duration of the agreement unless the agreement is extended. ECF No. 117-6 ¶ 4.

provided additional compelling reasons to approve the settlement and persuasively explained why the outcome is favorable for all parties.

d. Class Members' Reactions

Seventy-three class members submitted written objections to the settlement,[3] including Granados.[4] ECF No. 115. This represents approximately 2.4% of the class members. ECF No. 117-1 at 22. The objections generally fall into one or more of the following categories: (1) DPS is not implementing the Response Plan, to the class members' detriment; (2) class members do not want to release claims for injunctive/declaratory relief and/or damages; (3) the provisions governing AMP are insufficient because AMP recommendations are non-binding and inspection notices are too lengthy; (4) the settlement terms do not adequately protect the class members; (5) class members have suffered injuries from contracting COVID-19 in the facilities; (6) a federal monitor or special master should be appointed and binding enforcement should be available, subject to judicial review; and (7) DPS is not being held accountable through the settlement. *See generally* ECF No. 115.

[3] Thirty-six written objections were submitted, two of which were presented by multiple class members. ECF No. 115-10 (primary objector plus five additional inmates); ECF No. 115-27 (primary objector plus 32 additional inmates). Many of the objections were form objections submitted by multiple class members.

[4] Class counsel spoke to Granados after he submitted the form objection, and represented that Granados is now satisfied with the settlement.

Five class members appeared at the hearing (three from Maui Community Correctional Center and two from Halawa Correctional Facility), four of whom objected to the settlement on one or more of the following bases:[5] (1) there exist deficiencies with respect to COVID-19 protocols at the facilities, *i.e.*, comingling of COVID-19 positive inmates with COVID-19 negative inmates; lack of testing; overcrowding and lack of social distancing, particularly during meals; lack of sanitizer; (2) it is unclear whether the class will be entitled to monetary or other relief; and (3) the attorneys get a windfall. The participants maintained their positions even after hearing counsel's comments and responses to their objections.

The absence of a large number of objections to the proposed settlement raises a strong presumption that the terms of the proposed settlement are favorable to the class members and militates in favor of approving the settlement. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) (citations omitted); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 448 (E.D. Cal. 2013) ("Where a settlement agreement enjoys overwhelming support from the class, this lends weight to a finding that the settlement agreement is fair, adequate, and reasonable." (citations omitted)). Even a large number of objections by class members would not necessarily render the settlement unfair, "as long as it is

[5] Notably, these class members did not timely submit written objections. If they are included in the number of objectors, and Granados is removed, approximately 2.5% of the class has objected.

otherwise fair, adequate, and reasonable." *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (finding objections from 16% of the class, including three of four named plaintiffs, insufficient by itself to overturn the settlement) (citations omitted). This is because allowing objectors to prevent approval of a settlement "would put too much power in the hands of a few persons having no right to a preferred position in settlement, to thwart a result that might be in the best interests of the class." *Id.* (citation omitted). Moreover, a settlement should not be rejected "merely because class plaintiffs oppose it." *Id.* (citations omitted).

Here, notwithstanding the class members' objections, the Court finds that the settlement is fair, adequate, and reasonable. It is clear that the small percentage of class members who objected are dissatisfied and want greater relief under the settlement, but their preferences do not alone undermine the fairness of the settlement, nor compel its rejection. Significantly, over 97% of the class members have not objected to the settlement, and that supports approval. *See Boyd*, 485 F. Supp. at 624 ("[A]ll class members are affected equally by the settlement, and the Court finds persuasive the fact that eighty-four percent of the class has filed no opposition."). While some of the objections may on their face appear concerning, they are either unfounded or are insufficient to undermine the fairness, reasonableness, and adequacy of the settlement. The Court addresses each category of objections in turn.

First, as for complaints that DPS is not implementing the Response Plan and has deficient COVID-19 protocols, counsel represents that AMP has inspected the facilities, worked with staff, and its recommendations are forthcoming, after which additional steps will be taken to address identified issues. As counsel pointed out at the hearing, this is not an easy or quick fix in the corrections system. However, AMP's involvement and DPS's cooperation will result in meaningful changes in the near future. Thus, while the Court has had concerns about the implementation of and/or compliance with the Response Plan, it is currently satisfied that the Settlement Agreement has established a process to discern, address, and rectify the allegedly recurring COVID-19 issues.

Second, many of the objectors express dissatisfaction with the release of claims. But it appears that these objections are based on a misunderstanding of the scope of the release. No claims for monetary relief are released[6] and neither are claims for injunctive/declaratory relief that arise after the conclusion of this lawsuit. The general release in the Settlement Agreement pertains to "all claims and liabilities of any kind which Plaintiffs or Defendant had, have, or may have for *declaratory or injunctive relief* or for attorneys' fees and costs *arising from acts or*

[6] In fact, class counsel represented at the hearing that he will be pursuing a COVID-19 damages lawsuit in state court in January 2022. As such, any damages claims related to emotional or physical injuries suffered as a result of contracting COVID-19, are not barred by this settlement, and cannot be a basis to reject it.

omissions alleged in this lawsuit." ECF No. 117-6 ¶ 29 (emphases added). The class members therefore have recourse and are not precluded from seeking additional relief, if appropriate, at a later date.

Third, while AMP recommendations are non-binding and there is a 72-hour notification window prior to an inspection, this does not undermine the effectiveness of AMP nor its function. In the interests of the class and Defendant, the parties have mutually agreed that this is the best mechanism under the circumstances to timely address COVID-19 issues at DPS facilities. Indeed, AMP includes representatives from both sides who will engage with DPS staff to identify and rectify any existing shortcomings. At the hearing, class counsel expressed his satisfaction with the AMP process so far. The Court believes that this collaborative model will facilitate change in a far more expeditious and economical manner than continued litigation. To the extent that objectors urge the Court to appoint a federal monitor or special master, the Court finds that the lack of the foregoing does not render the settlement unreasonable, unfair, or inadequate, and that the dispute resolution section in the Settlement Agreement provides a mechanism to involve the Court should any disputes arise. *Id.* ¶¶ 38–45.

Fourth, the Court disagrees that DPS is not being held accountable through the settlement. Immediate and significant change has yet to be effectuated so the objectors' position is understandable. But DPS is not escaping any responsibility.

It is involved with AMP's process and has set aside $5 million in CARES Act and ARPA funds to finance AMP and to implement AMP's recommendations. Moreover, as the Court just explained, Plaintiffs have the ability to seek relief from the Court if DPS is noncompliant and informal dispute resolution efforts are unsuccessful.

Finally, Plaintiffs and the class members are adequately protected by the terms of the Settlement Agreement. Objections regarding monetary relief are without merit because Plaintiffs only sought injunctive/declaratory relief in this lawsuit and monetary damages are therefore unavailable. Monetary relief may be sought in a separate lawsuit, as may injunctive/declaratory relief for acts or omissions *not* alleged in this lawsuit.

e. Attorneys' Fees

The proposed attorneys' fees are reasonable, including the timing of payment.[7] *See* Fed. R. Civ. P. 23(e)(2)(C)(iii). Courts have "an independent obligation to ensure that [any attorneys' fee] award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *Briseño v. Henderson*, 998 F.3d 1014, 1022 (9th Cir. 2021) (alteration in original) (internal quotation marks and citations omitted). "Regardless of 'whether the attorneys'

[7] The fees will be paid within a reasonable time after the funds are appropriated by the Legislature of the State of Hawai'i. ECF No. 117-7 at 3.

fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper.'" *Id.* at 1023 (footnote and citation omitted). FRCP 23(e) requires courts to "balance the 'proposed award of attorney's fees' vis-à-vis the 'relief provided for the class' in determining whether the settlement is 'adequate' for class members." *Id.* at 1024.

Heightened scrutiny must be applied to "post-class certification settlements in assessing whether the division of funds between the class members and their counsel is fair and 'adequate.'" *Id.* at 1025 (quoting Fed. R. Civ. P. 23(e)(2)(C)). This requires courts to look particularly at three signs, which may indicate collusion: "(1) a handsome fee award despite little to no monetary distribution for the class, (2) a 'clear sailing' provision under which defendant agrees not to object to the attorneys' fees sought, and (3) an agreement that fees not awarded will revert to the defendant, not the class fund." *Kim*, 8 F.4th at 1180 (citation omitted); *see also Briseño*, 998 F.3d at 1023 (identifying these factors as a sign that class counsel have infected negotiations by pursuing their own self-interest). The presence of these red flags "is not a death knell — but when they exist, 'they require[] the district court to examine them, . . . develop the record to support its final approval decision,' and thereby 'assure itself that the fees awarded in the

agreement were not unreasonably high.'" *Kim*, 8 F.4th at 1180 (alterations in original) (citation omitted).

i. No Collusion

The Court has reviewed the settlement for signs of collusion and finds none. Although the parties have reached a separate agreement regarding the award of fees and Defendant has not opposed Plaintiffs' motion, there is no "clear sailing" provision. ECF Nos. 117-6, 117-7, 119. Additionally, there is no fund from which fees will be paid; they must be appropriated by the Legislature, so there is no reversion to Defendant.

The fact that class counsel would receive a sizeable fee award when the class receives no monetary relief "is not per se problematic." *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1051 (9th Cir. 2019). Indeed, this is an injunctive/ declaratory relief case, not a damages case. So the class members were never in a position to receive a monetary award. The relief accorded through the settlement, albeit non-monetary, has substantial value and serves the interests of the class members. Defendant will expend up to $5 million to maintain AMP and satisfy the terms of the Settlement Agreement. Therefore, after closely reviewing the requested fees, the Court finds the request reasonable for the reasons that follow.

ii. Reasonableness of Fee Award

Plaintiffs request $250,540.00 in attorneys' fees. "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). However, district courts have "an independent obligation to ensure that [any attorneys' fee] award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *Briseño*, 998 F.3d at 1022 (alteration in original) (internal quotation marks and citations omitted). A court "must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper" regardless of the source from which the funds are paid. *Id.* at 1023 (internal quotation marks, citation, and footnote omitted).

The Ninth Circuit authorizes "two methods of calculating attorneys' fee awards in class actions: (1) the 'lodestar' method and (2) the 'percentage-of-recovery' method." *Kim*, 8 F.4th at 1180 (quoting *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 570 (9th Cir. 2019) (en banc)). The lodestar method multiplies the number of hours reasonably expended in the litigation by a reasonable hourly rate to compute a reasonable fee award. *See id.* (citation omitted). This award may be adjusted "by an appropriate positive or negative multiplier reflecting . . . the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of

nonpayment." *Id.* at 1180–81 (alteration in original) (internal quotation marks and citation omitted). The lodestar method is particularly appropriate in class actions primarily involving injunctive relief. *See id.* at 1181 (citation omitted).

Alternatively, "[t]he percentage-of-recovery approach may be used 'where the defendants provide monetary compensation to the plaintiffs' and class benefit is easy to quantify." *Id.* (citation omitted). District courts award class counsel a reasonable fee based on a percentage of the settlement fund under this method. *See id.* (citation omitted).

Plaintiffs' fee request is based on a lodestar calculation reflecting class counsel's standard hourly rates multiplied by reduced corresponding hours expended in this litigation. ECF No. 116-1. According to class counsel, $500,000.00 more accurately reflects the amount of fees incurred since 2020, but he is willing to accept a significant reduction in fees to facilitate settlement. *Id.* ¶¶ 31, 35.

The Court starts by determining "reasonable hourly rate[s] to use for attorneys and paralegals in computing the lodestar amount," which are established by the "prevailing market rates in the relevant community," *i.e.*, the market rates of attorneys and paralegals of comparable "experience, skill, and reputation" in "the forum in which the district court sits." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1205–06 (9th Cir. 2013) (some internal quotation marks and citations

omitted). The Court must also ascertain the reasonable number of hours — the hours that could have reasonably been billed to a client — "for which the prevailing party should be compensated." *Id.* at 1202 (citation omitted).

Plaintiffs request the following hourly rates: (1) Eric Seitz — $475; (2) Gina Szeto-Wong — $300; and (3) Kevin Yolken — $250. ECF No. 116-1 ¶¶ 6, 11, 15. "[T]he established standard when determining a reasonable hourly rate is the 'rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation.'" *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008) (citation omitted). This Court is well aware of the prevailing rates in the community for similar services performed by attorneys of comparable experience, skill, and reputation. Based on the Court's knowledge of this community's prevailing rates for attorneys of comparable skill, experience, and reputation, the Court's familiarity with this case, and counsel's submissions, this Court finds the requested hourly rates to be manifestly reasonable.

Plaintiffs also provided timesheets estimating the time counsel expended as of September 1, 2021, though it does not reflect all time entries for work completed in this case. ECF No. 116-1 ¶ 30; ECF No. 116-2. According to these timesheets, Mr. Seitz expended 67.8 hours, Ms. Szeto-Wong expended 662.6 hours, and Mr. Yolken expended 220 hours. ECF No. 116-1 ¶ 30; ECF No. 116-2. This results in a lodestar of $285,985.00. Having reviewed the timesheets, the

Court finds that the time expended by counsel was reasonable. Considering that the timesheets do not include the significant work completed since September 1, 2021 and/or other time spent on this litigation, the settled fee amount is reasonable.

District courts are encouraged "to cross-check their attorneys' fee awards using a second method of fee calculation." *Johnson v. MGM Holdings, Inc.*, 943 F.3d 1239, 1242 (9th Cir. 2019) (citation omitted). Based on the parties' estimation that the value of the injunctive relief is up to $5 million, the requested fee award is approximately 5% of the settlement value.

The Ninth Circuit "has established 25% of the common fund as a benchmark award for attorney fees," *Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003) (internal quotation marks and citation omitted), and 20% to 30% is the usual range. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). This percentage may be increased or decreased, as appropriate. *See Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). If an adjustment is warranted, the court must provide a reasonable explanation of both "why the benchmark is unreasonable under the circumstances" and "how it arrives at the figure ultimately awarded." *Id.* at 272–73 (citation omitted). District courts may consider this non-exhaustive list of factors in determining the percentage ultimately awarded:

> (1) the extent to which class counsel achieved exceptional results for the class; (2) whether the case was risky for class counsel; (3)

> whether counsel's performance generated benefits beyond the cash settlement fund; (4) the market rate for the particular field of law; (5) the burdens class counsel experienced while litigating the case; (6) and whether the case was handled on a contingency basis.

In re Optical Disk Drive Prods. Antitrust Litig., 959 F.3d 922, 930 (9th Cir. 2020) (citations omitted).

The Court finds that the aforementioned factors weigh in favor of granting the requested fee award. Five percent is well below the benchmark. Twenty-five percent of $5 million is $1.25 million. And even if Defendant spends well below the $5 million fund, the requested fee award will still be within the benchmark if Defendant expends $1,002,160.00. Considering that the Settlement Agreement authorizes up to a collective total of $375,000.00 in fees for AMP members, it is reasonable to expect that at least $1 million will be expended from the $5 million fund to effectuate the Settlement Agreement.

Moreover, class counsel obtained a favorable result that benefits the class members and the corrections system as a whole; if the case were to proceed on its merits, there is a risk that Plaintiffs and the class would obtain no relief; class counsel assumed representation of Plaintiffs on a contingency-fee basis and advanced the costs of litigation, despite the risk that they would receive no compensation; and class counsel expended a considerable amount of time on this litigation, foregoing other work for a period of time. At the hearing, class counsel

represented that the fees merely cover overhead; no profits will result from this award and that was never the goal in any event. Class counsel explained that he took out loans to fund this litigation and the fee award will enable him to pay back the loans. Notably, the Court has received no formal written objections to the requested fees.[8]

f. Costs

Plaintiffs have waived recovery of costs associated with this litigation. ECF No. 116-1 ¶ 36.

In sum there is no evidence or any suggestion that the settlement is the product of fraud or overreaching by, or collusion between, the negotiating parties. Accordingly, the Court approves the settlement because it is fair, adequate, and reasonable for the reasons stated herein.

CONCLUSION

In accordance with the foregoing, the Court GRANTS (1) the parties' Joint Motion for Final Settlement Approval, ECF No. 117; and (2) Plaintiffs' Motion for Approval of Attorneys' Fees and Costs Settlement Agreement, ECF No. 116, and ORDERS as follows:

[8] One of the class members who appeared at the hearing characterized the fee award as a windfall for counsel. Based on the reasons already articulated, this characterization is unfounded.

(1) The requirements of FRCP 23(e) have been satisfied and the Settlement Agreement and Fee Settlement Agreement are fair, reasonable, and adequate.

(2) The Court approves $250,540.00 in attorneys' fees.

(3) This case is DISMISSED WITH PREJUDICE.

(4) The Court retains jurisdiction regarding all matters relating to the administration, consummation, and enforcement of the Settlement Agreement and Fee Settlement Agreement and for any other necessary purpose relating to the settlement.

(5) The Court directs the Clerk's Office to enter final judgment and close the case.

IT IS SO ORDERED.

DATED: Honolulu, Hawai'i, November 10, 2021.

Jill A. Otake
United States District Judge

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

CIVIL BEAT CENTER FOR THE PUBLIC INTEREST, INC., Plaintiff, vs. DEPARTMENT OF PUBLIC SAFETY, Defendant.	Civil No. 1CCV-22-0000735 NOTICE OF HEARING

NOTICE OF HEARING

TO: ROBERT BRIAN BLACK, ESQ.
STEPHANIE M. FRISINGER, ESQ.
Civil Beat Law Center for the Public Interest
700 Bishop Street, Suite 1701
Honolulu, Hawai‘i 96813

Attorneys for Plaintiff

PLEASE TAKE NOTICE that the hearing on the above-entitled matter is scheduled for Thursday, December 29, 2022 before the Honorable John M. Tonaki, presiding Judge of the above-entitled Court, in the Courtroom 5B at 1111 Alakea Street, Honolulu, Hawai‘i, at the hour of 9:00 a.m. of said day, or as soon thereafter as counsel can be heard.

DATED: Honolulu, Hawaii, November 18, 2022.

/s/ Lisa M. Itomura
LISA M. ITOMURA
Deputy Attorney General

Attorneys for Defendants

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

CIVIL BEAT CENTER FOR THE PUBLIC INTEREST, INC., Plaintiff, vs. DEPARTMENT OF PUBLIC SAFETY, Defendant.	Civil No. 1CCV-22-0000735 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on the parties, through the Judiciary Electronic and Filings Service System (JEFS), or by U.S. Mail, postage prepaid, on the date below:

ROBERT BRIAN BLACK, ESQ.
STEPHANIE M. FRISINGER, ESQ.
Civil Beat Law Center for the Public Interest
700 Bishop Street, Suite 1701
Honolulu, Hawai‘i 96813

Attorneys for Plaintiff

DATED: Honolulu, Hawai‘i, November 18, 2022.

/s/ Lisa M. Itomura
LISA M. ITOMURA
Deputy Attorney General

Attorney for Defendant
DEPARTMENT OF PUBLIC SAFETY