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Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

| | | |
|------------------------------|---|---------------------------------|
| ANGUS L.K. MCKELVEY, JOANNE |) | CIVIL NO. 2CCV-19-1012(3) |
| JOHNSON WINER, ARCHIE |) | (other civil action) |
| KALEPA, KE'EAUMOKU KAPU, and |) | |
| MAUI TOMORROW FOUNDATION, |) | |
| INC. |) | PLAINTIFFS' MOTION FOR |
| |) | SUMMARY JUDGMENT; |
| Plaintiffs, |) | MEMORANDUM IN SUPPORT OF |
| v. |) | MOTION; EXHIBITS "A" & "B"; |
| |) | DECLARATION OF ANTHONY L. |
| MICHAEL P. VICTORINO, MAYOR |) | RANKEN; NOTICE OF MOTION; |
| OF THE COUNTY OF MAUI; |) | CERTIFICATE OF SERVICE |
| MOANA M. LUTEY, CORPORATION |) | |
| COUNSEL FOR THE COUNTY OF |) | |
| MAUI; and THE MAUI COUNTY |) | |
| COUNCIL, |) | Hearing Date: December 18, 2019 |
| |) | Time: 9:30 a.m. |
| Defendants. |) | Judge: presiding |
| |) | |

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COME NOW Plaintiffs ANGUS L.K. MCKELVEY, JOANNE JOHNSON WINER, ARCHIE KALEPA, KE'EAUMOKU KAPU, and MAUI TOMORROW FOUNDATION, INC., and hereby submit their motion for summary judgment as to all counts of the First Amended Complaint filed herein November 1, 2019, as there is no genuine dispute of material fact and Plaintiffs are entitled to judgment as a matter of law.

The Court can rule as a matter of law as to the following propositions:

1. Resolution 19-158, approving settlement under the terms set forth in the 2019 Proposed Settlement, is binding upon the Mayor and Corporation Counsel.
2. An injunction shall issue requiring the Mayor and Corporation Counsel to act in accordance with Resolution 19-158.
3. Neither Defendant MOANA LUTEY, nor her office, may represent either party in this lawsuit.

This motion is brought pursuant to Rules 7 and 56 of the Hawaii Rules of Civil Procedure, the memorandum, declarations and exhibits attached hereto, and the Court's records and files herein.

DATED: Wailuku, Maui, Hawaii, November 29, 2019.

/s/ Samuel P. Shnider
SAMUEL P. SHNIDER
ANTHONY L. RANKEN
Attorneys for Plaintiffs

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| MAUI TOMORROW FOUNDATION, |) | |
| INC. |) | MEMORANDUM IN SUPPORT OF |
| |) | MOTION |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| MICHAEL P. VICTORINO, MAYOR |) | |
| OF THE COUNTY OF MAUI; |) | |
| MOANA M. LUTEY, CORPORATION |) | |
| COUNSEL FOR THE COUNTY OF |) | |
| MAUI; and THE MAUI COUNTY |) | |
| COUNCIL, |) | |
| |) | |
| Defendants. |) | |
| |) | |

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION AND FACTUAL SUMMARY

A. **The Facts are Undisputed**

The facts material to this lawsuit are not in dispute. The proceedings of Hawaii Wildlife Fund et al. v. County of Maui (the “LWRF Lawsuit”), now Supreme Court case no 18-260; the essential terms of the Maui County Council’s Resolution No. 19-158, adopting the 2019 Proposed Settlement; the Mayor’s refusal to act in accordance with that settlement; and Corporation Counsel’s position in accepting representation of all defendants, are all well-known and established by public records and by the filings in this matter. Thus this matter is ripe for a ruling on summary judgment.

B. Recitation of Relevant Factual Background

On April 16, 2012, the Hawaii Wildlife Fund and other parties filed a lawsuit in the United States District Court for the District of Hawaii ("District Court"), Civil No. 12-198 BMK, against the County of Maui, alleging violations under the Federal Water Pollution Control Act, also known as the Clean Water Act. The lawsuit is entitled Hawaii Wildlife Fund et al. v. County of Maui (referred to hereinafter as the "LWRF Lawsuit"). On January 23, 2015, and June 25, 2015, the District Court granted Plaintiffs' motions for partial summary judgment in the LWRF Lawsuit.

The County Council approved a Settlement Agreement by Resolution 15-75 ("2015 Settlement Agreement"). The 2015 Settlement Agreement was lodged with the District Court on September 24, 2015, and following federal government review pursuant to 40 C.F.R. §135.5, the District Court entered the Settlement Agreement and Order and entered its Judgment on November 17, 2015. Pursuant to the terms of the 2015 Settlement Agreement and Order, the Parties agreed that the County reserved the right to appeal the rulings of the District Court to the Ninth Circuit Court of Appeals and on to the United States Supreme Court.

The County did then appeal the District Court's decision to the Ninth Circuit Court of Appeals, Case No. 15-17447. The Ninth Circuit Court of Appeals denied the appeal on February 1, 2018. The County then filed a Petition for Writ of Certiorari with the United States Supreme Court on August 27, 2018, and on February 19, 2019, the U.S. Supreme Court granted the County of Maui's petition. (Supreme Court case no. 18-260). The case was briefed and oral argument was held on November 6, 2019. However, the Supreme Court will not be issuing a decision in the case until the spring of 2020, and that Court's rules provide that a case may be settled and an appeal may be withdrawn at any time before a written decision is issued by the Court.

Meanwhile on Maui, a majority of the members of the Maui County Council were desirous of solving the problem of ocean pollution caused by the injection wells and also were concerned about the possibility that if the United States Supreme

Court decided the case it might set a precedent that would severely weaken the Clean Water Act nationwide. Therefore the Council moved to enter into a new settlement agreement with the Plaintiffs in the LWRF lawsuit which would largely accept the terms of the 2015 Settlement Agreement and Order, withdraw the pending Supreme Court appeal, and avoid the possibility of being ordered to pay attorney fees to the Plaintiffs in the LWRF lawsuit in case the County loses the Supreme Court appeal.

In keeping with the impetus to settle the case and withdraw the Supreme Court appeal, Maui Corporation Counsel received from the LWRF Plaintiffs' counsel and transmitted to the Maui County Council's Governance, Ethics, and Transparency Committee, a "Confidential Settlement Communication - FRE 408," dated April 26, 2019 (with amendments made on May 9, 2019), hereinafter referred to as the "2019 Proposed Settlement".

On August 16, 2019, the *Maui News* published an opinion piece by Mayor VICTORINO in which he acknowledged the Maui County Council's authority to settle the case, referring to "rhetoric aimed at persuading our lawmakers to withdraw from the Supreme Court."

At the County Council meeting of September 20, 2019, five months after deliberations about the 2019 Proposed Settlement commenced, the Corporation Counsel for the first time questioned the County Council's authority to settle the case. The County Council considered the concerns raised by the Corporation Counsel, but did not find them persuasive.

On September 25, 2019, the Council passed Resolution No. 19-158, a copy of which is attached to the First Amended Complaint and to this motion as Exhibit "A", adopting the 2019 Proposed Settlement (hereinafter referred to as "the 2019 Settlement"). Resolution No. 19-158 had the following essential terms:

- a. Approving settlement of the case under the terms set forth in the 2019 Proposed Settlement as amended in open session before the reconvened September 3, 2019 meeting of the Governance, Ethics, and Transparency Committee on September 6, 2019;

- b. Authorizing the Mayor to execute a Release and Settlement Agreement on behalf of the County in the case;
- c. Authorizing the Director of Finance to satisfy said settlement of the case; and
- d. Ordering that certified copies of the resolution be transmitted to the Mayor, the Director of Finance, the Director of Environmental Management, and the Corporation Counsel.

After the passage of Resolution 19-158, Council Chair Kelly King sent a memorandum to Corporation Counsel MOANA M. LUTEY directing her as follows:

On behalf of your client, the Maui County Council, may I please request the Department of the Corporation Counsel promptly:

- 1. Execute a settlement agreement consistent with Resolution 19-158; and
- 2. Take other necessary action, including filing papers with the United States Supreme Court and, as needed, other actions, to resolve the case consistent with Resolution 19-158.

On October 3, 2019, Corporation Counsel LUTEY sent a memorandum to Council Chair Kelly King refusing to execute the settlement until the Mayor and the County Council concurred on acceptance of the settlement terms. Mayor VICTORINO has since stated publicly that he will not give his approval to the settlement terms. Corporation Counsel LUTEY has refused to direct the withdrawal of the pending appeal of the LWRF Lawsuit from the United States Supreme Court.

II. LEGAL STANDARD

Rule 56(c) of the *Hawaii Rules of Civil Procedure* provides in pertinent part as follows:

[Summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with

the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Hawaii Supreme Court held that 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. Hulsman v. Hemmeter Development Corp., 65 Haw. 58, 647 P.2d 713 (1982). Thus, Plaintiff must show that there are no genuine issues of material facts with respect to the Complaint.

Once the summary judgment movants satisfy their initial burden of showing the absence of any genuine issue of material fact, the burden shifts to the non-moving party to come forward with specific facts showing that there remains a genuine issue for trial. Arimizu v. Financial Sec. Ins. Co., Inc., 5 Haw. App. 106,679 P.2d 627 (1984). In other words, in opposing Defendants' Motion for Summary Judgment, Plaintiff must respond by affidavit or otherwise setting forth specific facts showing a genuine issue of material fact and may not rely on allegations. K.M Young & Assocs. v. Cieslik, 4 Haw. App. 657, 675 P.2d 793 (1983).

III. LEGAL ARGUMENT

A. The County Council has Exclusive Authority to Settle this Matter

1. The Maui County Code Clearly and Unambiguously Provides that Settlement of Lawsuits is Within the Discretion of the Maui County Council, and that the Mayor as Well as the County's Legal Counsel are Bound by the Council's Decision to Settle

This matter is controlled by Maui County Code Section 3.16.020, a copy of which is attached to this Motion as Exhibit "A". Pursuant to Code §3.16.020 (E), "The decision of the council to accept a settlement offer shall be binding on the County and on legal counsel." Pursuant to §3.16.020 (D) of the Code, the roles of both the mayor and corporation counsel in responding to settlement offers above \$7,500 are limited to making a "recommendation" to the County Council. The

dictionary definition of “recommendation” is “a **suggestion** or **proposal** as to the best course of action”. A recommendation, by definition, is not binding; it can either be adopted or rejected by the decision maker, and pursuant to §3.16.020 (E) of the Code, that decision maker is the County Council. In this case the Council made the decision to reject the mayor’s recommendation and to adopt the settlement agreement.

Now that that decision has been made by a majority vote of the Council, Maui County Charter §7-5(17) comes into play: it provides that the mayor has the duty to enforce all provisions of the County Charter and all ordinances of the county. That includes §3.16.020 (E) of the Maui County Code. The duty to enforce and abide by that Code section means in this case that the Defendant Mayor VICTORINO must respect the Council’s “binding” decision to settle the case and withdraw the Supreme Court appeal. Therefore Plaintiffs are entitled to a declaratory judgment that the County Council had the exclusive authority to accept the 2019 Proposed Settlement and adopt it as a final settlement, pursuant to Maui County Code, Section 3.16.020 (E), and that Resolution No. 19-158 of the County Council directing settlement of the LWRF Lawsuit is therefore binding on the County and on legal counsel. To enforce that declaratory ruling an injunction should issue requiring the Mayor and Corporation Counsel to act in accordance with Resolution 19-158.

2. The power to settle litigation is a traditional power of the governing legislative body, as confirmed by Harris v. Desoto.

The settlement of legal cases has commonly been regarded as an exercise of legislative power in municipal governments, as reported in legal treatises. See. e.g., 15 A.L.R.2d 1359 (“[T]he power to compromise usually exists in the governing legislative body, generally denominated the common council.”); 64A C.J.S. Municipal Corporations § 2552 (“Usually, the municipal council or other governing body is authorized to compromise a pending action by or against a municipal corporation.”) See also 2A McQuillin Mun. Corp. § 10:7 (3d ed.) (“Also deemed legislative in nature is the power to ... settle litigation.”).

The Hawaii Supreme Court, in Harris v. Desoto, confirmed this principle: “[T]he authority to settle claims with city funds on behalf of the city stems from the fiscal and spending powers vested in the council by the Revised Charter of Honolulu.” Harris v. DeSoto, 80 Hawai’i 425, 911 P.2d 60, 70 (Haw., 1996). On this basis, Harris determined that Honolulu Ordinance 93-78, which purported to provide exclusive settlement authority to the council, was in accordance with the principles of the Charter, so long as it did not enlarge the powers of the council “outside the area of authority prescribed it by the charter.” Id., 911 P.2d at 73. In all cases involving appropriation of funds, however, the council holds not only “the power to appropriate municipal funds for a particular purpose, but also . . . the power to dictate the means by which . . . the earmarked funds are expended.” Harris, id., 911 P.2d at 70.

3. *The Maui County Charter, similar to other jurisdictions noted in Harris, provides broad residuary executive power to the legislative branch, including the power to settle litigation, and only specific administrative powers to the mayor.*

Harris notes several other jurisdictions, which have held that “absent a contrary provision, the power to settle or compromise claims lies exclusively in the legislative branch of municipal government.” Id. Several examples follow in the text of the Harris decision, including the following:

- An action where the mayor acted in excess of his authority by authorizing settlement of a property damage suit, City of Fairmont v. Hawkins, 304 S.E.2d 824 (1983);
- An action based on wrongful demotion of a firefighter where the mayor acted in excess of his authority by agreeing to reinstatement, Nottingham v. City of Yukon, 766 P.2d 973, 975 (Okla. 1988), in which that court noted “The [settlement] agreement was not an employment decision. It was **not**, as employee asserts, **incidental to the city manager’s administrative power to hire and fire**...nothing in the city charter was found to give the city manager the authority to make such a contract.... [I]n the absence of

some contrary provision, power to compromise a claim is lodged with the legislative branch of a municipality.”(emphasis added);

- An action where the mayor acted in excess of his authority by instituting an action to remove an encroachment on city land, City of Owensboro v. Weir, Weir & Walker, 95 Ky. 158, 24 S.W. 115, (Ky. Ct. App., 1893);
- An action where the mayor acted in excess of his authority by ruling on denial of an application for a building permit after the city council had authorized it, Shaw v. Common Council of Watertown, 63 N.W.2d 252 (S.D., 1954) (Noting “we think the conclusion is inescapable that [the applicable statutes] reveal an intention to charge the council with the power and duty to make decisions for the municipality and the mayor with the duty of executing those decisions.”);

On the basis of these holdings, the Harris court ruled that Ordinance 93-78 was consistent with the Honolulu Charter. Harris v. DeSoto, 80 Hawai'i 425, 911 P.2d 60 at 72. The ordinance vested the authority to settle or compromise claims solely in the hands of the city council.

The Harris court then determined that Ordinance 93-78 only granted authority to the council to settle claims that could be settled with city funds but not matters traditionally within the purview of the executive, such as reinstatement of an officer, a building permit, or eminent domain actions. *Id.* at 72-73. Each proposed settlement required a determination as to whether a specific exercise of municipal authority is “vested exclusively” in the legislative or the executive branches. If no determination can be made, the two bodies must concur. *Id.* at 74.

But the conclusion of Harris v. DeSoto is intended, by its own logic, to apply only to the Honolulu charter. The Honolulu charter provides for a rigid system of separation of powers in which “each coordinate branch of municipal government is charged with particular governmental functions, largely free from interference by the others,” *id.* at 72. The Harris v. DeSoto conclusion is not in accordance with the conclusions of several of the other cases cited in Harris v. DeSoto itself (described

above), presumably because those jurisdictions do not have the same governing laws as Honolulu. Nor, therefore, can Harris v. DeSoto be applied in an unquestioning fashion to a Maui case, without examining the differences between the provisions of the Maui County Charter and the Honolulu charter in terms of the scope of powers allotted to the legislative body and the settlement power delegated to the county council as opposed to the administrative role allocated to the mayor.

The analysis is heavily dependent on the underlying city or county charter and statutory scheme, which consistent with Harris v. DeSoto in many cases allows the council to settle a case that involves decisions typically vested in the executive. For example, looking at some of the cases cited in Harris v. DeSoto: Shaw v. Common Council of Watertown, 63 N.W.2d 252 (S.D., 1954) ruled that the council had exclusive authority to settle a matter involving a building permit, an authority typically vested in the executive (See Harris v. DeSoto at 73, citing to Thousand Friends v. City and County of Honolulu, 75 Haw. 237, 858 P.2d 726 (1993)); Owensboro involved prevention of trespass or encroachment, also typically vested in the executive (See DeSoto, id., citing to Richardson v. City and County of Honolulu, 76 Hawai'i 46, 868 P.2d 1193 (1994)) and Nottingham involved the reinstatement of a firefighter, noting that the power to settle claims did not stem from the mayor's power to "hire and fire," one of the core executive powers (see Harris v. DeSoto, id., citing to Sussel v. Civil Service Commission, 74 Haw. 599, 851 P.2d 311 (Haw. 1993)). Thus many other jurisdictions have come to the conclusion that the power to control litigation, and to settle and compromise claims, unless otherwise provided, rests solely with the governing legislative body, generally denominated the common council. This power over litigation exists regardless of the substance of the litigation.

In the majority of jurisdictions, the separation of powers doctrine is incomplete on the municipal level, as the municipal department operates largely as an agent of the local government, with expressly delegated powers, and the county council may fulfill both legislative and executive functions:

Thus it [separation of powers] has been held inapplicable to municipal and

local officers, notwithstanding it adheres in state government.... in many instances, the separation of powers was not complete, since the council performed many duties not of a legislative character.

2A McQuillin, Mun. Corp., § 9.09, p. 190-191.

The Maui County Charter, **unlike the Honolulu Charter**, but similar to the jurisdictions in the other cases DeSoto v. Harris cites, vests the underlying powers of the county in the County Council:

Section 2-2. Exercise of Powers. All powers of the county shall be carried into execution as provided by this charter, or, if the charter makes no provisions, as provided by ordinance or resolution of the county council.

No similar provision exists in the Honolulu Charter. The import of Section 2-2 is that the county council has a plenipotentiary residuary power, and can fulfill any function, except those exclusively delegated to the mayor. As a result of the grant of that plenipotentiary residuary power, the Maui County Charter required a specific provision to limit the council's power over the executive:

Section 3-8. Restrictions on Council and Council Members.

1. Unless otherwise provided in this charter, neither the council nor any of its members shall, in any manner, dictate the appointment or removal of any officer or employee appointed by the mayor or by the mayor's subordinates.
2. Neither the council nor its members shall give orders to any county employees or county officers other than those appointed pursuant to Section 3-7 or Article 5, either publicly or privately. Any willful violation of the provisions of this subsection by a member of the council shall be sufficient grounds for the councilmember's removal from office by impeachment. (Amended 2016, 2002).

The import of this section is that the council has administrative aspects to its power, and therefore orders from the council to the executive would generally have effect, in the absence of the above specific provision. **No such provision is present or necessary in the Honolulu charter.**

Furthermore, while the Maui County Charter narrows the scope of the Mayor's authority to a role as head of the "executive branch," it defines the Council's authority more widely than an equivalent designation as the "legislative branch." Article III. Section 3-6 of the Charter states that the County Council "shall be the

legislative body of the county. Without limitation of the foregoing grant or other powers given it by this charter, the council shall have the power: [listing functions].” Compare this to the Honolulu provision, which vests only legislative power in the council: Article III. Section 3-101. Legislative Power – “The legislative power of the city shall be vested in and exercised by the city council, except as otherwise provided by this charter.”

Similarly, the Honolulu charter vests the executive power in the mayor, see section 4-101, while the Maui Charter vests the executive power in the executive branch, Section 6-1, which is created and funded by the council, Section 6-2, and which is shaped and supervised to some degree by the council as well. In Maui County, the mayor may not create new positions in the executive branch unless already created and approved by the council (Charter Section 7-5(2)); in Honolulu, by contrast, the Mayor may create new positions, and inform the council after their creation, Section 5-103(c). In Maui, the Council may “require periodic and special reports from all county departments concerning their functions and operations” (Charter section 3-6(5)), thus giving the council some supervisory function over all executive departments, while in Honolulu the council holds no such authority and the annual reports are an internal function of the executive.

All of the above provisions show that the Maui Charter does intend to confer a residuary administrative power to the council in all matters not specifically delegated to the executive -- consistent with the explicit grant of that residuary power in Charter section 2-2. The mayor is the head of the executive branch, but does not embody its powers; the shape and contours of the executive branch are defined by the Maui County Council. In all matters where executive power is not defined, the council has authority to act.

Thus Harris v. DeSoto, which tips its hat in the direction of other jurisdictions but distinguishes Honolulu, is not meant to apply to jurisdictions where there is a clear intent to follow the general “principle that in the absence of some contrary provision, the power to compromise a claim is lodged with the legislative branch of the municipality.” Harris v. DeSoto at 72, citing to Hawkins,

supra. This is in accordance with the clear adoption of that principle in the Maui Charter itself, in Section 2-2.

4. Even if Maui had a rigid separation of powers doctrine similar to Honolulu, and even if the holding of Harris were to apply in full, the 2019 Proposed Settlement of the LWRF Lawsuit would still fall in the domain of the legislative branch.

Three years after Harris was decided, the Maui County Council codified some of the case's principles by enacting Ordinance 2786, now codified as Maui County Code §3.16.020. That Code section is discussed in Section III.A.1. of this Memorandum, *supra*, and a copy of it is attached to this Motion as Exhibit “A”. In discussing and ultimately passing that ordinance, the Council obtained from the then Corporation Counsel and from their own attorney in Council Services a careful and thorough review of the Harris v. DeSoto case. (Declaration of Anthony L. Ranken attached hereto, paragraph 4.)

Knowing that Ordinance 2786 -- now Maui County Code §3.16.020(B) -- was carefully reviewed by the Council in light of Harris v. DeSoto, and knowing that said ordinance was enacted after the Harris ruling and in light of that ruling, the resulting ordinance can only be interpreted as an instance of the Council exercising its unique authority under Maui County Charter §2-2 to give itself a power not otherwise allocated by the Charter – the power to settle cases with a value over \$7,500. That sequence of events, and all the differences between the Maui County Charter and the Honolulu Charter – most notably Charter §2-2 -- thus distinguishes this case from Harris v. DeSoto.

The Supreme Court in Harris referenced the City Council's budget-making authority and control of the municipality's “purse” as bases for its exclusive authority to settle certain cases. 80 Hawai'i at 435 (“[T]he ultimate issue of settlement authority cannot be resolved without reference to the council's control over the city's purse.”). The 1966-67 Maui County Charter Commission, in its final report on February 6, 1967, used similar language. On page 18 of its report

recommending establishment of the Council-Mayor form of government that remains in existence, the Charter Commission stated:

The Council is a powerful body. The Council exercises a great deal of authority in fiscal matters. The Council controls the county "purse strings."

("A Statement of the Activities, Findings and Recommendations of the Charter Commission to the Board of Supervisors of the County of Maui," presented to the Board of Supervisors meeting of 2/9/67.)

As noted in the McQuillin treatise on municipal law, legislative power is "discretionary" policy making, while executive power or administrative power is policy implementation:

The crucial test for determining what is legislative and what is administrative has been said to be whether the ordinance is one making a new law, or one executing a law already in existence. In other words, if the legislative function is principally law creation, the executive function is chiefly law enforcement.

2A McQuillin Mun. Corp. § 10:6 (3d ed.).

In Harris v. DeSoto, the Supreme Court of Hawai'i provided the following examples of executive power:

- Appointing Mayor's staff
- Assessing fines for violation of a zoning ordinance
- Assessing real property tax
- Issuing Special Management Area use permits
- Managing contract bidding process
- Managing drug-screening programs
- Re-hiring a police officer suspected of criminal conduct
- Applying riparian water rights
- Enforcement of policy requiring rock concert promoters to conduct

inspections of patrons for bottles and cans prior to entry of arena

- Awarding contract for provision of municipal bus services

Harris, 80 Hawai'i at 438 (citations omitted).

Thus per Harris as applied under Honolulu's charter, the Honolulu City Council could not unilaterally make promises on the government's behalf in those and similar areas of executive power. But any promises involving the county's "purse strings" would necessarily fall in the exclusive realm of the legislative branch. Promises to expend public funds and to take other policy-making actions are exercises of legislative power, and settlements involving those areas would be legislative decisions. Harris emphasizes that where the legislature appropriates funds, it has the power to dictate how the funds will be applied, even if this involves specific directives to the executive:

The legislative branch's power to control the purse not only necessarily includes the power to appropriate municipal funds for a particular purpose, but also in turn necessarily includes the power to dictate the means by which, and, in this case, in what amounts, the earmarked funds are expended.

Harris, 911 P.2d at 69-70.

It is well established that the executive branch cannot exercise an indirect veto power by refusing to execute the laws, as set forth by the legislative branch:

[T]he executive branch does not have the authority to decline to execute a law under the guise of executing the laws: "To contend that the obligation imposed ... to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution and entirely inadmissible." The power to forbid the execution of the laws would enable the executive branch to nullify validly enacted statutes. In that situation, the executive branch would encroach upon the legislative power to repeal statutes or upon the judicial branch's power of judicial review. What the executive branch cannot do directly, it cannot do indirectly.

Perdue v. Baker, 586 S.E.2d 606, 616 (Ga., 2003) (citing to Supreme Court case law from Kendall v. United States, 37 U.S. (12 Pet.) 524, 613 (1838) to INS v. Chadha, 462 U.S. 919, 954 (1983)). Thus, where a settlement involves an appropriation of funds for a specific purpose, even if the execution of that purpose requires actions by the Mayor or the executive branch, settlement authority is exclusively vested in the County Council under Harris.

5. The 2019 Proposed Settlement Terms fall in the Exclusive Domain of the Legislative Branch, as terms involving the payment of money.

The proposed settlement includes seven enumerated terms. The following chart summarizes and analyzes those terms. Some of the proposed terms are recitals without any new or legally binding promises by the County and, therefore, are not exercises of either legislative or executive power.

| Summary of terms | Legislative or executive? | Explanation |
|--|---------------------------|---|
| 1. Parties agree to dismiss case. | Neither. | As the operative decisions in paragraph 2, to compromise or settle the claims in this case are “essentially fiscal,” involving a “weighing of the economic cost considerations of settlement versus litigation,” the county council may settle the claims (see below). The ministerial paperwork necessary to dismiss the case is of the same nature as the paperwork needed to settle any case, as referenced in Harris. If this kind of paperwork were considered an exercise of executive power, a case could never be settled over the Mayor's objection. That would be contrary to Harris. |
| 2.County promises to: (1) seek and comply with NPDES permit; (2) fund and implement projects in West Maui to divert treated wastewater; and (3) pay \$100,000 to U.S. Treasury | Legislative power. | The permitting requirement in (1) does not appear to constitute a new or legally relevant promise. It is a statement of the County's existing responsibility under the holding of <u>Hawaii Wildlife Fund, et al. v. County of Maui</u> , 881 F.3d 754 (9th Cir. 2018), which will remain in effect if the Supreme Court case is dismissed. Showing its legal irrelevance, this element could be eliminated, and the parties' rights and responsibilities would not change. The expenditures of public |

| | | |
|--|--------------------|--|
| | | funds in (2) and (3) are quintessential exercises of legislative power under Harris. |
| 3.County promises to reimburse the plaintiffs' costs. | Legislative power. | The expenditure of public funds is a quintessential exercise of legislative power under Harris. |
| 4.Plaintiffs conditionally promise not to sue County on certain grounds. | Neither. | This term is a promise by the plaintiffs, not the County. |
| 5.Plaintiffs conditionally promise not to sue County on certain grounds. | Neither. | This term is a promise by the plaintiffs, not the County. |
| 6. Parties recognize factors contributing to marine environment stresses and commit to addressing impacts as stated above. | Neither. | This term includes a general statement of good faith, which is implied in all contracts, but does not otherwise include a promise by either party. |
| 7.Parties "recognize" various other factors and reserve future rights. | Neither. | This term does not appear to include a promise by either party. |

B. There Is No Genuine Dispute Of Material Fact That Corporation Counsel Is Barred From Representing The Parties In This Case.

For the Corporation Counsel to represent the mayor or itself in this case would violate the Hawaii Rules of Professional Conduct (HRPC) §§1.7(a)(1) and 1.7(a)(2).

Pursuant to the Charter of the County of Maui §8-2.3, Defendant Moana Lutey, Corporation Counsel for the County of Maui, represents the County of Maui in all legal proceedings. The Corporation Counsel serves in a dual role in which her clients include both the Mayor, and the County Council. See *id.*, §8-2.3(2).

Under HRPC §1.7(a)(1), “A lawyer shall not represent a client...if the representation of one client will be directly adverse to another client.” As the interests and positions of Defendant Lutey’s two clients, the Mayor and the County Council are directly adverse to one another regarding both the settlement of the LWRF Lawsuit and the question raised in this Complaint of whether the Council

has exclusive authority to settle the LWRP lawsuit, the Corporation Counsel is barred from representing either party in this lawsuit.

Moreover, pursuant to HRPC §1.7(a)(2), “A lawyer shall not represent a client...if there is a significant risk that the representation...will be materially limited by the lawyer’s responsibilities to another client...or by a personal interest of the lawyer.” Defendant Lutey, because she is a Defendant herein, has a personal interest in this lawsuit that is in conflict with her responsibilities to her client, Defendant Maui County Council. Therefore neither she nor her office can represent Ms. Lutey as a Defendant in this lawsuit. In addition, for Defendant Lutey or her office to attempt to represent herself in this lawsuit would pit her interests against those of Defendant Maui County Council, which is another client of Defendant Lutey, and her responsibilities to that client would materially limit her ability to represent herself, in violation of HRPC §1.7(a)(2).

IV. CONCLUSION

There is no dispute as to any of the material facts in this matter, and therefore summary judgment is appropriate. For all of the foregoing reasons, Plaintiffs are entitled to judgment as a matter of law, that the Maui County Council’s settlement of the LWRP lawsuit (Exhibits “A” & “B”), is binding upon the Mayor and Corporation Counsel. An injunction should therefore issue requiring the Mayor and Corporation Counsel to act in accordance with Resolution 19-158.

It is respectfully submitted that the Court should also rule that neither Defendant MOANA LUTEY nor her office may represent either Defendant in this lawsuit.

DATED: Wailuku, Maui, Hawaii, November 29, 2019.

/s/ Samuel P. Shnider
SAMUEL SHNIDER
ANTHONY L. RANKEN
Attorneys for Plaintiffs

Resolution

No. 19-158

AUTHORIZING SETTLEMENT IN HAWAII
WILDLIFE FUND, ET AL. V. COUNTY OF MAUI,
CIVIL 12-00198 SOM BMK, U.S. SUPREME
COURT CASE 18-260

WHEREAS, Plaintiffs Hawaii Wildlife Fund, et al. filed a lawsuit in the United States District Court ("District Court") on April 16, 2012, Civil 12-00198 SOM BMK, against the County of Maui, alleging violations under the Federal Water Pollution Control Act, also known as the Clean Water Act; and

WHEREAS, on January 23, 2015, and June 25, 2015, District Court granted Plaintiffs' motions for partial summary judgment; and

WHEREAS, to avoid incurring expenses and the uncertainty of a judicial determination of the parties' respective rights and liabilities, the County Council approved a Settlement Agreement by Resolution 15-75 ("2015 Settlement Agreement"); and

WHEREAS, the 2015 Settlement Agreement was lodged with District Court on September 24, 2015, and following Federal government review pursuant to 40 C.F.R. §135.5, District Court entered the Settlement Agreement and Order and entered its Judgment on November 17, 2015; and

WHEREAS, pursuant to the terms of the 2015 Settlement Agreement and Order, the Parties agreed that the County reserved the right to appeal the rulings of the District Court to the Ninth Circuit Court of Appeals and on to the U.S. Supreme Court; and

WHEREAS, the County of Maui appealed District Court's decision to the Ninth Circuit Court of Appeals 15-17447, and the Ninth Circuit Court of Appeals denied the appeal on February 1, 2018; and

WHEREAS, the County of Maui filed a Petition for Writ of Certiorari with the U.S. Supreme Court on August 27, 2018, and on February 19, 2019, the U.S. Supreme Court granted the County of Maui's petition 18-260; and

EXHIBIT "A"

Resolution No. 19-158

WHEREAS, in accordance with Section 3.16.020(F), Maui County Code, the Department of the Corporation Counsel may transmit to Council settlement offers involving claims not specified by the Council pursuant to Section 3.16.020(D), Maui County Code; and

WHEREAS, the Department of the Corporation Counsel has received from Plaintiffs' counsel and transmitted to the Council's Governance, Ethics, and Transparency Committee, "Confidential Settlement Communication - FRE 408," dated April 26, 2019 (with amendments made on May 9, 2019), attached hereto as Exhibits "A" and "B" ("Plaintiffs' 2019 Settlement Proposals"); and

WHEREAS, in open session on September 6, 2019, at the reconvened September 3, 2019, meeting of the Governance, Ethics, and Transparency Committee, the Committee revised the terms of paragraph four of Exhibit "B" to read as follows:

"As long as the County makes good faith efforts to reduce its reliance on the LWRF injection wells to dispose of treated wastewater, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit—which could be 'an equivalent control document' (see Hawaii Administrative Rules §11-55-01)—for the LWRF injection wells, the Community Groups will not bring litigation seeking additional penalties based on the County's lack of Clean Water Act compliance for use of the LWRF injection wells."; and

WHEREAS, having reviewed the facts, circumstances, ramifications, and consequences regarding the case and pending appeal before the U.S. Supreme Court, and being advised in the premises, the County Council wishes to authorize the settlement; now, therefore,

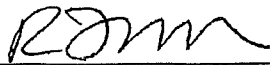
BE IT RESOLVED by the Council of the County of Maui:

1. That it hereby approves settlement of the case under the terms set forth in the Plaintiffs' 2019 Settlement Proposals, as amended in open session before the reconvened September 3, 2019 meeting of the Governance, Ethics, and Transparency Committee on September 6, 2019;

Resolution No. 19-158

2. That it hereby authorizes the Mayor to execute a Release and Settlement Agreement on behalf of the County in the case;
3. That it hereby authorizes the Director of Finance to satisfy said settlement of the case; and
4. That certified copies of the resolution be transmitted to the Mayor, the Director of Finance, the Director of Environmental Management, and the Corporation Counsel.

APPROVED AS TO FORM AND LEGALITY



Department of the Corporation Counsel
County of Maui

get:misc:026areso01


COUNCIL OF THE COUNTY OF MAUI

WAILUKU, HAWAII 96793

CERTIFICATION OF ADOPTION

It is HEREBY CERTIFIED that RESOLUTION NO. 19-158 was adopted by the Council of the County of Maui, State of Hawaii, on the 20th day of September, 2019, by the following vote:

| MEMBERS | Kelly T. KING Chair | Keani N. W. RAWLINS- FERNANDEZ Vice-Chair | G. Riki HOKAMA | Natalie A. KAMA | Alice L. LEE | Michael J. MOLINA | Tamara A. M. PALTIN | Shane M. SINENCI | Yuki Lei K. SUGIMURA |
|-----------|---------------------------|--|-------------------|--------------------|-----------------|----------------------|------------------------|---------------------|-------------------------|
| ROLL CALL | Aye | Aye | No | No | No | Aye | Aye | Aye | No |



DEPUTY COUNTY CLERK

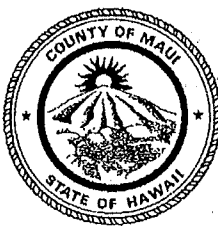
GET-26

MICHAEL P. VICTORINO
Mayor

MOANA M. LUTEY
Acting Corporation Counsel

EDWARD S. KUSHI, JR.
First Deputy

LYDIA A. TODA
Risk Management Officer



RECEIVED

2019 MAY -2 AM 8:43

OFFICE OF THE
COUNTY COUNCIL

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI

200 SOUTH HIGH STREET, 3RD FLOOR

WAILUKU, MAUI, HAWAII 96793

EMAIL: CORPCOUN@MAUICOUNTY.GOV

TELEPHONE: (808) 270-7740

FACSIMILE: (808) 270-7152

May 2, 2019

T O: Mike Molina, Chair
Governance, Ethics, and Transparency Committee

F R O M: Richelle M. Thomson, Deputy Corporation Counsel *R. Thomson*

SUBJECT: **GET-26** Hawaii Wildlife Fund et al., v. County of Maui, Docket No.
18-260, Supreme Court of the United States (PRL-1(20))

This memo is to provide notification to the GET Committee that a settlement proposal/revision has been received by this office in the above-identified matter.

The terms of the proposal are consistent with the prior settlement authority approved by the County Council pursuant to Resolution 15-75 and Resolution 15-107, and which resulted in the attached Settlement Agreement and Order, which was lodged by the Hawaii District Court on September 24, 2015.

EXHIBIT B

DAVID L. HENKIN #6876
 SUMMER KUPAU-ODO #8157
 EARTHJUSTICE
 850 Richards Street, Suite 400
 Honolulu, Hawai'i 96813
 Telephone No.: (808) 599-2436
 Fax No.: (808) 521-6841
 Email: dhenkin@earthjustice.org
 skupau@earthjustice.org

Attorneys for Plaintiffs*

IN THE UNITED STATES DISTRICT COURT
 DISTRICT OF HAWAII

| | | |
|-----------------------------------|---|----------------------------|
| HAWAII WILDLIFE FUND, a |) | CIVIL NO. 12-00198 SOM BMK |
| Hawai'i non-profit corporation, |) | |
| SIERRA CLUB - MAUI GROUP, a |) | SETTLEMENT AGREEMENT AND |
| non-profit corporation, SURFRIDER |) | [PROPOSED] ORDER RE: |
| FOUNDATION, a non-profit |) | REMEDIES; EXHIBIT A; |
| corporation, and WEST MAUI |) | CERTIFICATE OF SERVICE |
| PRESERVATION ASSOCIATION, a |) | |
| Hawai'i non-profit corporation, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| COUNTY OF MAUI, |) | |
| |) | |
| Defendant. |) | |

* Pursuant to Local Rule 10.2(b), please refer to the signature page for the complete list of parties represented.

SETTLEMENT AGREEMENT AND [PROPOSED] ORDER RE: REMEDIES

WHEREAS, on April 16, 2012, Plaintiffs Hawai'i Wildlife Fund, Sierra Club - Maui Group, Surfrider Foundation, and West Maui Preservation Association (collectively, "Plaintiffs") filed a Complaint against Defendant County of Maui ("Defendant"), since amended, alleging violations of section 301(a) of the federal Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), and Haw. Rev. Stat. § 342D-50(a) associated with the discharge into the nearshore ocean waters of West Maui of wastewater from injection wells operated by Defendant at the Lahaina Wastewater Reclamation Facility ("LWRF"), which is located at 3300 Honoapi'ilani Highway, Lahaina, Hawai'i 96761;

WHEREAS, Defendant maintains it has authorization under State and federal Safe Drinking Water Act permits for its four underground injection control wells that allows Defendant to discharge treated wastewater to groundwater that has a hydrological connection to navigable waters;

WHEREAS, on May 30, 2014 and January 23, 2015, the Court found that Defendant's discharges of treated wastewater from each of the LWRF injection wells without a National Pollutant Discharge Elimination System ("NPDES") permit violate the CWA;

WHEREAS, on June 25, 2015, the Court held Defendant is not immune from civil penalties because of a lack of fair notice that an NPDES permit was required;

WHEREAS, Plaintiffs and Defendant (collectively, “the Parties”) have agreed to enter into this Settlement Agreement and Order Re: Remedies (“Agreement”), without any admission of fact or law; and

WHEREAS, it is in the interest of the public, the Parties, and judicial economy to resolve the remaining issues related to remedies without protracted litigation;

NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PLAINTIFFS AND DEFENDANT, AND THE COURT ORDERS AS FOLLOWS:

1. This Agreement resolves all remaining issues in the remedies phase of the above-captioned lawsuit. The effective date (“Effective Date”) of this Agreement is the date the Agreement is entered by the Court.

DEFENDANT’S RESERVATION OF RIGHT TO APPEAL

2. By entering into this Agreement, Defendant does not admit liability. The Parties agree Defendant reserves the right to appeal any and all rulings of this Court other than the entry of this Agreement, including the Court’s rulings on liability and fair notice.

3. Appeals may be made to the Court of Appeals for the Ninth Circuit and the Supreme Court.

4. Defendant's obligations under Paragraph 8 shall be triggered by this Court's entry of this Agreement. Defendant's obligations under Paragraphs 9 through 13 herein are triggered by a Final Judgment that (1) discharges of treated wastewater from any of the LWRF injection wells without an NPDES permit violate the CWA and (2) Defendant is not immune from civil penalties because of a lack of fair notice that an NPDES permit was required. For purposes of this Agreement, the phrase "Final Judgment" is defined as in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(G).

5. In the event of a remand, the Parties agree that the remedies provided for in this Agreement control and are binding, that no additional remedies shall be assessed and that this Agreement and the remedies provided herein resolve all remaining issues regarding the remedy phase of the above-captioned lawsuit. Notwithstanding the foregoing, neither Party waives its right to litigate any remanded issue(s), including a liability determination as to any well or a ruling on fair notice.

LIMITATION ON FUTURE ACTIONS PENDING APPEAL

6. From the date of execution of this Agreement through Final Judgment, Plaintiffs shall not bring any claim in any State or federal court against

Defendant seeking additional civil penalties or injunctive or declaratory relief for alleged violations under State or federal law based on the lack of an NPDES permit for the LWRF's injection wells.

7. No penalties shall accrue or otherwise be imposed in this action from the Effective Date through the Final Judgment.

NPDES PERMIT

8. Defendant shall make good faith efforts to secure and comply with the terms of an NPDES permit for the LWRF injection wells. Such good faith efforts shall include, but not be limited to, cooperating in good faith with the Hawai'i Department of Health to secure an NPDES permit, including providing additional information when requested. Defendant's obligations under this paragraph as to any well shall cease only in the event of a Final Judgment that discharges of treated wastewater from that well without an NPDES permit do not violate the CWA.

SUPPLEMENTAL ENVIRONMENTAL PROJECT

9. In the event of a Final Judgment that (1) discharges of treated wastewater from any of the LWRF injection wells without an NPDES permit violate the CWA and (2) Defendant is not immune from civil penalties because of a lack of fair notice that an NPDES permit was required, Defendant shall fund and implement one or more projects located in West Maui, to be valued at a minimum

of Two Million Five Hundred Thousand Dollars (\$2.5 million), the purpose of which is to divert treated wastewater from the LWRF injection wells for reuse, with preference given to projects that meet existing demand for freshwater in West Maui. Examples of projects that would further this purpose include, but are not limited to, expansion of the R-1 distribution system for the LWRF's treated wastewater and indirect or direct potable reuse. Projects under this Agreement shall not include projects already required to be implemented by third parties.

10. No later than thirty (30) days following the Final Judgment as provided for in Paragraphs 4 and 9, the Parties shall meet and confer (in-person not required) in a good faith effort to reach agreement on one or more projects that further the purpose set forth in Paragraph 9, which agreement shall not be unreasonably withheld. If the Parties are unable to reach agreement within sixty (60) days of the Final Judgment as provided for in Paragraphs 4 and 9, Defendant shall, within ninety (90) days thereafter, instead pay a penalty of Two Million Five Hundred Thousand Dollars (\$2.5 million) to the U.S. Treasury. If the Parties reach agreement on one or more projects that do not meet the Two Million Five Hundred Thousand Dollars (\$2.5 million) value threshold, the balance shall be paid to the U.S. Treasury (for example, if a mutually agreed-upon project is valued at \$1.5 million, with no agreement as to other projects, Defendant would submit a \$1.0 million penalty payment to the U.S. Treasury).

11. No later than two (2) years following a Final Judgment as provided for in Paragraphs 4 and 9, Defendant shall complete the design of the project(s) agreed upon pursuant to Paragraph 10. Defendant shall complete the construction of those project(s) no later than five (5) years of the Final Judgment.

12. Defendant shall provide notification to Plaintiffs in accordance with Paragraph 27 when design of the project(s) is complete and when construction is complete.

CIVIL PENALTIES

13. In the event of a Final Judgment that (1) discharges of treated wastewater from any of the LWRF injection wells without an NPDES permit violate the CWA and (2) Defendant is not immune from civil penalties because of a lack of fair notice that an NPDES permit was required, Defendant shall pay a penalty in the amount of One Hundred Thousand Dollars (\$100,000.00) to the U.S. Treasury within ninety (90) days of the Final Judgment.

DELAY IN PERFORMANCE AND STIPULATED PENALTIES

14. Unless excused due to a Force Majeure event as defined below, Defendant shall be liable for Stipulated Penalties for each day it fails to comply with any of its obligations under Paragraph 11, as follows:

- a. \$250 per day for the first 15 days;

- b. \$500 per day for days 16 to 60; and
- c. \$1,000 per day for days 61 and beyond.

15. Stipulated Penalties shall begin to accrue on the day a violation occurs and shall continue to accrue through the final day of the correction of the violation.

- a. Plaintiffs may seek Stipulated Penalties under this Section by making a written demand. Plaintiffs shall send notice to Defendant in accordance with Paragraph 27 that Plaintiffs intend to seek Stipulated Penalties and stating the basis for Plaintiffs' demand.
- b. If Defendant disputes Plaintiffs' demand for Stipulated Penalties, the Parties shall meet and confer (in-person not required) in a good faith effort to resolve the dispute. If the Parties are unable to resolve their dispute within ten (10) days after receipt of the written notice, Plaintiffs may submit the dispute to the Court for resolution. Stipulated Penalties shall continue to accrue during the Court's resolution of any dispute, with interest on accrued penalties payable and calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until the following:

- i. If Plaintiffs prevail in whole or in part in a Court action regarding Stipulated Penalties, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest, within thirty (30) days of receiving the Court's decision or order, except as provided in subparagraph ii., below. Defendant shall also pay Plaintiffs' costs of litigation (including reasonable attorneys' fees).
- ii. If any party appeals the District Court's decision, Defendant shall pay all accrued penalties determined to be owing, together with interest, within fifteen (15) days of receiving the final appellate court decision. If Plaintiffs prevail in whole or in part in an appeal regarding Stipulated Penalties, Defendant shall also pay Plaintiffs' costs of litigation (including reasonable attorneys' fees).
- c. If Defendant does not dispute Plaintiffs' demand for Stipulated Penalties, within thirty (30) days of service of the written demand, Defendant shall pay the Stipulated Penalty set forth in Plaintiffs' demand.

- d. Defendant shall pay any Stipulated Penalties by certified check or cashier's check in the amount due, payable to: Hawai'i Department of Health, Environmental Response Revolving Fund and provide timely proof of payment to Plaintiffs in accordance with Paragraph 27.

16. The payment of Stipulated Penalties shall not alter in any way Defendant's obligation to comply with the terms of this Agreement.

FORCE MAJEURE

17. A "Force Majeure event" is any event beyond the control of Defendant, Defendant's employees, consultants or contractors, or any entity controlled by Defendant, that delays or prevents the performance of any obligation under this Agreement despite Defendant's best efforts to fulfill the requirements of the Agreement and includes, but is not limited to, acts of God or war. "Best efforts" includes anticipating any potential Force Majeure event and addressing the effects of any such event (a) as it is occurring and (b) after it has occurred, to prevent or minimize to the greatest extent possible any resulting delay in fulfillment of the requirements of the Agreement. "Force Majeure" does not include Defendant's financial inability to perform any obligation under this Agreement.

18. If and to the extent Defendant is prevented from performing any of its obligations under Paragraph 11 by a Force Majeure event, while Defendant is so prevented, Defendant shall be relieved of its obligations to perform and pay Stipulated Penalties, but shall make its best efforts to continue to perform its obligations under this Agreement as far as reasonably practicable.

19. If and to the extent Defendant suffers a delay in performing as a result of a Force Majeure event, Defendant shall be entitled to a reasonable extension of time to complete performance.

20. Defendants shall provide timely notice orally or by electronic transmission as soon as practicable, after the time Defendant first knew of, or by the exercise of due diligence, should have known of, a claimed Force Majeure event.

21. Defendant shall also provide notice to Plaintiffs in accordance with Paragraph 27 within seven (7) business days of the time Defendant first knew of, or by the exercise of due diligence, should have known of, the event. The notice shall state the nature and duration of the Force Majeure event, its cause(s), the anticipated delay of performance of any obligation(s) under Paragraph 11, a schedule for carrying out those obligations, and Defendant's rationale for attributing the delay to a Force Majeure event.

22. If Defendant provides notice of a claimed Force Majeure event in accordance with Paragraphs 20 and 21, Plaintiffs shall, within a period not to exceed twenty (20) days from the date of Defendant's notice of the event, provide a response to Defendant in accordance with Paragraph 27 about whether Plaintiffs agree that a Force Majeure event has occurred. Plaintiffs "agree that a Force Majeure event has occurred" when they agree with Defendant in writing as to both the nature and duration of the event.

23. If Plaintiffs fail to provide a written response to Defendant within the twenty (20) day period provided for in Paragraph 22, Plaintiffs will have been deemed to agree with Defendant's determination that a Force Majeure event has occurred.

24. If Defendant provides notice of a claimed Force Majeure event in accordance with this Agreement and:

- a. Plaintiffs timely agree that a Force Majeure event has occurred as provided in Paragraph 22, the Parties may agree to extend the time for Defendant to come into compliance with the Agreement by making the appropriate modification via stipulation pursuant to Paragraph 32; or
- b. Plaintiffs do not agree that a Force Majeure event has occurred or fail to timely provide the response pursuant to Paragraph 22,

Defendant may, within thirty (30) days of receipt of written notice of the disagreement or the deadline for Plaintiffs' response, file a written motion with the Court seeking an extension of time to perform. If Defendant does not file a motion within that time frame, Defendant waives its claim that a Force Majeure event has occurred.

25. To prevail on any written motion under Paragraph 24(b), Defendant bears the burden of proving, by clear and convincing evidence, that any claimed Force Majeure event is a Force Majeure event, that Defendant gave the notice required by this Agreement, that the Force Majeure event caused any delay in Defendant's performance of any obligation under Paragraph 11 that Defendant claims was attributable to that event, and that Defendant exercised best efforts to avoid or minimize any delay caused by the event.

26. When Plaintiffs agree or the Court rules that a Force Majeure event has occurred that delays performance of an obligation under Paragraph 11, Defendant shall not be liable for Stipulated Penalties for the time period of the delay caused by the Force Majeure event.

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ADDRESSES FOR NOTICES, SUBMISSIONS, OTHER COMMUNICATIONS

27. Unless otherwise specified herein, whenever notifications, submissions, and/or communications are required by this Agreement, they shall be in writing, and be addressed and sent via U.S. Mail or electronic mail as follows:

To Plaintiffs, via Plaintiffs' attorney of record:

David Lane Henkin
Earthjustice
850 Richards Street, Suite 400
Honolulu, Hawai'i 96813
Phone: (808) 599-2436
E-mail: dhenkin@earthjustice.org

To Defendant, via Defendant's attorney of record:

Patrick K. Wong
Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Hawai'i 96793
Phone: (808) 270-7740
Email: pat.wong@co.maui.hi.us and corpcoun@co.maui.hi.us

28. Any Party may, by written notice to the other Party, change its designated notice recipient or notice address provided above.

ATTORNEYS' FEES AND COSTS

29. Within thirty (30) days of the Effective Date, the Parties will meet and confer (in-person not required) in a good faith effort to reach agreement as to the amount of Plaintiffs' costs of litigation (including reasonable attorneys' and expert

witness fees) pursuant to Section 505(d) of the CWA, 33 U.S.C. § 1365(d), for proceedings before this Court. If the Parties are unable to reach agreement, Plaintiffs may file a motion with this Court for the recovery of fees and costs no later than sixty (60) days after the Effective Date, pursuant to Federal Rule of Civil Procedure 54(d)(2)(B).

30. Defendant shall not be required to pay Plaintiffs' attorneys' fees and costs until ninety (90) days following Final Judgment. During any appeals period, interest on any award of attorneys' fees and costs shall be calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until ninety (90) days following Final Judgment.

ENFORCEMENT OF THIS AGREEMENT

31. This Court has jurisdiction to enforce the terms of this Agreement. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994).

32. This Agreement may be modified by the Court upon good cause shown by written stipulation between the Parties filed with and approved by the Court.

33. In the event that either Party seeks to enforce the terms of this Agreement, including any of the deadlines for any action set forth herein, or in the event of a dispute arising out of or relating to this Agreement, or in the event that either Party believes that the other Party has failed to comply with any term or

condition of this Agreement, the Party raising the dispute, or seeking enforcement, shall provide the other Party with written notice of the claim. The Parties agree that they will meet and confer (in-person not required) at the earliest possible time in a good faith effort to resolve the claim before bringing any matter to the Court. If the Parties are unable to resolve the claim within ten (10) days after the notice, either Party may bring the claim to the Court.

ENTRY OF AGREEMENT

34. Upon the Government's confirmation of no objection to, or no action on, this Agreement within forty-five (45) days of receipt of this Agreement pursuant to 40 C.F.R. § 135.5, the Court shall enter this Agreement and enter judgment in this action. The Parties shall not withdraw their consent to this Agreement during the period of Governmental review of this Agreement without further notice; provided, however that either Party has the right to withdraw its consent to this Agreement if, prior to entry, the Court changes or the Government objects to any term or provision of this Agreement.

EPA FOIA DOCUMENTS

35. Plaintiffs agree that all EPA FOIA documents obtained by the County in response to a May 2, 2014, FOIA request that were submitted to the Court are authentic and that Plaintiffs will not challenge the authenticity of the documents.

A listing of all EPA FOIA documents that were submitted to the Court is attached hereto and incorporated herein as Exhibit A.

AUTHORIZATION TO SIGN

36. This Agreement shall apply to and be binding upon the Parties, their members, delegates, and assigns. The undersigned representatives certify that they are authorized by the Party or Parties they represent to enter into the Agreement and to execute and legally bind that Party or Parties to the terms and conditions of this Agreement.

COUNTY OF MAUI
200 South High Street
Wailuku, Maui, Hawai'i 96793

By: 
ALAN M. ARAKAWA
Its Mayor

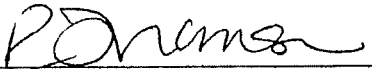
9/24/15
DATE

EARTHJUSTICE
DAVID L. HENKIN
SUMMER KUPAU-ODO
850 Richards Street, Suite 400
Honolulu, Hawai'i 96813

By: /s/ David L. Henkin
DAVID L. HENKIN
Attorneys for Plaintiffs Hawai'i Wildlife
Fund, Sierra Club – Maui Group,
Surfrider Foundation, and
West Maui Preservation Association

9/24/15
DATE

APPROVED AS TO FORM AND LEGALITY

By: 
RICHELLE M. THOMSON
Deputy Corporation Counsel
Attorney for Defendant
County of Maui

9/24/2015
DATE

DATED: _____

SUSAN OKI MOLLWAY
UNITED STATES CHIEF DISTRICT JUDGE

Hawai'i Wildlife Fund, et al. v. County of Maui, Civil No. 12-00198 SOM-BMK
(D. Haw.); SETTLEMENT AGREEMENT AND [PROPOSED] ORDER RE:
REMEDIES; EXHIBIT A

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

| | | |
|------------------------------|---|---------------------------|
| ANGUS L.K. MCKELVEY, JOANNE |) | CIVIL NO. 2CCV-19-1012(3) |
| JOHNSON WINER, ARCHIE |) | (other civil action) |
| KALEPA, KE'EAUMOKU KAPU, and |) | |
| MAUI TOMORROW FOUNDATION, |) | |
| INC. |) | |
| |) | DECLARATION OF ANTHONY L. |
| Plaintiffs, |) | RANKEN |
| |) | |
| v. |) | |
| |) | |
| MICHAEL P. VICTORINO, MAYOR |) | |
| OF THE COUNTY OF MAUI; |) | |
| MOANA M. LUTEY, CORPORATION |) | |
| COUNSEL FOR THE COUNTY OF |) | |
| MAUI; and THE MAUI COUNTY |) | |
| COUNCIL, |) | |
| |) | |
| Defendants. |) | |

DECLARATION OF ANTHONY L. RANKEN

COMES NOW Anthony L. Ranken, and hereby declares under penalty of perjury as follows:

1. I am one of the attorneys for Plaintiffs in this action.
2. I have personally studied the relevant documents and history of this case and the LWRF lawsuit out of which it arises and am well versed in the circumstances. I certify that the matters set forth in the "Recitation of Relevant Factual Background" above are true and correct.
3. Attached hereto as Exhibit "A" is a true and correct copy of the Resolution passed by the Maui County Council on September 20, 2019 approving settlement of the LWRF lawsuit.

4. Attached hereto as Exhibit “B” is a true and correct copy of a May 20, 2019 memorandum from the office of the Corporation Counsel attaching an executed copy of the settlement agreement reached between the parties on September 24, 2015 and lodged with the U.S. District Court for the District of Hawaii.
5. I have read the entire verbatim minutes of the Maui County Council’s Committee of the Whole from May 20, 1999, when that committee was discussing the proposed Ordinance 2786, now codified as Maui County Code §3.16.020 (Exhibit “A”). The discussion of that issue spans 25 pages and contains extensive discussions of the Harris v. DeSoto case that had been decided by the Hawaii Supreme Court just three years earlier. The case was discussed by the then Corporation Counsel James Takayesu and by the Council’s attorney David Raatz, and by members of the Council. Amendments were made to the draft ordinance. Ordinance 2786 was crafted with full knowledge of Harris v. DeSoto.

I, ANTHONY L. RANKEN, do declare under penalty of law that the foregoing is true and correct.

/s/ Anthony L. Ranken
ANTHONY L. RANKEN

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

| | | |
|------------------------------|---|---------------------------|
| ANGUS L.K. MCKELVEY, JOANNE |) | CIVIL NO. 2CCV-19-1012(3) |
| JOHNSON WINER, ARCHIE |) | (other civil action) |
| KALEPA, KE'EAUMOKU KAPU, and |) | |
| MAUI TOMORROW FOUNDATION, |) | |
| INC. |) | CERTIFICATE OF SERVICE |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| MICHAEL P. VICTORINO, MAYOR |) | |
| OF THE COUNTY OF MAUI; |) | |
| MOANA M. LUTEY, CORPORATION |) | |
| COUNSEL FOR THE COUNTY OF |) | |
| MAUI; and THE MAUI COUNTY |) | |
| COUNCIL, |) | |
| |) | |
| Defendants. |) | |
| |) | |

NOTICE OF MOTION

TO: MOANA M. LUTEY 6385
Corporation Counsel
PETER A. HANANO 6839
KRISTIN K. TARNSTROM 9934
Deputies Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Hawaii 96793

Attorneys for Defendants
MICHAEL P. VICTORINO, MAYOR OF THE
COUNTY OF MAUI; MOANA M. LUTEY,
CORPORATION COUNSEL FOR THE COUNTY
OF MAUI; and THE MAUI COUNTY COUNCIL

PLEASE TAKE NOTICE that the foregoing motion will come on hearing in the Circuit Court of the Second Circuit, Courtroom 3, before the Presiding Judge, on December 18, 2019, at 9:30 a.m.

DATED: Wailuku, Maui, Hawaii, November 29, 2019.

/s/ Anthony L. Ranken
ANTHONY L. RANKEN
SAMUEL P. SHNIDER
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this date served upon the following party by electronic service through the JEFS system as follows:

TO: MOANA M. LUTEY 6385
Corporation Counsel
PETER A. HANANO 6839
KRISTIN K. TARNSTROM 9934
Deputies Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Hawaii 96793

Attorneys for Defendants
MICHAEL P. VICTORINO, MAYOR OF THE
COUNTY OF MAUI; MOANA M. LUTEY,
CORPORATION COUNSEL FOR THE COUNTY
OF MAUI; and THE MAUI COUNTY COUNCIL

DATED: Wailuku, Maui, Hawaii, November 29, 2019.

/s/ Anthony L. Ranken
ANTHONY L. RANKEN
SAMUEL P. SHNIDER
Attorneys for Plaintiffs