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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

IN THE MATTER OF THE PETITION FOR THE COORDINATION OF MAUI FIRE CASES	S.P. NO. 2CSP-23-0000057 (Other Non-Vehicle Tort – Maui Fire) **NON-PARTY SUBROGATING INSURERS' MEMORANDUM OPPOSING INDIVIDUAL ACTION PLAINTIFFS' MOTION FOR ORDER REGARDING OPERATION OF HRS § 663-10 AND APPLICATION FOR INTERLOCUTORY APPEAL; DECLARATION OF VINCENT G. RABOTEAU; DECLARATION OF NORMAND R. LEZY; CERTIFICATE OF SERVICE** HEARING Date: August 13, 2024 Time: 10:00 a.m. Judge: Hon Peter T. Cahill

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NON-PARTY SUBROGATING INSURERS' MEMORANDUM OPPOSING MOTION FOR ORDER REGARDING OPERATION OF HRS § 663-10 AND APPLICATION FOR INTERLOCUTORY APPEAL

I. INTRODUCTION

The reports of a global settlement are greatly exaggerated. In lieu of resolving all claims, attorneys for the Individual Action Plaintiffs ("Individual Plaintiffs") have joined in common cause with the tortfeasor Defendants — the actual parties who bear responsibility for the inferno that destroyed the historic town of Lahaina — in an attempt to exclude the non-party Subrogating Insurers ("Subrogation Plaintiffs") from any recovery. No party asserts that the Subrogation Plaintiffs caused the Lahaina Fire. The Individual Plaintiffs agree and acknowledge the Subrogation Plaintiffs have contributed, to date, over $2.3 billion to the reconstruction of Lahaina, and anticipate making more than $1 billion in future payments. *See* Motion at 15. The Subrogation Plaintiffs are not the problem; they have been part of the solution. Nevertheless, the Individual Plaintiffs' Motion for Order Regarding the Operation of HRS § 663-10 ("Motion") somehow frames Subrogation Plaintiffs as the obstacle to resolving this crisis. Those representations are categorically false, and the Individual Plaintiffs' attempt to release Subrogation Plaintiffs' claims blatantly violates controlling Hawai'i precedent that "in the context of fire and casualty insurance … the insurer may maintain a subrogation action against the tortfeasor **regardless of outside settlement**." *Yukumoto v. Tawaraha,* 140 Hawaii 285, 292 (2017) (emphasis added).

In truth, Defendants and Individual Plaintiffs' attorneys are openly colluding with one another in broad daylight to destroy the Subrogation Plaintiffs' legal rights to enrich themselves. *State Farm Fire & Cas. Co. v. Pac. Rent-All, Inc.,* 90 Hawai'i 315, 330 (1999). This Court should resist the temptation to grant those tactics its official imprimatur. Stripped of its misleading rhetoric, the Motion requests that this Court summarily award the Individual Plaintiffs more than $4 billion, and their attorneys a hefty percentage of that recovery, without ever requiring them to prove the value of their claims. The Motion does not bother to attach a single document, piece of testimony, sworn declaration, or expert opinion demonstrating that the named Individual Plaintiffs have more than $4 billion in uninsured damage claims. As a result, the factual record is completely devoid of any support that could possibly justify a finding that "the totals of the aggregated liquidated claims" exceed the capacity of the tortfeasors to pay. *Salatino v. Chase,* 182 Vt. 267,

273 (2007). There are no pending evidentiary hearings before this Court, and all discovery has been stayed. If the settlement proceeds as planned, no factual record of the IP Plaintiffs' damages will ever exist. The Individual Plaintiffs are asking this Court to eliminate more than $3 billion in objectively verifiable subrogation claims, supported by actual checks paid and to be paid, on the strength of nothing more than whispers and rumors.

Taken collectively, the Motion asks this Court to exceed its authority with the goal of inflicting a multi-billion-dollar loss on entities that are not responsible for the underlying wildfire. To grant the Motion the Court must: (1) exercise jurisdiction over entities that are not parties before this court; (2) adjudicate the value of imaginary liens that Subrogation Plaintiffs have never asserted; (3) ignore clear Hawai'i precedent establishing the Individual Plaintiffs cannot release subrogated claims; (4) engage in the *first ever* application of the made whole rule on an aggregate basis in United States history; (5) determine that a limited recovery fund exists without ever hearing evidence regarding the ability of the Defendants to pay a settlement *or* the actual amount of the Individual Plaintiffs' damages; and (6) effectively declare the doctrine of equitable subrogation, recognized in Hawai'i since at least 1885[1], a dead-letter; dramatically altering the insurance landscape in the State.

If the Individual Plaintiffs wish to settle their claims with Defendants, they are free to do so. Similarly, if the Defendants wish to compensate their victims in the interest of social harmony, they are encouraged to do so. However, the Individual Plaintiffs and Defendants cannot also agree amongst themselves to release the Subrogation Plaintiffs' claims as part of that bargain. Those are simply not their claims to resolve, and it is black letter Hawai'i law that "the insured's release of the tortfeasor will not affect the insurer's subrogation right[s]." *State Farm,* 90 Hawai'i at 330. The tragic facts of this one fire do not justify a full scale abandonment of the rule of law.

II. FACTUAL AND PROCEDURAL BACKGROUND

On the morning of August 8, 2023, foreseeable winds snapped an overloaded utility pole; causing the attached electrical conductors to fall to the ground. Inexplicably, the utility, Hawaiian Electric Company, chose to reenergize those downed electrical lines despite the obviously dangerous conditions on the island. Those conductors ignited a ground fire which spread to adjacent dried and overgrown flammable grasses located on land owned by Kamehameha Schools.

[1] *See Kapena v. Kaleleonalani,* 6 Haw. 579, 583 (Haw. Kingdom 1885).

The trustees of Kamehameha Schools were well aware their property posed a fire hazard to the community. The same parcel had been cited for fire code violations for overgrown dried grasses and failure to maintain a firebreak on prior occasions. (Raboteau Decl. ¶ 4). Nevertheless, they declined to expend the $7,500 required to maintain the property's firebreaks sufficient to prevent a fire from spreading into Lahaina. (Raboteau Decl. ¶ 5). The ensuing inferno resulted in unspeakable devastation: including the loss of 102 lives and damage to more than 3,300 structures.

In the aftermath of the horrific devastation of Lahaina, the insurance industry began processing claims as soon as possible to assist in recovery efforts. For many wildfire victims, payment of claims by their insurer provided quick access to desperately needed funds. The Subrogation Plaintiffs have committed over $2.3 billion to date in the effort to compensate victims and begin rebuilding Lahaina. The Subrogation Plaintiffs further expect to contribute over $1 billion in future funds. (Raboteau Decl. ¶ 6).

In addition to deploying vast resources to aid the community of Lahaina's recovery, Subrogation Plaintiffs employed a team of experts and led investigation efforts to determine the origin and case of the Lahaina wildfire. As part of those efforts, the Subrogation Plaintiffs were the only litigant that actually processed the scene of the fire; collecting evidence in order to determine the identity of the responsible parties. (Raboteau Decl. ¶ 7). In the spirit of cooperation, and beginning in the immediate aftermath of the fire, the Subrogation Plaintiffs regularly shared information with the IP Plaintiffs regarding their theories of the case. (Raboteau Decl. ¶ 8).

On January 12, 2024, Subrogation Plaintiffs filed a Complaint in the Circuit Court of the First Circuit[2]. (*See* Dkt. 1 in Civ. No. 1CCV-24-0000068). Subrogation Plaintiffs' Complaint makes allegations which differ in form and substance from the IP Plaintiffs' Master Complaint. *Id.* The Subrogation Plaintiffs have never filed an action, of any kind, in the Second Circuit. (Raboteau Decl. ¶ 9). Furthermore, Subrogation Plaintiffs' have never filed a lien seeking reimbursement of insurance proceeds in any Hawai‘i court. (Raboteau Decl. ¶ 10). In sum, the Subrogation Plaintiffs are not presently parties in this coordinated proceeding, and this Court has

[2] The Motion states the Subrogation Plaintiffs' Complaint "failed to allege the identity of the insureds" or state details about the properties at issue. However, because "subrogation is an insurer's remedy for torts" that is not a pleading requirement in the State of Hawai'i. *Park v. City and County of Honolulu,* 154 Hawai‘i 1, 5 (2024).

never issued an order transferring Subrogation Plaintiffs' claims to this forum. (Raboteau Decl. ¶ 11).

Although Subrogation Plaintiffs are not parties to this coordinated proceeding, they attended and participated in several mediation sessions with mediators the Honorable Lou Meisinger, the Honorable Dan Buckley and Keith Hunter (the "Mediators"). (Raboteau Decl. ¶ 12). At the conclusion of one mediation session, the Mediators presented all Plaintiffs with a single, global settlement figure and a mandate to determine how to divide it amongst themselves. (Raboteau Decl. ¶ 13). The Plaintiffs and Defendants did not determine the settlement amount through arms-length bargaining, and the Plaintiffs were not told the amount each Defendant was contributing to the total settlement pool. (Raboteau Decl. ¶ 13). Instead, the settlement figure was presented by the Mediators on a take-it-or-leave it basis, and all requests for additional information about how the figure was determined were denied. (Raboteau Decl. ¶ 13).

Throughout June and July of 2024, Subrogation Plaintiffs and IP Plaintiffs attempted to negotiate an equitable split of settlement proceeds. (Raboteau Decl. ¶ 12-14). During that period, Subrogation Plaintiffs repeatedly requested some form of documentation that could be used to calculate the actual amount of IP Plaintiffs' uninsured damages. (Raboteau Decl. ¶ 12-14). Those requests were denied. (Raboteau Decl. ¶ 12-14). As a result, negotiations between the Plaintiffs ultimately failed due to lack of transparency surrounding the IP Plaintiffs' damage claims. (Raboteau Decl. ¶ 15).

On July 23, 2024, after the failure of the global mediation, Cynthia Wong, Esq., Liaison Counsel for Individual Plaintiffs, requested an "urgent" status conference regarding mechanisms to resolve insurer subrogation liens. In response to the letter, this Court set a status conference for all Maui Fire Cases for July 26, 2024. Subrogation Plaintiffs, who are not parties, did not participate. (Raboteau Decl. ¶ 16).

The status conference was a highly irregular proceeding. At 9:05 a.m. this Court recessed the hearing and held a private in-chambers meeting with certain attorneys for the Individual Plaintiffs and the Defendants in this action. (Lezy Decl. ¶ 8). That in-chambers meeting was not open to the public and was not livestreamed on the Hawai‘i State Judiciary's YouTube channel. (Lezy Decl. ¶ 9). At 9:57 a.m. this Court reconvened the public hearing and discussed a "plan" or an "idea" developed during the meeting. (Lezy Decl. ¶ 10, 12).

Approximately 30 minutes later, at 10:28 a.m., this Court issued a "*sua sponte*" order finding that it has "jurisdiction, authority, and legal duty to review and resolve subrogation liens" associated with the Lahaina Fire and setting an associated briefing schedule for a hearing on August 13th. (Raboteau Decl. ¶ 17). No specific "subrogation liens" were identified as part of the *sua sponte* order, and no subrogation liens have been filed as part of this action. (Raboteau Decl. ¶ 18). The *sua sponte* order further acknowledged that the Subrogation Plaintiffs are not "named as parties" in this proceeding and do not receive notification of this Court's proceedings. (Raboteau Decl. ¶ 17).

Finally, on August 2nd, in connection with this Motion, Individual Plaintiffs announced a "global settlement" with Defendants that *excluded* Subrogation Plaintiffs from any recovery. (Raboteau Decl. ¶ 18). The term sheet filed in connection with the global settlement does not state the amounts each Defendant will contribute to the total settlement pool; nor does it include any evidence of each Defendant's capacity to pay damages. (Raboteau Decl. ¶ 18). The Motion and Term Sheet further do not provide any calculation of the Individual Plaintiffs' claimed damages. (Raboteau Decl. ¶ 18). All discovery was subsequently continued indefinitely; meaning that this Court has never heard any evidence regarding either the ability of the Defendants to pay tort claims or of the actual amount of the Individual Plaintiffs' damages.

III. ARGUMENT

A. This Court Lacks Jurisdiction Over Non-Party Subrogation Plaintiffs' Claims

"It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 113 Hawai'i 251, 252 (2007). In order for a court order to "be binding upon [absent] persons, they must be made parties to the suit, either as plaintiffs or defendants." *Haiku Plantations Ass'n v. Lono*, 56 Haw. 96, 102 (1974). Subrogation Plaintiffs are not named parties in any action pending before this Court, and the subrogation claims pending in the First Circuit have never been transferred into this forum. This Court's own *sua sponte* order acknowledges the Subrogation Plaintiffs "are not currently named as parties in the Maui Fire Cases[.]" [Dkt. 1655 at 4].

Furthermore, no party in this coordinated action represents Subrogation Plaintiffs' interests with respect to either this Motion or the settlement agreement. In point of fact, the Individual

Plaintiffs and Defendants are attempting to invalidate all of Subrogation Plaintiffs' claims; rendering them plainly adverse in this proceeding. Subrogation Plaintiffs have also been denied the reasonable opportunity to be represented by their chosen counsel. [Dkt. 1766] "The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Sandy Beach Defense Fund v. City Council of City and County of Honolulu,* 70 Haw. 361, 378 (1989). Adjudicating the rights of non-parties is presumptively improper; particularly when the non-party is denied any opportunity to examine the evidence underlying the court's determination. *Id.* Consequently, this Court lacks jurisdiction to rule on non-party Subrogation Plaintiffs' claims.

B. There are no "Subrogation Liens" for this Court to Adjudicate

Individual Plaintiffs' Motion seeks to prospectively invalidate hypothetical liens. This request for relief is impossible to fulfill because no Subrogation Plaintiff has filed a lien seeking reimbursement for insurance payments in connection with the Lahaina Wildfire. There are not now, nor will there ever be, "subrogation lien" claims before this Court seeking to reclaim insurance payments from insureds. The Individual Plaintiffs' insistence that Subrogation Plaintiffs must assert liens against their settlement recoveries is a legal fiction totally unsupported by Hawai‘i law.

As the leading treatise on insurance law explains "[t]he concepts of 'reimbursement' and 'subrogation' are different principles: subrogation allows the insurer to stand in the shoes of the insured, whereas, with reimbursement, the insurer only has a right of repayment against the insured." *See* 16 Couch on Ins. § 226:4. As a result, "the concepts of reimbursement and subrogation are, indeed, different both in their functioning and in their legal effect." *Id.* Furthermore, subrogation claims and reimbursement claims cannot coexist in the same action because they pursue relief from different sources. In a subrogation action, the insurer seeks recovery from the underlying tortfeasor because "[s]ubrogation is the insurer's remedy for torts against its insureds." *Park,* 154 Hawai‘i at 5. By contrast, under Hawai‘i law, **reimbursement claims are "not a subrogation action in the classical sense since the suit is against the insured**" and not against the tortfeasor. *First Ins. Co. of Hawaii, Ltd. v. Jackson*, 67 Haw. 165, 167 (1984)(emphasis added). "As a matter of logic and case law, a party can have one right, but not the other." *Provident Life & Acc. Ins. Co. v. Williams*, 858 F. Supp. 907, 911 (W.D. Ark. 1994).

In the First Circuit, Subrogation Plaintiffs *are asserting subrogation claims* against the tortfeasor Defendants. Subrogation Plaintiffs *are not asserting reimbursement claims* against their own insureds. There is no recognized legal mechanism for the Court to transform a subrogation claim into a reimbursement claim. Furthermore, subrogation claims cannot be reinterpreted as a constructive lien. In Hawai‘i, a claim for a constructive lien cannot be implied; it must be explicit. Liens are "not judicially recognized until a judgment is rendered declaring [their] existence." *Matter of 2003 & 2007 Ala Wai Blvd., City & Cnty. of Honolulu*, 85 Hawai‘i 398, 412 (Ct. App. 1997). For that reason, there is no mechanism for a court to recognize the existence of lien when the "complaint in the underlying damage action [does] not request that an equitable lien be recognized or declared." *Id.* Subrogation Plaintiffs' claims cannot be compelled to involuntarily sue their own insureds. In sum, the Motion asks this Court to rule on fictional causes of action that are not pending in any jurisdiction.

"It is axiomatic that ripeness is an issue of subject matter jurisdiction." *Blake v. County of Kaua'i Planning Commission*, 131 Hawai‘i 123, 131 (2013). Because there are no pending "subrogation liens," there is no actual controversy between adverse parties for this Court to adjudicate. In order to grant the Motion, this Court would need to issue an "advisory opinion on an unripe issue," which would "contravene[e] the prudential rules of judicial self-governance." *Kapuwai v. City and County of Honolulu, Dept. of Parks and Recreation,* 121 Hawai‘i 33, 41 (2009). Those prudential rules are designed, in part, to prevent the court system from being employed as a crude instrument for achieving political results through judicial means. As the Hawai‘i Supreme Court recently explained, "we nevertheless believe judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context." *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai'i*, 121 Hawaii 324, 331 (2009). This principle of judicial restraint is an important feature in maintaining the "limited role of courts in a democratic society[.]" *Id.* There are no ripe "subrogation lien" claims for this court to adjudicate. The Motion must therefore be denied.

C. Subrogation Plaintiffs Pursue Their Own Claims as the Real Party in Interest

Individual Plaintiffs' assertion that HRS § 431:13-103 (a)(10) "limits the subrogation rights of an insurance carrier to reimbursement of amounts paid from a policy holder's recovery" is a gross misstatement of law. Individual Plaintiffs claim, in effect, that subrogation rights do not

arise until the insured has already settled its own claims against the tortfeasor. This position has been rejected by courts across the United States, as "it is not a prerequisite to equitable subrogation that the [insured] suffered actual loss; it is required only that he would have suffered loss had the [insurer] not discharged the liability or paid the loss." *St. Paul Fire & Marine Ins. Co. v. Liberty Mutual Ins. Co.,* 135 Hawai'i. 449, 453-454 (2015).

The pursuit of subrogation claims does not, in any way, inherently "limit" the scope of insurance coverage, and Individual Plaintiffs do not cite a single case applying HRS § 431:13-103 (a)(10) in the manner they propose. No such case exists, and for good reason. Hawai'i courts have long held that paying carriers retain valid, unencumbered and independently enforceable subrogation claims. Since 1971, the Hawai'i Supreme Court has recognized that once an insured "had received insurance compensation for such damages, [the insured] was merely a nominal party" with respect to the ensuing subrogation claim. *Mauian Hotel, Inc. v. Maui Pineapple Co.*, 52 Haw. 563, 567 (1971). The insured does not retain an interest in the subrogated claim because "[s]ubrogation is *an insurer's remedy* for torts against its insureds." *Park,* 154 Hawai'i at 5. "Subrogation rights are common under policies of property or casualty insurance, wherein the insured sustains a fixed financial loss, and the purpose is to place that loss ultimately on the wrongdoer." *Yukumoto* 140 Hawai'i at 292. "The insurer's subrogation right balances the insured's recovery right" because the insurer, who is not at fault, "comes out even" while the "tortfeasor pays exactly the damages it would ordinarily pay" in the absence of insurance coverage. *Park* 154 Hawai'i at 5.

Subrogation is also a core part of the insurance industry. "Subrogation aids indemnity. It allows insurers to recover what they pay when third parties injure their insureds." *Id.* It is an established, and entirely appropriate, vehicle for an insurer to mitigate its risks, reduce ultimate exposure, and thus lower premiums for consumers. Subrogation "plays an important role in insurance law" because it holds the legally responsible tortfeasor responsible for the harm caused to the insured. *State Farm Fire & Cas. Co. v. Pac. Rent-All, Inc.,* 90 Hawaii 315, 328 (1999). Subrogation also prevents "an insured from getting two recoveries: one from the insurer, one from the tortfeasor." *Park,* 154 Haw. at 5; *Moranz v. Harbor Mall,* 150 Hawai'i 387, 400 (2022).

In pursuing a subrogation action, an insurer is *not adverse* to its insured's litigation interests. Instead, the subrogating insurer and its insured work together to jointly prosecute their independent claims against the actual responsible party: the tortfeasor. By operation of law,

Subrogation Plaintiffs are "put in all respects in the place of" their insureds; they stand in the shoes of their insureds and pursue the claims assigned to them by virtue of payment of claims. *State Farm* 90 Hawai'i at 331. Furthermore, subrogated claims are not diminished legal rights. An insurer "slides into comfortable shoes, not shoddy shoes." *Park,* 154 Hawai'i at 5. For that reason, from "the outset of litigation" a subrogating insurer is legally permitted to pursue its *own* claims by "maintain[ing] a subrogation action against the tortfeasor regardless of [any] outside settlement" concerns. *Yukumoto* 140 Hawai'i 292; *see also United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 381 (1949).

Importantly, Subrogation Plaintiffs' rights "accrue[d] upon payment of the loss." *Winkelmann v. Excelsior Ins. Co.,* 85 N.Y.2d 577, 582 (1995). Consequently, Subrogation Plaintiffs may prosecute their subrogation claims "even though the insured's losses are not fully covered by the proceeds of the policy." *Id.* This means that "[t]he claims of the insurer for amounts paid by it and the insured's claim for uninsured losses are **divisible and independent**, and permitting the insurer to sue as equitable subrogee does not affect the insured's right to sue for the amount of the loss remaining unreimbursed." *Id* (emphasis added). As a result, Subrogation Plaintiffs and Individual Plaintiffs do not "share" a single claim against Defendants and do not "compete" for the proceeds of a single indivisble legal recovery.

Fundamentally, the Motion's interpretation of HRS § 431:13-103 (a)(10) confuses "coverage" provided by an insurer to its insured with an insured's ultimate total "recovery" in a tort action. In the context of property and casualty insurance coverage, the scope of insurance coverage and the insured's ultimate total recovery for all cognizable categories of damages are not inherently intertwined. This confusion is most clearly demonstrated by the Individual Plaintiffs' statement that "in many cases, the insurers paid full policy limits[.]" *See* Motion at p. 4 fn.2. **By definition, a property and casualty insurer that has paid out its full policy limits did not limit the scope of its coverage.** An insurer's obligation to its insured extends only to the policy limits. *Winkelmann,* 85 N.Y.2d at 580. HRS § 431:13-103 (a)(10) does not require Subrogating Plaintiffs to also functionally indemnify the actual tortfeasors against as-yet-to-be-determined personal injury claims. Subrogation Plaintiffs never agreed to essentially operate as additional liability insurance for the tortfeasors, and Hawai'i law does not impose that additional burden upon them.

D. Hawai'i Does Not Require Subrogation Plaintiffs to Seek Reimbursement for Liens

The Motion's claim that seeking reimbursement for liens is the Subrogation Plaintiffs' "exclusive remedy" also stems from the Individual Plaintiffs' failure to appreciate the legal and conceptual distinction between subrogation and reimbursement claims. *First Ins. Co. of Hawaii, Ltd. v. Jackson*, 67 Haw. 165, 167 (1984). Viewed in proper context, HRS § 663-10 is plainly inapplicable to property subrogation claims.

By its own terms, HRS § 663-10 applies only when: (1) a party has asserted the existence of a lien "against the amount of a judgment or settlement"; (2) a court has determined that a party holds a valid lien; (3) there is a defined amount of "special damages" obtained by judgment or settlement that can used to satisfy the lien. Because Subrogation Plaintiffs pursue subrogation claims against the tortfeasor Defendants, none of the required statutory elements exist here.

Case law interpreting HRS § 663-10 confirms subrogation claims need not be pursued as liens. "By its own permissive terms, the statute *permits,* but does not obligate a claimant to ask a court to determine the validity of a lien. The Hawai'i statutes do not impose any legal duty" to pursue subrogation claims as liens. *Rudel v. Hawai'i Mgmt. All. Ass'n*, 937 F.3d 1262, 1272 (9th Cir. 2019). Furthermore, the Hawai'i Supreme Court explicitly declined to "broadly construe the term 'lien'" in order to "to re-write HRS § 663-10 […] to define 'lien' as a claim, encumbrance, or charge on property for payment of some debt, obligation, or duty." *Ing v. Acceptance Ins. Co.,* 76 Hawai'i 266, 270 (1994). Accepting such a broad definition of lien "completely disregards the plain and unambiguous language of the statute as well as its clear intent and purpose." *Id.* "HRS § 663-10 was enacted to prevent double recoveries" not to provide a mechanism for eliminating subrogation claims entirely. *Id.*

E. Individual Plaintiffs May Not Release Subrogation Plaintiffs' Claims

The Individual Plaintiffs may not release the Subrogation Claims as part of the proposed Term Sheet because they are not the Individual Plaintiffs' claims to sell. "Where a third party obtains a release from an insured with knowledge that the latter has already received payment from the insurer … such a release does not bar the right of subrogation of the insurer." *Gibbs v. Hawaiian Eugenia Corp.,* 996 F.2d 101, 107 (2d Cir. 1992). In *State Farm v. Pacific Rent-All,* the Hawai'i Supreme Court acknowledged the general rule that "the release given by the insured does not bar the [associated] subrogation claim." 90 Hawai'i 315, 329 (1999). *State Farm's* facts are strikingly similar to the current matter, and conclusively demonstrate that the proposed settlement and term sheet and are counter to Hawai'i law.

In *State Farm,* the insurer paid insurance proceeds to its insured for fire damage to a building. *Id.* at 319. Thereafter, the insured pursued the tortfeasor for uninsured losses, and reached a settlement agreement without State Farm's participation. In *State Farm,* as here, the defendants and the plaintiff colluded with one another in an attempt to extinguish State Farm's subrogation claim in exchange for payment from the Defendant. *Id*. The Hawai'i Supreme Court disallowed such stratagems, holding that "in the context of fire and casualty insurance" if "the tortfeasor and insured colluded to destroy the insurer's subrogation right" and the insurers rights are "actually prejudiced by the insured's release of the tortfeasor, then **the release, settlement and/or indemnification agreement executed by the insured and the tortfeasor will not bar a subrogation action by the insurer against the tortfeasor**." *Id* at 333 (emphasis added).

State Farm directly controls the disposition of this motion. Here, the Defendants have actual knowledge of Subrogation Plaintiffs' claims: Subrogation Plaintiffs' have initiated suit against them. The proposed term sheet also seeks to actually prejudice Subrogation Plaintiffs' rights; improperly refashioning them as liens and then extinguishing them entirely. Consequently, under established Hawai'i law, the Individual Plaintiffs cannot contractually agree with the Defendants to release Subrogation Plaintiffs' claims. "Equity simply does not support the conclusion that the insurer, which has performed its contractual obligations under the policy in good faith, should be forced to *unjustly* enrich a tortfeasor who attempted to settle a claim with knowledge of the insurer's subrogation claim." *Id.* "Where the insurer's subrogation right clashes with the tortfeasor's contractual release right, the insurer's subrogation right will prevail[.]" *Id.*

Importantly, the *State Farm* court's reasoning specifically disproves two key arguments presented by the Motion. First, the Motion argues that the Term Sheet's indemnification provision means that any subrogation actions are "in effect" against their insured. This is, as a matter of law, incorrect. The Individual Plaintiffs' execution of an indemnification agreement related to their own, independent claims does not transform a subrogation claim into a reimbursement claim. Instead, *State Farm* establishes that the release is ineffective. Subrogation Plaintiffs would not be forced to sue their insureds. Instead, the proposed release would be deemed inoperable and the Subrogation Plaintiffs would continue to pursue their claims against the Defendants. Second, and relatedly, *State Farm*'s holding specifically extends to "indemnification agreement[s] executed by the insured and the tortfeasor[.]" *Id.* Thus, the Term Sheet's proposed procedural mechanism for manufacturing a lien through the execution of an indemnification agreement does not change the

core holding of *State Farm*. Instead, the indemnification provision would merely grant the Defendants their own right to bring a reimbursement claim against the Individual Plaintiffs. Subrogation Plaintiffs' claims are unaffected by the indemnification provision.

F. HRS § 663-10 Does Not Apply to Property and Casualty Policies

Individual Plaintiffs' discussion of *Yukumoto v. Tawarahara* is an engaging piece of fiction that bears little relationship to the actual text of the decision. 140 Haw. 285, 294 (2017). In reality, *Yukumoto* serves as an explicit rejection of the Motion's position. In *Yukumoto,* the plaintiffs specifically argued that HRS § 663-10 was an "anti-subrogation statute" that required all insurance claims to be asserted as liens. The *Yukomoto* court extensively analyzed the legislative history of HRS § 663-10 and determined that the statute was intended to apply only to health insurance policies; concluding that "[s]ubrogation rights in the 'personal insurance' context are treated differently from subrogation rights in the property or casualty insurance context" because "the two types of insurance cover different losses." *Yukumoto v. Tawaraha,* 140 Haw. 285, 292 (2017). "Subrogation rights are common under policies of property or casualty insurance wherein the insured sustains a fixed financial loss, and the purpose is to place [the] loss ultimately on the wrongdoer." *Id.* By contrast, in "personal insurance contracts … the exact loss is never capable of ascertainment." *Id.* As a result, different judicial doctrines apply.

The legislative context provided by the *Yukumoto* court is instructive. In 1986, the Hawai'i legislature enacted comprehensive tort reform legislation. The legislation, later codified as HRS § 663-10 (1993), addressed the issue of reimbursement for collateral sources who made payments for "costs and expenses arising out of the injury." *Yukumoto*, at 296, *citing* 1986 Special Sess. Haw. Sess. Laws Act 2, § 16 at 10. The legislation allowed for collateral sources to be reimbursed when "special damages" recovered in a judgment or settlement duplicated the amounts they had paid. *Id.* That HRS § 663-10 applies only to "special damages is of particular importance. In Hawai'i, the law divides tort damages into broad categories – general and special. *Ellis v. Crockett,* 51 Haw. 45, 50 (1969). General damages include items such as "pain and suffering, inconvenience, and loss of enjoyment which cannot be measured definitively in monetary terms." *Dunbar v. Thompson,* 79 Hawai'i 306, 315 (App. 315). By contrast, special damages are "often considered to be synonymous" with specific categories of pecuniary loss such as "medical and hospital expenses, loss of earnings, and diminished capacity." *Id.* Consequently, the statutory reference to

"special damages" is a clear indication the legislature had medical insurance in mind at the time of enactment.

In 2000, the legislature modified the law by passing S.B. No. 2563, which became Act 29, the purpose of which was to "make it an unfair or deceptive act to limit or withhold coverage under insurance policies because a consumer may have a third-party claim for damages." *Yukumoto*, at 296, *citing* H. Stand. Comm. Rep. No. 1330-00, in 2000 House Journal, at 1515; *see* HRS § 663-10 (Supp. 2000). Act 29 made clear that collateral sources were required to pay benefits and were limited to reimbursement under the statute in third-party personal injury situations. *Id.* Act 29 modified HRS § 663-10 by expressly including "health insurance or benefits" within its provisions. *Id.* Thus, the legislature enacted Act 29 with the intent to ""prevent duplicate recoveries in ***personal injury claims***[.]" *Id.*

The next year, in the 2001 session, the legislation enacted S.B. 940, which created special limitations on subrogated health insurance claims that are not applicable to casualty and property insurance. *Id.* at 297. The Legislature explained its intent in enacting S.B. 940 as:

> The intent of your Committee is that societies and HMOs promptly pay the benefits owing under their policies, and recoup their payments from a third-party claim by lien as provided under section 663-10, HRS. Testimony indicated that under current law, societies and HMOs may be interfering with a third-party settlement by claiming that they are exempt from insurance unfair trade practice as a result of Act 29, SLH 2000. This was clearly not the intent of the legislature. This measure clears up that confusion.

Id. Based upon that legislative history, the *Yukumoto* court concluded that "the legislature intended for HRS § 663-10 to serve as the authority which controls all of a **health insurer's obligations and rights** regarding reimbursement and subrogation benefits from third-party sources of recovery[.]" *Id* at 298 (emphasis added).

Yukumoto's application of HRS § 663-10 was explicitly limited to "health insurers." Not a single word of the decision suggests the *Yukumoto* court believed HRS § 663-10 applied to all subrogation claims generally or to fire and casualty insurance specifically. *Yukumoto* did not overrule or modify *State Farm* in any meaningful way. In fact, *Yukumoto* reaffirmed *State Farm's* holding that "in the context of fire and casualty insurance … the insurer may maintain a subrogation action against the tortfeasor regardless of outside settlement." *Id.* at 293. Subsequent

Federal Court decisions have adopted *Yukumoto's* holding that HRS § 663-10 is limited to "health insurance or benefits." *See Rudel v. Hawai Mgmt. All. Ass'n*, 937 F.3d 1262, 1273 (9th Cir. 2019). **There is no case in the State of Hawai'i applying HRS § 663-10 to a property or fire insurance subrogation claim**. There are several holding the opposite. Taken collectively, the plain weight of authority demonstrates that Individual Plaintiffs' reading of HRS § 663-10 is based on nothing more than motivated reasoning fueled by pure fantasy.

G. The Made Whole Rule Has Never Been Applied to a Mass Tort Action

Individual Plaintiffs' Motion repeatedly asserts, without any legal citation, that the Subrogation Plaintiffs may not pursue their own claims until their insureds are "made whole." *See e.g.* Motion at 4, 16. Through their related interventions and bad faith complaints, the Individual Plaintiffs claim that all subrogation actions must be dismissed unless and until every Individual Plaintiff is first "made whole." There are no cases in the state of Hawai'i applying the "made whole" rule in this manner. More to the point, the Individual Plaintiffs' interpretation of the "made whole" rule is without precedent anywhere in the United States, and should not be adopted for the first time by this Court.

As an initial matter, the made whole rule does not apply when the subrogating insurer assists in "prosecuting the suit" and "bears a share of the expenses" associated with the case. *Travelers Indem. Co. v. Ingebretsen,* 38 Cal.App.3d 858 (1974); *Chandler v. State Farm Mut. Auto Ins. Co.,* 322 F.3d 660 (9th Cir. 2003). "Under those circumstances … the insurer should be entitled to subrogation without regard to whether the insured has first been 'made whole.'" *Id.* Here, the Subrogation Plaintiffs are the only litigant that conducted a formal origin and cause investigation compliant with the standards laid out in NFPA 921: Guide for Fire and Explosion Investigations. (Raboteau Decl. ¶7). The Subrogation Plaintiffs materially contributed to the financial burdens of developing a theory of the case, and presented their liability theories to all parties during mediation. (Raboteau Decl. ¶ 8). The "global settlement" the Individual Plaintiffs seek to claim entirely for themselves was obtained, in part, through Subrogation Plaintiffs efforts. In those circumstances, the made whole rule does not apply.

The Individual Plaintiffs' position is also inconsistent with state law. Hawai'i does not provide that insureds are entitled to every dollar obtained through litigation, and the law does not eliminate subrogation rights in the name of maximizing the insured's recovery. For example, Hawai'i courts recognize that there is "inequity" when an "insured trie[s] to 'pyramid' or 'stack'

several policy provisions to build up a sum beyond his [or her] damage and thus gain a windfall." *AIG Hawaii Ins. Co., Inc. v. Rutledge,* 87 Hawai‘i 337, 344 (1998). An insured is never entitled to recover "more than an amount sufficient to compensate for actual damages suffered." *Allstate Ins. Co. v. Morgan,* 59 Haw. 44, 46 n.4 (1978). Allowing dual recovery is disfavored in law because it would "transform [indemnity] coverage into liability insurance. This result would cause insurance companies to charge substantially more" and render insurance coverage economically infeasible. *AIG Hawaii Ins. Co.* 87 Hawai‘i at 344. Thus, limiting recovery in tort to the amount of actual damages suffered does not "impair" the Individual Plaintiffs' interests; it is simply the fair and just application of the law.

In practice, these principles mean the made whole rule cannot be applied without first determining: (1) the identity of a specific insured; (2) the total amount of that insured's damages; and (3) the total amount of insurance coverage afforded to the insured. It is not enough to simply allege that an insured has an unknown quantity of "uninsured damages." "[T]here must be some allegation of facts … beyond merely stating that the [insured was] not "made whole." *Vandenbrink v. State Farm Mut. Auto. Ins. Co.,* 2012 WL 3156596, at *2 (M.D. Fla. Aug. 3, 2012). "Adequate facts in this scenario would at least make some showing as to what amount would be required to make [the insured] whole and what amount was actually received." *Id.*

Hawai‘i law further holds that a "fact-finding would be necessary" to determine what portion of any tort recovery is "properly allocable" to the categories of damages compensated by applicable insurance policies. *Shimabuku v. Mongomery Elevator Co.,* 79 Hawai‘i 352, 360-361 (1995). The "plain intent of the policy here involved, as in any contract agreeing to indemnify the insured in the event of certain contingencies, is that the insured will be made whole to the extent of the coverage contracted." *Snapp v. State Farm Fire & Cas. Co.,* 206 Cal.App.2d 827, 832 (1962). In any made whole calculation, Subrogation Plaintiffs are also entitled to an offset for the attorneys fees charged by Individual Plaintiffs' counsel. "In light of the policy justifications underlying the made-whole rule and reimbursement principles generally[,]" Subrogation Plaintiffs were not "paid to bear responsibility for the entire amount of attorneys fees and costs the insured needed in order to recover damages." *21st Century Ins. Co. v. Superior Court*, 47 Cal.4th 511, 527–28, 213 P.3d 972, 982 (2009). Consistent with prevailing law, Subrogation Plaintiffs are entitled to an evidentiary hearing on the amount of Individual Plaintiffs' attorneys fees prior to the entry of any order based upon the made whole rule.

In summation, the made whole rule is not an abstract idea that can be applied to an entire action; it requires substantial fact finding prior to adjudication. For this reason, there is also no coherent mechanism to apply the made whole rule in the context of a mass tort action. Because any made whole rule analysis requires an individualized damages inquiry, the rule can only realistically be applied on an insured-by-insured basis. For this reason, it's important to note that the Motion fails to recognize that a substantial number of the Subrogation Plaintiffs' claims relate to insureds who are not parties to any lawsuit. At present, the Subrogation Plaintiffs estimate upwards of 80 per ent of their claims involve insureds that are not parties to litigation and who, presumably, were fully reimbursed by their insurer for the property damage they sustained. The Hawai‘i Supreme Court has affirmed the right of subrogation where the insureds have not suffered any uninsured losses, and therefore, have no incentive to pursue a tortfeasor. *St. Paul Fire & Marine Ins. Co. v. Liberty Mut. Ins. Co.*, 135 Hawai‘i 449 (2015); *Seabright Ins. Co. v. Matson Terminals, Inc.*, 828 F.Supp.2d 1177, 1191–95 (D. Haw. 2011). Under these circumstances, the insurer has an equitable right to subrogate against the tortfeasor who inflicted the harm. *Id.* Similarly, many of the Individual Plaintiffs who have filed suit ***are not insureds***. There is no legal or factual basis for applying the made whole rule to the detriment of all Subrogation Plaintiffs for the benefit of individuals they never agreed to insure. The mass application of the "made whole" rule to those claims would unlawfully deprive Subrogation Plaintiffs of their subrogation claims that relate to insureds who were actually "made whole." There is flatly no legal authority in Hawai'i, or elsewhere, that would support the wholesale expungement and extinguishment of the Subrogation Insurers' billions of dollars of vested claims against the tortfeasors through the vague collective invocation of the made whole rule.

Notably, there are zero examples of the made whole rule being applied in the mass tort context. Because of the fact-intensive inquiry required to determine the extent of an insured's damages, the vast majority of made whole rule cases relate to a single insured and a single insurance policy. After an extensive nationwide search, counsel for Subrogation Plaintiffs were unable to locate *a single case* that applied the made whole rule to more than five insureds in a single ruling. *See In re Sept. 11 Litig.*, 328 F. Supp. 3d 178, 183 (S.D.N.Y. 2018). Individual Plaintiffs ask this court to apply the rule to thousands of cases without conducting any individualized factual inquiry regarding the extent of their damages. There is simply no historical precedent for such a ruling in United States history.

H. There is no Factual Record Supporting a Limited Fund Finding

Individual Plaintiffs' Motion takes it as a given that this case presents a "limited fund" that is insufficient to compensate all Plaintiffs for their damages. There is simply no factual record to support that contention. In order for a matter to qualify for "limited fund treatment" "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, [must] demonstrate the inadequacy of the fund to pay all claims." *Salatino v. Chase,* 182 Vt. 267, 273 (2007). "This inadequacy is the *sine qua non* of a limited-fund" determination. *Id.* A rough back-of-the-envelope calculation is insufficient because a "fund with a definitely ascertained limit" is a "presumptively necessary condition" for a judicial determination that all Plaintiffs must share a single pool of funds. *Geiss v. Weinstein Company Holdings LLC,* 474 F.Supp. 3d 628, 635 (S.D.N.Y. 2020).

For that reason, any declaration of a limited fund would require this Court to calculate: (a) the total amount of collectible Defendant assets; (b) the total amount of Individual Plaintiffs' damages; and (c) the total amount of the Subrogation Plaintiffs' damages. None of those calculations have been made by any court in this state. Only the total amount of Subrogation Plaintiffs' damages are a matter of public record. The Individual Plaintiffs' Motion actually acknowledges that the Court does not have sufficient information to declare the existence of a limited fund by noting that the total amount of the proposed settlement exceeds the total value of the Subrogation Plaintiffs' claims. *See* Motion at p. 15. In so pleading, the Individual Plaintiffs have actually demonstrated that any attempt to apply the made whole rule in the limited fund context is obviously premature and would require this Court to engage in unsupported numerical speculation.

The individual Plaintiffs' Master Complaint also demonstrates that any limited-fund declaration is premature. The Individual Plaintiffs filed suit against multiple well capitalized Defendants including:

(1) **Hawaiian Electric:** a publicly traded regional electrical utility;
(2) **Charter Communications:** a telecommunications provider with over $50 billion in total equity;
(3) **Kamehameha Schools:** Hawai'i's largest private landowner with over $15 billion in assets.
(4) **The State of Hawai'i:** a governmental entity with taxation power and a $1.5 billion rainy-day fund; and
(5) **The County of Maui:** a governmental entity with substantial resources.

The Individual Plaintiffs' Master Complaint asserts the applicability of joint and several liability against "each and every Defendant." [Dkt. 223]. Consequently, the Individual Plaintiffs' Master Complaint, on its face, alleges the existence of an essentially unlimited pool of collectible funds. Stated bluntly, the unlimited pool of collectible funds alleged by Individual Plaintiffs' Master Complaint is the *exact opposite* of a limited-fund.

Individual Plaintiffs attempt to evade the evidentiary requirement of actually ascertaining the limits of any potential pool of funds by asserting the proposed $4.037 billion settlement reflects the Mediator's "informed view of the maximum amount that the Paying Parties could fairly and practicably contribute based on the facts and circumstances of the case." *See* Motion at 16. The United States Supreme Court, however, has explicitly rejected that method of calculation. In overturning a District Court's limited-fund finding, the high court held that "simply accepting the [settlement figure] as representing the maximum amount" recoverable is "not always acceptable" "particularly in cases where the settlement presents the "potential for gigantic [attorney's] fees." *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 851-52 (1999). **This is precisely one of those cases that presents the potential for "gigantic attorneys fees" collected by mainland tort lawyers.** Because of the enormity in potential attorneys fees, judicial oversight and factfinding are of paramount importance.

Additionally, a settlement value cannot form the basis of a limited fund determination unless "parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining[.]" *Id.* The Mediator's proposal does not qualify. The Plaintiffs did not negotiate the settlement value on their own and were never told the amount that each Defendant contributed to the total pool. Even today, the term sheet does not reveal the monetary contributions of any single Defendant. Consequently, the mediator's proposal is not sufficient to establish the actual amount of any purportedly limited fund. The declaration of a limited fund requires, as a precondition, a large amount of financial transparency. None can exist when the process is, by design, shrouded in secrecy.

Similarly, there has been no determination, judicial or otherwise, of an amount the individual plaintiffs would be entitled to after an objective evaluation of their damage claims. Individual Plaintiffs' Counsel have repeatedly refused to provide any documentary evidence for their stated damage claims, and continue that pattern of behavior in this proceeding. The Motion notably does not append a single document, piece of testimony, or expert opinion stating the

amount of the Individual Plaintiffs' uninsured damages. The Individual Plaintiffs decline to provide even a sworn declaration of counsel attesting to the amount of uninsured damages. In essence, the Individual Plaintiffs ask this court to award them more than $4 billion in damages without even offering the Court the sanctity of their personal word. As a result, the Motion's fundamental premise that the Subrogation Plaintiffs pursue their own recovery at the expense of their insureds, is simply a speculative untruth. The Individual Plaintiffs have not produced a single document demonstrating the actual liquidated value of their uninsured damages; and it appears they never intend to. Instead, they hope to bully the judicial system into awarding them vast sums of money through media coverage and political influence. Those blunt instruments are insufficient to demonstrate any actual legal entitlement to the entirety of the proposed settlement.

IV. CONCLUSION

The old adage is that hard cases make bad law. *Northern Securities Co. v. United States,* 193 U.S. 197 (1904). Faced with extreme circumstances, courts are often tempted to make outcome-oriented decisions that age poorly when applied to more common circumstances. The Lahaina wildfire, and its associated human tragedy and carnage, is one of those hard cases. It need not result in bad law. Affording the Individual Plaintiffs the remedy they seek would represent a gross departure from not just established Hawai'i law, but the very norms undergirding the rule of law itself. Adjudicating the value of fictional liens, held by non-parties, in order to deprive them of their legal rights would be an Orwellian perversion of the entire concept of "equity" that this Court holds dear. The announcement of a global settlement and final resolution — in this manner and on these terms — is little more than chasing the cheap sugar high of finality while bypassing the actual detailed work that justice demands. This Court must decline the Individual Plaintiffs' temptation to err for the sake of expediency. The fair and just administration of the law is a principle too important to be sacrificed on the altar of any one case. The Motion must be denied.

DATED: Honolulu, Hawai'i, August 11, 2024.

GROTEFELD HOFFMANN

By: /s/ *Vincent G. Raboteau*
VINCENT G. RABOTEAU

Attorney for Non-Party Subrogating Insurors

AMGUARD INSURANCE COMPANY; CONCERT SPECIALTY INSURANCE COMPANY; GENERAL CASUALTY COMPANY OF WISCONSIN; THE CINCINNATI INSURANCE COMPANY; UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY; CERTAIN INTERESTED UNDERWRITERS AT LLOYD'S SUBSCRIBING TO POLICY PG2203220; CERTAIN INTERESTED UNDERWRITERS AT LLOYD'S SUBSCRIBING TO POLICY PG2203891; STATE FARM FIRE AND CASUALTY COMPANY; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; HARLEYSVILLE INSURANCE COMPANY OF NEW YORK; ASPEN SPECIALTY INSURANCE COMPANY; ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY; ALLSTATE INDEMNITY COMPANY; ALLSTATE INSURANCE COMPANY; ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY; ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY; INTEGON NATIONAL INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S AND VARIOUS NON-LLOYD'S INSURERS SUBSCRIBING TO POLICIES PIV209015, PIV205089, PIV202904, PIV201596, PIV201325, PIV200359, PIV199831, PIV199736, PIV198096, PIV195519

DATED: Honolulu, Hawai‘i, August 11, 2024.

COX WOOTTON LERNER
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STATE NATIONAL INSURANCE COMPANY; SWISS RE INTERNATIONAL SE (AUSTRALIA BRANCH); SWISS RE INTERNATIONAL SE (FRANCE BRANCH); SWISS RE CORPORATE SOLUTIONS ELITE INSURANCE CORPORATION; UNITED SERVICES AUTOMOBILE ASSOCIATION; USAA CASUALTY INSURANCE COMPANY; USAA GENERAL INDEMNITY COMPANY; GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY; ADVENTIST RISK MANAGEMENT, INC.; GENCON INSURANCE COMPANY OF VERMONT; DB INSURANCE CO., LTD.; SWISS RE CORPORATE SOLUTIONS CAPACITY INSURANCE CORPORATION; SWISS RE CORPORATE SOLUTIONS AMERICA INSURANCE CORPORATION; RLI INSURANCE COMPANY; MT. HAWLEY INSURANCE COMPANY

DATED: Honolulu, Hawai‘i, August 11, 2024.

OGAWA, LAU, NAKAMURA & JEW
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IN THE MATTER OF THE PETITION FOR THE COORDINATION OF INDIVIDUAL PLAINTIFFS MAUI FIRE CASES	CASE NO. 2CSP-23-0000057 **DECLARATION VINCENT G. RABOTEAU**

DECLARATION OF VINCENT G. RABOTEAU

I, VINCENT G. RABOTEAU, declare:

1. I am an attorney duly licensed to practice law in the Circuit Courts of the State of Hawai‘i.

2. I am an attorney of record in AmGuard Insurance Company, et al. v. Maui Electric Company, Limited, et al., Civil No. 1CCV-24-0000068, for Plaintiffs AMGUARD INSURANCE COMPANY; CONCERT SPECIALTY INSURANCE COMPANY; GENERAL CASUALTY COMPANY OF WISCONSIN; THE CINCINNATI INSURANCE COMPANY; UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY; CERTAIN INTERESTED UNDERWRITERS AT LLOYD'S SUBSCRIBING TO POLICY PG2203220; CERTAIN INTERESTED UNDERWRITERS AT LLOYD'S SUBSCRIBING TO POLICY PG2203891; STATE FARM FIRE AND CASUALTY COMPANY; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; HARLEYSVILLE INSURANCE COMPANY OF NEW YORK; ASPEN SPECIALTY INSURANCE COMPANY; ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY; ALLSTATE INDEMNITY COMPANY; ALLSTATE INSURANCE COMPANY; ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY; ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY; INTEGON NATIONAL INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S AND

VARIOUS NON-LLOYD'S INSURERS SUBSCRIBING TO POLICIES PIV209015, PIV205089, PIV202904, PIV201596, PIV201325, PIV200359, PIV199831, PIV199736, PIV198096, PIV195519 (collectively "Plaintiffs") in the above-captioned case.

3. This declaration is made upon personal knowledge, and if called upon, declarant is competent to testify as to the facts set forth herein.

4. Upon information and belief, Kamehameha Schools owned the parcel associated with the area of origin, identified as Tax Map Key ("TMK") (2) 4-6-018:003, prior to and during the fire, and was cited on multiple occasions for fire code violations by failing to maintain overgrown dried grass.

5. Upon information and belief, Kamehameha Schools was made aware that it would cost $7,500 to clear the overgrown dried grass situated near and around the area of origin within months prior to the devasting fire and declined to pay the $7,500 necessary to make their property safe.

6. Upon information and belief, Subrogation Plaintiffs have committed over $2.3 billion to their insureds from claims arising from the Lahaina Wildfire as of the date of this filing, August 6, 2024. Subrogation Plaintiffs estimate they will be contributing over $1 billion in the future as more claims are being processed.

7. On November 20, 2023, I visited the area of origin with our retained Origin and Cause ("O&C") Investigator. During this site visit, I was informed that our expert team were the first on the ground to secure the scene and begin investigation efforts in compliance with the standards laid out in NFPA 921: Guide for Fire and Explosion Investigations. Subrogation Plaintiffs' expert team participating in the investigation was comprised of our wildland fire O&C, electrical engineers, and consultants.

8. Several colleagues of mine have worked closely with counsel for the Individual Plaintiffs in an effort to assist them with establishing their legal theories as well as sharing information regarding our experts' theories of causation.

9. Subrogation Plaintiffs have never filed an action of any kind in the Second Circuit and have never been a part of the Special Proceeding in the Second Circuit as Special Proceeding No. 2CSP-23-0000057.

10. Upon information and belief, Subrogation Plaintiffs have never filed a lien in the Second Circuit in Special Proceeding No. 2CSP-23-0000057, nor have Subrogation Plaintiffs filed a lien in any circuit. It is my understanding that Subrogation Plaintiffs do not intend to file any type of lien in any circuit in the future.

11. Upon information and belief, Subrogation Plaintiffs' action is only before the Circuit Court of the First Circuit in Civil No. 1CCV-24-0000068. To date, it is my understanding that there have been no transfer orders involving Subrogation Plaintiffs' First Circuit action in Civil No. 1CCV-24-0000068.

12. Between June and July of 2024, I have attended and participated in several mediation sessions along with several other of my colleagues who all comprise the larger group of attorneys representing Subrogation Plaintiffs their First Circuit action in Civil No. 1CCV-24-0000068 with mediators Honorable Lou Meisinger, the Honorable Dan Buckley and Keith Hunter (the "Mediators"). While I have only attended mediation session via Zoom, several of my colleagues have attended in-person mediation sessions in California.

13. During one mediation session, the Mediators presented all Plaintiffs with one global settlement figure and despite the objections of Subrogation Plaintiffs' counsel, the Mediators mandated all Plaintiffs to determine allocation of the global settlement figure amongst

themselves. The settlement amount was not determined through a bargaining process, and we were informed that all Plaintiffs were not told the amount each Defendant contributed to the total settlement pool.

14. Throughout the ongoing mediation sessions, Subrogation Plaintiffs were informed that the total settlement amount was presented on a take-it-or-leave-it basis and no additional information was provided as to how the figure was determined or potential settlement terms necessary to reach an agreement, despite Subrogation Plaintiffs' continued requests for such information. Subrogation Plaintiffs were continuously denied any form of documentation that could be used to calculate the actual amount of Individual Plaintiffs' uninsured damages.

15. Due to a lack of transparency surrounding the settlement terms and the Individual Plaintiffs' damage claims throughout the mediation sessions held from June through July of 2024, negotiations were at an impasse and the global mediation ultimately failed.

16. While this Court set a status conference for all Maui Fire Cases for July 26, 2024, Subrogation Plaintiffs purposefully chose not to attend or participate because they are not parties before this Court in the Special Proceeding No. 2CSP-23-0000057 in the Second Circuit.

17. On July 26, 2024, approximately 30 minutes after the above-mentioned status conference, this Court issued its Sua Sponte Order of the Court Re: Hearing on the Effect of HRS Section 663-10 on All Maui Fire Cases [Dkt. 1655], which maintained this Court has "jurisdiction, authority, and legal duty to review and resolve subrogation liens" associated with the Lahaina Fire. The sua sponte order set an associated briefing schedule for a hearing on August 13, 2024 and acknowledged that the Subrogation Plaintiffs are not "named as parties" in Special Proceeding No. 2CSP-23-0000057 and do not receive notification of this Court's proceedings.

18. On August 2, 2024, Individual Plaintiffs announced a "global settlement" with Defendants and filed their Motion for Orders Regarding Operation of HRS 663-10 and Application for Interlocutory Appeal Under HRS 651-1(b) as Dkt. 1740 in Special Proceeding No. 2CSP-23-0000057 and as Dkt. 236 in the First Circuit in Civil No. 1CCV-24-0000068. The term sheet filed in connection with the "global settlement" excluded Subrogation Plaintiffs from any recovery and did not state the amounts each Defendant will contribute nor evidence of each Defendant's capacity to pay damages. The Motion and Term Sheet do not provide a calculation of the Individual Plaintiffs' claimed damages.

19. The sua sponte order did not identify or make reference to any specific subrogation liens. [Dkt. 1655]. Upon information and belief, no subrogation liens have been filed as part of this action in Special Proceeding No. 2CSP-23-0000057.

I, VINCENT G. RABOTEAU, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, August 11, 2024.

/s/ *Vincent G. Raboteau*
VINCENT G. RABOTEAU

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

IN THE MATTER OF THE PETITION FOR THE COORDINATION OF INDIVIDUAL PLAINTIFFS MAUI FIRE CASES	CASE NO. 2CSP-23-0000057 **DECLARATION OF NORMAND R. LEZY**

DECLARATION OF NORMAND R. LEZY

I, NORMAND R. LEZY, declare:

1. I am an attorney duly licensed to practice law in the Circuit Courts of the State of Hawaii.

2. I am an attorney of record in AmGuard Insurance Company, et al. v. Maui Electric Company, Limited, et al., Civil No. 1CCV-24-0000068, for Plaintiffs AMERICAN BANKERS INSURANCE COMPANY; STANDARD GUARANTY INSURANCE COMPANY; INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB; 21ST CENTURY CENTENNIAL INSURANCE COMPANY; FARMERS INSURANCE EXCHANGE; FARMERS PROPERTY AND CASUALTY INSURANCE COMPANY; FIRE INSURANCE EXCHANGE; FOREMOST INSURANCE COMPANY GRANT RAPIDS, MICHIGAN; MID-CENTURY INSURANCE COMPANY; FIRST FIRE & CASUALTY INSURANCE OF HAWAII, INC.; FIRST INDEMNITY INSURANCE OF HAWAII, INC.; FIRST INSURANCE COMPANY OF HAWAII, LTD.; FIRST SECURITY INSURANCE OF HAWAII, INC.; PENN-STAR INSURANCE COMPANY; UNITED NATIONAL INSURANCE COMPANY; ZEPHYR INSURANCE COMPANY, INC.; HAWAIIAN INSURANCE

AND GUARANTY COMPANY, LTD.; ISLAND INSURANCE COMPANY, LTD.; TRADEWIND INSURANCE COMPANY, LTD.; ISLAND PREMIER INSURANCE COMPANY, LTD.; CRESTBROOK INSURANCE COMPANY; NATIONAL CASUALTY COMPANY; NATIONWIDE GENERAL INSURANCE COMPANY; NATIONWIDE MUTUAL INSURANCE COMPANY; SCOTTSDALE INSURANCE COMPANY; NAUTILUS INSURANCE COMPANY; GREAT DIVIDE INSURANCE COMPANY; PRIVILEGE UNDERWRITERS RECIPROCAL EXCHANGE; USAA CASUALTY INSURANCE COMPANY; USAA GENERAL INDEMNITY COMPANY; GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY; WESTPORT INSURANCE CORPORATION; AXIS SURPLUS INSURANCE COMPANY; AMERICAN HALLMARK INSURANCE COMPANY OF TEXAS; STATE NATIONAL INSURANCE COMPANY; SWISS RE INTERNATIONAL SE (AUSTRALIA BRANCH); SWISS RE INTERNATIONAL SE (FRANCE BRANCH); SWISS RE CORPORATE SOLUTIONS ELITE INSURANCE CORPORATION; UNITED SERVICES AUTOMOBILE ASSOCIATION; ADVENTIST RISK MANAGEMENT, INC.; GENCON INSURANCE COMPANY OF VERMONT; DB INSURANCE CO., LTD.; SWISS RE CORPORATE SOLUTIONS CAPACITY INSURANCE CORPORATION; SWISS RE CORPORATE SOLUTIONS AMERICA INSURANCE CORPORATION.

3. This declaration is made upon personal knowledge, and if called upon, declarant is competent to testify as to the facts set forth herein.

4. I make this declaration in support of NON-PARTY SUBROGATING

INSURERS' MEMORANDUM OPPOSING INDIVIDUAL ACTION PLAINTIFFS' MOTION FOR ORDER REGARDING OPERATION OF HRS § 663-10 AND APPLICATION FOR INTERLOCUTORY APPEAL.

5. On Friday, July 26, 2024, I viewed portions of the Court's hearing in this action livestreamed via the Hawaii State Judiciary's YouTube channel (www.youtube.com/@hawaiicourts).

6. Review of the Hawaii State Judiciary's YouTube channel appears to confirm that livestreams of circuit court hearings, such as the Court's Friday, July 26, 2024 hearing, are not saved and/or archived and/or publicly available.

7. The portions of the Court's Friday, July 26, 2024 hearing that I viewed included the following events.

8. At 9:05 a.m., the Court recessed the hearing and held an in-chambers meeting with certain attorneys for the individual plaintiffs and the defendants in this action.

9. That in-chambers meeting was not open to the public and was not livestreamed on the Hawaii State Judiciary's YouTube channel.

10. At 9:57 a.m., the court reconvened the hearing.

11. The remainder of the hearing was livestreamed on the Hawaii State Judiciary's YouTube channel.

12. During the remainder of the hearing, the Court instructed the attorneys who participated in the in-chambers meeting to inform the attorneys for the parties to this action who did not participate in the in-chambers meeting about what had been discussed during the meeting.

13. In subsequent remarks to the Court during the remainder of the hearing an attorney who apparently participated in the in-chambers meeting referred to a "plan" or "idea" that was discussed during the meeting.

14. The timing noted above is confirmed by the Court's minutes from the Friday, July 26, 2024 hearing [Dkt. 1665].

I, NORMAND R. LEZY, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii, August 11, 2024.

NORMAND R. LEZY

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAIʻI

IN THE MATTER OF THE PETITION FOR THE COORDINATION OF MAUI FIRE CASES	S.P. NO. 2CSP-23-0000057 (Other Non-Vehicle Tort – Maui Fire) **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the foregoing document was served upon all counsel of record in this mater through the JEFS system.

DATED: Honolulu, Hawaiʻi, August 11, 2024.

GROTEFELD HOFFMANN

By: /s/ *Vincent G. Raboteau*
VINCENT G. RABOTEAU

Attorney for Non-Party Subrogating Insurors AMGUARD INSURANCE COMPANY; CONCERT SPECIALTY INSURANCE COMPANY; GENERAL CASUALTY COMPANY OF WISCONSIN; THE CINCINNATI INSURANCE COMPANY; UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY; CERTAIN INTERESTED UNDERWRITERS AT LLOYD'S SUBSCRIBING TO POLICY PG2203220; CERTAIN INTERESTED UNDERWRITERS AT LLOYD'S SUBSCRIBING TO POLICY PG2203891; STATE FARM FIRE AND CASUALTY COMPANY; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; HARLEYSVILLE INSURANCE COMPANY OF NEW YORK; ASPEN SPECIALTY INSURANCE COMPANY; ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY; ALLSTATE INDEMNITY COMPANY; ALLSTATE INSURANCE COMPANY; ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY; ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY; INTEGON NATIONAL INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S AND VARIOUS NON-LLOYD'S INSURERS SUBSCRIBING TO POLICIES PIV209015, PIV205089, PIV202904, PIV201596, PIV201325, PIV200359, PIV199831, PIV199736, PIV198096, PIV195519

DATED: Honolulu, Hawaiʻi, August 11, 2024.

COX WOOTTON LERNER

By: /s/ Normand R. Lezy
NORMAND R. LEZY
Attorney for Non-Party Subrogating Insurors

AMERICAN BANKERS INSURANCE COMPANY; STANDARD GUARANTY INSURANCE COMPANY; INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB; 21ST CENTURY CENTENNIAL INSURANCE COMPANY; FARMERS INSURANCE EXCHANGE; FARMERS PROPERTY AND CASUALTY INSURANCE COMPANY; FIRE INSURANCE EXCHANGE; FOREMOST INSURANCE COMPANY GRAND RAPIDS, MICHIGAN; MID-CENTURY INSURANCE COMPANY; FIRST FIRE & CASUALTY INSURANCE OF HAWAII, INC.; FIRST INDEMNITY INSURANCE OF HAWAII, INC.; FIRST INSURANCE COMPANY OF HAWAII, LTD.; FIRST SECURITY INSURANCE OF HAWAII, INC.; PENN-STAR INSURANCE COMPANY; UNITED NATIONAL INSURANCE COMPANY; ZEPHYR INSURANCE COMPANY, INC.; HAWAIIAN INSURANCE AND GUARANTY COMPANY, LTD.; ISLAND INSURANCE COMPANY, LTD.; TRADEWIND INSURANCE COMPANY, LTD.; ISLAND PREMIER INSURANCE COMPANY, LTD.; CRESTBROOK INSURANCE COMPANY; NATIONAL CASUALTY COMPANY; NATIONWIDE GENERAL INSURANCE COMPANY; NATIONWIDE MUTUAL INSURANCE COMPANY; SCOTTSDALE INSURANCE COMPANY; INSURANCE COMPANY; NAUTILUS INSURANCE COMPANY; GREAT DIVIDE INSURANCE COMPANY; PRIVILEGE UNDERWRITERS RECIPROCAL EXCHANGE; USAA CASUALTY INSURANCE COMPANY; USAA GENERAL INDEMNITY COMPANY; GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY; WESTPORT INSURANCE CORPORATION; AXIS SURPLUS INSURANCE COMPANY; AMERICAN HALLMARK INSURANCE COMPANY OF TEXAS; STATE NATIONAL INSURANCE COMPANY; SWISS RE INTERNATIONAL SE (AUSTRALIA BRANCH); SWISS RE INTERNATIONAL SE (FRANCE BRANCH); SWISS RE CORPORATE SOLUTIONS ELITE INSURANCE CORPORATION; UNITED SERVICES AUTOMOBILE ASSOCIATION; USAA CASUALTY INSURANCE COMPANY; USAA GENERAL INDEMNITY COMPANY; GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY; ADVENTIST RISK MANAGEMENT, INC.; GENCON INSURANCE COMPANY OF VERMONT; DB INSURANCE CO., LTD.; SWISS RE CORPORATE SOLUTIONS CAPACITY INSURANCE CORPORATION; SWISS RE CORPORATE SOLUTIONS AMERICA INSURANCE CORPORATION; RLI INSURANCE COMPANY; MT. HAWLEY INSURANCE COMPANY

DATED: Honolulu, Hawai‘i, August 11, 2024.

OGAWA, LAU, NAKAMURA & JEW
By: /s/Michael F. O’Connor
MICHAEL F. O’CONNOR
Attorney for Non-Party Subrogating Insurors

TOKIO MARINE AMERICA INSURANCE COMPANY; XL INSURANCE AMERICA, INC.; EVANSTON INSURANCE COMPANY; CRESTMONT INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER B0509PN2251799; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON AND INSURERS SUBSCRIBING TO POLICY NUMBER B0509PN2251784; GREAT AMERICAN ASSURANCE COMPANY; GREAT AMERICAN ALLIANCE INSURANCE COMPANY; GREAT AMERICAN E&S INSURANCE COMPANY; GREAT AMERICAN INSURANCE COMPANY; NATIONAL INTERSTATE INSURANCE COMPANY; NATIONAL INTERSTATE INSURANCE COMPANY OF HAWAII; IRONSHORE SPECIALTY INSURANCE COMPANY; LIBERTY INSURANCE CORPORATION; LIBERTY MUTUAL FIRE INSURANCE COMPANY; LIBERTY MUTUAL INSURANCE COMPANY; LIBERTY MUTUAL PERSONAL INSURANCE COMPANY; SAFECO INSURANCE COMPANY OF AMERICA; SAFECO INSURANCE COMPANY OF ILLINOIS; AMERICAN FAMILY CONNECT PROPERTY AND CASUALTY INSURANCE COMPANY; AMERICAN FAMILY MUTUAL INSURANCE COMPANY, S.I.; HOMESITE INSURANCE COMPANY; HOMESITE INSURANCE COMPANY OF CALIFORNIA; HOMESITE INSURANCE COMPANY OF THE MIDWEST; ACE AMERICAN INSURANCE COMPANY; BANKERS STANDARD INSURANCE COMPANY; CHUBB CUSTOM INSURANCE COMPANY; FEDERAL INSURANCE COMPANY; GREAT NORTHERN INSURANCE COMPANY; ILLINOIS UNION INSURANCE COMPANY; INDEMNITY INSURANCE COMPANY OF NORTH AMERICA; INSURANCE COMPANY OF NORTH AMERICA; VIGILANT INSURANCE COMPANY; WESTCHESTER SURPLUS LINES INSURANCE COMPANY; ERIE INSURANCE COMPANY; ERIE INSURANCE EXCHANGE; GCUBE INSURANCE SERVICES, INC.; HCC INSURANCE HOLDINGS, INC.; GOLDEN BEAR INSURANCE COMPANY; MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA; MITSUI SUMITOMO INSURANCE USA INC.; NATIONAL LIABILITY AND FIRE INSURANCE COMPANY; PHARMACISTS MUTUAL INSURANCE COMPANY; STILLWATER INSURANCE COMPANY; STILLWATER PROPERTY AND CASUALTY INSURANCE COMPANY; AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY; STEADFAST INSURANCE COMPANY; ZURICH AMERICAN INSURANCE COMPANY; AGCS MARINE INSURANCE COMPANY; ALLIANZ GLOBAL RISKS US INSURANCE COMPANY; AMERICAN AUTOMOBILE INSURANCE COMPANY; FIREMAN’S FUND INSURANCE COMPANY; ALLIED WORLD ASSURANCE COMPANY (U.S.) INC.; ALLIED WORLD NATIONAL ASSURANCE COMPANY; HISCOX INSURANCE COMPANY, INC.