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Attorneys for Plaintiff  
RODNEY SMITH and the Certified Class

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

RODNEY SMITH, individually and on  
behalf of all others similarly situated,

Plaintiff,

vs.

BANK OF HAWAII and  
DOES 1 through 10,

Defendants.

Case 1:16-cv-00513-JMS-WRP

PLAINTIFF'S BRIEF NOMINATING  
HAWAIIAN COMMUNITY ASSETS AS  
CY PRES RECIPIENT; DECLARATION  
OF ROBERT M. HATCH; EXHIBIT "A";  
CERTIFICATE OF SERVICE

**HEARING:**

**Date: July 23, 2020**

**Time: 1:30 p.m.**

**Judge: Hon. J. Michael Seabright**

**PLAINTIFF'S BRIEF NOMINATING HAWAIIAN  
COMMUNITY ASSETS AS CY PRES RECIPIENT**

At the final approval hearing on July 7, 2020, the Court directed Plaintiff to "submit a written brief regarding cy pres recipient, Public Citizen and/or a new recipient" by July 15, 2020. ECF 226. Taking into consideration the Court's statements at the hearing, Plaintiff, with Defendant's agreement, nominates Hawaiian Community Assets as the most appropriate cy pres recipient for the class action settlement in this case and withdraws Plaintiff's prior request for Public Citizen. In further support, Plaintiff states as follows:

While the proposed settlement contemplates distributing all of the available money to the class members, there may be residual funds remaining because some class members may never cash the checks sent to them. For this reason, the

proposed settlement provides that any such remaining funds will be distributed as a “cy pres” award to a recipient that is a 501(c) non-profit which “advocates on behalf of consumers in Hawaii regarding issues such as those in this lawsuit.” ECF 220-3 (Settlement, ¶ 12).

In the context of class actions settlements, when funds cannot be successfully distributed directly to class members, cy pres allows the court to approve the “next best distribution” that “bears a substantial nexus to the interests of the class members” as pursued in the case. *Lane v. Facebook, Inc.*, 696 F.3d 811, 820-21 (9th Cir. 2012). The recipient need not be “ideal,” but as the Court explained at the hearing on July 7, it should have some geographic nexus with the class members. *Id.*; see *In re Easysaver Rewards Litig.*, 906 F.3d 747, 761–62 (9th Cir. 2018), *cert. denied sub nom. Perryman v. Romero*, 139 S. Ct. 2744 (2019) (discussion of geographic nexus).

After the final approval hearing, the Court recommended that class counsel reach out to Stephen H. Levins, Executive Director, Office of Consumer Protection, State of Hawai‘i, for his input on the question of a suitable cy pres recipient located in Hawai‘i. Class counsel contacted Mr. Levins, and he recommended Hawaiian Community Assets. Declaration of Robert M. Hatch (“Hatch Dec.”), ¶ 2.

Class Counsel contacted Jeff Gilbreath, Executive Director of Hawaiian Community Assets, and Mr. Gilbreath explained the nature of Hawaiian Community Assets work supporting low and moderate income communities in Hawai‘i. *Id.*, ¶ 3.

Hawaiian Community Assets has been operating for twenty years and seeks to provide “access to affordable housing, living wage jobs, and the mainstream financial system as vehicles to economic self- sufficiency.” *Id.*, Exhibit A. It does this by providing its clients with free “financial education, housing counseling, match savings accounts, micro-loans, and workforce development services.” *Id.* Hawaiian Community Assets’ overall goal is to give its clients the “education and tools necessary to navigate the modern financial system and be active contributors in our local economy.” *Id.*

Hawaiian Community Assets is Hawai‘i’s largest HUD certified housing counseling agency serving 3,000 Hawai‘i residents annually. It receives funding from, among other sources: the Corporation for National Community Service; the Hawaii Commission for National and Community Services; the Department of Housing and Urban Development; the Office of Hawaiian Affairs; the County of Hawaii; and Helping Hands Hawaii. *Id.*

Class counsel believes that Hawaiian Community Assets’ work bears a “substantial nexus to the interest of the class members” as pursued in this action.

*Lane*, 696 F.3d at 820-21. The overdraft fees at issue in this action were more likely to be charged to low-and moderate-income people. Thus, the class is likely to include many people who would benefit from the type of financial counseling, education, and assistance that Hawaiian Community Assets provides. In addition, Hawaiian Community Assets is located in Hawai‘i, and the class members also mostly reside in Hawai‘i, satisfying the Court’s concerns about geographic nexus. Even, if Hawaiian Community Assets is not an “ideal” cy recipient in this case, it satisfies the “substantial nexus” test set forth by the Ninth Circuit in *Lane*.

For the foregoing reasons, Plaintiff respectfully requests that the Court approve Hawaiian Community Assets as the cy pres recipient in this case and finally approve the proposed class action settlement.

DATED: Honolulu, Hawai‘i, July 15, 2020.

/s/ Robert M. Hatch

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