

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

TABATHA MARTIN, et al.;

Plaintiffs,

vs.

CITY AND COUNTY OF
HONOLULU, a municipal
corporation; et al.;

Defendants.

Case No. CV 15-00363 HG-KSC

DECLARATION OF DANIEL M.
GLUCK; EXHIBITS "1"- "15"

DECLARATION OF DANIEL M. GLUCK

I, Daniel M. Gluck, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

1. Until June 30, 2016, I was the Legal Director of the American Civil Liberties Union of Hawaii. The American Civil Liberties Union of Hawaii is dedicated to protecting the fundamental freedoms enshrined in the United States and Hawaii State Constitutions.

2. I am duly licensed to practice before Hawaii State Courts and the United States District Court for the District of Hawaii. I was one of the attorneys representing the Plaintiffs in the above-entitled matter.

3. I make this declaration based on my own personal knowledge and if called to testify I could and would do so competently as follows.

4. More than six months before filing the Complaint in the instant case, I reached out to Corporation Counsel in an attempt to avoid litigation. On March 2, 2015, I e-mailed Corporation Counsel Donna Leong regarding sweeps of homeless individuals in the City & County of Honolulu. A true and correct copy of this letter is attached hereto as **Exhibit 1**.

5. Ms. Leong responded by e-mail on March 9, 2015, requesting additional information. A true and correct copy of her letter (dated March 6, 2015) is attached hereto as **Exhibit 2**.

6. I replied to Ms. Leong's letter on March 16, 2015, including the information she had requested. A true and correct copy of that letter is attached hereto as **Exhibit 3**.

7. I was on leave from the ACLU of Hawaii from late March until the beginning of July 2015. During my absence, Lois Perrin (former Legal Director, and then-Of Counsel, with the ACLU of Hawaii) sent Mr. Nomura a letter on April 15, 2015 outlining the damages, fees, and costs requested from the City. A true and correct copy of that letter is attached hereto as **Exhibit 4**.

8. The City never provided a substantive response to this settlement offer (or to several other communications regarding settlement, as set forth below).

9. On May 14, 2015, Deputy Corporation Counsel Ernest Nomura sent a letter to Ms. Perrin, seeking to interview the Plaintiffs. A true and correct copy of that letter is attached hereto as **Exhibit 5**.

10. When I returned to the office in early July, I e-mailed Mr. Nomura to discuss his request to interview my clients. Between early July and August 11, Mr. Nomura interviewed six of my clients regarding their seized (and destroyed) property, despite my explicit, repeated concerns to Mr. Nomura that this process would substantially increase our attorneys' fees and costs. In large part, my concern was based on the fact that I had to arrange an interpreter to speak with many of my clients simply to arrange a date and time for my clients to meet with Mr. Nomura.

11. On August 11, 2015 – after Mr. Nomura had an opportunity to interview six of my clients – I e-mailed Mr. Nomura to request that the City provide us with a settlement offer. A true and correct copy of that e-mail is attached hereto as **Exhibit 6**.

12. Neither Mr. Nomura nor any other City official responded to my August 11, 2015 e-mail.

13. Consequently, Plaintiffs filed the Complaint in the instant case on September 16, 2015. The same day, my co-counsel, Nickolas

Kacprowski, e-mailed Ms. Leong and Mr. Nomura to indicate our willingness to discuss an early settlement to the case.

14. Per Mr. Nomura's request, on September 18, 2015, Plaintiffs' counsel sent Mr. Nomura a written settlement demand letter. A true and correct copy of that letter is attached hereto as **Exhibit 7**.

15. Neither Mr. Nomura nor any other City official responded substantively to Plaintiffs' September 18 letter.

16. After Plaintiffs filed (and the Court denied) a Motion for a Temporary Restraining Order, Plaintiffs filed a Motion for a Preliminary Injunction on November 3, 2015 (Dkt. 36). That document describes material inaccuracies in a key declaration submitted by the City in opposition to Plaintiffs' Motion for a Temporary Restraining Order, upon which the Court relied in denying Plaintiffs' Motion. Plaintiffs' counsel incurred substantial fees and costs as a direct result of the City's submission of that declaration, as Plaintiffs' counsel had to expend significant time (and money) to gather additional facts to refute the City's assertions.

17. On November 4, 2015, the City Council authorized \$100,000 to retain the law firm of McCorriston, Miller, Mukai, MacKinnon LLP ("M4") to represent the City in the instant case. A true and correct copy of City Council Resolution 15-299 authorizing those funds is attached hereto as

Exhibit 8. The City Council authorized an additional \$50,000 on February 17, 2016. A true and correct copy of City Council Resolution 16-36 authorizing those funds is attached hereto as **Exhibit 9.**

18. M4, according to its website, is “one of Hawai‘i’s preeminent law firms, serving the legal needs of these islands and the Pacific Rim for over twenty years” whose “litigation department is routinely involved in the largest cases in Hawai‘i, whether for local, national or international clientele.” Attached hereto as **Exhibit 10** is a true and correct copy of one page of M4’s website, available at <http://www.m4law.com/Firm-Overview.shtml> (last accessed March 21, 2016).

19. According to the deposition transcripts in this case (which Plaintiffs’ counsel can provide to the Court upon request), the City had multiple lawyers present at seven out of the eight depositions in this case. Specifically, the City had the following numbers of lawyers available at each of the following depositions:

- a. Depositions noticed by (and taken by) the City:
 - i. Darrah-Okike (2 City lawyers)
 - ii. Kaneso (3 City lawyers)
 - iii. Martin, Tabatha (3 City lawyers)
 - iv. Martin, Tracy (3 City lawyers)

b. Depositions noticed by (and taken by) Plaintiffs:

- i. Sasamura (3 City lawyers defending current City employee)
- ii. Sato (3 City lawyers defending current City employee)
- iii. Shimizu (2 City lawyers defending current City employee)
- iv. Ponte (1 City lawyer defending former City employee)

20. According to Court minutes in this case, the City also had multiple lawyers at eight out of ten court appearances (including mediation), with up to five or six lawyers attending some proceedings:

- a. 9/22/15 hearing on Plaintiffs' Motion for Temporary Restraining Order (2 City lawyers)
- b. 11/9/15 status conference (4 City lawyers)
- c. 11/16/15 status conference (1 City lawyer)
- d. 11/17/15 status conference (1 City lawyer)
- e. 11/23/15 status conference (2 City lawyers)
- f. 11/30/15 discovery conference (5 City lawyers)
- g. 12/18/15 mediation (5 City lawyers)
- h. 12/22/15 mediation (6 City lawyers)
- i. 1/7/16 mediation (3 City lawyers)

j. 1/20/16 status conference (3 City lawyers)

21. The parties stipulated to the terms of an injunction, and the Court entered its order on November 18.

22. As the litigation proceeded, the parties engaged in discovery. Counsel for Defendant objected to or ignored nearly all of Plaintiffs' initial discovery requests. For example, Plaintiffs served their first document request on October 2, 2015; the discovery response deadline was set at November 3, 2015. Defendants failed to produce a single document by the deadline, requiring Plaintiffs to request a meet-and-confer. During the meet-and-confer, counsel for Defendant stated that it would refuse to produce any and all government records relating to sweeps until a blanket protective order was implemented – despite their nature as public records subject to public disclosure under state law. As Defendant would not compromise on this requirement, the parties engaged in a round of letter briefing and status conferences. Defendant did not begin delivering any of the requested discovery until November 25, 2015 – twenty-two days after the initial deadline – only after being ordered to do so by Judge Chang. Similarly, Defendant's counsel did not produce its initial disclosures by the required deadline; Plaintiffs' counsel asked Defendant's counsel to produce them at

least four times, and eventually had to ask the Court's assistance to compel Defendant to produce them in a December 7, 2015 letter brief.

23. On December 2, 2015, at the Court's suggestion, Plaintiffs' counsel sent a third settlement demand to Defendant's counsel. A true and correct copy of that letter is attached hereto as **Exhibit 11**. The City responded to that letter on December 11, 2015, requesting that Plaintiffs submit a demand for attorneys' fees, costs, and damages, which Plaintiffs did on December 14.

24. Plaintiffs began mediating this case with Chief U.S. District Court Judge J. Michael Seabright on December 18. The parties participated in multiple half-day and full-day mediation sessions. The parties thereafter agreed to terms for an amended injunction, which the Court entered on January 20, 2016, and subsequently entered into a settlement agreement resolving Plaintiffs' claims for damages and injunctive relief (but reserving questions regarding Plaintiffs' counsel's fees and costs). The parties have discussed the possibility of settling attorneys' fees and costs, and at Defendant's counsel's request, Plaintiffs' counsel sent Defendant's counsel billing sheets on June 3, 2016. Defendant's counsel did not respond until July 15, 2016, and did not make a firm offer of settlement. Plaintiff's counsel responded on July 22, 2016. The parties continued to discuss the

issue of settling fees and costs, but as of the date of this declaration have been unable to reach agreement.

25. Attached hereto as **Exhibit 12** is a chart of the costs incurred by the ACLU of Hawaii in connection with the instant case. Copies of receipts/invoices for each of the listed items (with the exception of charges for mileage, parking meters, and in-house copies/postage) are attached as **Exhibit 15**.

26. Attached hereto as **Exhibit 13** is a chart of all fees incurred by the ACLU of Hawaii in connection with the instant case. The time entries were made contemporaneously with the work performed, though some entries have been edited for purposes of preparing this fee petition (for example, by removing non-billable time and clarifying abbreviations and other entries so that the work performed is clear to the Court).

27. Our clients in this case were all homeless or formerly homeless individuals, and most were unsheltered (and transient) at the outset of this litigation. All of our clients faced (and continue to face) barriers – including linguistic, cultural, educational, and/or economic barriers – in accessing the courts and defending their civil rights. Many of our clients speak very little English, and many of our clients have only a rudimentary understanding of civil court proceedings. Many of our clients do not own mobile telephones

(or, if they owned phones, had only sporadic service – generally because the clients could not afford to keep their phone service active at all times).

28. As a result, client communication in this case was particularly difficult and took much more time and effort than the Court may otherwise expect. For example, relatively straightforward litigation tasks such as executing a declaration required an extensive amount of attorney and paralegal time: locating the client, arranging a time and place to meet (typically requiring counsel to travel to the clients, rather than having the clients travel to counsel's office), explaining the process of submitting a declaration, discussing the contents of the declaration, and then arranging to have the client sign the declaration (often after a delay to have the document translated) often took repeated phone calls (and/or multiple in-person visits), and often required both written and verbal interpretation services.

29. The City's sweeps of the Kakaako area in September and October 2015 (after the initiation of this lawsuit) hampered our ability to litigate this case: as a result of the City's actions, clients and prospective witnesses were scattered to multiple locations (including off-island), causing Plaintiffs' counsel to expend significant time maintaining contact with (or, in many cases, attempting to re-establish contact with) our clients. Similarly, the City caused Plaintiffs to incur unnecessary fees in other ways. For

example, the City insisted that our clients have their signatures on the settlement agreement notarized, despite our strenuous objections; some of our clients had been unable to replace their identification documents that the City had thrown away during previous sweeps, and had a very difficult time fulfilling the notarization requirement. Likewise, only one of our clients has access to a car, and the simple act of traveling to downtown Honolulu to meet with a notary proved very burdensome for many of the clients (and counsel).

30. My colleagues and I spent a considerable amount of time in various homeless encampments, including in Kakaako, meeting with clients and interviewing witnesses. I met with clients and witnesses at night, by myself, on the streets of Kakaako. My colleagues and I spent significant amounts of time walking through the Kakaako encampment looking for clients. While I did not feel subjectively threatened while doing this work, the media frequently reports on criminal activity in the area. *See, e.g.*, Brent Remadna, *Crime increases as homeless population grows in Kakaako*, KHON2 News (July 22, 2015), *available at* <http://khon2.com/2015/07/22/crime-increases-as-homeless-population-grows-in-kakaako-2/>; Allyson Blair, *Growing homeless encampment near airport viaduct 'scary,' haven for crime*, Hawaii News Now (Apr. 15, 2016),

available at <http://www.hawaiinewsnow.com/story/31730730/a-glimpse-into-life-under-the-nimitz-viaduct>. For example, the media reported at length on the assault on State Representatives Tom Brower. *See, e.g., Suspect arrested for assaulting lawmaker at Kakaako homeless camp*, KHON2 News (July 31, 2015), available at <http://khon2.com/2015/07/31/suspect-arrested-for-assaulting-lawmaker-at-kakaako-homeless-camp/>. To be clear, my personal belief is that these media reports are often sensationalized and overly stigmatize impoverished individuals and families. Nevertheless, given all the barriers to representation set forth above, I do not believe that many – or any – other attorneys in Honolulu would have been willing to take on this matter.

31. Plaintiffs' counsel had to spend an inordinate amount of time chasing after Defendant's counsel to get them to respond to communications from our office, insofar as Defendant's counsel refused to communicate with Plaintiffs' counsel in a timely manner. Plaintiffs' repeated attempts to settle this matter without the need for litigation, discussed *supra*, are one example of Defendant's failure to communicate. As another example, on May 3, 2016, Plaintiffs' counsel requested a status conference with the Court to discuss the Settlement Agreement in this case because Defendant's counsel simply refused to respond to Plaintiffs' counsel as to whether we had a final

agreement. After Defendant's counsel e-mailed Plaintiffs' counsel on April 15, 2016, Plaintiffs' counsel responded by e-mail on April 18, April 25, April 27, and May 3 (and the undersigned had an in-person conversation with one of Defendant's attorneys on April 29), without receiving a substantive response. As such, Plaintiffs' counsel spent several hours preparing a letter brief, and additional time in another mediation session with Judge Seabright, that could have been avoided had Defendant's counsel simply responded to Plaintiffs' counsel in a timely manner. Other examples of Defendant's delay (requiring us to incur additional fees) include:

- a. Judge Gillmor signed the parties' amended stipulation on January 20. Docket #96. Plaintiffs offered to draft the initial settlement agreement, but the City insisted on doing so. The City did not provide an initial draft for more than *six weeks* (on March 3), despite Plaintiffs' repeated requests to expedite the process.
- b. Plaintiffs provided the City with a proposed form of class notice on April 12, but the City did not provide a response to our proposed language until May 18.
- c. On March 11, Plaintiffs' counsel proposed a framework for publishing notice to prospective class members. Defendant's

counsel did not provide a substantive response until April 15, when the City proposed providing notice to class members in a way that would have violated the Court's order regarding translation of legally required notices to the class.

32. For over eight years, I participated directly in all ACLU of Hawai'i litigation. In this capacity, as well as that described directly below, I have substantial experience in civil rights matters and constitutional law.

33. I received my B.S in Industrial and Labor Relations from Cornell University in 1999 and my J.D. from Harvard Law School in 2003. I was admitted to the Hawai'i Bar in 2003. I am also licensed to practice before the United States Court of Appeals for the Ninth Circuit and the United States Court of Appeals for the D.C. Circuit.

34. From June 2003 to 2005, I served as a judicial law clerk to Hawai'i Supreme Court Associate Justice James E. Duffy, Jr., and from 2005-2006 I served as a judicial law clerk for the Honorable J. Michael Seabright of the U.S. District Court for the District of Hawai'i. From 2006-2007 I was an associate with Alston Hunt Floyd & Ing (AHFI); I left AHFI to join the ACLU of Hawai'i as the Senior Staff Attorney in 2007. I was promoted to Legal Director of the ACLU of Hawai'i in 2014.

35. I have extensive litigation experience in state and federal court on civil rights and constitutional law matters; I likewise have substantial litigation experience representing homeless and Limited English Proficiency individuals and families. Representative cases include:

- *Taylor-Failor v. County of Hawaii*, Civ. 15-00070 DKW-KSC: obtained temporary restraining order prohibiting urinalysis as condition of employment for non-safety-sensitive County employees.
- *Guy v. County of Hawaii*, Civ. 14-00400 SOM-KSC, and *State v. Guy*, 3DCC-14-0000420: obtained temporary restraining order in federal court striking down anti-solicitation ordinance after successfully having criminal charges (against homeless individual) dismissed in state court.
- *Aliviado v. Kimoto*, Civ. 12-00259 SOM-BMK: obtained injunction (after full evidentiary hearing) requiring Dept. of Public Safety to allow prisoners and their non-prisoner fiancés to marry.
- *Nobriga v. DOE*, Civ. 10-00159 DAE-LEK: obtained temporary restraining order prohibiting Dept. of Education and Maui County from discriminating against female student-athletes.
- *Kaleuati v. Tonda*, Civ. 07-00504 HG-LEK: obtained preliminary injunction (after full evidentiary hearing) in class action suit challenging Dept. of Education's failure to provide services for homeless students and families.

36. I was an Adjunct Professor at the University of Hawaii Richardson School of Law, having taught a seminar on Civil Rights in 2012, 2014, and 2015.

37. In my time with the ACLU of Hawaii, no court has ever ruled upon my billable rate; in every other case I have litigated, I have successfully negotiated fees and costs with the opposing party/parties.

38. In a recent settlement agreement in a pre-litigation matter involving the State of Hawaii, the State agreed to pay me \$2,500.00 in fees where I had billed 5.7 hours, with my offer that I would waive the one to two hours of additional time I anticipated spending (and did spend) drafting and negotiating a simple settlement agreement. Even adding in a full two hours more (for a total of 7.7 hours), that is an effective rate of \$324.68 an hour.

39. My 2016 hourly rate for this matter is \$375.00, which I have set based upon other local attorneys' rates – particularly those with comparable education and experience at AHFI, where I used to work. For example, Blaine Rogers – a partner at AHFI – graduated in 2006 (three years after me), clerked for the Hon. David A. Ezra, and joined AHFI in 2008. He became a Shareholder/Director of AHFI in 2015, and my understanding is that his current billable rate is \$325.00 an hour. My co-counsel in this case, Nickolas Kacprowski, graduated from law school in 2004 (one year after me), clerked for the Hon. Helen Gillmor, and joined AHFI in 2014. His current billable rate at the beginning of this case was \$375.00 an hour.

40. As is clear in the attached Exhibit 13 (the chart of ACLU fees), I began working on this case in 2014, and the case was most active in late 2015. Although my 2016 hourly rate at the ACLU of Hawaii was \$375/hour, for purposes of this case only I have discounted my rate to \$325 an hour, a 13% discount off my current market rate that takes into consideration that work was done in 2014 and 2015.

41. Attached hereto as **Exhibit 14** is a declaration submitted by Lois K. Perrin in another federal court matter, outlining her education, skill, and experience. Ms. Perrin retired from the ACLU of Hawaii in early 2016. She, like Ms. Holland (whose market rate was \$375 an hour at the beginning of this case), graduated from law school in 1996, and Plaintiffs are requesting the same hourly rate (\$375/hour) for Ms. Perrin.

42. From 2015-2016, Sarah Recktenwald served as the Legal and Legislative Assistant with the ACLU of Hawaii. In 2014, she earned a Bachelor of Arts in Psychology (with Honors) from the University of Chicago; she then worked as the Health Care Group Project Assistant (a paralegal position) with Sidley Austin LLP in Chicago from 2014-2015. She will be attending Harvard Law School this fall. She performed paralegal work for the ACLU of Hawaii during the course of this litigation.

Her billable rate in this case is \$125 per hour, comparable to a paralegal at AHFI.

43. From September 2015 to August 2016, Katie Mullins has served as the Legal Fellow with the ACLU of Hawaii. She earned a J.D. from the University of Michigan Law School in May 2015, and earned a Bachelor of Arts from the University of Michigan, in International Studies and Spanish, in 2012. She is admitted to practice law in Florida. Insofar as she is not admitted to practice law in Hawaii – and did not engage in the practice of law in Hawaii – her billable rate in this case is \$125 per hour, comparable to a law clerk (that is, an unlicensed law student or attorney) at AHFI.

44. Our clients did not pay us for representing them. Plaintiffs' counsel kept no portion of the damages paid to the clients themselves. Plaintiffs' counsel advanced all costs, and our recovery of fees was entirely contingent upon succeeding in the litigation and being awarded fees and costs by the Court.

45. In my experience with the ACLU, it is very difficult to find competent attorneys to partner with us, particularly on cases like this one: expensive, evidence-intensive class-action cases involving complex legal issues, which take up large amounts of attorney time. Very few firms have

the interest, expertise, or resources to devote to a case like this. AHFI is almost unique in being willing and able to take on such a case, given both the costs to the firm and the unpopularity of the cause. I strongly believe that if firms like AHFI are not awarded fees based on their standard market rates on cases like this, there will be an enormous disincentive for firms in Hawaii to partner with the ACLU (or other public interest groups) on large, complex, civil rights class actions. Although the ACLU may be able to find co-counsel in smaller cases involving more narrow issues, I fear that it will be very difficult to find co-counsel in complex, resource-intensive cases and class actions.

Executed in Honolulu, Hawaii on September 9, 2016.



Daniel M. Gluck