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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

IRENE O. BRITTON, Individually and in Her
Representative Capacity, on Behalf of Herself
and all Others Similarly Situated,

Plaintiffs,

vs.

CASTLE & COOKE WAIKOLOA, LLC. a
Domestic Limited Liability Company;
CASTLE & COOKE HOMES HAWAII INC.,
a Domestic Corporation; and DOES 1-10,

Defendants.

CIVIL NO. 13-1-2277-08 GWBC
(Construction Defects)

**ORDER GRANTING PRELIMINARY
APPROVAL OF SETTLEMENT, CLASS
CERTIFICATION, AND APPROVAL OF
NOTICE PLAN**

Hearing:
Date: June 10, 2021
Time: 1:00 p.m.
Judge: Gary W.B. Chang

Trial: None set

ORDER GRANTING PRELIMINARY APPROVAL OF SETTLEMENT, CLASS CERTIFICATION, AND APPROVAL OF NOTICE PLAN

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

WHEREAS Plaintiff and the Class Representative Irene O. Britton, on behalf of herself and all other Class Members (“*Waikoloa-Wind* Class¹”), and Defendant Castle & Cooke Homes Hawaii, Inc. (“Castle & Cooke”) (jointly, “Settling Parties”) have applied to the Court pursuant to Hawai‘i Rule of Civil Procedure 23 for an Order granting preliminary approval of the proposed settlement of this class action (“Lawsuit”) in accordance with the *Waikoloa-Wind* Settlement (including its exhibits) on file with the Court, which sets forth the terms and conditions for a proposed settlement of this case and for entry of an order granting final approval of the *Waikoloa-Wind* Settlement, and a Final Judgment implementing the terms of the *Waikoloa-Wind* Settlement Agreement; and

WHEREAS the Court has read and considered the *Waikoloa-Wind* Settlement;

WHEREAS the Court has read and considered the Settling Parties’ Motion for Preliminary Approval of Settlement, Class Certification, and Approval of Notice Plan, all memoranda and declarations in support thereof, and has heard argument of counsel thereon;

WHEREAS, based on the above submissions and presentations, the Court finds that the proposed *Waikoloa-Wind* Settlement is within the range of possible approval and that notifying the Class about the terms and conditions of the proposed Settlement and scheduling a formal final approval is worthwhile; and

WHEREAS *Waikoloa-Wind* Class Counsel intends to file a Motion for Final Approval of Settlement along with a Motion for Attorney Fees, Costs, and All Other Expenses to be heard after the Notice Plan has been accomplished; and

WHEREAS all terms of the proposed *Waikoloa-Wind* Settlement are subject to this Court’s decisions on *Waikoloa-Wind* Class Counsel’s Motion for Final Approval of Settlement and Motion for Attorney Fees, Costs, and All Other Expenses.

¹ Terms not defined in this Order shall have the definitions ascribed to them in the April 29 *Waikoloa-Wind* Settlement Agreement attached as Exhibit A to the April 30, 2021 Declaration of Graham B. LippSmith in Support of Plaintiff’s Motion for Preliminary Approval of Settlement, Class Certification, and Approval of Notice Plan.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

Waikoloa-Wind Class Definition, Class Representatives, and Class Counsel

1. The Court finds that proposed *Waikoloa-Wind* Class meets all of the criteria required by Hawai‘i Rule of Civil Procedure 23 and authorities interpreting it. Pursuant to Hawai‘i Rule of Civil Procedure 23, the Court certifies the *Waikoloa-Wind* Class, applying the following Class Definition:

All individual and entity homeowners who on the date of Final Order and Judgment own homes whose construction was completed on or after August 20, 2003 with wind protection systems in the Castle & Cooke housing developments known as Kikaha at Wehilani and Makana Kai at Wehilani, located in the City of Waikoloa and County of Hawai‘i, Island of Hawai‘i, and all homeowners’ associations whose members consist of such individual and entity homeowners.

The class definition specifically excludes (1) all individuals, entities, and associations of homeowners who have only homes completed prior to August 20, 2003; (2) persons who validly and timely exclude themselves from the *Waikoloa-Wind* Class; and (3) any judicial officer who has presided or will preside over this case.

2. The Court finds that proposed Class Representative and the proposed Class Counsel meet the criteria required by Hawai‘i Rule of Civil Procedure 23 and authorities interpreting it. Therefore, the Court appoints Plaintiffs Irene O. Britton to serve as the Class Representative and appoints Melvin Y. Agena of the Law Offices of Melvin Y. Agena, Glenn K. Sato of the Law Office of Glenn K. Sato, and Graham B. LippSmith, and Celene Chan Andrews of LippSmith LLP to serve as Class Counsel.

3. The Settling Parties have identified the *Waikoloa-Wind* Class Member Structures whose owners at the time of Final Judgment are to be enrolled in and qualify for the benefits provided in the *Waikoloa-Wind* Settlement. The list of *Waikoloa-Wind* Class Member Structures is attached as Exhibit 6 to the *Waikoloa-Wind* Settlement.

Preliminary Findings on the Proposed *Waikoloa-Wind* Settlement

4. Pursuant to Hawai‘i Rule of Civil Procedure 23, the Court preliminarily finds that the proposed *Waikoloa-Wind* Settlement, including its proposed allocations of and methodology

for distributing the *Waikoloa-Wind* Settlement Fund for Class Member payments, to pay the Administrator's costs, and to pay Attorney Fees, Costs, and Other Expenses, is within the range of possible approval and appears to have resulted from serious, informed, non-collusive negotiations conducted at arm's length by the Settling Parties and their counsel.

5. In making these preliminary findings, the Court considered the nature of the claims, the amounts and kinds of benefits to be paid in settlement, the information available to the Settling Parties, and the allocation of the *Waikoloa-Wind* Settlement among *Waikoloa-Wind* Class Members. The terms of the *Waikoloa-Wind* Settlement Agreement do not have any obvious deficiencies and do not improperly grant preferential treatment to any individual *Waikoloa-Wind* Class Member. In addition, the Court notes that the Settling Parties reached the proposed *Waikoloa-Wind* Settlement after substantial discovery, motion practice, arbitration proceedings, and multiple formal and informal settlement discussions before the respected third-party mediator Keith Hunter of Dispute Prevention & Resolution, Inc. Accordingly, the Court preliminarily finds that the Settling Parties entered into the proposed *Waikoloa-Wind* Settlement in good faith, that the proposed *Waikoloa-Wind* Settlement meets the standards for preliminary review and approval, and the *Waikoloa-Wind* Settlement appears to be sufficiently fair, reasonable, and adequate to warrant the Administrator's execution of the Notice Plan that will provide notice to the *Waikoloa-Wind* Class and scheduling a hearing for final approval of the proposed *Waikoloa-Wind* Settlement.

Final Approval Hearing on *Waikoloa-Wind* Settlement

6. Pursuant to the Hawai'i Rule of Civil Procedure 23, the Court will hold a Final Approval Hearing.

7. The Court hereby sets the Final Approval Hearing for August 25, 2021 at 3:00 p.m. The Court may approve the proposed *Waikoloa-Wind* Settlement at or after the Final Approval Hearing with such modifications to which the Settling Parties may consent and without further notice to the *Waikoloa-Wind* Class. At the Final Approval Hearing, the Court will consider, among other things:

- a. Whether the proposed *Waikoloa-Wind* Settlement is fair, reasonable, and adequate;
- b. Whether the Court should enter its Final Order granting final approval the

- Waikoloa-Wind* Settlement and Final Judgment implementing its terms;
- c. Whether the Notices and the Notice Plan implemented pursuant to the *Waikoloa-Wind* Settlement and this Preliminary Approval Order
 - (i) constituted the best practicable notice; (ii) constituted notice that was reasonably calculated, under the circumstances, to apprise potential *Waikoloa-Wind* Class Members of the pendency of the Lawsuit, the nature of the proposed *Waikoloa-Wind* Settlement (including Class Counsels' request for awards of attorney fees and reimbursement of costs), their right to object to the proposed *Waikoloa-Wind* Settlement, their right to exclude themselves from the *Waikoloa-Wind* Class, and their right to appear at the Final Approval Hearing, (iii) were reasonable and constituted due, adequate, and sufficient notice to all persons entitled to notice, and (iv) met all applicable requirements of Hawai'i Rule of Civil Procedure 23, the United States Constitution (including the Due Process Clause), the Rules of the Court, and any other applicable law;
 - d. Whether the Court should approve the releases in the *Waikoloa-Wind* Settlement Agreement;
 - e. Whether the *Waikoloa-Wind* Class Representative and Class Counsel adequately represented the *Waikoloa-Wind* Class for the purposes of entering into and implementing the proposed Settlement and will continue to adequately represent the *Waikoloa-Wind* Class for carrying out the *Waikoloa-Wind* Settlement;
 - f. Whether the Court should grant Class Counsel's request for an award of Attorney Fees, Costs, and All Other Expenses;
 - g. Whether the Court should grant the request for Class Representative incentive awards; and
 - h. Any other matters that the Court may deem appropriate to consider.

Approval, Appointment, and Retention of the Administrator, the Notice Plan, and the Administration of the Settlement

8. The Court approves the retention of CPT Group, Inc. ("Administrator") to serve

as the Administrator for the Settlement, including but not limited to implementation and management of the Notice Plan, *Waikoloa-Wind* Class Member verification process, and Settlement Escrow.

9. The Court also approves the proposed Notice Plan and settlement administration to be completed by the Administrator, including among other tasks: (i) distributing the *Waikoloa-Wind* Class Notice; (ii) arranging for publication of the *Waikoloa-Wind* Class Notice; (iii) posting the Notice on the Administrator's website; (iv) facilitating *Waikoloa-Wind* Class Member inquiries; (v) answering written inquiries from potential *Waikoloa-Wind* Class Members and/or forwarding such inquiries to Class Counsel; (vi) providing additional copies of the Notice(s) upon request; (vii) receiving and maintaining on behalf of the Court any objections to the *Waikoloa-Wind* Settlement received from potential *Waikoloa-Wind* Class Members; (viii) receiving and maintaining on behalf of the Court any exclusions from the *Waikoloa-Wind* Settlement received from potential Class Members; (ix) assisting in the coordination and inclusion of authorized *Waikoloa-Wind* Class Members for participation in the *Waikoloa-Wind* Settlement; and (x) otherwise administering and implementing the *Waikoloa-Wind* Settlement.

10. The Administrator estimates its costs for the Notice Plan and administration of all documents for and payments from the *Waikoloa-Wind* Settlement will not exceed \$4,000.00. The *Waikoloa-Wind* Settlement further provides that the Administrator's costs shall be paid from the *Waikoloa-Wind* Settlement Fund. The estimated amount for the Administrator's costs and payment therefor from the *Waikoloa-Wind* Settlement Fund appear to be fair, reasonable, and adequate.

Notices to the Class

11. The Court approves, as to form and content, the Notice Plan and Class Notices attached as Exhibits 1-4 to the *Waikoloa-Wind* Settlement Agreement. The Court finds that the Notice Plan and Class Notices will fully and accurately inform the potential *Waikoloa-Wind* Class Members of all material elements of the proposed *Waikoloa-Wind* Settlement and of each *Waikoloa-Wind* Class Member's right and opportunity to object to the proposed *Waikoloa-Wind* Settlement. The Court further finds that the mailing and distribution of the *Waikoloa-Wind* Class Notice and the publication of the *Waikoloa-Wind* Class Notices substantially in the manner and form set forth in the Notice Plan and Settlement Agreement meets the requirements of Hawai'i

Rule of Civil Procedure 23, the United States Constitution (including the Due Process Clause), the Rules of the Court, and any other applicable law, constitutes the best notice practicable under the circumstances, and constitutes due and sufficient notice to all potential Class Members.

12. The Settling Parties and their counsel may by agreement effectuate any amendments or modifications of the proposed *Waikoloa-Wind* Notice Plan and/or Class Notice, and any verification documents without notice to or approval by the Court if such changes are not materially inconsistent with this Order and do not materially limit the rights of *Waikoloa-Wind* Class Members.

Communications with Class Members

13. Because *Waikoloa-Wind* Class Members might contact Castle & Cooke about this *Waikoloa-Wind* Settlement, if contacted, Castle & Cooke shall respond, if at all, to *Waikoloa-Wind* Class Members in a manner materially consistent with the following:

“The terms of the settlement were negotiated at arm’s-length and in good faith by the parties and reflects a good faith resolution of disputed claims. The settlement is not an admission of any negligence, fault or wrongdoing on the part of Castle & Cooke. If you have any question regarding the details of the Settlement, please log onto the settlement website at www.waikoloawind.com, contact CPT Group, Inc., the Claims Administrator, at [Claims Administrator’s Telephone Number to be provided], or contact Class Counsel through the Law Offices of Melvin Y. Agena, (808) 536-6647.”

14. The Settling Parties will not solicit, facilitate, or assist in any way, Objections by potential or actual *Waikoloa-Wind* Class Members.

Objections

15. All *Waikoloa-Wind* Class Members who intend to object to the fairness, reasonableness and adequacy of the Settlement (“Objections”) must mail a timely written Objection to the Administrator by first-class mail with postage paid. The Administrator will then serve any Objections received on Class Counsel, Defense Counsel, and all other parties due notice in this case by U.S. Mail. The Administrator will then also file any such Objections with the Court by filing such documents directly or arranging for such documents to be filed by Class Counsel or Defense Counsel.

16. Objections must be postmarked no later than thirty (30) days after the date of the mailing of the *Waikoloa-Wind* Settlement Notice. The date of the postmark on the return-mailing envelope shall be the exclusive means used to determine whether an Objection has been timely submitted. In his/her/its Objections, an objecting *Waikoloa-Wind* Class Member must:

- a. Set forth his/her/its full name, current address, and telephone number;
- b. Identify the address of the Structure giving rise to standing to make an Objection and establish the sender's status as a *Waikoloa-Wind* Class Member, if the sender's current address is different;
- c. Identify the owner of the *Waikoloa-Wind* Class Member Structure;
- d. State that the objector has reviewed the definitions of the *Waikoloa-Wind* Class and understands that he/she/it is a member of the *Waikoloa-Wind* Class, and has not opted out of the *Waikoloa-Wind* Class;
- e. Set forth a complete statement of all legal and factual bases for any Objection that the objector wishes to assert; and
- f. Provide copies of any documents that the objector wishes to submit relating to his/her/its position.

17. In addition to the requirements set forth in above paragraph, objecting *Waikoloa-Wind* Class Members must state in writing whether he/she/it intends to appear at the Final Approval Hearing(s) either with or without separate counsel. No *Waikoloa-Wind* Class Member shall be entitled to be heard at the Final Approval Hearing (whether individually or through separate counsel) or to object to the *Waikoloa-Wind* Settlement, and no written Objections or briefs submitted by any *Waikoloa-Wind* Class Member shall be received or considered by the Court at the Final Approval Hearing, unless written Notice of the *Waikoloa-Wind* Class Member's intention to appear at the Final Approval Hearing and copies of any written Objections or briefs were postmarked or served on the Administrator on or before thirty (30) days after the date of the mailing of the *Waikoloa-Wind* Settlement Notice.

18. In addition to its obligations to serve and file timely Objections received, the Administrator will also serve any Notices of a *Waikoloa-Wind* Class Member's intention to appear at the Final Approval Hearing and associated briefing received on Class Counsel, Defense Counsel, and all other parties due notice in this case by U.S. Mail. The Administrator will also file any such Notices of a *Waikoloa-Wind* Class Member's intention to appear at the Final

Approval Hearing and associated briefing with the Court by filing such documents directly or arranging for such documents to be filed by Class Counsel or Defense Counsel.

19. All *Waikoloa-Wind* Class Members who fail to serve timely written objections in the manner specified in the Court's Order Granting Motion for Preliminary Approval of Settlement, Approval of Notice Plan, and Appointment of Additional Class Counsel and the *Waikoloa-Wind* Settlement will be deemed to have waived any objections, will be foreclosed from making any objection, whether by appeal or otherwise, to the *Waikoloa-Wind* Settlement and Motion for Attorney Fees, Costs, and All Other Expenses, will be bound by the terms of the *Waikoloa-Wind* Settlement Agreement and the Final Judgment, and will be foreclosed forever from making any objection to the fairness or adequacy or any other aspect of the proposed *Waikoloa-Wind* Settlement and Motion for Attorney Fees, Costs, and All Other Expenses unless otherwise allowed by the Court.

Exclusions/Opt Outs

20. Any member of the *Waikoloa-Wind* Settlement Class shall have the right to exclude him/her/itself (or opt out) of the *Waikoloa-Wind* Settlement Class by timely submitting a written request for exclusion to the Administrator's address listed in the Notice. The request for exclusion must provide the following information:

- a. Set forth his/her/its full name, current address, and telephone number;
- b. Identify the address of the *Waikoloa-Wind* Class Structure to establish the sender's status as a *Waikoloa-Wind* Class Member, if the sender's current address is different;
- c. Identify the owner of the *Waikoloa-Wind* Class Structure; and
- d. Indicate a request to be excluded from of the *Waikoloa-Wind* Settlement.

21. *Waikoloa-Wind* Class Members' written requests for exclusion must be postmarked no later than thirty (30) days after the date of the mailing of the Notice, which deadline shall be set forth in the FAQ, Publication Notice, Settlement Notice, and Summary Notice.

22. Within ten (10) days after the Court-ordered deadline for timely and properly opting out from the *Waikoloa-Wind* Settlement, the Administrator shall provide to Class Counsel

and Defense Counsel a list of the names and addresses of the members of the *Waikoloa-Wind* Class who timely excluded themselves from the *Waikoloa-Wind* Settlement.

23. All *Waikoloa-Wind* Class Members who fail to serve timely written exclusions in the manner specified in the Court's Order Granting Motion for Preliminary Approval of Settlement, Approval of Notice Plan, and Appointment of Additional Class Counsel and the *Waikoloa-Wind* Settlement will be deemed to have waived any exclusion, are foreclosed from making any exclusion, will be bound by the terms of the *Waikoloa-Wind* Settlement Agreement and the Final Judgment, and will be foreclosed forever from making any exclusion unless otherwise allowed by the Court.

Filing Papers Concerning *Waikoloa-Wind* Settlement

24. All papers in support of or in opposition to the proposed *Waikoloa-Wind* Settlement shall be filed as follows, with courtesy copies sent to the Court's Chambers:

- a. Motion for Final Approval of Settlement—No later than 14 days prior to the date initially set for the Final Approval Hearing; and
- b. Motion for Attorney Fees, Costs, and All Other Expenses—No later than 14 days prior to the date initially set for the Final Approval Hearing.

Termination of Settlement

25. This Order shall become null and void, and shall be without prejudice to the rights of the Settling Parties, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if (i) the Court declines to grant final approval of the proposed *Waikoloa-Wind* Settlement (or Settling Parties' later written modification thereof) pursuant to the terms of the *Waikoloa-Wind* Settlement Agreement; or (ii) the Settling Parties terminate the proposed *Waikoloa-Wind* Settlement in accordance with its terms or the *Waikoloa-Wind* Settlement does not become effective as required by its terms for any other reason. In such event, the *Waikoloa-Wind* Settlement Agreement shall become null and void and of no further force and effect, and shall not be used or referred to for any purpose whatsoever.

Use of Order

26. This Order shall be of no force or effect if the Court does not grant Final

Approval to the *Waikoloa-Wind* Settlement. The *Waikoloa-Wind* Settlement shall not be construed or used as an admission, concession, or declaration by or against Castle & Cooke of any fault, wrongdoing, breach, or liability. Nor shall this Order be construed or used as an admission, concession, or declaration by or against Plaintiffs or other *Waikoloa-Wind* Class Members that their claims lack merit or that the relief requested in the Lawsuit is inappropriate, improper, or unavailable, or as a waiver by any party of any defenses or claims he, she, or it might have.

Service of Papers

27. Settling Parties' Counsel shall promptly furnish each other with copies of any and all objections or written requests for exclusion that come into their possession.

Continuance of Final Approval Hearing

28. The Court reserves the right to continue the date of the Final Approval Hearing without further notice to *Waikoloa-Wind* Class Members.

Retention of Jurisdiction

29. The Court retains the exclusive jurisdiction to consider all further applications arising out of or connected with the *Waikoloa-Wind* Settlement. This Court, and only this Court, shall have exclusive jurisdiction to enforce or resolve any disputes related to the *Waikoloa-Wind* Settlement Agreement and Exhibits, including, but not limited to (i) any and all disputes arising out of applications for, claims concerning, claims related to, and/or allocations of Attorney Fees, Costs, and All Other Expenses by *Waikoloa-Wind* Class Counsel and/or before the *Waikoloa-Wind* Court; and (ii) any and all disputes arising out of claims by any other attorneys seeking attorney fees, costs, other expenses, or awards resulting from or in any way related to or arising out of this Lawsuit, the *Waikoloa-Wind* Settlement, and/or the Court's award of Attorney Fees, Costs, and All Other Expenses from the *Waikoloa-Wind* Settlement Fund.

APPROVED AS TO FORM:

By: /s/Melvin Y. Agena DATED: June 10, 2021
MELVIN Y. AGENA
GLENN K. SATO
GRAHAM B. LIPPSMITH
CELENE CHAN ANDREWS
SHARLA MANLEY
Attorneys for Plaintiffs and the Class

By: /s/ Lennes N. Omuro DATED: June 10, 2021
LENNES N. OMURO
Attorneys for Defendant

APPROVED AND SO ORDERED:

By: /s/ Gary W. B. Chang  DATED: June 10, 2021
The Honorable Gary W.B. Chang
State of Hawai'i, First Circuit Judge

ORDER GRANTING PRELIMINARY APPROVAL OF SETTLEMENT, CLASS CERTIFICATION, AND APPROVAL OF NOTICE PLAN; *Irene O. Britton. vs. Castle & Cooke Waikoloa, LLC, et al.*, Civil No. 13-1-2277-08 GWBC