SB2738

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012

ON THE FOLLOWING MEASURE:
S.B. NO. 2738, MAKING AN APPROPRIATION FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Friday, February 3, 2012 **TIME:** 11:15 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Caron M. Inagaki, Deputy Attorney General

Chair Hee and Members of the Committee:

The Department of the Attorney General supports this bill with amendments.

The purpose of this bill is to appropriate funds to satisfy claims against the State, its officers, or its employees, including claims for legislative relief, judgments against the State, settlements, and miscellaneous claims.

There is a claim contained in this bill, Segundo v. Frederick, et al., Civil No. 08-1-0106, Third Circuit, that is already included in S.B. No. 2700. This claim should be omitted from this bill.

With the deletion of this claim, the bill will contain eleven claims that total $2,109,814.01. Ten claims are general fund appropriation requests that total $1,899,814.01, and one claim is an appropriation request from departmental funds that total $210,000.00. Attachment A provides a brief description of each claim in the bill.

The Department has had a longstanding policy of advising agencies as to how to avoid claims such as those in this bill. The Department has also complied with section 37-77.5, Hawaii Revised Statutes, which requires the Attorney General to develop and implement a procedure for advising our client agencies on how to avoid future claims.

We respectfully request passage of this measure with the amendments as stated.

ATTACHMENT "A"

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES:

Elections Systems & Software, Inc. v. Cronin, et al., CAAP-11-0000078 — **$ 1,205,000.00** ***(General Fund)*** **Settlement**

A former chief elections officer of the State of Hawaii was found by the court to have violated Hawaii Revised Statutes Chapter 103D (State Procurement Code) when he awarded a multi-term contract for voting equipment to Hart Intercivic, Inc. without conducting the required analysis of the proposals.

Tanaka, et al. v. State of Hawaii, et al. Civil No. 09-00579, USDC — **$ 73,000.00** ***(General Fund)*** **Settlement**

Plaintiffs were were employees of the Department of Accounting and General Services (DAGS). They allege that DAGS subjected them to discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C., §2000e-1, et. seq. and § 378-2(1) (a), Hawaii Revised Statutes. Plaintiff Liashenko applied for and was interviewed for two vacant Computer Operator III positions in DAGS in 2006. He was not selected. He later alleged he was not selected because of race and gender discrimination by DAGS. Plaintiff Tanaka was selected for one of the two Computer Operator III positions, but was not the highest-scoring candidate and, as a result, did not get to choose the work shift she wanted. She later alleged the reason she was not given the highest score was because DAGS discriminated against her on the basis of her national origin (Vietnamese).

Before filing suit in federal court, Plaintiffs complained to the Equal Employment Opportunity Commission about alleged discrimination. After more than a year, the EEOC, in March 2008, issued determinations of reasonable cause to believe that DAGS discriminated against both plaintiffs.

After DAGS partially prevailed against both Plaintiffs in a motion for summary judgment, Liashenko agreed to settle for $23,000. Tanaka settled her claims for $50,000.

DEPARTMENT OF EDUCATION:

Miljkovic v. State of Hawaii, et al. Civil No. 09-00064 ACK-KSC, USDC — **$ 7,500.00** ***(General Fund)*** **Settlement**

Plaintiff was an employee of the University of Hawaii under a two-year teaching contract with the Honolulu Community College. The Plaintiff was hired to teach welding and carpentry skills. The Plaintiff was assigned to two high schools to teach students skills in framing a structure and welding. He was supervised by teachers and administrators of the Department of Education. At the close of his contractual term, the Plaintiff was advised that he would not be retained for another contractual term based partly on poor performance evaluations and complaints from the high schools about his conduct. Plaintiff filed suit against the University of Hawaii, the Department of Education, and

certain teachers and administrators of the Department of Education based on negligence, negligent infliction of emotional distress, defamation, and discrimination.

DEPARTMENT OF HEALTH:

Segundo v. Frederick, et al. **$ 328,250.00** ***(General Fund)***
Civil No. 08-1-0106, Third Circuit Court **Settlement**

On April 21, 2006, Defendant Frederick, while employed by the State of Hawaii, fell asleep at the wheel of her vehicle and crossed over the center line on Highway 11 on the Island of Hawaii, into the path of Plaintiff's pickup truck and crashed into the front driver's side of Plaintiff's vehicle. Plaintiff sustained fractures to his hip and femur, requiring internal fixation, a fracture of his L4 vertebra and a nasal fracture. He was also diagnosed with Post Traumatic Stress Disorder.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

Ah Loo v. State of Hawaii, et al. **$ 40,000.00** ***(General Fund)***
Civil No. 11-1-0032, Fifth Circuit **Settlement**

Plaintiff, a minor, was playing with her siblings on the Hanalei pier when a portion of the composite/tile roof broke off and fell, striking the Plaintiff on the dorsal side of her left wrist and hand. Plaintiff sustained damage to the tendons and tissue in her left hand and wrist and underwent surgery to repair the damage.

Weingartner v. State of Hawaii, et al. **$ 90,000.00** ***(General Fund)***
Civil No. 09-1-1563-07, First Circuit **Settlement**

Plaintiff was previously employed as the Northwestern Hawaiian Islands ("NWHI") Monument Policy Specialist with the Department of Land and Natural Resources ("DLNR"), Division of Aquatic Resources ("DAR"). One of his duties is to ensure compliance with State and Federal laws relating to activities occurring in the Papahanaumokuakea National Marine Monument ("Monument"). Plaintiff started work on February 4, 2009 in an exempt, at-will appointment which had a not-to-exceed ("NTE") date of June 30, 2009. Plaintiff was directly supervised by Athline Clark ("Clark"), the Monument Co-Manager. The Monument Program fell under the supervision of DAR Administrator Dan Polhemus ("Polhemus").

Plaintiff claims that within the first month of employment, he brought concerns regarding what he perceived to be the State's non-compliance with the Hawaii Environmental Policy Act. After two months of informing Clark and not having his concerns addressed, Plaintiff notified Polhemus about the non-compliance and difficulties in his working relationship with Clark (i.e., his role as Policy Specialist was diminished when Clark assigned him tasks outside of his position description, limiting his contact with his federal counterparts at the Monument). Plaintiff's employment was not renewed beyond the June 30, 2009 NTE date. Plaintiff claims the non-renewal of his NTE appointment was due to his whistleblowing activities.

On July 30, 2009, Plaintiff filed a First Amended Complaint against the DLNR, Clark and Polhemus (in their official and individual capacities) alleging - violation of Hawaii Whistleblower Protection Act; Promissory Estoppel/Detrimental Reliance; Breach of Contract; Interference with Contractual Relations and/or Prospective Economic Advantage; and Punitive Damages. The latter two claims were dismissed by the Court.

DEPARTMENT OF PUBLIC SAFETY:

Gishi v. State of Hawaii, et al. **$ 75,000.00** ***(General Fund)***
Civil No. 10-1-0198-01, First Circuit **Settlement**

A prison inmate was overdetained in prison by 134 days due to the court's and his attorney's failure to provide the prison with a copy of the order dismissing his case. To the prison's knowledge, the inmate's remaining charge was still pending and they were to continue holding him. Once a copy of the order was provided to the prison, the inmate was released immediately.

Glessner v. State of Hawaii, et al. **$ 30,000.00** ***(General Fund)***
MCCP No. 2010-066 **Settlement**

Claimant, an inmate at Oahu Community Correctional Center, began experiencing partial loss of vision in left eye in June 11, 2009. He had had a detached retina in his other eye several years before and went to the medical unit at OCCC and said he thought his retina was detaching in his left eye since his symptoms were similar to his detached retina years before. Claimant had had "floaters" the previous year so he was advised to wait and see how his vision was in a few days. Claimant returned to the medical unit three days later and reported increased loss of vision. He was referred to an ophthalmologist, but the appointment was not scheduled until the end of June. Throughout the intervening several days, Plaintiff reported increasing loss of vision several times to nursing staff at sick call. By the time the outside ophthalmology consult was conducted on June 30, 2009, Claimant's retina had detached. Surgery was scheduled on a nonemergency basis and as a result of the surgery, Claimant regained a great deal, but not all, of his field of vision. Claimant filed a claim with the Medical Claims Conciliation Panel. The Panel rendered its decision in favor of the Claimant but did not award any damages. Claimant agreed to settle for $30,000 before a lawsuit was filed.

Graff, et al. v. State of Hawaii, et al. **$ 156,814.01** ***(General Fund)***
Civil No. 08-1—0975-05, First Circuit **Settlement**

Two inmates who were incarcerated at the Oahu Community Correctional Center were participating in a work crew that was assigned to remove the chain link cover from an enclosure. This work project was done in anticipation of an electrical contractor installing a replacement transformer. In the enclosure were various pieces of electrical equipment, including the transformer that was to be replaced. When one of the inmates stepped on the top of that transformer's enclosure, a short occurred in the cables inside the transformer cabinet. This caused sparks and flames to shoot through the metal blank plate that had been affixed to cover a rust hole. The inmate fell to the ground and sustained a fracture to his arm and compression fracture of a vertebrae. The other inmate also

injured his arm and eyes. The case proceeded to trial, and the court awarded the inmates $300,000 and $500, respectively. The Court held the State 60% responsible for the damages; $180,300. The Court held the electrical contractor 40% responsible. The electrical contractor had settled for $50,000 before trial. No medical expenses were awarded. The inmates agreed to accept $150,000 total to settle all claims. The State will pay separately the compromised Medicaid lien of $6,815.01.

Timas v. State of Hawaii, et al. **$ 60,000.00** ***(General Fund)***
Civil No. 10-00517, USDC **Settlement**

A female inmate was overdetained in prison by 84 days due to the failure of the Department of Public Safety staff to give her all of the presentence credit she was entitled to. The mistake was made in 2000 when her sentence was calculated, but was not caught until 2008. By then, the inmate had already been overtained by 84 days. The inmate was released immediately upon discovery of the mistake that had been made years earlier.

OFFICE OF HAWAIIAN AFFAIRS:

Tsachev v. State of Hawaii, et al. **$ 162,500.00** ***(General Fund)***
Civil No. 09-1-1207-05, First Circuit **Settlement**

While riding his moped on Kapiolani Blvd., Plaintiff struck the left side of an Office of Hawaiian Affairs van pulling across Kapiolani Blvd. from Curtis street. Plaintiff sustained a fractured femur and hip, broke several teeth and claimed to have suffered brain damage. The total amount of the settlement is $325,000.00. The Office of Hawaiian Affairs agreed to pay one-half of the settlement.

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Kuahiwinui, et al. v. Zelo's, et al. **$ 210,000.00** ***(Department***
Civil No. 08-1-0067, Fifth Circuit **Settlement** ***Appropriation)***
Ackerman v. Kuahiwinui, et al.
Civil No. 08-1-0069

On April 1, 2006, driver Solomon Kuahiwinui, and his two passengers Christopher Ferguson and Kristopher Kuahiwinui spent their Friday night drinking, and smoking marijuana at Hanalei Bay park, then later drinking at two bars in Hanalei town. At the bars, Ferguson had been buying drinks for his designated driver S. Kuahiwinui. At approximately 12:30 a.m. they were headed out of town, but the driver missed the left turn onto the Hanalei Bridge. The vehicle struck the approach guardrail to the bridge, went over the embankment, and into the Hanalei River, flipped over & landed upside-down. The driver was able to get out of the vehicle alive, but both passengers were drowned ijn the vehicle. The driver had a blood alcohol content BAC level of 0.13. K. Kuahiwinui's BAC was 0.16 whole blood, or 0.19 serum and Ferguson's BAC was 0.26 serum. The driver and two of the bars have settled.

The bridge was built in 1912. In 1978, the U.S. Department of the Interior determined the bridge eligible for inclusion in the National Register of Historic Places. It is the only road access over the

river to Hanalei and the north shore communities west of Hanalei. The Hanalei River is designated as an American Heritage River. Beca use the bridge was in disrepair, the State retained Wilson Okamoto & Associates to conduct tests, host community informational meetings & design the repairs. The community strongly opposed any changes to the rural nature of the bridge, their community or the traffic. With FHWA approval of design exceptions & variance, DOT elected not to make upgrades to the bridge or approaches (including guardrails) that would adversely affect the rural nature of the community. The project was completed in 2003.

At the time of the subject accident, there were no street lights along the road from Hanalei town approaching the bridge and leading up to the guardrail. Because of the accidents during 2005, in a letter dated In a December 13, 2005 letter, from DOT to the Kauai Island Utility Cooperative DOT asked for a cost estimate for a street light because of a **"**high number of guardrail hits at the Hanalei Bridge". On April 21, 2006, KIUC installed the streetlight.

This case proceeded to mediation, and on the eve of trial settlement was reached in the amount of $210,000.00. Plaintiffs settled with the driver and one of the bars in the amount of $160,000.00. The second bar obtained summary judgment in its favor.

WRITTEN TESTIMONY ONLY

Date: 02/03/2012

Committee: Senate Judiciary and Labor

Department:	Education
Person Testifying:	Kathryn S. Matayoshi, Superintendent of Education
Title of Bill:	SB 2738 MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.
Purpose of Bill:	Makes appropriations for claims against the State, its officers, and its employees.
Department's Position:	The Department of Education supports this measure.