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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

BEVERLY BLAKE, STEPHANIE CAMILLERI, ARLENE SUPAPO, individually, and on behalf of all persons similarly situated,	)	CIVIL NO. 08-00281 SPK LEK
	)	(Contract) (Declaratory Judgment)
	)	(Other Civil Action)
	)	Class Action
Plaintiffs,	)	
	)	**PLAINTIFFS’ MOTION FOR**
vs.	)	**CLASS CERTIFICATION;**
	)	**MEMORANDUM IN SUPPORT;**
CRAIG NISHIMURA, in his official	)	**DECLARATION OF PAUL**

capacity as Acting Director of the Department of Facility Maintenance, City and County of Honolulu; CITY AND COUNTY OF HONOLULU, a municipal corporation, Defendants.	)	**ALSTON; EXHIBIT D; EXHIBIT 1 (PROPOSED CLASS NOTICE); CERTIFICATE OF SERVICE**

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PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs Beverly Blake, Stephanie Camilleri, and Arlene Supapo, individually and on behalf of all persons similarly situated, move for an order certifying the following class under Federal Rule of Civil Procedure ("Rule") 23:

The Class: All persons who are, were, or will be head of household tenants at Westlake Apartments entitled to receive utility allowances from the City and County of Honolulu as part of their section 8 subsidy at any time during which Defendants failed or fails to provide properly-calculated utility allowances for Westlake Apartments.

Plaintiffs also request that their counsel be appointed class counsel under Rule 23(g).

This Motion is brought under Rules 7(b) and 23 and the Local Rules for the District Court for the District of Hawai'i 7.2 and 7.3. This Motion is supported by the attached Memorandum, the attached declarations, the records and

file in this case, and any additional matters that may be presented at or before hearing.

DATED: Honolulu, Hawai`i, September 5, 2008

Respectfully submitted,

/s/ Jason H. Kim

VICTOR GEMINIANI
WILLIAM H. DURHAM
GAVIN K. THORNTON
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

BEVERLY BLAKE, STEPHANIE CAMILLERI, ARLENE SUPAPO, individually, and on behalf of all persons similarly situated, Plaintiffs, vs. CRAIG NISHIMURA, in his official capacity as Acting Director of the Department of Facility Maintenance, City and County of Honolulu; CITY AND COUNTY OF HONOLULU, a municipal corporation, Defendants.	CIVIL NO. 08-00281 SPK LEK (Contract) (Declaratory Judgment) (Other Civil Action) Class Action **MEMORANDUM IN SUPPORT**

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I. INTRODUCTION

Plaintiffs seek class certification of their claims for damages and declaratory and injunctive relief against Craig Nishimura, in his official capacity as acting director of the Department of Facilities Management, and the City and County of Honolulu (collectively "Defendants"). Plaintiffs allege defendants overcharged tenants at the Westlake Apartment Complex ("Westlake") in violation of the U.S. Housing Act and its supporting regulations and their lease contracts with Plaintiffs by failing for several years to update utility allowances to account for increased utility costs. Plaintiffs further seek damages, including trebled damages, for the Defendants' unfair and deceptive practice of certifying each year that they had properly calculated Plaintiffs' utility allowances.

II. FACTS AND GOVERNING LAW

A. Defendants have overcharged Plaintiffs for rent, in violation of federal law.

Westlake Apartments, owned and operated by the Defendants, is a 95-unit low-income housing project subsidized by the federal "Section 8 Loan Management program." Among other things, the United States Housing Act generally requires that "rent" for tenants residing in federally-subsidized public

housing projects not exceed 30% of tenant income.[1] Utilities are included in that rent calculation.[2] Because of this, where — as in Westlake — tenants are responsible for their utilities, the project owner must provide tenants with a utility allowance.[3]

Utility allowances must be sufficient to cover "the monthly cost of a reasonable consumption of…utilities…by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment."[4] Federal regulations require regular revision of the utility allowance to ensure it is sufficient to cover the reasonable utility consumption, thereby ensuring that rents do not exceed 30% of tenant income.[5] Project managers must review and adjust their utility allowances whenever a rent adjustment is made and, in between reviews, if there is a change in utility rates greater than 10%.[6]

Sometime prior to 1998, Defendants determined the reasonable consumption for Westlake Apartments, at then-existing rates, allowed for $40 each

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[1] 42 U.S.C. § 1437a (a)(1); 24 C.F.R. §5.628; *Wright v. Roanoke Redevelopment Auth.*, 479 U.S. 418 (1987); *Dorsey v. Hous. Auth. of Baltimore City*, 984 F.2d 622, 624 (4th Cir. 1993).

[2] 24 C.F.R. §§ 5.603(b) and 5.634(a).

[3] *Id*.

[4] 24 C.F.R. § 5.603 (b)

[5] 24 C.F.R § 886.126.

[6] 24 C.F.R. § 886.126.

month in utilities.[7] Since that time, utility rates have drastically increased, yet Defendants continue to provide to this day this same outdated and now grossly inadequate utility allowance to all tenants at Westlake Apartments, resulting in rent charges in excess of federal limits.[8]

Further, each year, Defendants falsely certified that rents were properly calculated.[9] In the HUD Form 50059, provided to each head of a Westlake household each year, Defendants are required to certify that "this Tenant's eligibility, rent and assistance payments have been computed in accordance with HUD's regulations and administrative procedures and that all required verifications have been obtained."[10] This deceptive certification, which is uniform throughout the class and the years for which certification is sought, constitutes an unfair and deceptive trade practice forbidden by Hawai'i Law.[11] Also, the Defendants' acts breached their uniform rental agreements with the tenants at Westlake, which incorporate by reference the terms of the applicable HUD Form 50059.[12]

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[7] *See* Exhibit "A" attached to Declaration of Stephanie Camilleri ("Camilleri Dec.") (to be filed separately).

[8] *See* Exhibit "B" to Camilleri Dec.

[9] *See, e.g.*, Exhibits "A"-"B" to Camilleri Dec.

[10] *Id.*

[11] H.R.S. § 480-2.

[12] *See* Exhibit "C" to attached Declaration of Arlene S. Supapo at ¶ 27 (to be filed separately).

III. ARGUMENT

Class certification is the only appropriate method of resolving claims of all injured Westlake tenants against the Defendants. The proposed class meets all the requirements of Rule 23(a):

- The class consists of hundreds of present, former, and future tenants at Westlake who have been or will be injured absent court intervention who cannot practicably be joined as parties.

- The named Plaintiffs' claims and those of the class arise from the same conduct — the Defendants' failure to update the utility allowances.

- The named Plaintiffs' claims are typical of the class, as all have been injured by the Defendants' failure to adjust the allowance in the same manner and to the same extent as the proposed class; and

- The named Plaintiffs are represented by able counsel and are capable of adequately protecting the interests of the class.

Further, the proposed class qualifies for certification under both Rule 23(b)(2) and (b)(3):

- In their calculation of utility allowances, failure to update those allowances, and representations about those allowances, Defendants have acted on grounds generally applicable to the class and Plaintiffs are seeking injunctive relief to require Defendants to adjust utility allowances — both now and into the future — to comply with the applicable laws and regulations; and

- The common questions of law and fact — whether the utility allowance was insufficient, what the appropriate of allowance should have been, and were the Defendants' certifications unfair and deceptive practices — predominate over questions affecting individual class members.

Certification will allow Plaintiffs to secure a remedy that matches the scope of Defendants' violations and insure compensation to all persons injured by Defendants' conduct.

Both federal and state courts in Hawai`i have recently certified classes of subsidized-housing tenants in cases alleging that utility allowances were calculated incorrectly. Judge Kay of this Court certified a class in *Amone v. Aveiro*, 226 F.R.D. 677 (D. Haw. 2005) in a case alleging that the State of Hawai`i provided inadequate utility allowances for disabled residents living in federally-subsidized housing. And in *Waters v. Housing and Community Development Corp. of Hawaii*, Civ. No. 05-1-0815-05 EEH05-1-0815-05 EEH, the Circuit Court for the First Circuit certified a class of all tenants of federally-subsidized housing managed by the State of Hawai`i who are or were eligible for utility allowances from May 6, 2003 to the entry of the order.[13] *Waters* was quite similar to this case: plaintiffs alleged that the State had failed to update utility allowances to account for increased utility rates as required by federal laws and regulations. As explained in more detail below, class certification is just as appropriate in this case as it was in *Amone* and *Waters*.

[13] *See* Exhibit "D" to attached Declaration of Paul Alston.

A. The Proposed Class

All persons who are, were, or will be head of household tenants at Westlake Apartments entitled to receive utility allowances from the City and County of Honolulu as part of their section 8 subsidy at any time during which Defendants failed or fails to provide properly-calculated utility allowances for Westlake Apartments.

B. The requirements of Rule 23(a) are met.

In deciding motions for class certification, the Court must apply Rule 23 liberally and flexibly.[14] The allegations of the Complaint, which must be taken as true,[15] demonstrate the existence of common claims that are best addressed through class-wide relief.

Under Rule 23, Plaintiffs must meet the four requirements of Rule 23(a) and at least one of Rule 23(b). The elements of Rule 23(a) are:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

The proposed class satisfies all these criteria.

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[14] *See Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997).

[15] *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975), *cert. denied*, 492 U.S. 816 (1976).

1. Joinder is impractical given the large number of potential class members and the difficulty of identifying all former and future potential plaintiffs.

Plaintiffs satisfy the "numerosity" requirement of Rule 23(a)(1), as the proposed class is "so numerous that joinder of all members is impracticable." Impracticability, as used in Rule 23, does not mean impossibility, but merely the inconvenience of joining all members in a single action.[16]

In determining impracticability, Courts first look to the size of the class — size alone can provide a basis for certification.[17] A proposed class presumptively satisfies the numerosity requirement where the class exceeds 40 members.[18]

The proposed class is sufficiently large to meet the numerosity requirement: all present, former, and future tenants at Westlake who received or will in the future receive inadequate utility allowances. Westlake consists of 95 subsidized units. Compl. at ¶ 2. Potential class members include: the 95 present heads of household at Westlake, all heads of households who have left Westlake

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[16] *Harris v. Palm Springs Alpine Estates Inc.*, 329 F.2d 909, 913-914 (9th Cir. 1964).

[17] *Stewart v. Abraham*, 275 F.2d 220, 226-26 (3d Cir. 2001), *cert. denied*, 536 U.S. 958 (2002).

[18] *See Amone*, 226 F.R.D. 677, 684 (D. Haw. 2005); *see also Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1964), *vacated on other grounds*, 459 U.S. 810 (1982) (indicating an inclination to find class cert solely based on the existence of 39 class members); *Harris*, 329 F.2d at 913-4.

and who received inadequate utility allowances, and all future heads of households who will move into Westlake before the allowance is recalculated as units turn over. The sheer size of this group meets the numerosity requirement.

Courts also consider other indicia of impracticability as plus factors in determining numerosity, such as the difficulty of locating affected persons, the existence of unknown future members, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought.[19] Each of these plus factors weighs in favor of certification. First, former heads of household may be difficult to locate and information about them is held solely in the Defendants' private records. Second, the class includes unknown future members. Third, the individual claimants have low-incomes and relatively small claims, so they are unlikely to pursue separate suits. Finally, injunctive and declaratory relief are among the remedies sought.

This large group of plaintiffs could not be practically joined in a single action. Further, litigating each of the potential plaintiff's claims in separate actions would be a costly and unnecessary complication and burden upon the Court. Given the size and characteristics of the class, the numerosity requirement is met.

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[19] *Jordan*, 669 F.2d at 1319-1320.

2. There are questions of law or fact common to the class.

Plaintiffs satisfy the "commonality" requirement of Rule 23(a)(2) as there are "questions of law or fact common to the class." All that is required to meet this test is a single question of law or fact related to the resolution of the litigation.[20] Commonality is given a "permissive application, and it is usually found to be satisfied."[21]

The core legal and factual issues that need be decided would be necessary to the resolution of any case by a Westlake tenant on the adequacy of the utility allowance. Utility allowances are calculated based on estimates of reasonable consumption levels and, once properly determined, apply uniformly to all class members (with the exception of households with disabled members who have medical needs that require additional utility consumption). The common questions of fact and law raised in this action are:

- Did the Defendants fail to raise utility allowances in violation of law?
- If so, when should they have raised the utility allowances and to what amount?
- Did the Defendants' uniform misrepresentations that the rents had been calculated in accordance with federal law constitute unfair and deceptive practices under Hawai`i law?

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[20] *Jordan*, 669 F.2d at 1320; *Blackie*, 524 F.2d at 904.
[21] *Hum v. Dericks*, 162 F.R.D. 628, 638 (D. Haw. 1995).

- Did the Defendants breach the terms of their form leases with Westlake tenants by miscalculating utility allowances?

These questions do not require case-by-case analysis, but apply to the class as a whole. For this reason, the commonality requirement is met.

3. The named plaintiffs' claims are typical of the class' claims and are not subject to unique defenses.

Plaintiffs satisfy the "typicality" requirement of Rule 23(a)(3) as "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The typicality and commonality requirements overlap and tend to merge.[22]

Typicality basically checks to ensure that the named plaintiffs' claims are similar to those of class members, not subject to unique defenses, and not unique cases alleging harm different from those of the class.[23]

Here, Plaintiffs' injuries are not unique, but rather are characteristic of those suffered by every other member of the class. In cases like this where the claims of the named plaintiffs are based on the "same course of injurious conduct"

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[22] *See Gen'l Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982) ("The commonality and typicality requirements of Rule 23 (a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiffs claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence").

[23] *See generally Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

as the proposed class claims — namely the Defendants' failure to update the utility allowances and false certifications — their interests will be sufficiently aligned to satisfy the typicality requirement.[24]

Because the conduct leading to the named plaintiffs injuries are identical to those of the proposed class members, the typicality requirement is met.

4. The named plaintiffs will adequately and fairly represent the interests of the class.

Plaintiffs satisfy the "adequacy" requirement of Rule 23(a)(4) because they can "fairly and adequately protect the interest of the class." The named Plaintiffs are adequate because (1) their "attorn[eys are] qualified, experienced, and generally capable to conduct the litigation" and (2) their "interests [are not] antagonistic to the interests of the class."[25]

First, Plaintiffs' counsel has litigated numerous individual and class actions involving federal regulatory and statutory schemes, including cases specific to utility allowances in federally subsidized housing, and is undoubtedly qualified and capable to conduct the litigation. The extensive class action experience of proposed class counsel is detailed in the attached declaration.[26]

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[24] *See Jordan*, 669 F.2d at 1321; *Amone v. Aveiro,* 226 F.R.D. 677, 686 (D. Haw. 2005).

[25] *Jordan*, 669 F.2d at 1323. *See also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

[26] *See* Declaration of Paul Alston.

Second, as in other actions where plaintiffs sought agency compliance with statutory and constitutional requirements, the key interests of the Plaintiffs are co-extensive with the class.[27] In the absence of actual or potential conflicts, this part of the adequacy requirement is met.[28] Here, all named Plaintiffs and unnamed class members, including potential future residents, have identical interests in pursuing an accurate determination of what prior utility allowances should have been and an appropriate permanent injunction setting appropriate rates for the future.

As Plaintiffs are represented by appropriate counsel and no inherent conflict exists between the named Plaintiffs and the class, the proposed class representatives will fairly and adequately protect the interests of the class.

C. The requirements of Rule 23(b)(2)(b) are met.

In addition to satisfying the prerequisites of Rule 23(a), Plaintiffs can satisfy the requirement of Rule 23 to meet at least one of the three standards set forth in Rule 23(b). Plaintiffs seek certification under both Rule 23 (b)(2) and (b)(3). Rule 23(b)(2) provides:

> A class action may be maintained if Rule 23(a) is satisfied and if … (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief is appropriate respecting the class as a whole.

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[27] *Jordan*, 669 F.2d at 1323; *Amone*, 226 F.R.D. at 686.
[28] *See, e.g.*, *Hanlon*, 150 F.3d at 1020.

As explained above, Defendants calculated the utility allowances for the plaintiff class in a uniform manner and uniformly failed to update those allowances. Defendants also made uniform misrepresentations stating that rent had been properly calculated and entered into uniform leases that incorporated by reference the requirement that Defendants properly calculate rent. In short, Defendants acted and refused to act in the same way with respect to the class as a whole. Plaintiffs are seeking final injunctive relief on behalf of the entire class to require that the utility allowances be updated, both now and in the future. Compl. at ¶ 7. Certification is plainly appropriate pursuant to Rule 23(b)(2).

The fact that Plaintiffs are also seeking monetary damages does not bar certification under Rule 23(b)(2).[29] Here, Plaintiffs are seeking an injunction requiring Defendants to update utility allowances on an ongoing basis that will benefit Westlake's current and future tenants for years to come.

In any event, as discussed below, certification is also appropriate pursuant to Rule 23(b)(3) and so this Court need not decide whether Plaintiffs are seeking predominantly injunctive relief as opposed to damages. Alternatively, this

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[29] *See Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir. 1986) ("Class actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages."). *See also Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003) (whether damages was predominant relief sought so as to make certification under Rule 23(b)(3) more appropriate than certification under Rule 23(b)(2) is

Court could certify a subclass as to injunctive relief pursuant to Rule 23(b)(2) and a subclass as to damages pursuant to Rule 23(b)(3).

D. The requirements of Rule 23(b)(3) are met.

Rule 23(b)(3) provides:

A class action may be maintained if Rule 23(a) is satisfied and if: …

> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

The common issues predominate over any individual differences, which will necessarily be limited to applying a formula to calculate damages. Further, a class action is far superior to the federal court and Defendants being faced with over a hundred nearly identical claims by individual Plaintiffs premised on identical theories and requiring identical discovery. For these reasons, the predominance requirement is met.

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based on "the specific facts and circumstances of each case").

1. The common questions of fact and law predominate over any individual differences.

Questions common to the class predominate over questions affecting only individual members. Common questions will be found to predominate where there is a common course of conduct over a period of time directed against members of the class and violating common statutory provisions.[30] Here, Defendants' breaches of its statutory, regulatory, and contractual obligations are common to all prospective class members and are the main issue of the suit.

The Defendants' calculation of the utility allowance is applicable to all residents of Westlake Apartments (except for certain disabled persons, as noted above). For all members of the putative class, the Defendants failed to regularly revise the utility allowances as utility rates increased. As a result, all members were damaged by not being provided a sufficient utility allowance and being charged over 30% of their income for rent.

Though the damages each class member has suffered is different — depending on the time frames that members resided at Westlake — these differences are minor when viewing these claims as a whole. Individual damage

[30] *Epstein v. Weiss*, 50 F.R.D. 387, 391 (D.C.E.D. La. 1970) (citing *Harris*, 329 F.2d at 914).

issues do not prevent class certification where damages are ascertainable and can be computed and distributed by formula, as is the case here.[31]

The method of calculating damages will be consistent across the class. Each household at Westlake currently receives a $40 utility allowance. To structure relief, the Court must determine, based on when increases to utility rates occurred, when the Defendants' should have raised the allowance for the project and to what dollar amount. Once the Court determines this new schedule of what the allowances should have been during each relevant period, each individual class member's recovery can be calculated formulaically by applying the schedule to the periods during which a class member resided at Westlake.

2. The proposed class action is superior to any other method of resolution.

Resolution of all class members' claims in a single action is superior to other methods for the fair and efficient adjudication of this controversy. The Defendants' acts are common to all class members and a class action will allow the court to consolidate their identical causes of actions into a single suit.[32] Further,

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[31] *See In re Hawai'i Beer Antitrust Litigation*, 1978 U.S. Dist. LEXIS 15905, *15 (D. Haw. 1978).

[32] *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1235 (9th Cir. 1996) ("Last, but certainly not least, the district court must find that a class action is superior to other methods of adjudication. Fed. R. Civ. P. 23(b). Where class wide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation.")

class action treatment is the only way to achieve fairness in this case, since few potential class members would have the means to undertake individual litigation to recover the relatively modest individual damages at issue.[33]

In the absence of class certification, few class members would have any practical, meaningful redress against the Defendants. As such, a class action is the superior method of resolving this case.

Because the requirements of 23 are met, the class should be certified.

E. Notice should be provided to all class members in the attached form.

When a class action is certified under Rule 23(b)(3), class members must be provided the "best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). The best notice available here is individual notice to class members by mailings incorporated into the Defendants' correspondence with its tenants, as conducted in the regular course of business, and separate mailings to former tenants. Current and former tenants should be easily identifiable from within the Defendants' existing records. Individual notification by mail is required

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[33] *See Mace v. Van Ru Credit Corp*., 109 F.3d 338, 344 (7th Cir. 1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.")

where, as here, the names and addresses of most class members are known.[34] Plaintiffs proposed notice is attached as Exhibit "1."

The proposed notice meets all the requirements of Rule 23(c)(2): it fairly and accurately describes the action, the class, the claims and defenses, the right of class members to enter an appearance through an attorney, the right to be excluded, the exclusion process, and the binding effect of a class judgment in plain, easily understood language.

The Court has broad discretion to allocate notification tasks and costs under Rule 23(c)(2).[35] A well-recognized exception to the general rule that a party seeking the class action must bear the costs of notice is "when the task ordered can be performed as part of the defendant's regular course of business."[36] Defendants should be responsible for mailing the notifications to current tenants at least because they communicate with their tenants on a monthly basis concerning the

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[34] *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974); 1 Herber Newberg & Alba Conte, *Newberg on Class Actions* § 8:2 (4th ed. 2002).

[35] *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355; 98 S. Ct. 2380, 2391-92 (1978) ("Rule 23(d) ... authorizes a district court in appropriate circumstances to require a defendant's cooperation in identifying the class members to whom notice must be sent.").

[36] *Id*. at 358, 98 S. Ct. at 2393 (where court requires defendant to perform tasks necessary for class notice, "it may be appropriate to leave the costs where it falls because the task ordered is one that the defendant must perform in any event in the ordinary course of its business").

tenants' income and rents and can include the notice as part of their regular course of business at little or no additional cost.

IV. CONCLUSION

This action meets all the requirements for class certification prescribed by Rule 23. For the foregoing reasons, Plaintiffs respectfully request that this Court certify this action as a class action.

DATED: Honolulu, Hawai'i, September 5, 2008

/s/ Jason H. Kim
VICTOR GEMINIANI
WILLIAM H. DURHAM
GAVIN K. THORNTON
LAWYERS FOR EQUAL JUSTICE

PAUL ALSTON
JASON H. KIM
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

BEVERLY BLAKE, STEPHANIE CAMILLERI, ARLENE SUPAPO, individually, and on behalf of all persons similarly situated, Plaintiffs, vs. CRAIG NISHIMURA, in his official capacity as Acting Director of the Department of Facility Maintenance, City and County of Honolulu; CITY AND COUNTY OF HONOLULU, a municipal corporation, Defendants.	CIVIL NO. 08-00281 SPK LEK (Contract) (Declaratory Judgment) (Other Civil Action) Class Action **DECLARATION OF PAUL ALSTON**

DECLARATION OF PAUL ALSTON

I, Paul Alston, declare that:

1. I am an attorney at law licensed to practice before this Court and am one of the attorneys for Plaintiffs Beverly Blake, Stephanie Camilleri, and Arlene Supapo in this matter.

2. I make this Declaration based on my personal knowledge and am competent to testify about the matters contained in this Declaration.

3. Attached as Exhibit D is a true and correct copy of the Order Granting in Part Plaintiffs' Motion for Class Certification Filed August 10, 2005,

entered on October 3, 2005 in *Waters v. Housing and Community Development Corp. of Hawaii*, Civ. No. 05-1-0815-05 EEH.

4. The law firm of Alston Hunt Floyd & Ing has extensive experience in class actions and has been found to be qualified to act as class counsel in dozens of cases, many of them involving claims relating to federal and state benefits. I have served as lead counsel in over 25 class actions.

5. Class actions in which Alston Hunt Floyd & Ing served as lead or co-lead class counsel include the following:

a. In 1992, *Felix v. Cayetano*, Civil No. 93-00367 (DE) was brought on behalf of a Maui public school student whose guardian was compelled to sue the Governor and the State of Hawai`i because federally-guaranteed mental health and educational services were not being provided as required by law. The number in the class was approximately 13,000. Alston Hunt Floyd & Ing was co-lead counsel for the *Felix* plaintiffs.

b. In 1995, Alston Hunt Floyd & Ing filed a class action lawsuit, *Burns-Vidlak v. Chandler*, Civil No. 95-00892, against the State of Hawai`i and the Department of Human Services for disability discrimination under section 504 of the Rehabilitation Act and the Americans with Disabilities Act. The U.S. District Court for the District of Hawai`i certified a class action. Summary judgment was entered against the State of Hawai`i on behalf of the class on the issue of liability for compensatory

damages under Section 504 of the Rehabilitation Act. Subsequently, over 300 individual compensatory damage actions were filed. Alston Hunt Floyd & Ing was lead counsel for the *Burns-Vidlak* case.

c. In 1998, Alston Hunt Floyd & Ing filed *Sterling v. Chandler* on behalf of a class of plaintiffs and against the Department of Human Services, State of Hawai`i, for discrimination in medical insurance coverage for disabled persons. The lawsuit was based on the State's continued discrimination against the disabled, for which the *Burns-Vidlak* class action was filed. Summary judgment was entered on behalf of the class members. Alston Hunt Floyd & Ing was lead counsel for the *Sterling* plaintiffs.

d. In *Pasatiempio by Pasatiempo v. Aizawa*, 103 F.3d 796 (9th Cir. 1996), parents and students brought a class action against the State of Hawai`i Department of Education alleging that the state failed to comport with the procedural requirements of the Individuals with Disabilities Education Act and the Rehabilitation Act in administering evaluation of students. The Ninth Circuit ruled in favor of the plaintiff class. Alston Hunt Floyd & Ing was lead counsel for the plaintiff class.

e. In *Kihara v. Chandler*, Civil No. 00-1-2847-09 (SSM), Alston Hunt Floyd & Ing filed a class action lawsuit on behalf of a class of plaintiffs alleging that the State of Hawai`i

Department of Human Services incorrectly reduced the General Assistance benefits to the plaintiffs' class. The suit sought reimbursement of GA benefits wrongfully withheld; general, special, and punitive damages against the defendant; and reimbursement of costs and expenses, including attorneys' fees. On April 29, 2002, the court approved a settlement for the class which including the establishment of a fund for the payment of claims to members of the class certified in Kihara in the amount of $1,500,000.00. Alston Hunt Floyd & Ing was co-lead counsel for the plaintiff class.

f. In *David Garner et al. v. State of Hawai`i, Department of Education*, Civil No. 03-1-000305, Alston Hunt Floyd & Ing filed four class action lawsuits in the First Circuit alleging that the Department of Education failed to pay substitute teachers properly according to law. Class certification has been granted in all of these cases. Alston Hunt Floyd & Ing is co-lead counsel for the plaintiff class.

g. In *Waters v. Housing and Community Development Corp. of Hawaii*, Civil No. 05-1-0815-05 EEH, Alston Hunt Floyd & Ing (along with Lawyers for Equal Justice) filed a class action lawsuit against the Housing and Community Development Corporation of Hawaii ("HCDC") alleging that the HCDC had failed to update utility allowances for hundreds of tenants who had lived or were living in federally-subsidized

housing managed by the HCDC. This firm and Lawyers for Equal Justice obtained a $2.3 million settlement. This action and others filed by this firm and Lawyers for Equal Justice also caused the HCDC to finally update utility allowances and institute a process for keeping them updated in the future.

h. In *Amone v. Aveiro*, CV04-00508 ACk/BMK, Alston Hunt Floyd & Ing (along with Lawyers for Equal Justice) filed a class action lawsuit against the HCDC alleging that the HCDC had failed to provide supplemental utility allowances for disabled tenants who had lived or were living in federally-subsidized housing managed by the HCDC and who, because of their medical needs, consumed a greater amount of utilities than other tenants. This firm and Lawyers for Equal Justice obtained a permanent injunction in favor of the plaintiff class.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Honolulu, Hawai`i on September 5, 2008.

/s/ Paul Alston
PAUL ALSTON

Of Counsel:
LAWYERS FOR EQUAL JUSTICE

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Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

JACK WATERS individually, and on behalf of all persons similarly situated, Plaintiff, v. HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I, a duly organized and recognized agency of the State of Hawai'i; HHA WILIKINA APARTMENTS, INC., DOES 1-25, Defendants.	CIVIL NO. 05-1-0815-05 EEH (Contract) **ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR CLASS CERTIFICATION FILED ON AUGUST 10, 2005** Class Action

EXHIBIT D

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION FILED ON AUGUST 10, 2005

Plaintiffs' Motion for Class Certification, filed on August 10, 2005, came on for hearing before the Honorable Eden E. Hifo in her Courtroom on September 21, 2005 at 9:45 a.m. Shelby Anne Floyd, Esq., and Gavin K. Thornton, Esq., appeared on behalf of Plaintiffs, Dorothy Sellers, Esq. appeared on behalf of Defendant Housing and Community Development Corporation of Hawaii. Having considered the memoranda filed by the parties, the arguments of counsel, and the record and files in this action,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Motion for Class Certification, filed on August 10, 2005, is GRANTED IN PART as follows:

1. The Court is satisfied that this case meets the Rule 23(a) and 23(b)(3), H.R.C.P., requirements of class certification and therefore GRANTS class certification in this matter. The following class (the "Class") is certified pursuant to H.R.C.P., Rule 23(a) and (b)(3) with Plaintiff Jack Waters as the class representative:

   persons that currently reside, or resided at any point from May 6, 2003 to the present in an HCDCH project-based Section 8 project in which residents receive or should receive utility allowances

2. Plaintiff's motion to certify a subclass is denied without prejudice.

3. The Court defers ruling on the proposed notice of pendency of class action. The parties are ordered to confer concerning a joint proposed

notice after the disposition of Defendant's pending motion for summary judgment. If the parties are unable to agree upon notice, a status conference will be held on this issue.

OCT 03 2005

DATED: Honolulu, Hawai'i, _____.

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

for DOROTHY SELLERS
Deputy Attorney General
Attorney for Defendant
HOUSING AND COMMUNITY DEVELOPMENT
CORPORATION OF HAWAI'I

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

BEVERLY BLAKE, STEPHANIE CAMILLERI, ARLENE SUPAPO, individually, and on behalf of all persons similarly situated, Plaintiffs, vs. CRAIG NISHIMURA, in his official capacity as Acting Director of the Department of Facility Maintenance, City and County of Honolulu; CITY AND COUNTY OF HONOLULU, a municipal corporation, Defendants.	CIVIL NO. 08-00281 SPK LEK (Contract)(Declaratory Judgment)(Other Civil Action) Class Action **NOTICE OF PENDENCY OF CLASS ACTION**

NOTICE OF PENDENCY OF CLASS ACTION

TO ALL PERSONS RECEIVING THIS NOTICE WHO ARE OR WERE TENANTS OF WESTLAKE APARTMENTS.

EXHIBIT 1

I. WHY YOU SHOULD READ THIS NOTICE

Your rights and the rights of others may be affected by the class action lawsuit known as BLAKE, CAMILLERI, and SUPAPO, individually and on behalf of all persons similarly situated v. NISHIMURA, in his official capacity as Acting Director of the Department of Facility Maintenance, and the CITY AND COUNTY OF HONOLULU, a municipal corporation, Civil Number 08-00281 SPK LEK in the United States District Court for the District of Hawai‘I (referred to in this notice as the “Class Action”). Notice of this Class Action is being provided by mail to all known Class members.

II. THE CLASS

The Court has certified a group, or “class,” of plaintiffs in this Class Action. The Class is defined as:

All persons who are, were, or will be head of household tenants at Westlake Apartments entitled to receive utility allowances from the City and County of Honolulu as part of their section 8 subsidy at any time during which Defendants failed or fails to provide properly-calculated utility allowances for Westlake Apartments.

Because you are receiving this notice, you are a member of the Class.

III. THE LITIGATION

This Class Action involves claims for reimbursements of excess rents paid by public housing tenants who receive utility allowances for utility consumption.

Plaintiffs BEVERLY BLAKE, STEPHANIE CAMILLERI, and ARLENE SUPAPO, allege that the City and County of Honolulu has failed to adjust utility allowances as required by law and therefore charged excessive rents to tenants of Westlake Apartments. The Plaintiffs further allege that the City and County of Honolulu's certification that rents were properly calculated constituted an unfair and deceptive practice. Plaintiffs seek recovery of the overpayments, interest, trebled and statutory damages, injunctive relief, and additional relief as allowable by law.

The Defendants deny these allegations and the Court has not ruled on the merits of Plaintiffs' claims.

IV. REMAINING IN OR EXCLUDING YOURSELF FROM THE CLASS:

A. Staying in the Class:

You do not need to do anything to remain in the Class. If you remain in the Class, you will be automatically and legally bound by all proceedings, orders, and judgments entered in connection with the Class Action, whether favorable or unfavorable. This means that if you remain in the Class and the

judgment is favorable, you may receive a proportionate share of the judgment. If you remain in the Class and the judgment is not favorable, you will be bound by the adverse decision and will have no right to relitigate any of the claims asserted on behalf of the Class. You will be represented by Plaintiffs and their attorneys for the purposes of this Class Action.

B. Excluding Yourself from the Class / "Opting Out":

You may choose to "opt out" and not be a Class member. You may then retain your own attorney and take legal action on your own. If you exclude yourself from the Class, you will not be bound by court orders or judgments entered in connection with this Class Action. You must "opt out" to exclude yourself from this Class Action litigation.

If you wish to opt out and <u>not</u> participate in this Class Action, please send written notice of that intent to Plaintiffs' counsel, whose address is ALSTON HUNT FLOYD & ING, ASB Tower, Suite 1800, 1001 Bishop Street, Honolulu, HI 96813, Attn: Westlake Class Action. A request to opt out and be excluded from the class must contain your: (1) legal name, (2) address, (3) telephone number, (4) a clear written request to be excluded from the class, (5) the case reference number, Civil No. 08-00281 and (6) your signature. Any request to opt out must be received by Plaintiffs' counsel by [30 days from the date of mailing] in order to be effective.

V. PLAINTIFFS AND THEIR COUNSEL

The Court has appointed Plaintiffs BEVERLY BLAKE, STEPHANIE CAMILLERI, and ARLENE SUPAPO, and their counsel to act on behalf of the Class for the purposes of the Class Action. Counsel for Plaintiffs may be reached at the following address:

ALSTON HUNT FLOYD & ING
American Savings Bank Tower
1001 Bishop St., 18th Floor
Honolulu, HI 96813
ATTN: Westlake Class Action

Lawyers for Equal Justice
PO Box 37952
Honolulu, HI 96837-0952

PLEASE DO NOT TELEPHONE OR SEND CORRESPONDENCE TO THE COURT REGARDING THIS NOTICE

DATED: Honolulu, Hawai‘i, _____, 2008

_____
BY ORDER OF THE UNITED STATES DISTRICT COURT FO R THE DISTRICT OF HAWAI‘I

THE HONORABLE SAMUEL P. KING

CERTIFICATE OF SERVICE

IT HEREBY CERTIFY that on the dates and methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known address:

Served electronically through CM/ECF:

Marie Manuele Gavigan, Esq. September 5, 2008
mgavigan@honolulu.gov

Attorney for Defendants

DATED: Honolulu, Hawai`i, September 5, 2008.

/s/ Jason H. Kim
VICTOR GEMINIANI
WILLIAM H. DURHAM
GAVIN K. THORNTON
LAWYERS FOR EQUAL JUSTICE

PAUL ALSTON
JASON H. KIM
ALSTON HUNT FLOYD & ING

Attorneys for Plaintiffs