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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

TONY KORAB, TOJIO CLANTON, KEBEN ENOCH, CASMIRA AGUSTIN, ANTONIO IBANA, AGAPITA MATEO, and RENATO MATEO, each individually and on behalf of those persons similarly situated, Plaintiffs, vs. PATRICIA MCMANAMAN in her official capacity as Director of the State of Hawaii Department of Human Services; and KENNETH FINK in his official capacity as State of Hawai'i, Department of Human Services, Med-QUEST Division Administrator, Defendants.		CIVIL NO. 10-00483 JMS KSC REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING NEW RESIDENTS; CERTIFICATE OF SERVICE Hearing Date: June 2, 2010 Time: 9:00 a.m. Judge: Hon J. Michael Seabright

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REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING NEW RESIDENTS

1. The Court's Prior Order Did Not Deal With the New Residents

Plaintiffs complain that Defendants "ignored" this Court's prior Order and that the analysis in the Court's prior Order applied to the New Residents as well as the COFA residents. This is not correct. As set forth in footnote 1 of the Order Denying Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted as to COFA Residents: "Although the briefing also addressed Plaintiffs' claims as they relate to New Residents, the parties agreed at the November 2, 2010 hearing that the Court would limit its analysis at this time to the COFA residents only."

Additionally, Defendants previous motion was made pursuant to FRCivP, Rule 12(b)(6), requiring Defendants admit to the "truth" of the allegations. As this Court is now aware, many of the allegations are not true and must be rejected in light of the evidence presented. See *ACLU Foundation of Southern California v. Barr*, 952 F.2d 457 (C.A.D.C. 1991) (Rule 12(b)(6) is not a tool for testing the truth of allegations or for determining whether a plaintiff has evidence to back up those allegations); *Reeves v. City of Jackson, Mississippi*, 532 F.2d 491 (5th Cir. 1976) (The district court should give the plaintiff the full protection a federal court claim should receive at least until it can see what the real facts are; if after full

development of the facts, the plaintiff obviously is not entitled to relief, the claim may be washed out on summary judgment).

Defendants are entitled to have their Motion heard based on the facts, not unsupported allegations.

2. Plaintiffs are Not Correct in Alleging the New Residents Had Been Receiving State-Funded Medical Assistance Benefits Prior to BHH

Plaintiffs assert, without evidentiary support, that the "New Residents" were receiving state-funded medical benefits prior to becoming eligible to receive them through BHH. This is simply not true. Exhibit C to Plaintiffs' Opposition does not support this assertion. It states that "immigrants who have been legally residing in the United States for less than five (5) years may also be eligible [for BHH]." *Id.* at 1.

Even more telling is the fact that none of the Plaintiffs' Declarations state they were receiving state-funded medical benefits prior to becoming eligible for BHH. Plaintiffs do discuss the Immigrant Health Initiative (IHI), but, as explained below, this is not a state-funded medical assistance program.

The undisputed material facts supporting Defendants' Motion, including citations to evidentiary support are:

- The term "New Residents" as applied in the present lawsuit refers to non-pregnant legal immigrants, age nineteen or older, who have been legally residing in the United States for less than five years. Dkt. No. 66-1. at 3.

- Since 1996, New Residents have not been eligible for the federal Medicaid program and have not received state-funded medical assistance benefits through the QUEST, QExA, QUEST-Net, QUEST-ACE, fee-for service, or SHOTT programs, collectively referred to as the Other Programs by Plaintiffs. Dkt. No.62-3.
- The Basic Health Hawaii (BHH) program is a state-funded medical assistance program only for certain aliens, including New Residents, who are ineligible for the federal Medicaid program. Dkt. No.62-3.
- On July 1, 2010, BHH was implemented and New Residents became eligible for BHH, subject to the program limitations. Dkt. No.62-3.
- Certain New Residents were deemed into BHH pursuant to HAR § 17-1722.3-33(b). Dkt. No.62-3.
- The New Residents that were deemed into BHH and have continued to meet the eligibility requirements have received state-funded BHH benefits from the State of Hawaii since July 1, 2010. Dkt. No.62-3.
- Should this Court decide to restore the status quo that existed on June 30, 2010, the New Residents would no longer be eligible to receive state-funded medical assistance benefits from the State of Hawaii. Dkt. No.62-3.

Plaintiffs complain that Dr. Fink's statements are "unsubstantiated." Their complaint is irrelevant. Plaintiffs must do more than simply suggest sworn testimony is untrue, they most produce evidence that actually refutes it.

3. The Immigrant Health Initiative Is Not a State-Funded Medical Assistance Benefits Program

Plaintiffs' counsel simply do not understand IHI. The facts regarding IHI, with evidentiary support, are as follows:

- In response to the enactment of PRWORA and recognizing the impact this federal legislation would have on the health care safety-net, the Hawaii legislature appropriated funds for the safety-net providers who would otherwise have provided uncompensated care to the affected population. This provider subsidy was called the Immigrant Health Initiative (IHI), and the State contracted with an entity to disperse the funding to safety-net providers. Dkt. No. 66-1 at 3-4.
- Plaintiffs suggest that New Residents who became ineligible for federally funded medical assistance as a result of PRWORA would have had no access to care absent the existence of IHI. This is incorrect. The IHI contract is simply a mechanism for the DHS to transfer funds appropriated by the Hawaii State Legislature to the safety-net providers who would, regardless of the existence of the IHI, be treating the additional New

Residents who became newly uninsured due to PRWORA. Dkt. No. 66-1 at 4.

- As a subsidy to providers, the IHI funds are consumed as uncompensated care is provided to patients. IHI is not a medical assistance program. Individuals do not receive any benefit package. In fact, no individual related to IHI receives an eligibility determination by the State, is entered into a State information system, or receives an eligibility identification card. IHI does not exist in statute or administrative rule; it is simply an appropriation that gets dispersed by a contractor to safety-net providers. Dkt. No. 66-1 at 4.
- DHS believes that the Hawaii Primary Care Association ("HPCA"), has been awarded the IHI contract since 1997, and DHS has recently received State Procurement Office approval to sole source the IHI contract to the HPCA using Rainy Day funds appropriated through Act 191, Session Laws of Hawaii 2010. The HPCA's mission is "to improve the health of communities in need by advocating for, expanding access to, and sustaining high quality care through the statewide network of community health centers." Dkt. No. 66-3. (http://hbe.ehawaii.gov/documents/business.html?fileNumber=73741D2).

- The community health centers are federally qualified health centers ("FQHCs"), "non-profit organizations [that] exist in federally-recognized areas where residents have barriers to getting health care." Dkt. No. 66-4. (http://www.hawaiipca.net/9/what-are-chcs).
- FQHCs "provide services to all with fees adjusted based on ability to pay." Dkt. No. 66-5. (http://bphc.hrsa.gov/about/index.html)
- They serve people of all ages, with or without health insurance, and of all races and ethnicities. *Id*.
- The FQHCs provide primary care services to uninsured or underinsured New Residents as part of their mission "to establish access to primary health care services for everyone." Dkt. No. 66-6. (http://www.hawaiipca.net/22/mission).
- This is possible because over one third of the FQHCs' income in Hawaii comes from private and government grants and contracts, such as the IHI. Dkt. No. 66-7. (http://www.statehealthfacts.org/profileind.jsp?ind=428&cat=8&rgn=13).
- Therefore, it is clear that New Residents were never excluded from obtaining services from FQHCs, either before or after enactment of PRWORA. Neither IHI nor BHH had any impact on a New Resident's ability to receive services from a FQHC.

- Unlike IHI, BHH does provide medical assistance to legal aliens ineligible for Medicaid. Upon implementation of BHH, certain legal aliens, including New Residents receiving a State human services benefit were deemed into BHH and not subject to the enrollment limit. HAR §17-1722.3-32, et seq.
- BHH is a new and additional benefit, and it is voluntary. Deemed individuals can disenroll. Dkt. No. 66-1 at 5; HAR §17-1722.3-12(4).

As BHH is an additional benefit, it is incorrect that Plaintiffs claim that New Residents were deemed into an even more inadequate health benefits program, BHH. BHH provides some services that are not available through FQHCs, and New Residents who use up their allotted BHH benefits still have access to all of the services that are available through the FQHCs. If the New Resident is enrolled in BHH and has not used up his allotted BHH benefits, then the FQHC may bill the BHH health plan. If the New Resident is uninsured or has exhausted his BHH benefits, then the FQHC may be reimbursed through IHI, provided there are contract funds remaining. Again, the appropriations for IHI are limited, and the DHS will not pay the HPCA any more than the amount appropriated by the Legislature.

4. Defendants Stand By Their Analysis of Plaintiffs' ADA Claim

After reviewing Plaintiffs' Opposition regarding their ADA claim, Defendants stand by their earlier analysis. *Olmstead v. L.C.*, 527 U.S. 581 (1999),

and the cases that follow it, do not stand for the proposition that a state is required to provide every alien that is ineligible to receive federal benefits with benefits comparable to benefits which citizens and eligible aliens receive. Plaintiffs' counsel is simply trying to have this Court order that their judgment be substituted in place of the judgment made by the Executive Branch of State of Hawaii.

5. BHH Does Not Violate the Naturalization Uniformity Rule

The naturalization clause gives Congress power to establish a uniform Rule of Naturalization. U.S. Const. art. I, § 8, cl. 4. The exact grant of power to Congress is: "To establish a uniform rule of Naturalization and uniform rules on the subject of Bankruptcies throughout the United States." Although the term "uniform rule" appears in both the context of naturalization and bankruptcies, the concept of "uniformity" has not stopped states from enacting their own diverse exemption policies, which have been allowed by Congress. Since the naturalization and bankruptcy clauses appear together, the question naturally arises whether the word "uniform" has the same meaning and operation in both grants of power. In the context of a bankruptcy case, the Supreme Court has ruled that the standard of **naturalization** should be the same in each and every state. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 275-77 (1827).

Courts have had few occasions to address the interpretive problem of the word "uniform" in the naturalization clause. The issue of uniformity **has** arisen in

cases where the alien seeking citizenship finds his or her eligibility for naturalization affected by state law. For example, the naturalization laws deny eligibility on the basis of an alien's violation of the state's criminal law. Immigration and Nationalization Act of 1952, § 316, 8 U.S.C. § 1427(a).

However, what if the state defines its criminal offenses in a unique manner? This issue was raised in *In re Lee Wee*, 143 F. Supp. 736 (S.D. Cal. 1956). There petitioner had been convicted of gambling, an act which was lawful in other nearby communities. His petition for naturalization was rejected on the ground that his gambling convictions evidenced lack of 'good moral character.' He sued in district court, arguing that the use of his state gambling convictions for naturalization purposes violated the constitutional mandate of uniformity. The court rejected his argument. More recently, however, in *Nemetz v. Immigration and Naturalization Service*, 647 F.2d 432 (4th Cir. 1981) Nemetz admitted engaging in activity violative of the state sodomy statute. As in *Lee Wee*, Nemetz' petition for naturalization was denied on the ground that he lacked the 'good moral character' required by the naturalization statute. The Fourth Circuit reversed. Noting that at least nine state had decriminalized consensual homosexual behavior, the court reasoned that to define good moral character' in terms of the state' sodomy statute would violate uniformity. *Id*. at 435.

Defendants do not belief that *Sudomir v. McMahon*, 767 F.2d 1456 (1985)

compels the conclusion drawn by Plaintiffs: That because Congress passed a law that prohibited states from providing federally-funded welfare benefits to New Residents, and at the same time allowed states to provide optional state-funded benefits, the rule of uniformity as to laws on naturalization requires the state-funded benefits be at the same level as the federally-funded benefits. Defendants are aware of no cases that would support this conclusion, as the issue does not appear to have been litigated to date.

6. Conclusion

Defendants' Motion should be granted because:

- The State of Hawaii did not violate Plaintiffs' Equal Protection rights under the United States Constitution;
- BHH does not discriminate based on alienage against aliens and in favor of citizens;
- The federal government, not the State, has chosen to exclude New Residents from Medicaid coverage;
- The Centers for Medicare & Medicaid Services has prohibited coverage for New Residents in QUEST, QExA, QUEST-Net, and QUEST-ACE;
- The Equal Protection Clause does not require that the State create a health care program for aliens whom Congress has chosen not to cover;

- To the extent the State has chosen to create a program just for aliens, it is subject to a rational basis standard of review;
- There is a rational basis for the State to provide to non-eligible aliens with different benefits than it provides to those who are eligible for federally-funded benefits;
- Plaintiffs have not shown Olmstead is applicable to the New Residents;
- Defendants have shown they have a viable defense to an Olmstead claim; and
- Plaintiffs have not stated a claim for discrimination based on disability.

DATED: Honolulu, Hawaii, May 16, 2011.

/s/ John F. Molay .
JOHN F. MOLAY
Deputy Attorney General
Attorney for Defendants

PATRICIA McMANAMAN and
KENNETH FINK

CERTIFICATION OF LENGTH OF MEMORANDUM

Pursuant to L.R. 7.5 counsel for Defendants hereby certifies the length of this Reply Memorandum to be 2,202 words, using the word count feature of Word 2007.

DATED: Honolulu, Hawaii, May 16, 2011.

/s/ John F. Molay .
JOHN F. MOLAY

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PATRICIA McMANAMAN and
KENNETH FINK