MARK J. BENNETT 2672
Attorney General of Hawaii

HEIDI M. RIAN 3473
JOHN F. MOLAY 4994
LEE-ANN N.M. BREWER 5583
Deputy Attorneys General
Department of the Attorney
General, State of Hawai'i
465 South King Street, Room 200
Honolulu, Hawaii 96813
Telephone: (808) 587-3050
Facsimile: (808) 587-3077
E-Mail: John.F.Molay@hawaii.gov

Attorneys for Defendants
LILLIAN B. KOLLER and KENNETH FINK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

TONY KORAB, TOJIO CLANTON and KEBEN ENOCH, each individually and on behalf of those persons similarly situated,

Plaintiffs,

vs.

LILLIAN B. KOLLER 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' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS; CERTIFICATE OF SERVICE

Date: November 2, 2010
Time: 9:00 a.m.
Judge: J. Michael Seabright

REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

1. Defendants' Motion to Dismiss Should Not Be Converted to a Motion for Summary Judgment

Plaintiffs initially complain that Defendants have produced and referred to public documents in their Motion to Dismiss. (Opposition at 1). They believe this Court should disregard these documents or, in the alternative, convert the Motion to Dismiss into a Motion for Summary Judgment. (Opposition at 1). Defendants note that a court may take judicial notice of a public document without converting a motion to dismiss into a motion for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001).

2. *Soskin* Was Decided Properly and Accurately Reflects Federal Law

Plaintiffs are in the unenviable position of urging this Court to ignore a published federal circuit court case (*Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004)) and instead asking this Court to adopt the reasoning of a number of cases decided by state courts, one of which is unpublished. (Opposition at 16-21). Defendants do not believe that it is appropriate to ignore a federal circuit court decision. After all, despite Plaintiffs' apparent belief to the contrary, the *Soskin* decision is the law, at least in the 10th Circuit. It is difficult to imagine the 9th Circuit would stray very far from a decision of a sister circuit with such similar facts.

In *Soskin*, the Tenth Circuit upheld as constitutional Colorado's decision to mitigate a budget shortfall by eliminating its optional coverage of certain aliens from Medicaid (those whom, unlike COFA Residents and New Residents, a State may cover under Medicaid). *Soski, supra, at* 1246, 1254-57.

After conducting an extensive discussion of *Graham* and *Mathews*, the court concluded that neither case determined the result. "Unlike *Graham*, here we have specific Congressional authorization for the state's action, the PRWORA. Unlike *Mathews*, here we have a state-administered program, and the potential for states to adopt coverage restrictions with respect to aliens that are not mandated by federal law." *Id*. at 1251. Instead, "[t]his case fits somewhere in between." *Id*. The Tenth Circuit noted that, unlike the federal law at issue in *Mathews*, the PRWORA "gives states a measure of discretion" that can take into account the impact on the state budget. *Id*. That is because states are "addressing the Congressional concern (not just a parochial state concern) that 'individual aliens not burden the public benefits system.'" *Id*. (quoting 8 U.S.C. §1601(4)). The court commented that "[t]his may be bad policy, but it is Congressional policy; and we review it only to determine whether it is rational." *Id*.

Finally, the Tenth Circuit borrowed reasoning from the Massachusetts Supreme Court's opinion in *Doe v. Comm'r of Transitional Assistance,* 437 Mass. 521, 773 N.E.2d 404 (2002) to explain how equal protection principles apply in cases that fall within the gray area between the bright lines of *Graham* and

Mathews. The court described what Congress did in the PRWORA as, "in essence," creat[ing] two welfare programs, one for citizens and one for aliens . . . . The decision to have separate programs for aliens and citizens is a Congressional choice, subject only to rational-basis review." *Id*. (citing *Mathews*, 426 U.S. at 78-83). When a state exercises the option to include more or fewer aliens in the aliens-only program, that decision "should not be treated as discrimination against aliens as compared to citizens. That aspect of the discrimination is Congress's doing . . . ." *Id*. at 1255-56. Thus, the Tenth Circuit held that rational basis review applies to such classifications. *Id*. Clearly, if the rational basis test applies, BHH passes constitutional muster.

3. Plaintiffs' ADA Claim Turns on Whether or Not Plaintiffs are Qualified to Receive Benefits

As to their ADA claim, Plaintiffs fail to recognize that the person claiming discrimination must first be qualified to receive the benefits before the ADA is applicable. They do not address this issue, focusing instead on the disability status of the Plaintiffs, and the effect of the State's decision. If we accept Plaintiffs' argument, then every disabled person without insurance benefits who applies for and is denied those benefits has a viable ADA claim against the State. This is obviously not the law, as it leads to an absurd result.

4. Conclusion

For the reasons set forth above, and in Defendants' Motion to Dismiss, Defendants do not believe Plaintiffs have stated a claim upon which relief may be granted.

DATED: Honolulu, Hawaii, October 12, 2010.

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

LILLIAN B. KOLLER and
KENNETH FINK