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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HAZEL MCMILLON; GENE STRICKLAND; TRUDY SABALBORO; KATHERINE VAIOLA; and LEE SOMMERS, each individually and on behalf of a class of present and future residents of Kuhio Park Terrace and Kuhio Homes who have disabilities affected by architectural barriers and hazardous conditions, Plaintiffs, vs. STATE OF HAWAI'I; HAWAI'I PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawai'i limited liability company, Defendants.	CIVIL NO. 08-00578 JMS/LEK Civil Rights Action Class Action DEFENDANT REALTY LAUA LLC'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION FILED JUNE 3, 2009; DECLARATION OF R. AARON CREPS; EXHIBITS "A"-"I"; DECLARATION OF ROBERT FALEAFINE; CERTIFICATE OF SERVICE HEARING Date: August 13, 2009 Time: 10:00 a.m. Judge: Hon. J. Michael Seabright TRIAL DATE: February 9, 2010

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DEFENDANT REALTY LAUA LLC'S
MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION FILED JUNE 3, 2009

I. INTRODUCTION

Comes now Defendant REALTY LAUA LLC ("Realty"), by and through its attorneys, O'Connor Playdon & Guben LLP, and hereby submits this memorandum in opposition to Plaintiffs' Motion for Class Certification, filed herein on June 3, 2009 ("the Motion").

Initially, one procedural matter should be noted. Plaintiff Gene Strickland passed away on or about July 7, 2009, and thus can no longer serve as a class representative. See generally Bailey v. Patterson, 369 U.S. 31 (1962) (in order to represent a class, plaintiff must be a member of the class). Consequently, his particular claims will not be directly addressed herein.

II. BACKGROUND

Plaintiffs are tenants at Kuhio Park Terrace ("KPT") and Kuhio Homes, public housing projects on Oahu. The State of Hawaii, through its Hawaii Public Housing Authority (collectively "the State"), owns and operates KPT and Kuhio Homes. Realty, by contract with the State, provides onsite property management services at these projects. KPT is comprised of two sixteen-story towers known as the "A" and "B" buildings.

Kuhio Homes, on the other hand, is a series of two-story, split-level units with front and back entrances.

In this case, Plaintiffs contend that Realty and the State have violated the Americans with Disabilities Act, the Rehabilitation Act, and the Fair Housing Act Amendments.[1] See Motion at 1. They allege that the following conditions at KPT and Kuhio Homes constitute actionable discrimination under these laws: (1) access and travel barriers, (2) trash chute fires, (3) the lack of fire evacuation plans, (4) unreliable elevators, and (5) denial of reasonable requests for accommodations. See Motion at 5.[2] Each will be addressed in sequence.

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[1] There is also a parallel case pending in the First Circuit Court of the State of Hawaii, entitled Faletogo, et al. v. State of Hawaii, et al., Civil No. 08-1-2608-12 (SSM). The State court case seeks damages related to allegedly uninhabitable conditions at KPT and Kuhio Homes on breach of lease-type theories.

[2] Plaintiffs had also made claims related to the lack of hot water at KPT. This problem was fixed, however, with the recent replacement of the water boilers. Plaintiffs indicated in their depositions that there is no longer a lack of hot water. See, e.g., Sabalboro Depo. at 22; McMillon Depo. at 58; Sommers Depo. at 65.

In addition, although it does not appear to be a basis of the Motion, Plaintiffs have nonetheless included complaints regarding roaches, rodents, and other pests in the supporting declarations. Plaintiffs have failed to explain, however, how such conditions could represent a discriminatory policy or program. There is no allegation, much less any evidence, that any (cont'd)

A. ACCESS AND TRAVEL

In actuality, none of the individual Plaintiffs have identified barriers in their paths of travel. Plaintiff Trudy-Ann Sabalboro ("Plaintiff Sabalboro") uses a motorized scooter. She reports that she travels either by Handi-Van or municipal bus, and does not have any trouble getting to the pick-up points for either. See Exhibit "A", Deposition of Trudy-Ann Sabalboro, dated June 25, 2009 ("Sabalboro Depo.") at 32-33.

Plaintiff Katherine Vaiola ("Plaintiff Vaiola") uses a wheelchair. She travels by "transporter" to her appointments. See Exhibit "B", Deposition of Katherine Vaiola, dated June 25, 2009 ("Vaiola Depo.") at 8-9. The operator of the transporter comes into Plaintiff Vaiola's unit, assists her down a wheelchair ramp, and into the vehicle. See id. Plaintiff Vaiola's alleged hearing and sight impairments do not impair her ability to travel. See id. at 12.

Plaintiff Lee Sommers ("Plaintiff Sommers") also uses a wheelchair. She is able to wheel herself around the vicinity of KPT. See Exhibit "C", Deposition of Lee Sommers, dated July 1, 2009 ("Sommers Depo.") at 23-28. Although some sidewalks are "uneven", which she

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(f.n. 2 cont'd) of the Plaintiffs informed Realty or the State that pests were exacerbating breathing disabilities. Allegations of unsanitary living conditions are more properly decided, if anywhere, in the State case.

attributes to uplifting caused by tree roots, Plaintiff Sommers overcomes this with just "a little extra effort." Id. at 25.

Plaintiff Hazel McMillon ("Plaintiff McMillon") ambulates freely; without the use of a cane, scooter, or wheelchair. See Exhibit "D", Deposition of Hazel McMillan [sic], dated July 9, 2009 ("McMillon Depo.") at 69. And while she claims that taking the stairs when the elevators are out of service increases the arthritis pain in her knees, Plaintiff McMillon is able to negotiate eight flights of stairs without assistance. See id. at 22-23, 69.

Several Plaintiffs have identified mobility barriers within their units at KPT. However, as the State has indicated previously, barriers within the units cannot be eliminated based on the age, design, and construction of KPT. And the State is not required to make its facilities accessible to or usable by persons with disabilities; only that there be accessible units within the State's public housing system. See 28 C.F.R. §35.150 (a).

B. TRASH CHUTE FIRES

Fires in the trash chutes at KPT are intentionally set by vandals. See McMillon Depo. at 50-52. Plaintiffs have failed to explain how trash chute fires, which are not set or otherwise caused by the State or Realty, constitute a discriminatory policy or program. In addition, as the State has

previously represented, the trash chutes are in the process of being modernized.

C. FIRE ISSUES

Realty currently maintains a "fire watch" program at KPT. See Declaration of Robert Faleafine, dated July 24, 2009 ("Faleafine Dec.") at 4-5, ¶15. As part of this program, an employee of Realty is constantly patrolling KPT to look for signs of fire. See id. In the event of a fire, residents are advised and the Honolulu Fire Department ("HFD") is called. See id. Realty also keeps a current list of disabled residents at KPT to provide to the HFD in the event that an evacuation is necessary. See id.

D. ELEVATORS

As the State has previously represented, the modernization of KPT's elevators is in progress, and has been since before this lawsuit was filed.

E. REQUESTS FOR ACCOMODATIONS

At the beginning of their tenancies, each of the Plaintiffs signed acknowledgments of the written request for reasonable accommodation process. See Exhibit "E" (Exhibit "3" to Sabalboro Depo., Exhibit "6" to Vaiola Depo., Exhibit "18" to Sommers Depo., Bates No. K000000212). None, with the exception of Plaintiff Sommers, have attempted to follow this

procedure. The following are summaries of the requests for accommodations allegedly made by Plaintiffs.

1. Plaintiff Sabalboro

Plaintiff Sabalboro has lived in a two-bedroom unit on the fourth floor of the "A" Building at KPT since 2003. She presently lives with her 36 year-old daughter, Mary, and Mary's three children. See Sabalboro Depo. at 8. Ms. Sabalboro alleges that she has verbally requested to be moved to a scooter/wheelchair friendly unit on several occasions. See id. at 24-25. In particular, she claims that the kitchen in her unit is too narrow, the counters are too high, the shower does not have a grab bar,[3] and she is unable to take her scooter/wheelchair all the way into the shower due to the design of the shower. See id. at 24-26.

Realty does have a record of Ms. Sabalboro requesting a larger unit in 2006. This request, however, did not mention the need for a scooter/wheelchair accessible unit, or even refer to a disability. See Exhibit "F" (Exhibit "1" to Sabalboro Depo.). Instead, Plaintiff Sabalboro admits that this request was made because Mary had given birth to another child

[3] On the issue of the shower grab bar, Ms. Sabalboro admits that Mr. Faleafine told her to fill out the necessary paperwork, and she failed to do so or otherwise follow-up. See Sabalboro Depo. at 23-24.

and needed more space. See Sabalboro Depo. at 26 ("That was because my granddaughter was born, so we needed a bigger unit.").

Also in 2006, Ms. Sabalboro requested that Mary be permitted to live with her as her caregiver. See id. at 10-11. This request was granted. Mary assists by cooking, cleaning, doing laundry, and helping Plaintiff Sabalboro bathe. See id. at 12-13. Thus, Ms. Sabalboro's mobility issues, within her unit, have effectively been accommodated by Mary's services.

2. Plaintiff Vaiola

Plaintiff Vaiola began living at KPT in 1979. See Vaiola Depo. at 8. In 1993, she was transferred from one of the high rise buildings at KPT to a low rise unit at Kuhio Homes, and has lived in the same unit ever since. See id. Plaintiff Vaiola's two children, a son who is 30 and a daughter who is 18, have lived with her since birth. See id. at 17-18.

In 2005, her left leg was amputated at the knee due to diabetes. See id. at 23. Although she is in the process of being fitted for a prosthetic devise, Plaintiff Vaiola presently requires a wheelchair. See id. at 27-28.

Plaintiff Vaiola's unit is two stories (split level), with the bedrooms and only bathrooms upstairs. See id. at 20-21. She is allegedly unable to climb the stairs, and thus cannot access her bathroom. See id.

Yet, it was not until *April of 2008* that Ms. Vaiola requested a transfer. See Exhibit "G" (Exhibit "7" to Vaiola Depo.). This request was prompted by the death of her neighbor, who occupied a four-bedroom unit with a downstairs bathroom. See Vaiola Depo. at 38. The unit was given, however, to Lewers Faletogo (who was morbidly obese and who has, just recently, passed away), a Plaintiff in the State court case. See id.

Plaintiff Vaiola was offered the chance to transfer to a unit in one of the high rise buildings at KPT (which have downstairs bathrooms) or to another project altogether. See Faleafine Dec. at 4, ¶14. Although she denies that this offer was ever made, Plaintiff Vaiola is adamant that she does not want to move from Kuhio Homes back to KPT or to another project altogether. See Vaiola Depo. at 33.

Plaintiff Vaiola has not made any other requests for accommodation. See id. at 26. In her declaration submitted in support of the Motion, Plaintiff Vaiola swore, under penalty of perjury, that she had "asked building management for a ramp to allow me to access my apartment, however, they refused to provide me one." Declaration of Katherine Vailoa [sic] in Support of Motion for Class Certification at 3, ¶7. Plaintiff Vaiola admitted in her deposition, however, that the foregoing

statement is unequivocally false.[4] See Vaiola Depo. at 53-54; see also id. at 24.

3. Plaintiff Sommers

Plaintiff Sommers lives alone. She moved into unit 210, on the second floor of the "B" building at KPT, on or about January 25, 2007. See Sommers Depo. at 72. As a result of persistent diabetes-related infections, she has had all but two toes on each foot amputated. See id. at 13-14. For the last year, Plaintiff Sommers has been essentially wheelchair bound. See id. at 14.

Prior to moving into KPT, Plaintiff Sommers filled out the State's "Request for a Reasonable Accomodation" form to request a unit on a "lower floor" and an air conditioner. See Exhibit "H" (Exhibit "15" to Sommers Depo.). Plaintiff Sommers was initially assigned to a unit on an upper floor, but given her request for a lower unit, was placed on the second floor. See Faleafine Dec. at 4, ¶13. Presently, when the regular elevators in her building are not working, Plaintiff Sommers calls maintenance by phone and is given an escort on the freight elevator. See Sommers Depo. at 33-36.

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[4] There is also some question as to whether Plaintiff Vaiola had even reviewed her declaration prior to signing its verification. She testified that the first time she saw the declaration (signed May 1, 2009) was the date of the deposition (June 25, 2009). See Vaiola Depo. at 48.

Plaintiff Sommers' request for an air conditioner was granted. See Sommers Depo. at 53. She is permitted to have an air conditioner installed, but must purchase the device herself. See id. Ms. Sommers, however, cannot afford an air conditioner, and has no plans to purchase one. See id. at 75.

4. Plaintiff McMillon

Originally, in 2004, Plaintiff McMillon's 27 year-old daughter (Regina Turner) and two grandchildren took up residence in unit 803 of KPT's "A" building. See McMillon Depo. at 12-13. One or two years later, Plaintiff McMillon was permitted to move into the unit as well. See id. at 13-14. Sometime in 2007, Ms. Turner and her children moved out, leaving Plaintiff McMillon alone. See id. at 16-17. She was allowed to stay on as a resident even though the titular head of the household, Ms. Turner, had left.

In the latter part of 2008, with the assistance of her present attorneys, Plaintiff McMillon requested to have Ms. Turner, Ms. Turner's "fiancée", and Ms. Turner's three children move back into her two bedroom unit. See id. at 81. Ms. McMillon claimed that she needed Ms. Turner to serve as her caregiver. The request was eventually granted at the beginning of 2009. See id.

III. ARGUMENT

In order to attain class action status, Plaintiffs must first satisfy the criteria of Rule 23 (a) of the Federal Rules of Civil Procedure ("FRCP"): (1) numerosity, (2) commonality, (3) typicality, and (4) fair and adequate representation. Next, since they are proceeding under FRCP 23 (b) (2), Plaintiffs have to demonstrate that the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Id.

Plaintiffs carry the burden of establishing that these requisites are met. See Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1309 (9th Cir. 1977). The Court must engage in a "rigorous analysis" when faced with a motion for class certification. See Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982).

A. THE PROPOSED CLASS DEFINITION IS VAGUE AND OVERBROAD.

Courts typically begin the class certification analysis by looking at whether the proposed class definition is appropriate. See Davoll v. Webb, 160 F.R.D. 142, 144 (D. Colo. 1995) ("In determining whether the proposed class meets Rule 23(a)'s numerosity requirement, one must first determine whether the class is sufficiently defined so that potential class members can

be identified."); Ad-Hoc Comm. v. City of St. Louis, 143 F.R.D. 216 (E.D. Mo. 1992) ("The threshold inquiry in any determination of class certification is identification of the parameters of the proposed class."). "Although not specifically mentioned in Rule 23(a), a class must be sufficiently definite in order to warrant certification." Hagen v. City of Winnemucca, 108 F.R.D. 61, 63 (D. Nev. 1985). Here, Plaintiffs' proposed class definition is vague and overbroad.

The proposed class is not limited to persons, such as the Plaintiffs, who have alleged mobility and breathing impairments. Rather, the proposed class extends to all persons eligible for public housing that have "disabilities" or "handicaps":

> All present and future residents of KPT and Kuhio Homes who are eligible for public housing, who have mobility impairments *or other disabling medical conditions that constitute 'disabilities' or 'handicaps'* under federal disability nondiscrimination laws, and who are being denied access to the facilities, programs, services, and/or activities of the Defendants, and/or discriminated against, because of the architectural barriers and/or hazardous conditions described herein ('the Class').

Motion at 4 (emphasis added).

This definition could be read to include, for example, persons with learning, communication, hearing, and sight impairments. Plaintiffs have not contended that or explained how such persons have been

discriminated against at KPT or Kuhio Homes. Further, Plaintiffs' alleged disabilities, as relevant to the claims asserted herein, are limited to mobility and breathing impairments.[5] See Motion at 7-8 ("All class representatives have mobility impairments . . . . Many of the class representatives also have asthma and other respiratory disabilities . . . ."). Their complaints relate to (1) obstacles in paths of travel, (2) breathing smoke from trash chute fires, (3) no notice of fire evacuation plans, (4) unreliable elevators, and (5) failure to provide reasonable accomodations such as "grab bars" upon request. See Motion at 5. These are mobility and breathing complaints.

Moreover, it is improper to include both KPT and Kuhio Homes within the same class. The structures are entirely different. KPT consists of two 16-story buildings which contain things like elevators, exterior stairwells, and trash chutes. Kuhio Homes, on the other hand, is comprised of a series of two story, split-level units. There are no elevators, exterior stairwells, or trash chutes at Kuhio Homes. And it is not clear why

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[5] In her declaration filed in support of the Motion, Plaintiff McMillon contended that she suffers from glaucoma. It was revealed at her deposition, however, that the glaucoma has since been corrected through surgery. See McMillon Depo. at 22.

Further, although Plaintiff Vaiola claims to suffer from cataracts, the cataracts do not affect her mobility. See Vaiola Depo. at 12.

an evacuation plan would need to be disseminated to residents of Kuhio Homes since their units are low rise.

Further, Plaintiff Vaiola is the sole representative of Kuhio Homes in this case. She makes no complaints regarding hot water, elevators, sewage backups, exterior stairwells, trash chute fires, or breathing issues. All she is requesting is to be moved to another unit at Kuhio Homes, and is presently the only resident at Kuhio Homes requesting such a transfer. See Faleafine Dec. at 3, ¶8. Thus, while Kuhio Homes and KPT are owned and managed by the same entities, the structural differences are such that they should not be included in the same class.

Finally, Plaintiffs have not explained how the existence of trash chute fires is evidence of discrimination on the part of Realty or the State. Neither the State nor Realty set the fires. The fires are not the product of some inherent defect in the trash chutes themselves. Instead, these fires are intentionally or negligently set by vandals. See Faleafine Dec. at 5, ¶16. Consequently, there is no evidence to substantiate a claim that Realty or the State has discriminated against persons with breathing disabilities. Persons with purported breathing impairments should be omitted from any proposed class.

B. PLAINTIFFS HAVE FAILED TO ESTABLISH NUMEROSITY.

Plaintiffs contend that the potential class exceeds 200, well above the generally recognized 40 person minimum threshold for a class action. See Motion at 20. To reach this conclusion, they use a seemingly simple calculation. With 614 units at KPT and 134 units at Kuhio Homes, and assuming three residents per unit, Plaintiffs estimate that there are 2,000 residents at KPT and Kuhio Homes. Since, according to the United States Census Bureau, 12.5% of the non-institutionalized population over the age of 5 is "disabled", Plaintiffs believe there are more than 200 potential class members.

The flaws in this logic are obvious. This calculation assumes that the potential class includes *all* types of disabilities, not just mobility or breathing impairments. As discussed above, the facts and pleadings in this case do not support casting such a broad net. Also, Plaintiffs do not factor in that many of the residents at KPT and Kuhio Homes, including several in the households of the Plaintiffs, are under the age of 5. It is inconsistent to apply a percentage that does not include infants to an estimated population that does include infants. For these reasons, Plaintiffs have exaggerated the size of the potential class.

More importantly, Plaintiffs' hypothetical tabulation is undermined by reality. As of July 22, 2009, 47 residents of KPT and Kuhio Homes had identified themselves as having a mobility disability. See Faleafine Dec. at 2, ¶6. Of these 47 residents, 23 live at Kuhio Homes and 24 live at KPT. See id. at 2, ¶7.

Of the 23 residents at Kuhio Homes, only Plaintiff Vaiola is presently requesting a transfer. See id. at 3, ¶8. There is also one resident of Kuhio Homes that is requesting an access ramp. See id.

Of the 24 residents at KPT, only 8 have pending requests to transfer to a ground floor unit at KPT, Kuhio Homes, or another project in the State system. See id. at 3, ¶9. While Plaintiffs Sabalboro and Sommers have been identified as two of the 24 mobility impaired residents at KPT, Realty's records do not indicate that either of these residents has a pending request to transfer. See id.

Thus, there are just 10 mobility impaired residents in the entirety of KPT and Kuhio Homes that are presently awaiting an accommodation. 10 potential class members does not qualify as numerous under FRCP 23 (a). See Amone v. Aveiro, 226 F.R.D. 677, 684 (D. Haw. 2005) (citing General Telephone Co. v. E.E.O.C., 446 U.S. 318 (1980) for

the proposition that a 15 member class is too small to meet the numerosity requirement).

Plaintiffs have also overstated the impracticability of litigating this matter short of a class action. This is not a case where the potential claimants are a dispersed, amorphous group. Current residents are identifiable and confined to the KPT/Kuhio Homes area. Potential residents can be identified since there is a long waiting list for public housing in Hawaii. Of these persons, those with mobility restraints, to the extent that privacy concerns can be overcome, are identifiable by applications for housing and other similar materials.

Based on the limited discovery that has been performed to date, it appears that Plaintiffs' counsel has used their best efforts to recruit putative Plaintiffs. For example, Plaintiff Sabalboro became involved in this litigation after being approached by one of the Plaintiffs' attorneys. See Sabalboro Depo. at 52-53. And Plaintiff Strickland became involved only after reading a letter regarding housing complaints that was posted in the KPT lobby, which directly caused him to contact Lawyers for Equal Justice. See Exhibit "I", Deposition of Gene Strickland, dated July 1, 2009 at 101-03. The fact that Plaintiffs' counsel has been unable to secure the

participation of more than 5 (now 4) residents of KPT and Kuhio Homes speaks volumes about the lack of numerosity.

C. PLAINTIFFS' CLAIMS ARE NOT COMMON.

"Commonality is established by the existence of shared legal issues with divergent factual predicates or a common core of salient facts coupled with disparate legal remedies within the class." Amone, 226 F.R.D. at 684 (internal quotes omitted). On the issue of commonality, Plaintiffs contend that Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001) is controlling. See Motion at 23. According to Plaintiffs, Armstrong stands for the proposition that where a "systemic policy is challenged", differences in class members' disabilities do not preclude a finding of commonality. Motion at 23.

Yet, Plaintiffs have not articulated which "systemic policy", attributed to either the State or Realty, is being challenged. They speak only in conclusory and generalized terms; contrary to their obligation to make a "specific presentation identifying the questions of law or fact that [are] common to the claims of the [Plaintiffs] and of the members of the class . . . ." Falcon, 457 U.S. at 158. It is therefore difficult to address whether commonality exists.

To the extent that Plaintiffs are claiming that they were improperly denied reasonable accommodations,[6] commonality is lacking. Whether a Plaintiff has been reasonably accommodated is a fact-intensive inquiry. See Blatch v. Hernandez, 360 F. Supp. 2d 595, 636 (S.D. N.Y. 2005) ("Reasonable accommodation issues are likewise specific to the circumstances and needs of particular individuals."). Each Plaintiff's request is unique and discrete. There will be differences, for example, in (1) how the request was made, (2) when it was made, (3) what was requested, (4) the reason for the request, (5) whether the request was supported by medical documentation, (6) what the response from the State was, and (7) what would be a "reasonable" accommodation under the circumstances. With respect to the Plaintiffs that have allegedly made verbal requests, there will be an added element of credibility in terms of whether the request was in fact made.

To the extent that Plaintiffs are challenging the State's reasonable accommodation process itself, it is incongruous for Plaintiffs to challenge a procedure that all but one of them (Plaintiff Sommers) never utilized. There is a reasonable accommodation procedure in place. Plaintiffs all admit that they were given notice of this procedure when they

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[6] See Motion at 5 ("Have been, and are being denied reasonable modifications/accommodations for their disabilities despite requests . . . .").

began their residency at KPT or Kuhio Homes. See Exhibit "E". The notice uses plain language, gives examples of types of accommodations, defines "reasonable", and identifies where the necessary form can be found. See id. The form itself is straightforward: describe what you want changed, why you want it changed, and identify who can provide medical support for your request. See Exhibit "H". Inexplicably, other than Plaintiff Sommers, no Plaintiff has attempted to follow this procedure.

This fact alone distinguishes Armstrong. In Armstrong, the plaintiffs had at least gone through the parole procedure that they were challenging. See 275 F.3d at 863, n. 19-21.

D. PLAINTIFFS' CLAIMS ARE NOT TYPICAL.

For much of the same reasons that Plaintiffs' claims lack commonality, typicality is absent as well. "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct." Yokoyama v. Midland Nat'l Life Ins. Co., 243 F.R.D. 400, 407 (D. Haw. 2007) (quoting Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992)). Further, "where the claims of the name representative would be subject to unique defenses which could become the focus of the litigation because of facts

peculiar to that particular plaintiff, typicality is lacking." Amone, 226 F.R.D. at 685.

The Plaintiffs and potential class members are not similarly situated. Each request for accommodation is unique. Plaintiff Vaiola, as an example, has refused to move either back to KPT or to another project. By taking this position, she cannot be said to be typical of other persons with mobility impairments seeking accommodations.

Further, as discussed above, the vast majority of the Plaintiffs have not followed the written reasonable accommodation procedure. Their claims are therefore not typical of other potential class members who have followed the proper procedure.

E. PLAINTIFFS HAVE FAILED TO JUSTIFY PROCEEDING UNDER FRCP 23 (B) (2).

Plaintiffs are proceeding under FRCP 23 (b) (2). Therefore, they must establish that the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Id. Most court have read an implied "need requirement" into this provision of the rule. See 7AA Wright, Miller & Kane, Federal Practice and Procedure §1785.2 (". . . the need requirement now seems well-accepted as an appropriate consideration when certifying a Rule 23(b)(2)

action."). "In most cases utilizing the requirement, the courts simply refuse class certification stating that a class action is not necessary inasmuch as all the class members will benefit from any injunction issued on behalf of a single plaintiff." Id.

Plaintiffs have not shown that a class action is necessary here. Several of the deficiencies cited by Plaintiffs have been (hot water) or are in the process being (elevators, trash chutes) remedied. To the extent that Plaintiffs are left to prosecuting individual grievances, the requirements of FRCP 23 (a) have not been met. Insofar as Plaintiffs are truly challenging an unspecified "systemic policy", a ruling in their favor will necessarily benefit all present and future mobility disabled residents of KPT and Kuhio Homes, regardless of whether a class is certified.

Under these circumstances, the fact that Plaintiffs insist on creating a class calls into question whether an injunction is the predominate form of relief that they actually are seeking. If it is not, then they cannot rely on FRCP 23 (b) (2). See Molski v. Gleich, 318 F.3d 937, 947 (9th Cir. 2003) ("In other words, in order to permit certification under this rule, the claim for money damages must be secondary to the primary claims for injunctive or declaratory relief.").

IV. CONCLUSION

Based on the foregoing, Realty respectfully requests that this Honorable Court deny Plaintiffs' Motion for Class Certification.

DATED: Honolulu, Hawaii, July 24, 2009.

/s/ R. Aaron Creps
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