MARK J. BENNETT 2672
Attorney General of Hawaii

CARON M. INAGAKI 3835
DIANE K. TAIRA 3761
JOHN M. CREGOR 3521
JOHN C. WONG 2804
JAROD J. BUNA 8976
KRISLEN N. CHUN 7953
Deputy Attorneys General
Department of the Attorney
General, State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
Telephone: (808) 587-3080
Email: Caron.M.Inagaki@hawaii.gov
Diane.K.Taira@hawaii.gov
John M.Cregor@hawaii.gov
John.C.Wong@hawaii.gov
Jarod.Buna@hawaii.gov
Krislen.N.Chun@hawaii.gov

Attorneys for Defendants and Third-Party
Plaintiffs STATE OF HAWAII and
HAWAII PUBLIC HOUSING AUTHORITY

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,

CIVIL NO. CV 08-00578 JMS-LEK

Civil Rights Action
Class Action

DEFENDANTS' and THIRD-PARTY PLAINTIFFS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY CLASS; DECLARATION OF ROBERT

Plaintiffs, vs. STATE OF HAWAII; HAWAII PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawaii limited liability company, Defendants.	**FALEAFINE; CERTIFICATE OF SERVICE** **Hearing Date:** August 13, 2009 **Time:** 10:00 a.m. **Judge:** Hon. J. Michael Seabright **No Trial Date**

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY CLASS

Defendants STATE OF HAWAII and the HAWAII PUBLIC HOUSING AUTHORITY (collectively referred here as "HPHA") oppose Plaintiffs' Motion to Certify Class.

INTRODUCTION

Plaintiffs filed their Complaint as a putative class action for present and future residents of Kuhio Park Terrace ("KPT") and Kuhio Homes ("KH") "who have disabilities affected by architectural barriers and hazardous conditions." They allege discrimination in violation of the Fair Housing Act ("FHA"), the Americans with Disabilities Act ("ADA"), and Section 504 of the Rehabilitation Act of 1978 ("504"). Plaintiffs claim they are disabled tenants who have been denied program access by HPHA because of their disabilities and because of the architectural barriers and hazardous conditions at KPT and KH.

Plaintiffs' Motion to Certify Class under the Complaint should be denied, because Plaintiffs do not meet the prerequisites to class certification as set forth in Fed. R. Civ. P. 23(a) and (b).

ARGUMENT AND AUTHORITIES

Rule 23 of the Federal Rules of Civil Procedure sets forth a two-part test for the maintenance of a class action. First, Plaintiffs must satisfy the four prerequisites of FRCP 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Second, one of the three subsections of FRCP 23(b) must also be satisfied. The U.S. Supreme Court has required district courts to conduct a "rigorous analysis" into whether the prerequisites of FRCP 23 are met before certifying a class. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161; 102 S. Ct. 2364, 2372 (1982).

Importantly, it is Plaintiffs who bear the burden of proving that all of the requirements for class certification are met. *Yokohama v. Midland Nat'l Life Insurance Co.*, 243 F.R.D. 400, 405 D.Haw. 2007. *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2001); *Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988) ("[a] party seeking to certify a class is required to show 'under a strict burden of proof, that all the requirements of [Fed. R. Civ. P.] 23(a) are clearly met."). As the Tenth Circuit aptly stated: "[i]t is neither practical nor prudential to engage the powerful machinery of a class action on the basis of a

hypothetical." *Reed*, supra, 849 F.2d at 1311. The court may consider evidence on the merits of the claims if that evidence also goes to the class requirements under Rule 23. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992); *Yokoyama, supra* at p. 405.

I. PLAINTIFFS CANNOT SATISFY THE COMMONALITY REQUIREMENT OF FRCP 23 (a)(2)

To satisfy FRCP 23(a)(2), there must be issues of law or fact common to the class. *See Kohn* v. *American Hous. Found., Inc.,* 178 F.R.D. 536, 540 (D. Colo. 1998). The requirement of commonality is not satisfied by asserting, as Plaintiffs do, the broad issue of whether or not HPHA's policies and practices, or lack thereof, have violated accessibility laws. *See, e.g., Wheeler v. City of Columbus,* 703 F.2d 853, 855 (5th Cir. 1983) ("discrimination in its broadest sense is the only question alleged common to [plaintiff] and to the Class she sought to create and represent. . .this is not enough."). Rather, Plaintiffs must 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, supra,* 457 U.S. at 158. In other words, Plaintiffs must demonstrate that the proof offered in support of their individual claims will also prove the claims asserted on behalf of the alleged class members. *See, e.g., Sheehan v. Purolator, Inc.,* 839 F.2d 99, 103, 104 (2nd Cir. 1988) (denying certification because the class claims "were not susceptible to class-wide proof); s*ee also, Fraga v. Smith,* 607 F.Supp. 517, 522

(D.O.R. 1985) (class treatment inappropriate because relief depended on consideration of question of law and facts of each individual).

Determining whether Defendants acted or failed to act in a manner that violates the ADA and 504 requires a highly individualized assessment of each reasonable accommodation request. *See Blatch v. Hernandez*, 360 F.Sup.2d 595, 636 (S.D. N.Y. 2005)("Reasonable accommodation issues are likewise specific to the circumstances and needs of particular individuals.") Each potential architectural barrier offers its own combination of legal constraints (different standards/regulations based on construction date, i.e., pre or post ADA, different operative standards, local jurisdiction permitting, prior rights, ownership/control considerations), and physical constraints (width, slope, grade, topography, easements, safety, space/dimension available for modification, technical infeasibility) to be reckoned with.[1]

A blanket order to fix or make KPT and Kuhio Homes ADA compliant is nearly impossible in a class action context. First, there are legal constraints. For example, contrary to the Plaintiffs' assertion, ADA does not require HPHA to make each of its existing facilities (like KPT or KH) accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.150 (a)(1). Instead, ADA/ 504 require

[1] The facts of this case are already known to this Court and have been established to the extent necessary for this motion by Declarations previously filed in support of Defendants' Motion to Dismiss.

that HPHA review the entire system for accessible units. 28 C.F.R. § 35.150(a); 24 C.F.R. § 8.24(a). Moreover, neither the ADA nor 504 requires the alteration or modification to any of its programs, or existing facilities, if by doing so it would create an "undue financial hardship or administrative burden." 28 C.F.R. § 35.150(a)(3); 24 C.F.R. § 8.24(a)(2).

Secondly, there are physical constraints to making KPT and Kuhio Homes ADA/504 compliant per Plaintiffs' request. Due to KPT and KH's age, structural inflexibility and overwhelming size, it is impossible to alter the structural layout of any given unit at KPT or KH. Moreover, Title II does not require enabling individuals with disabilities to participate in a public entity's services, programs and activities "in a manner that is comparable in every way" as "enjoyed by persons without disabilities." *American Association of People with Disabilities v. Shelley,* 324 F.Supp.2d 1120, 1126 (CD. Cal. 2004). Accordingly, each reasonable accommodation request from a disabled tenant at KPT or KH must be evaluated on a case by case basis.[2] In some cases, HPHA may be able to accommodate the tenant at KPT and/or Kuhio Homes in other instances the tenant must be moved to another project within the system.

---

[2] *See U.S. v. California Mobile Home Management Co.*, 29 F.3d 1413, 1418 (9th Cir. 1994)("the reasonable accommodation inquiry is highly fact-specific, requiring case-by-case determination.).

Thirdly, rarely are there common issues under a Title II determination. The operative standard for determining whether a public entity has complied with its obligations under Title II is whether "the service program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). The regulations promulgated pursuant to Title II of the ADA do not "necessarily require a public entity to make each of its existing facilities accessible and usable to individuals with disabilities." 28 C.F.R. § 35.150(a)(1); *Schonfeld v. City of Carlsbad,* 978 F.Supp. 1329, 1336 (S.D. Cal. 1997). This standard of "accessibility in their entirety" in turn means that common issues do not exist because each location and its accessibility for a particular class member are different. Too many individual considerations go into determining whether a location violates Title II, including, *inter alia,* alternative routes, historical preservation, feasibility of alteration, and whether the location was built or altered in an inaccessible form.

Probably due to the narrow application of Title II, Plaintiffs attempt to apply Title III considerations to this matter.[3] Titles II and III employ radically different approaches for dealing with existing facilities" *(i.e.,* those pre-dating the effective date of the ADA). Title III focuses first and foremost upon removing "architectural

[3] On page 1 of Plaintiffs' Opposition to the Defendants' Motion to Dismiss they protested that they are only suing under Title II, and not Title III; however, in both their Complaint and Opposition, they use the language of Title III to articulate a cause of action for discrimination.

barriers" to provide access to public accommodations' existing facilities for individuals with disabilities. *See* 42 U.S.C. § 12182(b)(2)(A)(iv). A private entity subject to Title III is required to remove all such architectural barriers in all existing public accommodations, so long as such removal is "readily achievable" taking into account the nature and cost of the action needed and the overall financial resources of the facility and the private entity involved. *See* 42 U.S.C. §§ 12181(9), 12 182(b)(2)(A)(iv). In stark contrast, under Title II, **a public entity** is only required to make its "services, programs and activities" accessible, but not a particular service, program or activity accessible. *See, e.g.,* 42 U.S.C. § 12132; 28 C.F.R. § 35.150; *Tennessee* v. *Lane,* 541 U.S. 509, 531-32, 124 S.Ct. 1978, 1993 (2004).[4] So long as the public entity's existing "services, programs, and activities,"

---

[4] Title II does not require enabling individuals with disabilities to participate in a public entity's services, programs and activities "in a manner that is comparable in every way" as "enjoyed by persons without disabilities." *American Association of People with Disabilities v. Shelley,* 324 F.Supp.2d 1120, 1126 (CD. Cal. 2004). Title II facilities constructed before the effective date of the ADA (January 26, 1992) "are held to a much lower standard of accessibility" than new construction. *Association for Disabled Americans, Inc. v. City of Orlando,* 153 F.Supp.2d 1310, 1320 (M.D. Fla. 2001). Title II requires that "new construction" - facilities constructed after January 26, 1992 - shall be designed and constructed such that the facility is "readily accessible to and useable by individuals with disabilities." 28 C.F.R. § 35.151(a). The program-access requirements for existing facilities under C.F.R. § 35.150 is more flexible and less stringent than requirements for newly constructed or altered facilities under 28 C.F.R. § 35.151. See Title II Preamble, 28 C.F.R. § 35, Appendix A (program-access requirement, which is lower than the standards for new facilities, applies to existing facilities). *See also, Pierce v. Orange*, 526 F.3d 1190, 1215 (9th Cir. 2008)("We agree, as a matter of law, that

when viewed in their entirety, are accessible, the public entity has done all that the law requires.

As required by the language of ADA[5] and 504[6], HPHA has taken a system-wide approach to addressing the needs of disabled tenants at KPT and KH by, upon their request, moving them into appropriate units, which may include ADA/504 compliant units, in other nearby public housing projects. This is completely acceptable under Title II.[7] Similar to this matter, in *Orlando, supra,* the defendants were held to have the right (and the fiscal responsibility to the taxpayers) to make their "services, programs and activities" accessible programmatically to as great an extent as possible, rather than spending a truly enormous amount of scarce public resources to make physical alterations to a finite number of sidewalks, most built many decades ago, up to current accessibility standards. *Id.*

Plaintiffs also improperly seek to use class certification as a means to bring before the Court all non federal claims affecting everyone at KPT and Kuhio Homes, not just the ones actually encountered by Plaintiffs' identified class members.

---

where reasonable alternative methods achieve compliance, structural changes to existing facilities need not be made.").

[5] 28 C.F.R. § 35.150(a)

[6] 24 C.F.R. § 8.24(a)

[7] *See,* 24 C.F.R. § 35.150(b)(1); *Pierce*, 526 F.3d at 1215 (stating that the regulations allow public entities to use a variety of methods to make existing facilities 'readily accessible' including the 'reassignment of services to accessible buildings'").

Those non-federal claims which the Plaintiffs have complained about could arguably be considered *de minimis* based on the depositions of the Plaintiffs taken for the purposes of this class certification. For example, although each of them complained about roaches none of them has ever made a specific request to Realty Laua for fumigation of the unit, which is available to residents. Further, none of the Plaintiffs requested bait traps from management which also is available to them free of charge if requested. Bait traps and non-chemical measures are the preferred methods in the first instance under the Integrated Pest Management ("IMP") program required by HUD for public housing agencies. *See, www.hud.gov.*

In his deposition testimony[8], Plaintiff Strickland said he had a problem with "bedbugs" but stated he never requested fumigation from management; instead he only asked what "he" could do about them. Eventually, his problem was eliminated when he disposed of his furniture. Plaintiff Viola said she has a problem with mice in her unit, but likewise, she said she has never even reported that to management, much less requested management's assistance in vector eradication.

---

[8] Deposition testimony of named Plaintiffs is summarized in the Memorandum filed by Co-Defendant Realty Laua with deposition excerpts attached as exhibits. In the interests of conservation, the State incorporates those summaries and excerpts by reference.

As to trash chute fires, Plaintiff McMillon testified that she "sees" the kids that start the fires but she herself does not call 911 nor report the culprits to the proper authorities.

The Court should not allow the Plaintiffs to essentially elevate these non-federal claims to a status of a recognized federal right; they are not. Even if Plaintiffs were just seeking injunctive relief, determining what relief is proper is simply too difficult in a case of this size because mini-trials for each access barrier or complained condition at KPT and Kuhio Homes would be required. If all the proposed class members were involved in this matter (as sought by Plaintiffs), it would require the Court (1) to speculate as to what access barriers need to be addressed and (2) conduct an untold number of mini-trials regarding each access barrier (countless curb ramps, bathrooms, kitchens, walkways, etc.) to determine if such an access barrier denied the class a benefit of a public service because of the access barrier. Plaintiffs have made it clear that they are not simply seeking injunctive relief in this action, but also damages. Any calculation of damages would require even more highly individualized proof, including considerations of which floor on which tower, family size, proximity to the elevator, proximity to the garbage chute and many, many more.

As opposed to a more manageable case with a relatively small number of identified accessibility issues at the isolated locations raised by the 5 identified class

members in this case. The Court should require Plaintiffs to bring individual lawsuits with the burden to prove disability discrimination at a particular access barrier. With regard to each access barrier, Plaintiffs must show that: (1) they are qualified individuals with a disability, (2) they were either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or were otherwise discriminated by the public entity, and (3) such exclusion or denial of benefits was by reason of their disability. *Weinrich v. Los Angeles County Metro. Transport. Auth.,* 114 F.3d 976, 978 (9th Cir. 1997). Because ADA/504 cases are so factual intensive and require that Court focus on each access barrier, class certification is ineffective.

II. PLAINTIFFS' HAVE FAILED TO SATISFY THE TYPICALITY REQUIREMENT OF FRCP 23(a)(3)

The "typicality" requirement of FRCP 23(a) "does not focus as much on the relative strengths of the cases of the named and unnamed plaintiffs as it does on the 'similarity of the legal and remedial theories behind their claims.'" *Neff v. VIA Metro. Transit Auth.,* 179 F.R.D. 185, 193 (W.D. Tex. 1998); *Berlowitz v. Nob Hill Masonic Management,* No. C-96-01241, 1996 WL 724776, at *3 (N.D. Cal. December 6, 1996), 1996 WL 724776, at *4; *see also, Lightbourn v. County of El Paso,* 118 F.3d 421, 426 (5th Cir. 1997). The claims of the purported class representatives need not be identical to the claims of other class members, but the class representatives "must be part of the class and 'possess the same interest and

suffer the same injury' as the class members." *General Tel. Co. of Southwest v. Falcon, supra,* 457 U.S. at 156. "[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, [, and is] based on the same legal theory [as their claims]." *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir. 1992).

"Typicality" is not met in this case for at least the following three reasons. First, and as explained above regarding the "commonality" requirement, the class representatives do not possess the same interest as other class members. Second, it is unclear whether the class representatives suffered the same injury as the class members (and likewise whether the class members each suffer the same injury). Plaintiffs have presented numerous declarations attesting to how they have been denied "access."

But, it is clear based on their deposition testimony[9] that none of the Plaintiffs have been denied "access" to receipt of their housing benefits, certainly not due to any architectural or physical barriers.

For example, Plaintiff Sabalboro, who is in a motorized wheelchair, testified that she essentially has no problem travelling to the KPT entrance, where she is picked up at the tower lobby by the Handi-Van, nor does she encounter any problem when she is in the lobby. Further, she has no problems getting around

---

[9] See footnote 8, page 10.

the project's grounds and even motors off-campus to First Hawaiian Bank. Her sole complaint is the delay she encounters in waiting for the passenger elevators, which cannot accommodate her large wheelchair when full with other passengers. She is able to get to the lobby within a reasonable time which will be much shorter when the elevator modernization contract is completed next year.

Likewise, Plaintiff Sommers who is in a non-motorized wheelchair also testified that she is able to travel along the sidewalks with "some effort" because of the unevenness of the sidewalks. But, there are no deficiencies in the walkways, sidewalks or common areas which can be characterized as actual impediments or "barriers" to the Plaintiffs. Sommers also testified regarding the wait-time for the passenger elevators when full. However, she solves that problem by calling the management office to request that the security personnel in the elevator have the elevator stop on her second floor to pick her up.

"Elevator wait-time" is something we all experience, and although an inconvenience, it is not an issue that should be elevated to the status of a "federal right" to justify its abatement. Given the age and structure of the KPT Towers, and the size of the population of the KPT, elevator wait time is unfortunately a reality, as there is no way that a "third elevator" shaft can be constructed to diminish the wait time.

There is no reliable evidence that Plaintiffs' complaints and experience are "typical" of the other members they purport to represent.

III. PLAINTIFFS CANNOT SATISFY THE NUMEROSITY REQUIREMENT OF FRCP 23 (a)(1)

To satisfy "numerosity," Plaintiffs "must first adequately define the class and then establish that it is so numerous that joinder of all members is impracticable." *Schwartz* v. *Celestial Seasonings,* 178 F.R.D. 545, 549. (D. Colo. 1998). Plaintiffs cannot meet this burden.

Plaintiffs have failed to meet their burden of demonstrating that either class they wish to have certified is "so numerous that joinder of all members is impracticable." The determination of whether a class is sufficiently large so as to render joinder of all its members impracticable must be made by the Court "in light of the particular circumstances of the case." *Arkansas Ed. Ass'n v. Board of Education of the Portland, Arkansas School District*, 446 F.2d 763, 765 (8th Cir.1971). Although no arbitrary rules regarding the necessary size of a class have been established, a plaintiff must demonstrate that numerosity exists. The Plaintiffs need not specify an exact number of class members, but must only show "some evidence or reasonable estimate of the number of purported class members." *Linquist v. Brown*, 633 F.Supp. 846, 858 (W.D.Mo.1986) (quoting *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir.1981)). Plaintiffs cannot meet this burden.

Additionally, speculative population data is insufficient to establish "numerosity." *See, e.g., Green v. Borg-Warner Protective Servs. Corp.,* No. 95 Civ. 10419, et al., 1998 WL 17719, at *1-4 (S.D.N.Y. Jan. 16, 1998) (rejecting census data on overall population of shelter residents because plaintiffs failed to link the population data to an actual violation of rights); *see also, Legrand v. New York City Transit Auth.,* No. 95-CV-0333, 1999 WL 342286, at *3-5 (E.D.N.Y. May 26, 1999) (numerosity not satisfied because the statistical data on number of pregnant women in company had no relation to the number of such women who suffered pregnancy discrimination). Here, Plaintiffs assert that there are in excess of 200 potential class members. However they provide no support for this proposition. Plaintiffs also failed to make the necessary ***link*** between the potential class and the Plaintiffs' identified class members. The identified members **do not** state that there are problems throughout KPT and Kuhio, they only reference access issue specific to their unit and elevator and maintenance issues which are currently being addressed.

Plaintiffs simply have not established – even in ballpark numbers - how many mobility-impaired and/or vision-impaired individuals actually encountered difficulties. Significantly, Plaintiffs are only able to identify 5 class members who claim to have suffered "discrimination" even after soliciting for class members.

The attached Declaration of Robert Faleafine establishes that using an actual count, the "class" is no larger than 10. Decl. of Robert Faleafine at Nos. 6, 7, 8, and 9.

In actuality, there exists only scant support for Plaintiffs' lawsuit against HPHA. Assuming Plaintiffs' declarations establish that their identified class members encounter difficulties with architectural barriers, the facts are still limited to these individuals only. This is insufficient for class certification, as it would not be impracticable to join this handful of individuals in suit. Plaintiffs thus fail to establish "numerosity."

IV. PLAINTIFFS ALSO CANNOT SATISFY THE REQUIREMENTS OF FRCP 23(b).

To certify this action under FRCP 23(b)(2), this Court must find 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." The requirements of FRCP 23(b) are designed to test whether there are compelling circumstances to make the class action appropriate. *Reilly v. Gould, Inc.*, 965 F.Supp. 588, 596 (M.D. Pa. 1997). Certification under FRCP 23(b)(2) is not appropriate for at least three independent reasons.

First, the class is not "large and amorphous." Plaintiffs only produced 5 individuals who suffered purported "accessibility issues." Second, this action does not implicate a system-wide policy, as discussed previously. In *Lang v. Kansas*

City Power & Light Co., 199 F.R.D. 640, 649 (W.D. Mo. 2001), the court held that FRCP 23(b)(2) certification is "properly invoked when a policy or practice is challenged, and injunctive or declaratory relief is necessary to prohibit or change the policy or practice." Finding that the claims "do not arise from official company policy directed toward [plaintiffs], but rather from separate, discrete events" scattered across various locations, the court denied class certification. *Id.* Likewise, Plaintiffs' claims here arise from separate and distinct alleged discriminatory conditions (alleged denial of a specific reasonable accommodation), not from any official policy aimed at Plaintiffs.

Third, certification has been denied where it is unnecessary to accomplish the Plaintiffs' claimed objectives of injunctive or equitable relief as to putative class members. The "lack of need" approach is accepted by the "vast majority" of courts[10], and "now seems well-accepted as an appropriate consideration when

---

[10] This necessity doctrine has great geographical acceptance, and appears well-entrenched. Courts in most of the federal circuits have permitted the use of the necessity doctrine. *Kansas Health Care Ass'n v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1548 (10th Cir. 1994); *Sandford v. R.L. Coleman Realty Co.*, 573 F.2d 173, 178 (4th Cir. 1978); *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 686-87 (6th Cir. 1976), rev'd on other grounds, 436 U.S. 1 (1978); *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974); *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973); *Ihrke v. N. States Power Co.*, 459 F.2d 566, 572 (8th Cir. 1972), vacated as moot, 409 U.S. 815 (1972); *Lobue v. Christopher*, 893 F. Supp. 65, 78 (D.D.C. 1995); *Lucky v. Bd. of Regents,* 34 Fair Empl. Prac. Cas. (BNA) 986, 993 (S.D. Fla. 1981).

certifying a Rule 23(b)(2) action." 7A C.A. Wright, A.R. Miller, & M.K. Kane, Federal Practice & Procedures, § 1785.2. *See also Montgomery v. Rumsfeld*, 572 F.2d 250, 255 (9th Cir. 1978) (The Ninth Circuit has held there is a necessity requirement in a class certification analysis and that "[t]he determination of class action status rests within the sound discretion of the district court.) *Hornreich v. Plant Industries, Inc.*, 535 F.2d 550, 552 (9th Cir. 1976). *James v. Ball*, 613 F.2d 180, (9th Cir. 1979); rev'd on other grounds. *See Ihrke v. Northern States Power Co.*, 459 F.2d 566, 572 (8th Cir.1972), vacated as moot, 409 U.S. 815, 93 S.Ct. 66, 34 L.Ed.2d 72 (1972); *David v. Smith*, 607 F.2d 535, 540 (2nd Cir.1978); *Local 1928, American Federation of Government Employees v. Federal Labor Relations Authority*, 630 F.Supp. 947, 948 n. 2 (D.D.C.1986).

This analysis also has been applied to deny certification in numerous cases, including ADA class action cases. *See Access Now, Inc. v. Walt Disney World Co.*, 211 F.R.D. 452, 455 (M.D. Fla. 2001) (class certification unnecessary because

---

Only the Seventh Circuit has completely rejected the necessity doctrine, arguing that such analysis has no place in Rule 23 jurisprudence. *E.g., Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th Cir. 1978). Early in the history of the necessity doctrine, two student notes contended that the necessity doctrine did not constitute an appropriate reading of Rule 23. *See* Michael J. Murphy & Edwin J. Butterfoss, Note, The "Need Requirement": A Barrier to Class Actions Under Rule 23(b)(2), 67 Geo. L.J. 1211 (1979); Richard S. Talesnick, Note, The Necessity Doctrine: A Problematic Requirement for Certification of Rule 23(b)(2) Class Actions, 8 Hofstra L. Rev. 1025 (1980). The Seventh Circuit alone rejects the doctrine.

injunctive relief in favor of plaintiffs would benefit all potential class members equally); *see also, Women's Health Center of West Country, Inc. v. Webster*, 670 F.Supp. 845, 852 (E.D. Mo. 1987), aff'd, 871 F.2d 1377 (8th Cir. 1989) (noting that even if FRCP 23 requirements had been satisfied it would have denied certification on the basis of need). The complexity and expense of a class action is neither necessary nor appropriate in this case.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for class certification.

DATED: Honolulu, Hawaii, July 24, 2009.

MARK J. BENNETT

Attorney General
State of Hawaii

JOHN M. GREGOR
JOHN C. WONG
JARROD BUNA
KRISLEN N. CHUN
Deputy Attorneys General

Attorneys for Defendants and Third-Party Plaintiffs STATE OF HAWAII and HAWAII PUBLIC HOUSING AUTHORITY

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, v. STATE OF HAWAII; HAWAII PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawaii limited liability company, Defendants.	CIVIL NO. CV 08 00578 JMS/LEK (Class Action) DECLARATION OF ROBERT FALEAFINE

DECLARATION OF ROBERT FALEAFINE

ROBERT FALEAFINE hereby declares as follows:

1. I am a principal of Defendant Realty Laua, LLC ("Realty"). Realty provides management services at Kuhio Park Terrace ("KPT") and Kuhio Homes by virtue of a contract with the Hawaii Public Housing Authority ("HPHA"), dated August 1, 2007.

2. I was previously employed by Urban Real Estate Co. ("Urban"), which previously managed KPT and Kuhio Homes, from approximately 1996 to 2007. I have personal knowledge of the facts stated in this Declaration and am competent to testify thereto.

3. As a principal of Realty and former employee of Urban, I have a direct understanding of HPHA's reasonable accommodation policies and procedures. I am also familiar with the maintenance and tenant relations services that Realty provides.

4. Realty maintains tenant files which include not only records of reasonable accommodation requests, but also records concerning annual reviews at which time residents identify handicapped or disabled members of their households.

5. Based upon a review of these files and my own personal knowledge and observations, I have arrived at the following figures.

6. As of July 22, 2009, 49 residents of KPT and Kuhio Homes had identified themselves as having a mobility disability. Of these residents, two are deceased (one being Lewers Faletogo) but remain in our records since their units have not yet been transferred to another individual.

7. Of the 47 ongoing residents, 23 live at Kuhio Homes and 24 live at KPT.

8. Of the 23 residents at Kuhio Homes, only Plaintiff Katherine Vaiola ("Plaintiff Vaiola") is presently requesting a transfer. There is also one other resident of Kuhio Homes that is requesting an access ramp.

9. Of the 24 residents at KPT, 8 have pending requests to transfer to a ground floor unit at KPT, Kuhio Homes, or another project within the HPHA system. While Plaintiffs Trudy Ann Sabalboro and Lee Sommers ("Plaintiff 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.

10. Thus, according to the tenant files kept by Realty, there are presently 10 residents between KPT and Kuhio Homes that are requesting an accommodation on account of a mobility disability.

11. According to Realty's records, neither Plaintiff Gene Strickland (recently deceased) nor Plaintiff Hazel McMillon have identified themselves as disabled or requested an accommodation on account of a disability. Hence, they have not been included in the foregoing statistics.

12. It is my understanding that Realty's employees, including myself, cannot unilaterally inquire as to whether a resident is disabled or whether a resident needs an accommodation on account of a disability.

13. From what I recall, before Plaintiff Sommers first moved into KPT, she submitted a request for reasonable accommodation form asking to be placed on a "lower floor" and for an air conditioner. She was originally supposed to be placed in a unit on an upper floor but, given this request, was assigned to a unit on the second floor of the "B" building at KPT. Plaintiff Sommers' request for an air conditioner was granted after she provided the necessary medical documentation, entitling her to purchase and install an air conditioner in her unit at her own cost.

14. It is my understanding that, sometime in 2008, Plaintiff Vaiola met with Pita Sala, Realty's tenant relations advisor, to discuss transferring her to another unit. At that meeting, Plaintiff Vaiola refused to be transferred to either KPT (where the units have only one floor) or another project within the HPHA system, and insisted that she would only be willing to transfer to different unit within Kuhio Homes. The particular unit at Kuhio Homes that Plaintiff Vaiola was requesting, which is next door to hers and has four bedrooms, was assigned instead to Lewers Faletogo. This unit was the only one at Kuhio Homes with doorways wide enough to accommodate Mr. Faletogo who, because of morbid obesity, could not fit through other doorways.

15. Realty currently maintains a "fire watch" program at KPT. As part of this program, an employee of Realty regularly patrols KPT to look for signs of fire. In the event of a fire, residents are advised and the Honolulu Fire Department

("HFD") is called. Realty also keeps a current list of disabled residents at KPT which would be available to the HFD in the event that an evacuation is necessary.

16. Based upon my experience, the trash chute fires at KPT are intentionally set by residents; typically teenagers.

17. Realty will arrange to have a unit at KPT fumigated if requested by the tenant. It also maintains a supply of roach and ant traps in the management office which are available, upon request, to residents at no charge. Residents are informed of this service at the time of their placement at KPT.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

DATED: Honolulu, Hawaii; July 24, 2009.

ROBERT FALEAFINE

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 HAWAII; HAWAII PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawaii limited liability company, Defendants.	CIVIL NO. CV 08-00578 JMS-LEK Civil Rights Action Class Action **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, a copy of the foregoing document was served on the following parties electronically through CM/ECF at their last-known addresses as follows:

VICTOR GEMINIANI, ESQ. victor@lejhawaii.org
WILLIAM H. DURHAM, ESQ. william@lejhawaii.org
Lawyers for Equal Justice
P. O. Box 37952
Honolulu, Hawaii 96837

PAUL ALSTON, ESQ. palston@ahfi.com
JASON H. KIM, ESQ. jkim@ahfi.com
Alston Hunt Floyd & Ing
American Savings Bank Tower
1001 Bishop Street, 18th Floor
Honolulu, Hawaii 96813

Attorneys for Plaintiffs
HAZEL MCMILLON; GENE STRICKLAND;
TRUDY SABALBORO; KATHERINE VAIOLA;
and LEE SOMMERS

GEORGE W. PLAYDON, ESQ. gwp@roplaw.com
R. AARON CREPS, ESQ. rac@roplaw.com
Reinwald O'Connor & Playdon
Pacific Guardian Center
Makai Tower
733 Bishop Street, 24th Floor
Honolulu, Hawaii 96813

Attorneys for Defendant
REALTY LAUA LLC

DATED: Honolulu, Hawaii, July 24, 2009.

JOHN M. CREGOR
JOHN C. WONG
JARED BUNA
KRISLEN N. CHUN
Deputy Attorneys General

Attorneys for Defendants and Third-Party
Plaintiffs STATE OF HAWAII and
HAWAII PUBLIC HOUSING
AUTHORITY