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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	CIVIL NO. CV 08-00578 JMS-LEK Civil Rights Action Class Action **MOTION FOR PRELIMINARY INJUNCTION AND**

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.

MEMORANDUM IN SUPPORT; CERTIFICATE OF WORD COUNT; DECLARATION OF ELIZABETH M. DUNNE; EXHIBITS A-T; DECLARATION OF HAZEL MCMILLON; EXHIBITS A-H; DECLARATION OF TRUDY SABALBORO; EXHIBITS A-B; DECLARATION OF JAMES SILVA; EXHIBITS A-B; DECLARATION OF GENE STRICKLAND; EXHIBITS A-D; DECLARATION OF SII TUIA; EXHIBITS A-B; DECLARATION OF KATHERINE VAIOLA; EXHIBITS A-H; DECLARATION OF LEE SOMMERS; EXHIBITS A-F; DECLARATION OF MELISSA BOSWELL; EXHIBIT A; DECLARATION OF JEFF MASTIN; EXHIBITS A-I; SECOND DECLARATION OF JEFF MASTIN; DECLARATION OF MANNY MUNIZ; EXHIBIT A; SECOND DECLARATION OF MANNY MUNIZ; EXHIBITS A AND B-1 TO 10; MARCH 30, 2009 DECLARATION OF ROBERT FALEAFINE; EXHIBIT 1-3; JULY 24, 2009 DECLARATION OF ROBERT FALEAFINE; MARCH 23, 2009 DECLARATION OF CHAD TANIGUCHI; EXHIBIT 1-3; MAY 28, 2009 DECLARATION OF CHAD TANAGUCHI; DECLARATION OF STEPHANIE L. FO; EXHIBITS 1-2; DECLARATION OF RITABELLE FERNANDES; CERTIFICATE OF SERVICE

STATE OF HAWAII; HAWAII PUBLIC HOUSING AUTHORITY,

Third-Party Plaintiffs,

vs.

URBAN MANAGEMENT CORPORATION DBA URBAN REAL ESTATE COMPANY, DOES 1-20,

Third-Party Defendant.

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INTRODUCTION

Plaintiffs Hazel McMillon, Trudy Sabalboro, Katherine Vaiola, and Lee Summers (collectively "Plaintiffs")[1], bring this motion on behalf of themselves and the class to obtain relief for the irreparable injuries they suffer on a daily basis due to ongoing hazardous physical and programmatic access barriers at Kuhio Park Terrace ("KPT") and Kuhio Homes ("KH"). The discriminatory conduct of Defendants State of Hawaii and the Hawaii Public Housing Authority's (collectively "HPHA") and Defendant Realty Laua, LLC's ("Realty Laua") denies Plaintiffs and other tenants with disabilities equal access to public housing and places them in imminent danger of irreparable harm warranting preliminary injunctive relief.

The Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 ("ADA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) ("Section 504"), and the Fair Housing Act Amendments, 42 U.S.C. § 3604(f) ("FHAA"), guarantee disabled tenants the right to housing that is integrated, accessible, and equally safe. The housing at KPT and KH is extremely hazardous and inaccessible for residents with disabilities.

[1] Plaintiff Gene Strickland is now deceased.

In an effort to conserve judicial resources and obtain comprehensive injunctive relief for Plaintiffs, Plaintiffs' counsel has been participating in both formal and information settlement discussions with Defendants since January 2009. (*See* Doc. 85, 95, 110, 117, 118, 123.) Yet, to this day, Defendants refuse to meet disabled residents' urgent needs and, without Court intervention, hazardous and inaccessible conditions will continue to cause irreparable harm.

Plaintiffs request that the Court order Defendants to:

- Immediately ensure at least two working elevators in buildings A and B of KPT at all times;
- Within thirty (30) days, adopt and implement a regular and effective elevator maintenance program to ensure continued access;
- Within thirty (30) days, complete installation of the fire alarm system, implement interim fire and life safety measures for KPT as identified by Plaintiffs' fire expert, develop and implement effective evacuation plans for KPT and KH, post evacuation route maps in common areas, ensure easy access to plans by Defendants' appropriate personnel and emergency personnel, and provide residents with mobility impairments written directions, a brochure, or a map showing locations of usable circulation paths or areas of refuge;
- Within thirty (30) days, remove hazardous paths of travel, as identified by Plaintiffs' access expert, that pose a particularly severe harm to mobility impaired residents, are inexpensive to fix, and can be fixed within a short period of time;
- Within thirty (30) days, remedy the following barriers for residents with mobility impairments: the lack of bathroom grab bars, the lack of shower seats, the two-foot high shower barrier at KPT, and the lack of access ramps for residents with mobility impairments at KH;
- Within fifteen (15) days, create accessible parking spots, including 7 parking spots each for KPT buildings A and B, and issue and enforce a

policy requiring that designated "accessible" parking spots be reserved for authorized disabled persons;

- Provide interim accommodations to named Plaintiffs by removing access barriers in their individual units within thirty (30) days and, if deemed appropriate in light of their specific disabilities, transfer them to accessible units within sixty (60) days;

- Distribute a new Notice of Right to Reasonable Accommodation to all present and future residents, translated into all languages required by Hawaii's language access law, substantially in the form of Exhibit "T" attached to the Declaration of Elizabeth M. Dunne;

- Keep a written record of all reasonable accommodation requests to be provided to Plaintiffs' counsel, or a neutral third-party, on a monthly basis; and

- Within thirty (30) days, provide a written report to the Court as to the status of Defendants' compliance with the Court's order.

And, further:

- Enjoin Defendants from failing to follow HPHA's reasonable accommodations policy.[2]

STATEMENT OF FACTS

I. KPT And KH's History Of Discriminatory Housing Conditions

KPT consists of two 16 story towers and 614 units. KH is a neighboring low-rise complex containing 134 units. HPHA receives federal financial assistance to manage KPT and KH pursuant to an Annual

[2] Plaintiffs also contend that Defendants have failed to prevent and ameliorate allergens and toxic air that disproportionately impact residents suffering from respiratory ailments, including severe asthma, but do not, at this juncture, seek injunctive relief as to these conditions.

Contributions Contract between HPHA and the United States Department of Housing and Urban Development (HUD). *See* 24 C.F.R. § 941.302, *et seq.*

HPHA has entered into a contract with Realty Laua, LLC, to provide property management and maintenance services for KPT, KH, and the Ka Hale Kameha'ikana Resource Center. (*See* March 30, 2009 Declaration of Robert Faleafine ("March Faleafine Decl.") at Exhibit 1, ("Management Contract"). The Management Contract requires Realty Laua to "maintain the overall physical appearance and condition of the properties, including maintenance and up-keep to the individual units." (Management Contract, "Scope of Services" ¶1.A.)

HPHA has a long history of failing to comply with U.S. Department of Housing and Urban Development (HUD) standards for public housing agencies. In February 2008, HUD inspected KPT. KPT received a failing score of 40 out of 100. (*See* Declaration of Elizabeth M. Dunne, dated December 14, 2009 ("Dunne Decl.") Exh. A ("KPT Inspection Summary Report"); *see also* Defendants' Motion to Dismiss, Doc. 23 at p. 9-10. KH's similarly failing scores have ranged from 37 in 2004 to 58 in 2007. (Dunne Decl., Composite Exh. B "PHAS Physical Reports").

A series of independent inspections reveal a litany of urgent health, safety, and access issues which disproportionately impact the disabled. Such inspections[3] include, but are not limited to:

- An April 1, 1997 Feasibility Study prepared by Group 70 International, finding lack of accessible housing as well as fire and environmental hazards;
- 1999 Uniform Federal Accessibility Checklist Self Evaluation and Transition Plans identifying a number of accessibility issues;
- A February 23, 2003 Physical Needs Assessment Inspection Report finding fire code violations, elevator outages, and lack of accessibility features; and
- An April 8, 2009 "2008 Physical Needs Assessment and Energy Audit for Federally Assisted Projects" identifying the need for hundreds of urgent repairs.

Virtually identical conditions exist today. *See* May 21, 2009 Declaration of Jeff Mastin ("Mastin Decl."), December 14, 2009 Declaration

[3] The following inspections are attached to Dunne Decl. as Exh. C ("April 1997 Feasibility Study"); Composite Exh. D ("1999 KPT and KH Accessibility Checklists"); Exh. E ("Feb. 2003 KPT Physical Needs Assessment"); and Composite Exh. F ("2008 KPT and KH Physical Needs Assessments"), respectively.

of Jeff Mastin ("Second Mastin" Decl.)[4]; May 19, 2009 Declaration of Manny Muniz ("Muniz Decl"); December 9, 2009 Declaration of Manny Muniz ("Second Muniz Decl.").[5]

II. Class Members Are Residents With Disabilities

The Court's October 29, 2009 Order (Doc. 120) certified a class: "defined as all present and future residents of KPT and KH 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 in the Complaint." Many class members, including the class representatives, have mobility impairments and use wheelchairs or other devices for mobility.[6] *See* McMillon Decl. ¶ 3; Sabalboro Decl. ¶ 3; Silva Decl. ¶ 5 & 6; Sommers Decl. ¶¶ 3, 4; Vaiola Decl. ¶ 4; Boswell Decl.

[4] Jeff Mastin is an expert on disability access. (Mastin Decl. ¶¶ 1-8.)

[5] Manny Muniz is an expert on fire and emergency safety. (Muniz Decl. ¶¶ 1-7.).

[6] Plaintiffs submit the declarations of Hazel McMillon ("McMillon Decl."); Trudy Sabalboro ("Sabalboro Decl."); Katherine Vaiola ("Vaiola Decl."); James Silva ("Silva Decl."); Sii Tuia ("Tuia Decl."); Gene Strickland ("Strickland Decl."), Lee Sommers ("Sommers Decl.") and Melissa Boswell ("Boswell Decl.").

¶ 8; Tuia Decl. ¶ 3. Many of the class representatives also have asthma and other respiratory disabilities that substantially limit their ability to breathe. Sabalboro Decl. ¶ 3; McMillon Decl. ¶ 3.

STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

To obtain a preliminary injunction, Plaintiffs must show: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 374 (2008). "Because 'the burdens at the preliminary injunction stage track the burdens at trial,' once the moving party has carried its burden of showing a likelihood of success on the merits, the burden shifts to the non-moving party to show a likelihood that its affirmative defense will succeed." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007) (citation omitted). Courts have frequently granted preliminary injunctive relief in ADA and Section 504 cases on facts similar to those present here.

ARGUMENT

I. Plaintiffs Have Shown More Than A Likelihood Of Success On The Merits.

A. Plaintiffs Have Established ADA and Section 504 Violations.

The uncontested evidence establishes that Defendants have violated, and continue to violate, Title II of the ADA and Section 504.[7] To establish a Title II violation, a plaintiff must show that (1) she is a qualified individual with a disability; (2) she was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities; and (3) such exclusion or discrimination was by reason of her disability. *See Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997). To establish a Section 504 violation, a plaintiff must show that (1) she is handicapped within the meaning of Section 504; (2) she is otherwise qualified for the benefit or services sought; (3) she was denied the benefit or services solely by reason of her handicap; and (4) the program providing the benefit or services receives federal financial assistance. *See id.; Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002).

[7] Plaintiffs' FHAA claim remains only as to Defendant Realty Laua. (*See* Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, Doc. 87). Because Plaintiffs' FHAA failure to follow a policy to provide reasonable accommodations claim is substantially similar to such claims under the ADA and Section 504, this Motion focuses on Defendants' ADA and Section 504 violations.

Plaintiffs have established a prima facie case for ADA and Section 504 violations. The HPHA is a public entity that receives federal funding. Plaintiffs and class members are individuals with disabilities qualified to live in public housing. They are being denied the benefits of a program – public housing – and are being otherwise discriminated against because of their disabilities as set forth below. *See Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996) ("Section 12132 of the ADA precludes (1) exclusion from/denial of benefits of public services, as well as (2) discrimination by a public entity.").

B. Defendants Are Discriminating Against Class Members by Failing to Remove Access Barriers and Failing to Provide Reasonable Accommodations.

Plaintiffs' disability discrimination claims include: (1) Defendant's failure to ensure program access; and (2) Defendants' failure to accommodate. *See Putnam v. Oakland Unified School Dist.*, 1995 WL 873734 at *13 (N.D. Cal. June 9, 1995).

1. Defendants Are Failing to Ensure Equal Safety and Accessibility for Tenants with Disabilities

Title II and Section 504 prohibit Defendants from maintaining housing facilities that are less safe for disabled tenants than for nondisabled tenants. *Putnam*, 1995 WL 873734 at **11, 13 ("In addition to mandating that programs be accessible, § 504 and the ADA also prohibit discrimination

in programs. Providing disabled students with facilities less safe than those provided to other students constitutes such prohibited discrimination. … By failing to remove [ ] safety hazards, Defendant has discriminated against all mobility-impaired students by subjecting them to unequal risks.") (citing *California School for the Blind v. Honig*, 736 F.2d 538 (9th Cir.), *vacated on other grounds*, 471 U.S. 148 (1995)); *Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 5 (1st Cir. 2000) ("To the extent that the alleged defect in the path prevented Parker from using his wheelchair to access the Monet Garden safely, it is self-evident that it did so 'by reason of' his disability."); *accord Independent Living Resources v. Oregon Arena Corp.*, 1 F. Supp. 2d 1124, 1147 (D. Or. 1998) ("If the cross slope is too steep, it may be difficult to steer or, in extreme cases, the wheelchair may even overturn."). The Title II regulations further provide: "[a] public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part." 28 C.F.R. § 35.133(a).

a. Failure to Maintain Safe and Accessible Elevators.

Each of the KPT towers has two passenger elevators and one freight elevator. Defendants unlawfully fail to maintain the elevators and often one or both passenger elevators are broken. (Tuia Decl. ¶ 4; Strickland Decl.

¶ 5; Sabalboro Decl. ¶ 4; Sommers Decl. ¶ 8; Silva Decl. ¶ 23; McMillon Decl. ¶ 4.) The freight elevators are not designed for tenant use, and require a key and operator. (McMillon Decl. ¶ 5; Mastin Decl. ¶¶ 96-98.) Freight elevators impose substantial delays and additional hazards compared to passenger elevators. (Strickland ¶ 5; McMillon ¶ 5; Mastin Decl. ¶ 97.)

Without elevator service, residents with disabilities must struggle with multiple flights of dangerous and poorly lit stairs while avoiding wet areas, trash, and urine. (McMillon Decl. ¶¶ 6-8, Exhs. A, B; Sommers Decl. ¶¶ 7, 9; Strickland ¶¶ 5-6.) Disabled residents frequently fall and have suffered injuries. (Strickland Decl. ¶¶ 7-8; Tuia Decl. ¶ 5; McMillon Decl. ¶ 6-7; Tuia Decl. ¶ 5.)

Elevators in operation are dangerous and crowded. It is not uncommon for residents to wait 30 minutes or more for elevator service. (Strickland Decl. ¶ 5; Sommers Decl. ¶ 8; McMillon Decl. ¶ 4; Silva Decl. ¶ 23; Boswell Decl. ¶ 16.) The lack of reliable elevator service causes tenants to miss important medical appointments. (Strickland Decl. ¶ 9; Boswell Decl. ¶ 16.) Mobility impaired residents are prevented from leaving or returning to their apartments for hours. (Sabalboro Decl. ¶ 4; Tuia Decl. ¶ 5.) Many residents remain in their housing units out of fear they will not be able to return. (Strickland ¶ 20; Silva Decl. ¶ 23; Tuia Decl.

¶¶ 4,5; Sabalboro Decl. ¶ 4.) Defendants' failure to ensure safe and accessible elevators violates Title II and Section 504.

b. Numerous Fire Code Violations and Failure to Implement an Evacuation Plan for Residents With Disabilities.

Defendants have failed to ensure the safe evacuation of residents with disabilities, including Plaintiffs, in the event of fire or other emergency. For more than one decade, Defendants have violated the State Fire Code with damaged trash chute doors, the failure to repair and service dry and wet standpipe systems, an inoperable fire alarm system, and nonexistent fire exit doors and signs. (Muniz Decl. ¶¶ 29-37.) Instead of remedying these violations, Defendants have sought fire code exemptions, the terms of which they have violated. (Muniz Decl. ¶¶ 29-36.) The failure to correct code violations is particularly egregious given the frequency of fires. (Strickland Decl. ¶ 15; McMillon Decl. ¶ 10; Sabalboro Decl. ¶ 5; Tuia Decl. ¶ 17; Boswell Decl. ¶ 17-18; Muniz Decl.¶ 11.)[8]

Over four years ago, HPHA asked the Honolulu Fire Department (HFD) if it could replace the required fire alarm system with what was

[8] In 2007, the Honolulu Fire Department ("HFD") came to KPT to respond to fires at least 60 times. (Muniz Decl. ¶ 11a.) From January to July 2009, there were 10 reported fires. (Dunne Decl. Exh. H .)

supposed to be an interim fire watch program.[9] (Muniz Decl. ¶ 3.) A fire watch program requires the maintenance of fire watch logs. (Second Muniz Decl. ¶¶ 6-7.) The documents produced by Realty Laua show that it has not been properly maintaining logs or otherwise operating a fire watch program. (*Id*. ¶¶ 6-7; Dunne Decl. at Exh. G.) The lack of proper procedures places residents with disabilities at increased risk for potentially life threatening injuries. (Second Muniz Decl. ¶ 7.) In July 2008, HPHA finally entered into a contract for a fire alarm system. (Dunne Decl. at Exh. I.) Yet, as of the date of this Motion, KPT still does not have an operable fire alarm system. (Second Muniz Decl. ¶ 8.)

Residents with disabilities are not informed of emergency evacuation procedures, have never been told whether they would receive help should there be an evacuation, and have never participated in evacuation drills. (Sommers Decl. ¶ 10; Vaiola Decl. ¶ 9; Tuia Decl. ¶ 17; Strickland Decl. ¶ 15; McMillon Decl. ¶ 11; Sabalboro Decl. ¶ 6; Silva Decl. ¶ 26; Boswell Decl. at ¶ 19.) Residents fear they would be unable to safely leave in an

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[9] The Management Contract requires what was supposed to be an "*interim* fire watch program" to remain in effect 24 hours a day until a new fire alarm system is installed. (Management Contract at p. 3 (emphasis added).) According to the contract, the fire watch program "will involve surveillance" of KPT's two sixteen story buildings and "a patrol by a Fire Watch Management Assistant. . ." (*Id.* at p. 4.)

emergency. (Sommers Decl. ¶ 10; Strickland Decl. ¶ 15; Sabalboro Decl. ¶ 6.) Evacuation plans and procedures are essential to providing a safe environment. (Muniz Decl. ¶¶ 17-26; Second Muniz Decl. ¶ 13.) Possible consequences of insufficient safety planning include catastrophic loss of life. (Muniz Decl. ¶¶ 17-19.) By failing to take action to remedy these hazards, Defendants are denying disabled tenants the benefits of public housing and placing them at imminent risk of harm.

2. Defendants Are Failing to Remove Access Barriers and to Maintain Accessibility.

The failure to remove access barriers and maintain accessibility features constitutes discrimination. *See Barden v. City of Sacramento*, 292 F.3d 1073, 1075 (9th Cir. 2002) ("One form of prohibited discrimination is the exclusion from a public entity's services, programs, or activities because of the inaccessibility of the entity's facility . . ."). Regulations promulgated under the ADA and Section 504 make clear that public entities must operate their housing programs, services, and activities "so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 35 C.F.R. § 35.150(a) (regulation

implementing Title II)[10]; 28 C.F.R. § 8.24(a) (providing similar language regarding Section 504).

While a public entity need not make each facility accessible, it must make changes including structural changes as necessary to achieve program access. 28 C.F.R. § 35.150(a)(1), (b)(1)(c); 24 C.F.R. § 8.24(b), 8.25(c); *Chaffin v. Kansas State Fair Bd.*, 348 F.3d 850, 861 (10th Cir. 2003) (where "no methods are effective in achieving program accessibility other than making structural changes," entity must make such changes and comply with access standards); *Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 910 (6th Cir. 2004) ("[T]o avoid denying the individual of the benefits of the public services at issue, the public entity must remove the impeding architectural barriers."); *see also id.* at 910-12 (reviewing program access regulations, identifying their statutory support, and concluding that "Congress intended that Title II serve as a mechanism for imposing affirmative architectural standards on public entities"). The deadlines for planning and implementing these structural and other nonstructural changes

[10] Because Congress explicitly authorized the Attorney General to promulgate regulations under the ADA, 42 U.S.C. § 12134(a), they must be given controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute. *Shotz v. Cates*, 256 F.3d 1077, 1080 n.2 (11th Cir. 2001) (enforcing program access regulations); *accord Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 5 n.5 (1st Cir. 2000); *Matthews v. Jefferson*, 29 F. Supp. 2d 525, 532-33 (W.D. Ark. 1998).

have long since passed.[11] *See Campos v. San Francisco State University*, 1999 WL 1201809 at *4-5 (N.D. Cal. June 26, 1998) (reviewing regulatory scheme and deadlines); *Putnam*, 1995 WL 873734 at *9 (same).

As documented by disabled residents and Plaintiffs' expert, access barriers pervade the facilities. (Mastin Decl. ¶¶ 30-125; Dunne Decl. Composite Exh. D ("1999 KPT and KH Accessibility Checklists"); Vaiola Decl. ¶¶ 5-8; Sabalboro Decl. ¶¶ 8, 11.) Disabled residents must traverse hazardous paths of travel marked by drop-offs, cross slopes, and raised edges. (Mastin Decl. ¶¶ 32-77.) By Defendants' own admission, there are no accessible housing units at KPT and only seven "borderline" accessible units at KH. (*See* Dunne Decl. at Exh. J.)

Both ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG") and Uniform Federal Accessibility Standards ("UFAS")

[11] 28 C.F.R. §§ 35.105(a) (ADA self-evaluation plan to be completed within one year of effective date of Act), 35.150(c) (any necessary structural changes to be completed "within three years of January 26, 1992, but in any event as expeditiously as possible"), 35.150(d)(1) (for public entities employing 50 or more employees, ADA transition plan setting forth steps necessary to complete any structural changes was due "within six months of January 26, 1992"); 24 C.F.R. §§ 8.24(c) (under Section 504, nonstructural changes due "within sixty days of July 11, 1988"), 8.25(c) (Section 504 transition plan to achieve program access in public housing due "as expeditiously as possible, but in any event no later than two years after July 11, 1988" and structural changes due "no later than four years after July 11, 1988"); 8.51 (Section 504 self-evaluation to be completed "within one year of July 11, 1988").

require accessible parking based upon the number of spaces provided in each lot. (Mastin Decl. ¶ 78.) There is non-compliant and inadequate accessible parking at Tower B and a complete lack of accessible parking at Tower A. There is also a complete lack of accessible parking for visitors to the site, at the management office, and near the health facility located in Tower A. (Mastin Decl. ¶ 78.) Not only have Defendants failed, for years, to provide accessible parking, but Defendants converted two accessible spaces at Tower A for management staff use in blatant disregard of this obligation. (Mastin Decl. ¶ 80.) The lack of accessible parking poses a serious burden on mobility impaired residents and puts them at risk of significant hazards. (Mastin Decl. ¶ 81.)

Plaintiffs also experience access barriers in their own units. (Vaiola ¶¶ 5-8; Strickland ¶¶ 10-11; Sabalboro ¶¶ 8, 11; Mastin Decl. ¶¶ 109-124.) Plaintiff Vaiola, for instance, is an amputee who uses a wheelchair and resides in a two-story unit in which the bedrooms and the *only* bathroom are located upstairs. (Vaiola Decl. ¶¶ 4-5, Exhs A-C.) Plaintiff Vaiola is forced to bathe in the sink and use a portable toilet in her living room. (Vaiola Decl. ¶ 6, Exhs. D-E.) Her apartment has not been modified and is completely inaccessible. (Vaiola Decl. ¶ 7; Mastin Decl. ¶122.) Despite Ms. Vaiola's obvious need for an accessible unit, Defendants have failed to

provide one. (Vaiola Decl. ¶¶ 11, 15.) Other residents have similarly suffered from Defendants' discriminatory conduct. (*See* Strickland Decl. ¶ 12) (describing how he was trapped on his bathroom floor for six hours after he slipped and fell and could not get up); (Tuia Decl. ¶ 5) (describing an incident where she fell after being forced to walk down the stairs due to inoperable elevators.)

Defendants have known of access barriers since at least 1999, but have failed to remove them. In June 1999, the National Center for Housing Management (NCHM) prepared the "Uniform Federal Accessibility Checklist Self Evaluation and Transition Plans" which documented countless violations of UFAS and recommended specific corrective actions. (Dunne Decl. Exh. D.)

3. Defendants Are Failing to Provide Reasonable Accommodations

Title II requires public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity." 28 C.F.R. § 35.134(b)(7); *see*

also Townsend v. Quasim, 328 F.3d 511, 516 (9th Cir. 2003).[12] Public entities must provide information of its services regarding the rights and protections afforded by Title II, including information about how Title II requirements apply to its particular programs, services and activities. 28 C.F.R. § 35.106; *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1038 (S.D.N.Y. 1995); *see also* 24 CFR §§ 8.53, 8.54 (recipients of federal financial assistance must notify participants of its Section 504 obligations and adopt grievance procedures); 28 C.F.R. § 35.160(a); 28 C.F.R. § 25.107. The obligation to provide such information is a proactive one. *See Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 5 (1st Cir. 2000) ("The public entity must also provide notice to individuals with disabilities of the 'protections against discrimination assured them,' *id*. § 35.106, and 'disseminate sufficient information" to those individuals 'to inform them of the rights and protections afforded by the ADA,' 56 Fed.Reg. 35694, 35702 (1991).").

Defendants are violating the law by: (1) failing to respond to requests for reasonable accommodations; and (2) failing to effectively communicate about the right to request reasonable accommodation. *See Armstrong v. Schwarzenegger*, __ F.R.D. __, 2009 WL 2997391 at *3-4 (N.D. Cal.

[12] Similar requirements are imposed by Section 504 and the FHAA. 24 C.F.R. § 8.33; 42 U.S.C. § 3604(f)(3)(B).

Sept. 16, 2009) (citing similar evidence in finding defendants in violation of ADA and Section 504 for failing to provide reasonable accommodations).

a. Denial of Requested Accommodations

Class members have either repeatedly requested reasonable accommodations or residents' needs for accommodations have been obvious. *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001) ("When the plaintiff has alerted the public entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the public entity is on notice that an accommodation is required . . . ."). (Silva Decl. ¶¶ 10-13; McMillon Decl. ¶ 11; Vaiola Decl. ¶¶ 10, 11, 13; Sabalboro Decl. ¶¶ 9-12; Sommers Decl. ¶¶ 12-15; Tuia Decl. ¶¶ 6-8, 11.)

Rather than responding to such requests in a uniform and legally required manner, Defendants have a practice of denying such requests through consistent inaction. (Strickland Decl. ¶¶ 16, 19; Vaiola Decl. ¶¶ 11, 14, 15; Silva ¶ 14, Sabalboro ¶ 12.) In some cases, residents' requests, often accompanied by doctors' notes, date back five or more years. (Silva Decl. ¶ 10.) Dr. Ritabelle Fernandes, a physician who serves KPT and KH residents, has written approximately 400 letters in eight years requesting reasonable accommodations, including 200 requesting transfers to accessible

units. (Declaration of Dr. Ritabelle Fernandes ("Fernandes Decl.") ¶ 6.) Between February 2009 and July 2009 alone, Dr. Fernandez wrote approximately twenty letters on behalf of patients requesting that they be transferred to accessible units or accommodated to the extent possible in their existing units. (*Id.* ¶ 7.)

The Defendants' failures are evident in their own records. Defendants have provided a summary of reasonable accommodation requests. (Dunne Decl. Exh. K.) HPHA's counsel acknowledges that none of the Plaintiffs' names appear in the summary. (Dunne Decl., Exh. L.) This is true even for Plaintiff Sommers, who Realty Laua admits requested a reasonable accommodation in 2007. (July 24, 2009 Declaration of Robert Faleafine ("July Faleafine Decl.") ¶ 13.) Defendants themselves acknowledge at least 47 residents identifying themselves as having a mobility disability. (July Faleafine Decl., ¶¶ 6, 7.)

In many cases, modifications requested – but not provided – would require only modest expenditures. These include grab bars. (Strickland Decl. ¶¶ 10-14, 16, 18-19; Sabalboro ¶ 9; Mastin Decl. ¶¶ 112-115, 131.) Yet, HPHA does not even consider providing these most basic accommodations. Instead, disabled tenants continue to struggle with daily life functions while they are placed on an amorphous "wait list" for transfer

to accessible units where they will remain for years. (Tuia Decl. ¶ 13; Sabalboro Decl. ¶ 12; Sommers Decl. ¶¶ 13, 15; Fernandez Decl. ¶ 11; March 30, 2009 Declaration of Stephanie Fo ¶ 8; May 28, 2009 Declaration of Chad Tanaguchi ¶ 7.) They are not told when, if ever, they will live in accessible nondiscriminatory public housing.[13]

b. Failure To Communicate Effectively About the Right to Request Reasonable Accommodations

Defendants have failed to adequately notify tenants of their right to request reasonable accommodations. When first moving into public housing some tenants are asked to sign a Notice of Right to Request Reasonable Accommodations Form. (March Faleafine Decl. Exh. 3 ("Notice").) The Notice does not: (1) explain the process (e.g., whether the request is being made to HPHA or management, who makes the determination, or who to contact regarding additional information); (2) describe how HPHA or management will notify the resident of its answer, or (3) explain what action a resident may take if her request is denied. There is no evidence that the Notice is translated into other languages and residents are not otherwise notified of their right to request reasonable accommodations. McMillon Decl. ¶ 12; Vaiola

[13] Defendant HPHA has acknowledged that there are an insufficient number of accessible public housing units. (*See* Dunne Decl. Exh. J .) Even under HPHA's own calculation, which Plaintiffs dispute as exceedingly low, HPHA is missing 115 accessible units required by federal law. (*See id.)*

Decl. ¶ 12. HPHA's procedures for handling reasonable accommodations are not available to tenants or the public.[14] *See Engle*, 1994 WL 263347 at * 3 ("'As far as proactive notification is concerned, the Department of Justice has determined that a public entity can provide effective notice of programs to advise disabled individuals of their rights and protections under the ADA through handbooks, manuals, and pamphlets describing the different programs to accommodate those with disabilities. 28 CFR Part 35, Appendix A. p 449-450.").

Moreover, Defendants have admittedly been requiring *written* reasonable accommodation requests. (*See* Defendants' Motion to Dismiss (Doc. 23), at 12; Fo Decl. ¶ 6.) As this Court has recognized, such a policy is contrary to federal law. (*See* Order Granting in Part and Denying in Part Defendants State of Hawaii and Hawaii Public Housing Authority's Motion to Dismiss and/or for Summary Judgment on Plaintiffs' Complaint (Doc. 87) at 24-25). It is also contrary to HPHA's own policy. *See* Notice ("If you need help filling out a REASONABLE ACCOMMODATION REQUEST

[14] HPHA has produced an "Interoffice Memorandum," dated October 12, 2001, outlining procedures that are supposed to be followed when handling reasonable accommodation requests. (*See* March 23, 2009 Declaration of Chad Taniguchi, Exh. 2.) HPHA's Admissions and Continued Occupancy Policy for the Federal Assisted Public Housing Program states only a general anti-discrimination/accommodations policy. (*See* March Taniguchi Decl., Exh. 1.)

FORM or if you want to give us your request in some other way, we will help you."). In any event, Defendants rarely, if ever, provide tenants with a "reasonable accommodation request" form. (Vaiola Decl. ¶ 12; Silva Decl. ¶ 21, McMillon Decl. ¶ 13, Strickland Decl. ¶ 17.)[15]

C. The Modifications Required Would Not Fundamentally Alter the Provision of Public Housing or Otherwise Impose an Undue Burden

Title II "does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164; *see also* 28 C.F.R. § 35.150(a)(3). Fundamental alteration and undue burden are affirmative defenses upon which the public entity bears the burden of proof. 28 C.F.R. § 35.164 ("In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens.").

[15] It was not until after the filing of this lawsuit, and after Defendants knew of Plaintiffs' counsel's communications with them, that Defendants spoke to putative class members James Silva and Sii Tuia about reasonable accommodations. (Tuia Decl. ¶ 9; Silva Decl. ¶ 16.) Mr. Silva has requested accommodations for approximately five years, while Ms. Tuia has made such requests since May 2006. (Silva Decl. ¶ 10; Tuia Decl. ¶ 6).

Given the size and resources of the public entities here, Defendants cannot meet their burden of demonstrating fundamental alteration or undue burden. Just this year, HPHA received $4.5 million for maintenance, improvements, renovations and ADA compliance. *See* H.B. 200, H.D. 1, S.D. 1, C.D. 1.[16] HPHA was also eligible for, and received, federal stimulus money. *See* Dunne Decl., Exh. M.

The remedying of many of the access violations requires only modest investments of resources, including finite expenditures for barrier removal and additional and more frequent maintenance. (Mastin Decl. ¶¶ 42, 43, 50, 53, 67, 73, 74, 77, 83, 85, 94, 99, 103, 126, 131; Second Mastin Decl. ¶¶ 5, 7, 8, 12, 17, 18, 20, 23, 24, 25; Second Muniz Decl., Exh. A.) Such actions do not approach fundamental alteration or undue burden. *See* 28 C.F.R. § 35.164 ("If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity."); *accord* 24 C.F.R. § 8.24(a) ("If an action would result in such an alteration or such burdens, the recipient shall take any action that would not result in

[16] Available at http://www.capitol.hawaii.gov/session2009/Bills/HB200_CD1_.HTM

such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.").

Additionally, Defendants have not complied with the procedural prerequisites for asserting these defenses under Title II: "The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion." 28 C.F.R. § 35.164.

II. Plaintiffs Require Preliminary Injunctive Relief To Avoid Continued Irreparable Harm.

There can be no reasonable dispute that steep paths of travel, inoperable elevators, lack of accessible parking, and other safety hazards, present an immediate and substantial threat to the physical safety and health of class members and should be remedied immediately. *See Galusha v. New York State Dep't of Envtl. Conservation*, 27 F. Supp. 2d 117 (N.D.N.Y. 1998) (granting preliminary injunctive relief to allow disabled individual to use motorized vehicle to access national park). The goals of the ADA include assuring that individuals with disabilities enjoy "equality of opportunity, full participation, independent living, and economic self-sufficiency." 42 U.S.C. § 12101. It is

well-established that "[i]njuries to individual dignity and deprivations of civil rights constitute irreparable injury." *Cupolo v. BART*, 5 F. Supp. 2d 1078, 1084 (N.D. Cal. 1997) (citing *Chalk v. United States Dist. Court*, 840 F.2d 701, 710 (9th Cir. 1988); *Sullivan v. Vallejo City Unified School Dist.*, 731 F. Supp. 947, 961 (E.D. Cal. 1990) (injury to ability to function as independent person constitutes irreparable injury)). Where, as here, plaintiffs show violation of their civil rights irreparable harm is presumed. *See Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) ("We have held that where a defendant has violated a civil rights statute, we will presume that the plaintiff has suffered irreparable injury from the fact of the defendant's violation.") (collecting cases).

A. The Court Should Order Defendants to Maintain Two Operable Elevators, Remedy Hazardous Freight Elevator Conditions, and Adopt an Effective Elevator Maintenance Program.

Inoperable elevators are the norm at KPT. Class members have been forced to miss necessary medical appointments and have hurt themselves because they have been forced to use the stairs due to broken elevators. (*See, e.g.*, Tuia Decl. ¶ 5, McMillon Decl. ¶¶ 7-8.) Numerous class members testified to the ongoing failure to maintain KPT's elevators in proper working order. (*See id.*) HPHA's own records show that the elevators frequently malfunction or are inoperable. (Dunne Decl. at Exhs. N-R (3/31/08 Elevator Repair Report,

10/28/08 Elevator Repair Report, 11/28/08 Elevator Repair Report, 1/22/09 Elevator Repair Report, 11/12/2009 Elevator Modernization Report)).

For months, Plaintiffs have asked Defendants to maintain two operable elevators, even if it requires management personnel to manually operate the freight elevator. *See* Dunne Decl. at Exh. S (6/12/09 Email.) In violation of its contract requirements, Realty Laua has refused. (Management Contract, "Scope of Services" ¶5.)

Defendants' failure to maintain an adequate number of working elevators is discriminatory and preliminary injunctive relief is necessary to bring the elevators into compliance. *Cupolo,* 5 F. Supp.2d at 1084 (N.D. Cal. 1997); *see also California School for the Blind v. Honig,* 736 F.2d 538, 541 (9th Cir.) (affirming preliminary injunction based on expert witness testimony that seismic problems posed serious hazards to disabled students), *vacated on other grounds*, 471 U.S. 148 (1995).

In *Cupolo*, the federal district court granted the disabled plaintiffs preliminary injunctive relief because of Defendant BART's failure to maintain elevators in operable condition. The *Cupolo* court's finding of irreparable injury is applicable here: "The pattern of unreliable elevator service established by Plaintiffs indicates that class members frequently endure inconvenience and indignity as a result of malfunctioning elevators, and that these instances of

inconvenience and indignity are likely to recur in the future." *Cupolo*, 5 F. Supp.2d at 1084. Defendants' long-standing failure to maintain and repair elevators shows that they are incapable of implementing an effective elevator maintenance program. *See Cupolo*, 5 F.Supp.2d at 1085 (finding that BART's recent initiatives to maintain and repair elevators did not establish that injunctive relief was no longer needed).

Defendants have also made numerous unfulfilled promises as to when the elevator modernization would be complete. After years of non-functioning and malfunctioning elevators, construction for all six elevators was originally scheduled to be complete by *November 2009*. *See* Dunne Decl., Composite Exh. N (3/31/08 Elevator Modernization and Repair Reports). Instead, work has just barely begun. In January 2009, HPHA estimated that modernization would not be complete until *May 2011*: a date recently pushed back another month. *See* Dunne Decl., Exh. Q (1/9/09 Elevator Modernization Report); Exh. R (11/2/09 Elevator Modernization Report.)

The Court should order Defendants to:

- immediately ensure at least two working elevators in buildings A and B at all times (including if necessary the manual operation of the freight elevator as an emergency interim measure);

- remedy freight elevator conditions hazardous to persons with mobility impairments (Second Mastin Decl. ¶¶ 21, 22); and
- within thirty (30) days, adopt and implement a regular and effective elevator maintenance program to ensure continued access.

B. The Court Should Order Defendants to Remove Access Barriers to Prevent Ongoing Irreparable Injuries.

Plaintiffs and class members are subjected daily to numerous physical barriers that limit their ability to access programs and services. Plaintiffs' access expert, Jeff Mastin, has identified barriers that deny class members the ability to use the facilities independently, in a dignified manner, and on an equal basis with nondisabled tenants. (*See* Mastin Decl.) Mr. Mastin has reviewed the access barriers and identified those posing particularly severe hazards. (*See* Second Mastin Decl.)

Courts have ordered public entities and private property owners alike to remove barriers in cases with facts similar to those present here. In so doing, the courts have recognized that the denial of access to persons with disabilities causes irreparable harm, and that public entities and private owners are capable of making the necessary changes to their facilities. *See Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 336 (2d Cir. 1995) (affirming grant of preliminary injunctive relief); *Cupolo*, 5 F. Supp. 2d at 1084 (same); *Spitzer v. County of*

Schoharie, 82 F. Supp. 2d 19, 25-26 (N.D.N.Y. 2000) (ordering county to provide ADAAG compliant accessibility at no fewer than 25 accessible polling places within a little over one month of the date of the court's order); *Deck v. City of Toledo*, 29 F. Supp. 2d 431, 434 (N.D. Ohio 1998) (non-compliant and hazardous curb ramps subject plaintiffs to irreparable harm); *Leiken v. Squaw Valley Ski Corp.*, 1994 U.S. Dist. LEXIS 21281 at *33, **34 (E.D. Cal. June 28, 1994) (where "injury involves the violation of a civil right, no further showing of irreparable harm is required," requiring access to ski facilities and cable car); *see also Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1998) (ruling that the trial court abused its discretion by not ordering mandatory injunctive relief after finding access barriers at the county courthouse); *Parr v. L&L Drive-Inn Restaurant*, 96 F. Supp. 2d 1065, 1088 (D. Haw. 2000) ("[T]he architectural barriers relating to the entrance ramp and the exterior route are prohibited by the ADA and must be removed."); *Simpson v. City of Charleston*, 22 F. Supp. 2d 550, 555 (S.D. W.V. 1998) (holding city violated ADA where curb ramps not flush and caused injury); *Campos*, 1999 WL 1201809 at *2, 7-8 (physical barriers such as heavy doors and inaccessible parking were safety hazards).

In *Spitzer*, the court enumerated, by way of example, numerous barriers that could be removed from polling sites *in less than one month*, including:

(1) the creation of accessible handicapped parking places; (2) the installation of door handles that can be easily used by disabled persons; and (3) the installation of temporary ramps with appropriate slope, handrails, and a non-slip surface. *See Spitzer*, 82 F. Supp. 2d at 25-26. Similar to *Spitzer*, Plaintiffs' access expert has identified hazardous paths of travel presenting a severe danger of imminent harm that can easily be removed. (*See* Second Mastin Decl. ¶¶ 6-20.) Within thirty (30) days of the Court's order, the Court should order removal of these access barriers.

In addition to hazardous paths of travel, Mr. Mastin has identified access barriers in individual units that pose a particularly severe harm to mobility impaired residents, are inexpensive to fix, and can be fixed within a short period of time: the lack of bathroom grab bars, the lack of shower seats, the two-foot high shower barriers at KPT, and the lack of access ramps at KH.[17] (Second Mastin Decl. ¶¶ 24, 25, 26.) Plaintiffs request that residents with mobility impairments, (including the 47 that Defendants acknowledge)[18], be provided these accommodations within thirty (30) days of the Court's order. *See United*

[17] The lack of a ground level bathrooms also presents irreparable injury. Because this Motion is for preliminary relief and transfer is likely the most viable option, Plaintiffs do not, at this Motion, request construction of ground level bathrooms.

[18] (*See* July 24, 2009 Declaration of Robert Faleafine ¶ 7.) At least two KH residents, including Plaintiff Vaiola, are requesting access ramps. (*Id.* ¶ 8.)

States v. Freer, 864 F. Supp. 324, 326 (W.D.N.Y. 1994) (granting preliminary injunction on FHAA claim allowing disabled resident to build wheelchair ramp finding "unquestionably the defendants' refusal to permit installation of the ramp has effectively denied Ms. Soper an equal opportunity to use and enjoy her home.").

C. The Court Should Order the Defendants to Create Accessible Parking and Adopt Appropriate Parking Policies.

The harm suffered by Plaintiffs and class members because of the lack of accessible parking constitutes irreparable injury. *See Shapiro*, 51 F.3d at 332-33 (affirming district court's issuance of preliminary injunction requiring defendant to immediately provide accessible parking space); *Parr*, 96 F. Supp.2d at 1087 ("[W]here parking is provided for public buildings, a certain number of parking spaces on 'the shortest accessible route of travel from adjacent parking to an accessible entrance' must be specially designated for people with disabilities.").

The Court should order Defendants to, within fifteen (15) days, create the required number of accessible parking spots, including 7 parking spots each for KPT buildings A and B (Mastin Decl. ¶¶ 80, 84) and issue and enforce a policy requiring that designated "accessible" parking spots be reserved for authorized disabled persons.

D. The Court Should Order Defendants to Complete Installation of the Fire Alarm at KPT, and Implement Evacuation Plans and Other Interim Fire and Life Safety Measures.

Numerous class members have testified to the Defendants' failure to develop, implement, and communicate evacuation and emergency plans. (McMillon Decl. ¶ 11; Sommers Decl. ¶ 10; Vaiola ¶ 9; Tuia Decl. ¶ 17; Silva Decl. ¶ 26). As a result, class members are fearful for their lives in the event of an emergency. (Sabalboro Decl. ¶ 6; Sommers Decl. ¶ 10.). The imminent and irreparable harm posed by a fire, or other emergency requiring evacuation is readily apparent. Residents with disabilities are at increased risk. (Muniz Decl. ¶¶ 10, 12.) As Mr. Muniz explains:

> Persons with mobility disabilities have more difficulty evacuating a building in the event of an emergency and that it may take them longer to evacuate, because they may be unable to use evacuation routes containing stairs and are especially vulnerable to other hazards in the path of travel, including wide grates, cracked sidewalks, and obstacles blocking egress routes.

(Muniz Decl. ¶ 12; *see also id.* at ¶¶ 21, 23.)

Although Plaintiffs have repeatedly raised this issue, class members remain uninformed about the Defendants' evacuation plans. Defendants' inexcusable silence is causing needless anxiety. Courts have granted injunctive relief in virtually identical circumstances. *See Shirey v. City of Alexandria School Bd.*, 229 F.3d 1143, 2000 WL 1198054 at *5 (4th Cir. Aug. 23, 2000)

("Given the nature of the violation in this case, we think it is clear that the appropriate remedy would be injunctive relief requiring the School Board to develop and implement a reasonable evacuation plan for disabled children."). Mr. Muniz identified thirteen "Interim Fire and Life Safety Measures" necessary to mitigate the consequences of a potentially catastrophic fire. (Second Muniz Decl., Exh. A.). Within thirty (30) days of the Court's order, Defendants should be ordered to:

- complete installation of the fire alarm system (Second Muniz Decl. ¶ 8);
- implement the thirteen interim fire and life safety measures for KPT (Second Muniz Decl. Exh. A); and
- develop and implement effective evacuation plans, post evacuation route maps in common areas, ensure easy access to plans by Defendants' appropriate personnel and emergency personnel, and provide residents with mobility impairments written directions, a brochure, or a map showing locations of usable circulation paths or areas of refuge. (Muniz Decl. ¶¶ 21-24; Second Muniz Decl. ¶¶ 13, 14.)

E. <u>The Court Should Order Defendants to Reasonably Accommodate the Named Plaintiffs.</u>

In addition to the above relief benefiting all class members, named Plaintiffs are entitled to immediate injunctive relief in the form of reasonable accommodations. *See Stross v. Gables Condo. Ass'n.*, 2009 WL 1770129 at

* 4 (W.D. Wash. June 18, 2009) (enjoining failure to provide reasonable accommodations). The records show that named Plaintiffs are in need of reasonable accommodations. In addition to the interim accommodations that should be provided to all class members within thirty (30) days (*see* Second Mastin Decl. ¶¶ 24-26), Plaintiffs McMillon, Sabalboro, Sommers, and Vaiola request transfers to fully accessible housing units, if deemed appropriate in light of their specific disabilities, within sixty (60) days of the Court's order.

F. The Court Should Order Defendants to Follow and Communicate a Reasonable Accommodations Policy.

Defendants' failure to follow a reasonable accommodations policy is causing class members irreparable harm by denying disabled residents meaningful access. *See Rothschild v. Grottenthaler*, 716 F. Supp. 796, 800 (S.D.N.Y. 1989) ("Meaningful access means [providing] reasonable accommodations in [a] program or benefit.") (quoting *Alexander v. Choate*, 469 U.S. at 301, 105 S.Ct. 712) (internal quotations omitted)). Reasonable accommodations are those that do not "require either a modification of the essential nature of [a] program or impose an undue burden on the [program provider]." *Easley v. Snider*, 36 F.3d 297, 302 (3d Cir. 1994); *see also Staron v. McDonald's Corp*., 51 F.3d 353, 356 (2d Cir. 1995); *Innovative Health Sys. v. City of White Plains*, 931 F. Supp. 222, 239 (S.D.N.Y. 1996).

The Court should, as is frequently done,[19] order Defendants to stop denying tenants reasonable accommodations and to follow a reasonable accommodations policy.[20] *See Clarkson v. Coughlin*, 898 F. Supp. 1019, 1038 (S.D.N.Y. 1995) ("Defendants have violated the ADA by their failure to notify class members of the protections to which they are entitled under the ADA, [and] consult with class members as to effective accommodations . . . "); *Engle v. Gallas*, 1994 WL 263347 at *3 (E.D. Pa. June 10, 1994)

[19] *See McGary v. City of Portland*, 386 F.3d 1259, 1261 (9th Cir. 2004) (reaffirming holding that the FHAA imposes an "'affirmative duty' on landlords and public agencies to reasonably accommodate the needs of disabled individuals"); *Stringham v. Bick*, 2007 WL 60996 at *14 (E.D. Cal. Jan. 8, 2007) (granting plaintiff's "emergency" motion for preliminary injunction and requiring defendants to reasonably accommodate plaintiff by placing him in window tinted cell housing); *Concerned Parents to Save Dreher Park Center v. City of West Palm Beach*, 846 F. Supp. 986, 993 (S.D.Fla. 1994) (on motion for preliminary injunction, ordering: "The City shall immediately begin to take steps to comply with and conclude with all due speed its compliance with the requirements of 28 C.F.R. §§ 35.105, 35.106 and 35.107, relating to self-evaluation, notice and designation of responsible employee and adoption of grievance procedures. The City shall submit to this Court within thirty (30) days of this Order its plan and estimated timetable for compliance therewith."); *cf. Crowder v. Kitagawa*, 81 F.3d 1480, 1485-86 (9th Cir. 1996) (holding that where a facially neutral Hawai`i statute requiring all dogs entering the state be quarantined had a disparate impact on the visually impaired, the district court shall consider whether proposed modifications to the statute/policy are reasonable).

[20] Plaintiffs also note that the HPHA did not follow the public rulemaking procedures contained in HRS Chapter 91 in developing its reasonable accommodations procedures. HPHA established its policy by "interoffice memorandum" rather than by publishing draft rules and providing an opportunity for public comment. The validity of the policy, however, is beyond the scope of the present motion.

("[A]lthough defendant intends to accommodate people with disabilities, it just has not put a program into place to assure that such intentions are carried out in fact.").

In light of Defendants' repeated failure to follow their own policy, the Court should order Defendants to keep a written record of all requests which should be provided to Plaintiffs' counsel, or a neutral third-party, on a monthly basis. *See Armstrong v. Schwarzenegger*, 2007 WL 2694243 at *2-3 (N.D. Cal. Sept. 11, 2007) (ordering defendants to establish a disability tracking database).

Defendants must also provide adequate and effective notice of its reasonable accommodations policy. *See Adelman v. Dunmire*, 1996 WL 107853 at *4 (E.D. Pa. Mar. 12, 1996) ("Each public entity must provide information to users of its services regarding the rights and protections afforded by Title II, including information about how Title II requirements apply to its particular programs, services and activities."); *see also Parker*, 225 F.3d at 5. The Court should order Defendants to distribute a new Notice to all present and future residents, translated into all languages required by Hawaii's language access law (H.R.S. § 371-33(c)), substantially in the form of Exhibit T to the Dunne Declaration which:

- explains the process;

- describes how HPHA or management will notify the resident of its answer to the request; and
- explains what action a resident may take if her request is denied.

III. The Balance Of Equities Favors The Grant Of A Preliminary Injunction

There can be no dispute that the years of Defendants' inactions have placed Plaintiffs under threat of imminent and irreparable harm. *See Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001); *Hous. Rights Ctr. v. Donald Sterling Corp.*, 274 F. Supp. 2d 1129, 1140 (C.D. Cal. 2003).[21] The relief requested herein prevents Defendants from continuing to ignore their clearly established legal obligations. Any financial burden on Defendants is slight compared with the irreparable harm suffered by class members on a daily basis. Defendants have been out of compliance for decades and Plaintiffs are seeking nothing more than what is required under federal law. The balance of the hardships therefore weighs entirely in favor of the requested injunction.

[21] Indeed, the FHAA specifically authorizes the issuance of a permanent or temporary injunction "if the court finds that a discriminatory housing practice has occurred or *is about to occur.*" 42 U.S.C. § 3613(c)(3) (emphasis added).

IV. Granting A Preliminary Injunction Is In The Public Interest

The public interest overwhelmingly weighs in favor of Plaintiffs. Congress has determined that people with disabilities are precluded from fully participating in all aspects of society because of prejudice, antiquated attitudes and the failure to remove societal and institutional barriers. *See* ADA Amendments Act of 2008, Pub. L. 110-325 (Sept. 25, 2008). In enacting the ADA, Congress intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.* The public has an interest in ensuring that people with disabilities can fully participate in the programs, services and activities of a public entity on an equal basis with their non-disabled counterparts.

V. The Circumstances Warrant Waiver Of Fed. R. Civ. P. 65(c)'s Bond Requirement

The Court has discretion to issue a preliminary injunction without requiring a bond. *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003) Exercise of that discretion is particularly appropriate where, as here, an action is brought by a class of indigent plaintiffs. *See, e.g., Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 386 n. 42 (C.D. Cal. 1982); *Kincaid v. City of Fresno*, 2006 WL 3542732 at *41 (E.D. Cal. Dec. 8, 2006).

CONCLUSION

For the reasons stated above, this Court should grant Plaintiffs' Motion.

DATED: Honolulu, Hawai`i, December 16, 2009.

Respectfully Submitted,

By: /s/ Jason H. Kim
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

HAZEL MCMILLON; et al., Plaintiffs, v. STATE OF HAWAI`I; et al., Defendants.	CIVIL NO. CV 08 00578 JMS LEK (Civil Rights Action; Class Action) **CERTIFICATE OF WORD COUNT**
STATE OF HAWAII; et al., Third-Party Plaintiffs, vs. URBAN MANAGEMENT CORPORATION DBA URBAN REAL ESTATE COMPANY, et al., Third-Party Defendant.	

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.5, I hereby certify that the Motion for Preliminary Injunction and Memorandum in Support contains 8,987 words, exclusive of case caption, table of contents, table of authorities, exhibits, declarations, certificates of counsel, and certificate of service.

DATED: Honolulu, Hawai`i, December 16, 2009.

/s/ Jason H. Kim
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