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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

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	)))))))	CIVIL NO. CV 08 00578 JMS LEK (Civil Rights Action; Class Action) **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS STATE OF HAWAII AND HAWAII PUBLIC HOUSING AUTHORITY'S**

affected by architectural barriers and hazardous conditions,

Plaintiffs,

v.

STATE OF HAWAI`I; HAWAI`I PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawai`i limited liability company,

Defendants.

MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES, FILED DECEMBER 18, 2008; CERTIFICATE OF WORD COUNT; DECLARATION OF CLAUDIA CENTER; EXHIBITS A-F; 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 VIOLA; EXHIBITS A-H; DECLARATION OF LEE SOMMERS; EXHIBITS A-F; DECLARATION OF JEFF MASTIN; EXHIBITS A-I; DECLARATION OF MANNY MUNIZ; EXHIBIT A; DECLARATION OF ROBERT SCOFIELD, D. ENV.; EXHIBITS A-C; CERTIFICATE OF SERVICE

DATE: June 8, 2009
TIME: 9:00 a.m.
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I. INTRODUCTION

The motion of Defendants STATE OF HAWAII ("HAWAII") and the HAWAII PUBLIC HOUSING AUTHORITY ("HPHA") to dismiss Plaintiffs' complaint should be denied. Plaintiffs have stated claims of disability discrimination under Title II of the ADA and Section 504 of the Rehabilitation Act for Defendants' failure to ensure program access, failure to provide equally safe housing, failure to maintain accessibility features, and failure to provide reasonable modifications to policies, practices and procedures. Plaintiffs have further stated a claim under the Fair Housing Act Amendments for failure to provide reasonable accommodations. These claims are not moot, and do not require administrative exhaustion. Further, Plaintiffs make no claim under Title III of the ADA, and the "readily achievable" standard does not apply to their claims brought under Title II. As in countless similar cases brought under federal disability nondiscrimination statutes, this Court can and should order relief. Finally, Plaintiffs should be permitted to amend their complaint to add individual official defendants should the Court deem them necessary to award injunctive relief under Title II.

II. STANDARDS OF REVIEW

Defendants move to dismiss Plaintiffs' complaint for failure to state a claim. Fed. R. Civ. Proc. 12(b)(6). Such motions are viewed with disfavor. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248 (9th Cir. 1997); *U.S. v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981) (12(b)(6) dismissals proper only in "extraordinary" cases). "To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations; rather, it must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007)). In a motion to dismiss, the court must accept as true all material allegations in the complaint, and construe them "in the light most favorable to the plaintiff." *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). Dismissals under 12(b)(6) are particularly disfavored where the complaint alleges civil rights violations. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

With their motion to dismiss, Defendants have filed declarations purporting to assert facts in support of their motion, including numerous factual statements with no citations to evidentiary materials. *See* Fed. R. Civ. Proc. 12(d) ("If, on a motion under Rule 12(b)(6) …, matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary

judgment under Rule 56."). Here, it would be improper to treat Defendants' motion as one for summary judgment because they: (1) have not complied with Local Rule 56.1 which requires a separate concise statement of allegedly undisputed material facts; and (2) have not even attempted to show how their factual materials demonstrate the absence of any disputed issue of material fact. *See* Fed. R. Civ. P. 56(c); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987); *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1564 (9th Cir. 1994) (this Circuit requires "very little evidence to survive summary judgment in a discrimination case). Accordingly, the Defendants' additional materials should be disregarded unless relevant to subject matter jurisdiction (*e.g.* failure to exhaust administrative remedies, mootness). To the extent the Court reviews such additional materials, Plaintiffs have also attached declarations and exhibits to demonstrate subject matter jurisdiction as well as plainly disputed issues of fact.

Defendants also claim that Plaintiffs seek injunctive relief without an indispensible party, and seek dismissal under Rule 12(b)(7). Such a motion is based on "failure to join a party under Rule 19." Fed. R. Civ. Proc. 12(b)(7). Under Rule 19(a), Plaintiffs are required to join as parties all persons whose interests are so directly involved that their presence is needed for just adjudication. The primary purpose of Rule 19(a) is to assure that any judgment rendered will

provide complete relief to the existing parties and prevent repeated lawsuits on the same subject matter. *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999). Under Rule 19(b), the Court determines whether an action should be dismissed or proceed without the party if joinder is not feasible. This inquiry "is a practical one and fact specific, and is designed to avoid the harsh results of rigid application." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (internal citation omitted). "The moving party has the burden of persuasion in arguing for dismissal." *Id*. Here, should this Court deem state officials indispensible under Rule 19 to ensure injunctive relief, it should grant Plaintiffs leave to add such Defendants, who may be feasibly and promptly joined.

III. STATEMENT OF CLAIMS

A. DEFENDANTS' FAILURE TO PROVIDE SAFE AND ACCESSIBLE HOUSING TO RESIDENTS WITH DISABILITIES.

Residents with disabilities, including Plaintiffs, live in unsafe and inaccessible housing units. (Vaiola ¶¶ 5-8; Strickland ¶¶ 10-11; Sabalboro ¶¶ 8, 11; Mastin Decl. ¶¶ 109-124.) As documented by disabled residents[1] and Plaintiffs' access expert,[2] barriers pervade the facilities at Kuhio Park Terrace

[1] 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.") and Lee Sommers ("Sommers Decl.").

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

(KPT) and Kuhio Homes. (Mastin Decl. ¶¶ 30-125.) Disabled residents must traverse hazardous paths of travel marked by drop-offs, cross slopes, and raised edges. (Mastin Decl. ¶¶ 32-77.) Persons with mobility impairments are unable to independently open or travel through exterior or interior doors, and existing curb cuts are non-compliant. (Compl. ¶ 45; Mastin Decl. ¶¶ 31-32.) Common facilities such as the management office, community meeting building, laundry room and health clinic cannot be accessed equally or independently and the facility lacks the required accessible parking. (Sabalboro ¶ 10; Tuia ¶ 14; Mastin Decl. ¶¶ 78-88, 105-108.) By Defendants' own admission, there are no accessible housing units at KPT and only seven "borderline" accessible units at Kuhio Homes. (*See* Declaration of Claudia Center ("Center Decl."), Exh. A.)[3]

The lack of access is obvious. 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

[3] A decade ago, the National Center for Housing Management (NCHM) prepared a transition plan. (Center Decl., Exh. B.) NCHM recommended that Defendants give overall accessibility highest priority, and documented numerous access barriers, including paths of travel "marred by extensive cracks and avulsions," tenant services located up stairs, and an insufficient number of accessible parking spaces.

completely inaccessible. (Vaiola Decl. ¶ 7; Mastin Decl. ¶122.) Despite Ms. Vaiola's request for a ramp to enter her front door, building management refused. (Vaiola Decl. ¶ 7.) Instead, her friend built a makeshift ramp. (*Id.)* Each year, management comes to her unit and sees her living conditions. (Vaiola Decl. ¶ 11, 15.)

The transfer of tenants to other, more accessible, housing projects is not an effective option. Disabled tenants have been told there are no accessible units available and remain on an amorphous "wait list" for years. (Tuia Decl. ¶ 13; Sommers Decl. ¶¶ 13, 15.) They are not told when, if ever, they will live in accessible nondiscriminatory public housing.

B. DEFENDANTS' FAILURE TO PREPARE AND IMPLEMENT EVACUATION PLANS FOR RESIDENTS WITH DISABILITIES.

Defendants have failed to ensure the safety and safe evacuation of residents with disabilities, including Plaintiffs, in the event of fire or other emergency. (Compl. ¶ 36.) 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. (Compl. ¶ 38; Declaration of Manny Muniz[4] ("Muniz Decl.") at ¶¶ 29-37.) Instead of remedying these violations, Defendants have sought fire code

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

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.)[5]

Significantly, residents with disabilities are not informed of emergency evacuation procedures or policies, 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.) Residents fear they would be unable to safely leave in an 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.) Possible consequences of insufficient safety planning include catastrophic loss of life. (Muniz Decl. ¶¶ 17-19.)

C. DEFENDANTS' FAILURE TO REMEDY HAZARDOUS ENVIRONMENTAL CONDITIONS AND TO PROVIDE HOT WATER AT KPT.

Defendants have failed to remedy hazardous environmental conditions and to provide hot water. (Compl. ¶¶ 40-44.) Hazardous environmental conditions include smoke from fires, sewage backups, and roach droppings. (Declaration of

[5] In 2007, the Honolulu Fire Department came to KPT to respond to fires at least 60 times. (Compl. ¶ 37; Muniz Decl. ¶ 11a.)

Rob Scofield[6] ("Scofield Decl.") ¶¶ 10-14; Sommers Decl. ¶ 11; Strickland Decl. ¶ 15; Sabalboro Decl. ¶ 7; Silva Decl. ¶ 25, McMillon Decl. ¶ 10.) These conditions have a greater impact on disabled residents with allergies, asthma, other respiratory aliments, and/or are at high risk for bacterial infections. (Scofield Decl. ¶¶ 12-15.) Similarly, there has been no consistent hot water. (Compl. ¶ 44.) Disabled residents have been unable to bathe, as the water is so cold as to trigger a worsening of their disabilities, or the risk of opportunistic infections such as pneumonia. (Compl. ¶ 44; McMillon Decl. ¶ 9).

D. DEFENDANTS' FAILURE TO MAINTAIN SAFE AND ACCESSIBLE ELEVATORS.

Each of the KPT towers has two tenant elevators and one freight elevator. (Compl. ¶ 32.) Defendants unlawfully fail to maintain the elevators and often one or both tenant elevators has been broken. (Center Decl., Exh. C; McMillon Decl. ¶ 4.) When the passenger elevators are inoperable, tenants with disabilities are forced to use the freight elevator or attempt to negotiate dark, slippery, and unsanitary stairwells in order to reach their units. (Compl. ¶ 32.) The freight elevators are not designed for tenant use, and require a key and operator. (Compl. ¶ 32; McMillon Decl. ¶ 5.) Freight elevators impose substantial delays and additional hazards compared to passenger elevators. (Compl. ¶ 32; Strickland ¶ 5;

[6] Rob Scofield is an expert in environmental conditions. (Scofield Decl. ¶¶ 2, 4-6, 8-9).

McMillon ¶ 5; Mastin Decl. ¶¶ 105-108.)

Without elevator service, residents with disabilities must struggle with multiple flights of dangerous and poorly lit stairs and landings while avoiding wet areas, trash, and urine. (Compl. ¶ 33; McMillon Decl. ¶¶ 6-8, Exhs. A, B; Sommers Decl. ¶¶ 7, 9; Strickland ¶¶ 5-6.) Plaintiffs and other disabled residents frequently fall and have suffered injuries. (Strickland Decl. ¶¶ 7-8; Tuia Decl. ¶ 5; McMillon ¶ 7-8.) Plaintiff Strickland recently underwent a hernia operation because of a stairway fall. (Strickland Decl. ¶ 8.) Putative class member Tuia has fallen at least twice while in the stairway. Tuia Decl. ¶ 5.) On May 5, 2009, Ms. Tuia slipped and fell in the stairway and required medical treatment for bruises and cervical strain. (*Id.*)

Elevators in operation are dangerous and crowded. (Compl. ¶ 34.) They are often unable to stop on or be called from every floor. (Compl. ¶ 34; Sommers Decl. ¶ 7.) 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.) The lack of reliable elevator service causes tenants to miss important medical appointments. (Strickland Decl. ¶ 9.) Due to the malfunctioning elevators, mobility impaired residents have been prevented from coming or going from 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.)

E. DEFENDANTS' FAILURE TO PROVIDE REASONABLE MODIFICATIONS/ACCOMMODATIONS TO RESIDENTS WITH DISABILITIES.

Defendants have failed to implement an effective system for responding to requests for reasonable modifications/accommodations. **(**Compl. ¶ 28.) Plaintiffs and putative class members have repeatedly asked for reasonable modifications. (Silva Decl. ¶¶ 10-13; McMillon Decl. ¶ 12; Vaiola Decl. ¶¶ 10, 11, 13; Sabalboro Decl. ¶¶ 9-12; Strickland Decl. ¶¶ 10, 13, 14, 16, 19; Sommers Decl. ¶¶ 12-15; Tuia Decl. ¶¶ 6-8.) Defendants have failed to follow any type of policy in responding to these requests. **(**Compl. ¶ 28.) Indeed, 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, and even ten or more years. (Silva Decl. ¶ 10; Vaiola Decl. ¶¶ 10, 11, 13.) Many 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. ¶¶ 112-125, 131.)

Although Defendants have a "reasonable accommodation request" form, Defendants rarely, if ever, provide tenants with this form. (Vaiola Decl. ¶ 12;

Silva Decl. ¶ 21, McMillon Decl. ¶ 13, Strickland Decl. ¶ 17.)[7] According to Defendants' own policy, Realty Laua is supposed to submit reasonable accommodation requests to the HPHA's Compliance Officer, and the Compliance Officer is supposed to promptly review the request and respond. Defendants have failed to follow this policy to the detriment of all disabled residents. *Id.*

IV. ARGUMENT

A. PLAINTIFFS HAVE STATED CLAIMS FOR DISABILITY DISCRIMINATION ARISING FROM THE DENIAL OF PROGRAM ACCESS REQUIRED BY THE ADA AND SECTION 504.

To prove a violation of Title II of the ADA, a plaintiff must show that she or he is a qualified individual with a disability, and was or is excluded from participation in or denied the benefits of a public entity's programs, services, or activities, or otherwise discriminated against, based upon disability. *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997); *Putnam v. Oakland Unified Sch. Dist.*, No. C-93-3772 CW, 1995 WL 873734, at *11 (N.D. Cal. June 9, 1995); *Campos v. San Francisco State Univ.*, No. C-97-2326 MMC, 1999 WL 1201809 (N.D. Cal. June 26, 1999), at *6. The elements for

[7] 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 modifications. (Tuia Decl. ¶ 9; Silva Decl. ¶ 16.) Mr. Silva had been asking for modifications for approximately five years, while Ms. Tuia had been making such requests since May 2006. (Silva Decl. ¶ 10; Tuia Decl. ¶ 6).

a violation of Section 504 of the Rehabilitation Act ("Section 504") are similar, with the additional showing of federal funding. *Id.*

Here, Plaintiffs claim that they are individuals with disabilities who are qualified and eligible to live as tenants in KPT and Kuhio Homes. (Compl. ¶ 2.) They allege that due to Defendants' failure to provide program access as required by law, they have been denied the benefits of the housing provided by the Defendants, and have otherwise been discriminated against, based upon their disabilities. *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 – thus, the program accessibility regulations at issue here."). Such claims are unrelated to, and do not require or depend upon, any individual request for reasonable accommodation or reasonable modification. Plaintiffs' complaint states program access claims under the ADA and Section 504.

1. For Years, Defendants Have Had an Affirmative Obligation to Provide Program Access to Persons with Disabilities.

Regulations promulgated under the ADA and Section 504 make clear that public entities must operate their housing programs, services, and activities so as to provide access to individuals with disabilities:

> A public entity shall operate each service, program, or activity 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 of the ADA).[8]

> A recipient [of federal funds] shall operate each housing program or activity receiving Federal financial assistance so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons.

28 C.F.R. § 8.24(a) (regulation implementing 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);[9] *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*

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[8] 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); *Chaffin*, 348 F.3d at 858, 860-62.

[9] Contrary to Defendants' suggestion, *see* Memorandum in Support of Motion, pp. 20-23, changes to existing facilities required to meet the program access standard need not be "readily achievable." *See Shotz*, 256 F.3d at 1081 n.4 ("The County also argues that the plaintiffs have failed to allege that the architectural changes are "readily achievable." The regulations require that changes be made unless they would necessitate "a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.150(a)(3). The County mistakenly points to Title III of the ADA, 42 U.S.C. § 12182(b)(2)(A)(iv), which applies to "public accommodations" not "public entities," and which requires that the architectural changes be readily achievable.").

of Greater Toledo v. City of Sandusky, 385 F.3d 901 (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 910-11 (6th Cir. 2004) (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 have long since passed.[10] *See Campos*, 1999 WL 1201809 at **4-5 (reviewing regulatory scheme and deadlines); *Putnam*, 1995 WL 873734 at *9 (same).

2. The Public Defendants' Obligation to Provide Program Access Does Not Depend Upon Notice or a Request for "Reasonable Accommodation" or "Reasonable Modification."

Defendants suggest repeatedly that they cannot be liable for their failure to ensure program access because, they allege, individual plaintiffs have not

[10] 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").

sufficiently notified the defendants of their disabilities or access needs through a request for reasonable accommodation.[11] The obligation of public entities to provide program access does not depend upon any request for reasonable accommodation or reasonable modification. The obligation of public entities to ensure program access is stated in the imperative ("A public entity shall …"), and separately from the distinct obligation of entities to respond to individual requests for reasonable modifications. *Compare* 28 C.F.R. § 35.150 (setting forth program access obligations) with 28 C.F.R. § 35.130(b)(7) (setting forth obligation to make reasonable modifications in policies, practices, or procedures). Consistently, setting forth a *prima facie* case under Title II and Section 504 as articulated by the Ninth Circuit (and every other Circuit) does not require a request for reasonable accommodation or modification. *See also* Memorandum in Support of Motion, p. 15 (reviewing elements of prima facie case).

[11] *See* Memorandum in Support of Motion, pp. 2-3 ("Whenever KPT tenants have properly requested reasonable accommodations because of a verified disability, they have been accommodated."), 3-4 ("When a KPT tenant becomes disabled due to a mobility impairment, and submits the proper request for accommodation form, with the appropriate medical verification, that tenant is, as soon as practicable, relocated to another housing project that can accommodate his/her needs."), 10-12 (reviewing asserted accommodation and grievance procedures), 12 ("Except for Plaintiff Lee Sommers, there are no records or evidence … that any of the Plaintiffs … ever submitted a RA form for a specific accommodation."), 14 (characterizing plaintiffs' Title II and Rehabilitation Act claims as being that defendants "wrongfully denied or simply ignored [plaintiffs'] requests for reasonable accommodations"), 16-17 (asserting that plaintiffs' complaint is premature because they purportedly failed to request accommodation).

Defendants' attempted conflation of separate legal obligations – the obligation to provide program access and the obligation to respond to individual requests for reasonable modification – finds no regulatory or judicial support, and has been rejected. In *Tyler v. City of Manhattan*, 857 F. Supp. 800 (D. Kan. 1994), the district court distinguished a public entity's response to individual grievances or complaints, and its affirmative obligations to achieve program access:

> The City has adopted an "ADA Services and Programs Policy," consistent with the spirit of the ADA, under which the City addresses problems with services, policies, and procedures when identified as such by a particular individual with a disability. However, the regulations require more. The self-evaluation requirement imposes an affirmative duty on public entities to evaluate their own services, policies, and practices, in conjunction with input from interested persons, for the purpose of identifying problems and proceeding to correct them. While the City is to be commended for adopting its ADA policy and a grievance procedure, it is not enough for the City to adopt an approach of responding on an *ad hoc* basis to specific individual complaints. A public entity that simply adopts a policy of responding to individual complaints alleging violations of Title II has not gone far enough to affirmatively identify access problems with its services, policies, and practices, and proceed on its own to correct them[.]

Id. at 814-15 (emphasis added).[12] Similarly, in *Putnam*, the Northern District of

[12] In a prior opinion, the court explained:

> [The City] states that its ADA policy allows for a "day-to-day evaluation of programs and activities and the flexibility to modify or move programs that are or may become inaccessible under individual circumstances." However, the Title II implementing regulations clearly call for the City to conduct a comprehensive self-evaluation within one year of the effective date of the regulations. Further, to the

California explained:

> Defendants harbor a more serious misunderstanding of the requirements of § 504 and its regulations. They mistakenly argue that the regulations do not require entities to take any action to address architectural barriers creating the potential for denial of access, but instead allow entities to deal with problems when they "actually arise," either by then removing the barrier or by alternative means. However, the regulations impose upon schools the affirmative duty continuously "to operate each program ... so that the program ..., when viewed in its entirety, is readily accessible to handicapped persons."
>
> Although the regulations do not require removal of all architectural barriers to achieve such ready accessibility, they do require prompt implementation of a plan making all programs readily accessible. The approach of taking no action to render programs accessible until a student or parent identifies an accessibility problem does not make a program "readily" accessible. Rather, this approach imposes the discriminatory requirement that a disabled student ascertain which barriers deny her access and brave possible disapproval to point them out and request that they be remedied. Furthermore, it imposes the further discrimination of forcing the student to wait for the barriers to

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> extent the City elects to comply with the ADA's accessibility mandate by making structural modifications to existing facilities, the regulations require the City to adopt a specific transition plan by July 26, 1992, showing specifically how the City plans to achieve such compliance. In short, the regulations promulgated by the Department of Justice to enforce Title II do not permit the City to exercise a "day-to-day evaluation;" nor do they afford the City the "flexibility" to make modifications of programs that "are or may become inaccessible" on a case-by-case basis. Rather, the regulations impose an affirmative duty on the City to ensure its services, programs, and activities are accessible to those with disabilities. The City is required by the regulations to conduct a self-evaluation to identify compliance deficiencies, and proceed to correct those deficiencies whether or not a particular qualified individual with disabilities is presently excluded from access by such deficiencies.

Tyler v. City of Manhattan, 849 F. Supp. 1429, 1437 (D. Kan. 1994).

> be remedied, and in the meantime either be excluded or be subjected to the perils attendant to the barriers. …

Putnam v. Oakland Unified School Dist., 1995 WL 873734, at *10 (emphasis added); *id.* at *13 ("Program accessibility and reasonable individual accommodation are separate requirements."); *accord Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 8 (1st Cir. 2000) ("the University must act affirmatively to eliminate barriers on the premises that would otherwise serve to deny persons with disabilities access to services, programs, or activities").[13]

3. Plaintiffs Complaint States a Claim Under Title II and Section 504 Based Upon the Failures of the Public Defendants to Provide Program Access.

Plaintiffs' complaint, together with the declarations accompanying this motion, detail Defendants' countless failures to provide program access in the housing programs including a tenant who must bathe herself in the sink because she cannot access her bathroom, a tenant who was trapped on his bathroom floor for six hours after he slipped and fell and could not get up, and a tenant who recently fell because she was forced to walk down the stairs when the elevators

[13] *See also Layton v. Elder*, 143 F.3d 469, 471, 472-73 (8th Cir. 1998) (reversing and directing district court to order compliance with program access regulation, despite defendant's argument that plaintiff failed to notify county of his intent to participate or to request accommodation); *Matthews v. Jefferson*, 29 F. Supp. 2d 525, 533, 537-38 (W.D. Ark. 1998) (ordering injunctive relief to comply with section 35.150, despite defendant's repeated argument that the plaintiff had not requested accommodation).

were not working. (Vaiola Decl. ¶ 6; Strickland Decl. ¶ 12; Tuia Decl. ¶ 5.)[14] As a result of these failures, Plaintiffs have experienced, and are continuing to experience, discrimination based upon their disabilities, including being denied the equal benefits of public housing.

These allegations state claims under Title II and Section 504. *See Chaffin v. Kansas State Fair Bd.*, 348 F.3d 850, 857 (10th Cir. 2003) ("We therefore do not agree with Defendants that mere physical presence on the fairgrounds – at least when coupled with being effectively trapped in a handicapped section, unable to leave for food or to use the restroom, unable to view the stage, and subjected to

[14] Defendants repeatedly suggest that they cannot be in violation of federal disability discrimination laws because all tenants, disabled and nondisabled, experience the same housing conditions. *See* Memorandum in Support of Motion, p. 18 ("Plaintiffs have failed to allege how they were denied a benefit which was made available to non-disabled tenants. Where is the different treatment between Plaintiffs and any other tenants at KPT or Kuhio Homes? … Here, all tenants at KPT and Kuhio Homes experience the maintenance and repair problems equally."). Defendants miss the point. The gravamen of Plaintiffs' complaint is that disabled tenants experience the conditions differently, because the conditions function to deny them the benefits of the housing, and to discriminate against them, on the basis of disability. Unlike a tenant who can climb stairs, Plaintiffs with mobility impairments experience disability discrimination when they are stranded inside or outside of their living units. Unlike a tenant who can sustain breathing in the particulates from vermin infestations, Plaintiffs with respiratory impairments experience disability discrimination when they become ill from breathing the air. The entire concept of requiring accessibility as a matter of law is founded on the understanding that persons with disabilities may be excluded or discriminated against due to barriers in the environment, and that such barriers must be removed to ensure access. "Equal treatment" is not a defense. *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002); *Giebeler v. M & B Assoc.*, 343 F.3d 1143, 1149 (9th Cir. 2003).

being climbed over, stepped on, and bumped into by other attendees – amounts to anything other than a denial of the benefits of the fair."); *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001) ("A violation of Title II, however, does not occur only when a disabled person is completely prevented from enjoying a service, program, or activity. … If the Courthouse's wheelchair ramps are so steep that they impede a disabled person or if its bathrooms are unfit for the use of a disabled person, then it cannot be said that the trial is 'readily accessible,' regardless whether the disabled person manages in some fashion to attend the trial.").

Plaintiffs are entitled to pursue their claims for denial of program access under Title II and Section 504. *See Shotz*, 256 F.3d at 1080-81 ("We therefore conclude that the plaintiffs have alleged a set of facts that, if true, would constitute a violation of Title II. Accordingly, they have stated a claim under Title II."); *Toledo v. Sanchez*, 454 F.3d 24, 32 (1st Cir. 2006) (noting that "Title II imposes an affirmative obligation on public entities to make their programs accessible to qualified individuals with disabilities, except where compliance would result in a fundamental alteration of services or impose an undue burden," and finding that "Toledo's complaint sufficiently alleges state conduct that violated Title II of the ADA."); *Campos*, 1999 WL 1201809 at *6 ("In short, the complaint alleges that SFSU's programs, services, and activities, viewed in their entirety, are inaccessible to plaintiffs. Defendants may well disagree that this is the case, but the accuracy of

the complaint's allegations is not the issue to be decided at this stage of the litigation. Plaintiffs have sufficiently stated a claim under both the ADA and the Rehabilitation Act[.]").

B. PLAINTIFFS HAVE STATED CLAIMS FOR DISABILITY DISCRIMINATION ARISING FROM DEFENDANTS' FAILURE TO ENSURE EQUAL SAFETY FOR TENANTS WITH DISABILITIES.

Plaintiffs have stated further claims under Title II and Section 504 by alleging that the housing facilities are less safe for them than for nondisabled tenants. In *Putnam v. Oakland Unified Sch. Dist.*, 1995 WL 873734 (N.D. Cal. 1995), Judge Wilken found that under Ninth Circuit precedent such unequal hazards violate federal disability nondiscrimination laws:

> 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. *California School for the Blind v. Honig*, 736 F.2d 538 (9th Cir.), *vacated on other grounds*, 471 U.S. 148 (1985) …
>
> [I]t is undisputed that each high school has architectural barriers constituting safety hazards described above; these have a discriminatory impact on disabled students. For example, at Oakland High, the path of travel to the wheelchair accessible parking area contains a hazardous grate with openings over four times wider than permitted. Even with the provision of an aide, this presents a safety hazard to a wheelchair user as well as to other mobility and sight impaired individuals. Plaintiff's expert also found that the faculty bathroom Putnam was expected to use was not only inaccessible but also hazardous, since the toilet was so low and the toilet paper dispenser so high as to create a falling hazard. In addition, this campus contains a path of travel with an extremely hazardous slope of more than twice the maximum permissible and with no handrail. …

> By failing to remove these safety hazards, Defendant has discriminated against all mobility-impaired students by subjecting them to unequal risks.

Id. at **11, 13; *accord Campos,* 1999 WL 1201809 at *7 ("The complaint further states a cause of action under the ADA and the Rehabilitation Act because it alleges that defendants provide disabled students with facilities less safe than those provided to other students," citing *Honig); see also Parker v. Universidad de Puerto Rico,* 225 F.3d 1, 5, 7-8 (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. … [T]he University does not satisfy the duties imposed by Title II merely by exercising reasonable care to protect persons with disabilities, along with other members of the public, from dangerous conditions on the premises.").

Here, given the architectural barriers, malfunctioning elevators, lack of fire safety equipment, and environmental conditions, residents with disabilities are unable to safely live or use the facilities. (Compl. ¶ 30.) Plaintiffs' complaint states a claim for disability discrimination, in that the public defendants have failed to provide them with equally safe housing facilities. *See Campos*, 1999 WL 1201809 at *8 (citing complaint's references to "safety hazards," and concluding that "the complaint adequately states a claim on this basis.").

C. PLAINTIFFS HAVE STATED A CLAIM FOR DISABILITY DISCRIMINATION ARISING FROM DEFENDANTS' FAILURE TO MAINTAIN ACCESSIBILITY FEATURES AS REQUIRED BY TITLE II OF THE ADA.

Under Title II, "[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). Plaintiffs have alleged that the Defendants have failed to maintain accessibility features including the elevators and paths of travel, and that this failure has resulted in disability discrimination. (Compl. ¶¶ 32-35.) These facts state a further claim for disability discrimination under Title II.

D. DEFENDANTS CANNOT DEMONSTRATE ANY AFFIRMATIVE DEFENSE JUSTIFYING ITS FAILURES TO PROVIDE PROGRAM ACCESS OR EQUAL SAFETY, OR ITS FAILURE TO MAINTAIN ACCESSIBILITY FEATURES.

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) (citing defenses in context of program access requirement).[15] As public entities, Defendants repeatedly suggest that they

[15] Unlike the Department of Justice regulations implementing Title II, the original Section 504 regulations promulgated by the (then) Department of Health, Education and Welfare (HEW) requiring that federally funded entities ensure program access do not include an undue burden or fundamental alteration defense; neither do the DOJ's program access regulations. 45 C.F.R. § 84.22; 28 C.F.R.

are unable to provide Plaintiffs with safe and accessible housing, or to comply with its maintenance obligations, due to the age and structure of the facilities, the impact of vandals, and the cost of upgrades.[16] Fundamental alteration and undue burden are affirmative defenses upon which the public entity bears the burden of proof.[17] Here, given the size and resources of the public entities here, Plaintiffs dispute that

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§ 41.57; *Putnam*, 1995 WL 873734 at *13 ("The § 504 regulations, however, require that programs be made readily accessible, with no exception allowed for financial burden. Only the § 504 regulations' requirement to make reasonable accommodations to the known physical or mental limitations of disabled individuals contains a financial burden exception."). The Supreme Court has recognized the HEW regulations as "an important source of guidance on the meaning of § 504." *Alexander v. Choate*, 469 U.S. 287, 304 & n.24 (1985). Nevertheless, some agencies and courts have imputed these defenses to the Section 504 program access obligation citing, *inter alia, Southeastern Community College v. Davis*, 442 U.S. 397 (1979). *Cf.* 24 C.F.R. § 8.24(a) ("This paragraph does not … [r]equire a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens.").

[16] *See* Memorandum in Support of Motion, pp. 3 ("Because of this structure, it is impossible to alter the structural layout of any given unit at KPT."), 4 ("Unfortunately because of KPT's age, structural inflexibility and overwhelming size, HPHA spends approximately in excess of $120,000 annually on repairs and maintenance."), 5 ("Like many public housing projects across the country, both KPT and Kuhio Homes suffer from malcontents and vandals who constantly damage the physical facilities. … [M]any of the structural concerns outlined in the Plaintiffs' Complaint have been repeatedly repaired and redamaged because of vandals."), 21 (citing Title II's fundamental alteration and undue burden defenses), 23 (stating that estimated cost of upgrades is approximately $18 million); *see also id.*, pp. 20-23 (reviewing inapplicable "readily achievable" standard of Title III).

[17] 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.").

Defendants can demonstrate fundamental alteration or undue burden as a matter of law as to each failure cited by Plaintiffs or uncovered by this class action litigation.

Moreover, the remedying of many access violations requires only modest resources, including finite expenditures for barrier removal and additional maintenance. For example, installing grab bars would cost approximately $400 and accessible parking spaces would cost approximately $9,600. (Mastin Decl. ¶¶ 83, 86.) Such actions do not approach fundamental alteration or undue burden.[18] Additionally, Defendants have not complied with the procedural prerequisites for asserting these defenses under Title II. *See* 28 C.F.R. § 35.164.

E. PLAINTIFFS HAVE STATED CLAIMS FOR DISABILITY DISCRIMINATION ARISING FROM DEFENDANTS' FAILURE TO PROVIDE REASONABLE MODIFICATIONS AND 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,

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

program or activity." 28 C.F.R. § 35.130(b)(7); *see also Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003). Similar requirements are imposed by Section 504 and the Fair Housing Act Amendments. 24 C.F.R. § 8.33; 42 U.S.C. § 3604(f)(3)(B). Public entities 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. 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). The obligation to provide such information is a proactive one. *See Engle v. Gallas*, 1994 WL 263347, *3 (E.D. Pa. June 10, 1994) (noting that public entity did not provide proactive notification, did not provide instruction regarding disability verification, and did not train its employees, and concluding: "[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. Good intentions, in this regard, are of little help to one who must endure the hardship of a disability."); *Adelman v. Dunmire*, 1996 WL 107853, *4 (E.D. Pa. Mar. 12, 1996).

Plaintiffs dispute that Defendants' "system" for receiving and responding to requests for reasonable modifications or accommodations is functional. Although

Defendants have a "reasonable accommodation request" form, they rarely, if ever, provide tenants with this form. (Vaiola Decl. ¶ 12; Silva Decl. ¶ 21, McMillon Decl. ¶ 13, Strickland Decl. ¶ 17.) Defendants assert that the named Plaintiffs have not been granted reasonable modifications because their requests have not been in writing, and reference "HUD regulations" as requiring written requests. *See* Memorandum in Support of Motion, page 17. In fact, neither HUD nor any other law or regulation requires that a request for modification or accommodation be in writing. *See* Joint Statement of the Department of Housing and Urban Development and the Department of Justice, "Reasonable Accommodations Under the Fair Housing Act" at page 6 ("housing providers must give appropriate consideration for reasonable accommodation requests even if the requester makes the request orally or does not use the provider's preferred forms or procedures for making such requests."). (Center Decl., Exh. D.)[19] Defendants' own procedure for handling reasonable modifications does not require that the requests be in writing ("[r]easonable accommodation requests *should* be in writing) (emphasis added). (Center Decl., Exh. E.) In *Clarkson* the court rejected the argument that Defendants in this case make – that the absence of requests relieves them of their

[19] Department of Justice settlements do not require a form. (Center Decl., Exh. F, ¶ 21(a)(ii)(1)) ("An individual's request for reasonable modification shall not be denied on grounds that the individual failed to adhere to the District's procedures or forms for making such requests.")

reasonable accommodation obligations. *Clarkson*, 898 F. Supp. at 1045. ("Rather, this absence is indicative only of [the defendant]'s failure to comply with their obligation to create and maintain procedures for requests and grievances regarding accommodations and assistance.").

The process described by Defendants in its moving papers is inconsistent with its written policy.[20] Moreover, the grievance procedure cited by Defendants is not referenced in its written policy. Most importantly, in practice, disabled residents do not hear back and some requests date back five, and even ten or more years. (Strickland Decl. ¶ 16, 19; Vaiola Decl. ¶¶ 10, 11, 13; Silva Decl. ¶ 10). Defendants' reasonable accommodation process is not functional and thus violates the ADA. *See Clarkson*, 898 F. Supp. at 1045 ("The statute imposes an affirmative obligation upon public entities to create and maintain a coherent procedure by which requests for accommodations and assistive services can ultimately have some effect").

Additionally, one outcome of the policy is that disabled residents remain on a waiting list for an accessible unit. Fo Decl. ¶ 8. Yet, Defendants admit there are

[20] Defendants describe a procedure whereby all written accommodation requests are sent to Realty which in turn sends them to HPHA's Compliance Office (except for requests for live-in aides), which makes a decision, informs Realty, which in turn informs the tenant. *See* Fo Decl. ¶ 6; Inafuku Decl. ¶ 7; Faleafine Decl. ¶ 6. The process described by Fo, Inafuku and Faleafine is not consistent with the written policy. (*See* Center Decl., Exh. E.)

no accessible units, there are very few accessible units statewide and thus the effect is that residents remain in their inaccessible units for years while waiting for a unit to become available. (Sabalboro Decl. ¶ 11-12; Vaiola Decl. ¶¶ 10, 11, 14; Tuia Decl. ¶ 13; Sommers Decl. ¶ 13.) Such a result is inconsistent with Defendants' obligations.

F. THERE ARE NO ADMINISTRATIVE EXHAUSTION REQUIREMENTS FOR THE CLAIMS BROUGHT BY PLAINTIFFS.

Administrative exhaustion is not required to bring a Title II claim. *Bogovich v. Sandoval*, 189 F.3d 999, 1002 (9th Cir. 1999) (citing *Cable v. Dep't of Developmental Services of California*, 973 F. Supp. 937, 940 (C.D. Cal. 1997) ("Courts have consistently held that there is no exhaustion requirement under Title II of the ADA.")); 28 C.F.R. § 35.172(b) ("At any time, the complainant may file a private suit pursuant to section 203 of the Act, whether or not the designated agency finds a violation."). Nor must Plaintiffs administratively exhaust to bring claims under Section 504 or the Fair Housing Act Amendments. *See Wiles v. Dep't of Educ.*, 555 F. Supp. 2d 1143, 1156 (D. Haw. 2008) (discussing Section 504); *Oxford House, Inc. v. City of Virginia Beach, Va.*, 825 F. Supp. 1251, 1260 (E.D. Va. 1993) ("The court agrees that plaintiffs suffering an actual injury need not exhaust administrative remedies through HUD, or HUD-certified state agencies, before bringing claims in federal court under the Fair Housing

Act."), citing House Report at 39, reprinted in 1988 U.S.C.C.A.N. at 2200 ("An aggrieved person is not required to exhaust the administrative process before filing a civil action. The Committee intends for the [HUD] administrative proceeding to be a primary, but not exclusive, method for persons aggrieved by discriminatory housing practices to seek redress."). Defendants' assertion that Plaintiffs' complaint must be dismissed for failure to administratively exhaust with HUD or some other agency is without merit. Similarly, their argument regarding primary jurisdiction is not supported by any applicable authority. They have not cited any case where a court has referred a claim for disability discrimination to HUD or any other administrative agency. *See Disability Rights Council of Greater Washington v. Washington Metropolitan Area Transit Agency*, 239 F.R.D. 9, 20 (D.D.C. 2006) (claim for disability discrimination based on inadequate transportation services to disabled individuals was not subject to primary jurisdiction where issues required no special expertise and there was no proceeding regarding the same issue before the Department of Transportation).

G. THE CLAIMS ARE NOT MOOT.

Defendants suggest that Plaintiffs' claims are moot, because of their plans to improve conditions, and the possibility of the "privatizing" of KPT.[21] In order to

[21] *See* Memorandum in Support of Motion, pp. 4 ("Recently, a private developer has approached HPHA with a proposal to 'privatize' KPT: that is, the company would buy the building, completely refurbish it and rent it out as mixed use,

demonstrate that claims are moot due to voluntary remedial actions, a public entity must demonstrate that "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Layton v. Elder*, 143 F.3d 469, 471 (8th Cir. 1998); *see also U.S. v. W.T. Grant*, 345 U.S. 629, 632-33 (1953) ("The burden is a heavy one."); *Chaffin*, 348 F.3d at 865 (when transition plan was ten years late and after litigation commenced, "we are hesitant to declare the matter moot, which would allow Defendants to evade judicial review.").

In *Layton*, the county had purportedly made progress toward remedying the access violations by adopting a grievance procedure and initiating barrier removal. Nevertheless, and noting that the programs at issue were still located in inaccessible sites, the Eighth Circuit reversed and directed the district court to enter an injunction. *Layton v. Elder*, 143 F.3d 469, 471-72 ("The steps taken by the county toward ADA compliance, while commendable, have not addressed this problem. Therefore, this appeal clearly cannot be considered moot."); *accord Matthews v. Jefferson*, 29 F. Supp. 2d 525, 538 (W.D. Ark. 1998) (finding that

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retaining a high number of low income housing units. … The Board has resolved to publicly invite additional proposals for review and consideration."), 5-6 (reviewing plans to replace hot water boilers, install fire alarms, and to replace and modernize elevators, noting that "HPHA is currently reviewing options for a new pest control exterminating contract" and that an "engineering study has been funded and is underway" regarding sewage backups, citing appropriation for modernization of garbage chutes, and asserting that "[s]everal other projects are also in the early stages of consideration").

defendant's "plans to have a completely accessible courthouse" in a different building did not render claims moot); *Cooper v. Weltner*, No. 97-3105-JTM, 1999 WL 1000503 (D. Kan. Oct. 27, 1999), at *6 ("The defendants also suggest that because they had plans to build a new facility in New Century, Kansas, this extinguished the need to comply with the ADA at its existing facility. However, construction of a new accessible facility was of no value to Cooper at the time.").

Here, Plaintiffs' complaint (and the declarations accompanying this opposition), review ongoing and chronic barriers that are currently interfering with their ability to access and enjoy the facilities on an equal basis with nondisabled tenants. The claims are not moot.

H. THE COURT MAY ORDER THE FULL RANGE OF RELIEF AGAINST DEFENDANTS.

1. Plaintiffs' Claims Under Section 504 and Under the Fair Housing Act Amendments Are Founded On Congress's Spending Clause Powers – This Court May Order the Full Range of Relief.

The standards of the Rehabilitation Act and the Fair Housing Act Amendments apply to state actors such as Defendants HAWAII and HPHA by virtue of their acceptance of federal financial assistance. Accordingly, these claims are founded on Congress's spending clause powers, and this Court may order any and all appropriate relief, including damages, declaratory relief, and injunctive relief. *Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002) ("We therefore

agree with our sister circuit, *see Jim C.*, 235 F.3d at 1081-82, that the Rehabilitation Act is a valid exercise of Congress's spending power. The Eleventh Amendment is thus not a bar to Lovell and Delmendo's § 504 claims against the State."); *accord Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 493 (4th Cir. 2005); *Barbour v. Washington Metro. Area Transit Auth.*, 374 F.3d 1161, 1168-69 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 904 (2005); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003); *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 176 (3d Cir. 2002); *Jim C. v. U.S.*, 235 F.3d 1079, 1081 (8th Cir. 2000). There are no indispensible parties to Plaintiffs' claims under Section 504 or the Fair Housing Act Amendments. The doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), which requires naming individual State officers to avoid the immunity conferred on the States by the Eleventh Amendment, is irrelevant where Congress has properly waived the States' sovereign immunity. There is therefore no need to name state officials individually.

2. Plaintiffs' Claims Under Title II Are Founded on Congress's Powers Under the Fourteenth Amendment – Plaintiffs May Add Official Defendants If Deemed Necessary and This Court May Order Injunctive Relief.

Under Ninth Circuit precedent, Plaintiff's claims under Title II against the state Defendants are not barred by the Eleventh Amendment. *Lovell v. Chandler*, 303 F.3d 1039, 1050 (9th Cir. 2002); *Hason v. Medical Bd. of California*, 279 F.3d

1167, 1170 (9th Cir. 2002). Accordingly, this Court may order the full range of relief, including injunctive relief, to remedy Plaintiffs' ADA claims and there is no need to name state officials individually.

In an abundance of caution, however, Plaintiffs hereby seek leave to add as named Defendants the relevant officials of the state Defendants. As there is no prejudice to any party to make this amendment, it should be granted. Whether or not Ninth Circuit precedent on Title II of the ADA remains settled, *see Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (finding that Congress exceeded its Fourteenth Amendment power in enacting Title I against the states) and *Tennessee v. Lane*, 541 U.S. 509 (2004) (finding that Congress did not exceed its Fourteenth Amendment power in enacting Title II to ensure access to the courts), this Court may continue to order injunctive relief to remedy Title II violations under *Ex Parte Young* if Plaintiffs are granted leave to amend their complaint to add the relevant state officials. *See Garrett*, 531 U.S. at 374 n.9 (Title I standards may be enforced against the state "by private individuals in actions for injunctive relief under *Ex parte Young*[.]").

V. CONCLUSION

For all of the reasons stated above, the motion to dismiss should be denied.

DATED: Honolulu, Hawai`i, May 21, 2009.

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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**

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.5, I hereby certify that Plaintiffs' Memorandum in Opposition to Defendants State of Hawaii and Hawaii Public Housing Authority's Motion to Dismiss Plaintiffs' Complaint for Declaratory and Injunctive Relief and Damages, Filed December 18, 2008 contains 8,917 words, exclusive of case caption, table of contents, table of authorities, exhibits, declarations, certificates of counsel, and certificate of service.

DATED: Honolulu, Hawai`i, May 21, 2009.

/s/ Jason H. Kim
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the dates and methods of service noted below, as true and correct copy of the foregoing was served on the following at their last known address:

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