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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' MOTION FOR CLASS CERTIFICATION;** MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF

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; CERTIFICATE OF WORD COUNT; APPENDIX OF DISABILITY CASES IN WHICH CLASSES HAVE BEEN CERTIFIED; DECLARATION OF MELISSA BOSWELL; EXHIBIT A; DECLARATION OF HAZEL MCMILLON; EXHIBITS A-H; DECLARATION OF TRUDY SABALBORO; EXHIBITS A-B; DECLARATION OF JAMES SILVA; EXHIBITS A-B; DECLARATION OF LEE SOMMERS; EXHIBITS A-F; DECLARATION OF GENE STRICKLAND; EXHIBITS A-D; DECLARATION OF SII TUIA; EXHIBITS A-B; DECLARATION OF KATHERINE VAIOLA; EXHIBITS A-H; DECLARATION OF JEFF MASTIN; EXHIBITS A-I; DECLARATION OF MANNY MUNIZ; EXHIBIT A; DECLARATION OF ROBERT SCOFIELD, D. ENV.; EXHIBITS A-C; DECLARATION OF PAUL ALSTON; DECLARATION OF CLAUDIA CENTER; DECLARATION OF WILLIAM DUNHAM; CERTIFICATE OF SERVICE

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs HAZEL MCMILLON; GENE STRICKLAND; TRUDY SABALBORO; KATHERINE VAIOLA; and LEE SOMMERS, individually and on behalf of all persons similarly situated, move for an order certifying the following class under Federal Rule of Civil Procedure (“Rule”) 23:

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

Plaintiffs also request that their counsel be appointed class counsel under Rule 23(g).

This Motion is brought under Rules 7(b) and 23 and the Local Rules for the District Court for the District of Hawaiʻi 7.2 and 7.3. This Motion is supported by the attached Memorandum, the attached declarations, the records and file in this case, and any additional matters that may be presented at or before hearing.

DATED: Honolulu, Hawai`i, June 3, 2009.

/s/ Jason H. Kim
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CLAUDIA CENTER
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

HAZEL MCMILLON; et al.,	)	CIVIL NO. CV 08 00578 JMS LEK
	)	(Civil Rights Action; Class Action)
Plaintiffs,	)	
	)	**MEMORANDUM OF POINTS AND**
v.	)	**AUTHORITIES IN SUPPORT OF**
	)	**MOTION**
STATE OF HAWAI`I; et al.,	)	
	)	
Defendants.	)	
______________________________	)	

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I. INTRODUCTION

Plaintiffs respectfully request certification of a class of tenants with disabilities who live or will live in two adjoining Honolulu federal public housing projects known as Kuhio Park Terrace ("KPT") and Kuhio Homes pursuant to Federal Rule of Civil Procedure 23(b)(2). Specifically, Plaintiffs seek certification of a class to redress Defendants State of Hawai`i, Hawai`i Public Housing Authority, and Realty Laua LLC's (collectively "Defendants") longstanding and continuing policy and practice of denying program access to disabled low-income tenants at KPT and Kuhio Homes in violation of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* ("ADA") and Section 504 of the Rehabilitation Act of 1973 29 U.S.C. § 701, *et seq* ("Section 504") (Compl. at ¶¶ 62-77); their failure to make reasonable accommodations as required by the Fair Housing Act Amendments ("FHAA"), 42 U.S.C. § 3604(f) (Compl. at ¶¶ 78-94); and Defendant Realty Laua's interference with Plaintiffs' rights under the ADA in violation of 42 U.S.C. § 12203(b) (Compl. at ¶¶ 95-102). As a direct and proximate result of Defendants' failure to comply with these federal civil rights laws, Plaintiffs and other disabled residents have been, and continue to be, subjected to discriminatory, dangerous, inhumane, and shocking living conditions at KPT and Kuhio Homes. Because the discrimination is systemic and pervasive,

class certification is the only means to guarantee that all disabled residents are able to use the programs, services and activities of KPT and Kuhio Homes.

Actions that challenge a public entity's failure to remove architectural and programmatic barriers are particularly suited for class certification under Rule 23(b)(2). The Ninth Circuit, like other federal circuits, recognizes that class certification is appropriate under Title II and Section 504 because both the legal and factual issues that establish the public entity's liability focus solely on the defendant's acts and omissions. *Armstrong v. Davis,* 275 F.3d 849 (9th Cir. 2001); *see also Lightbourn v. County of el Paso, Texas,* 118 F. 3d 421, 423, 426 (5th Cir. 1997); *Marcus v. Kan. Dept. of Revenue*, 206 F.R.D. 509, 511, 513 (D. Kan. 2002); *Access Now, Inc. v. Ambulatory Surgery Ctr. Group, Ltd.*, 197 F.R.D. 522, 530 (S.D. Fla. 2000).

Defendants' decades of non-compliance with federal disability laws have resulted in systemic and pervasive barriers and conditions that deny or limit program access and services to Plaintiffs and all other similarly situated disabled residents of KPT and Kuhio Homes. This lawsuit provides a compelling case for class certification under Rule 23(b)(2) for at least four reasons.

First, the putative class contains a sufficient number of low-income, disabled tenants. The size of the class well exceeds 200: there are 614 units in two 16-story towers at KPT and 134 units across several low-rise complexes at Kuhio

Homes. Joinder is impractical because there are hundreds of present and future disabled residents who are or will be harmed because of architectural and programmatic barriers and hazardous conditions created by Defendants' unlawful policies, neglect and violations of federal law.

Second, where, as here, "the lawsuit challenges a system-wide practice or policy that affects all of the putative class members" the commonality requirement is easily satisfied. *Armstrong v. Davis,* 275 F.3d 849, 868 (9th Cir. 2001), *cert. denied,* 537 U.S. 812 (2002). In this case, where the Court's merits inquiry focuses solely on the scope and nature of Defendants' conduct and the determination of what barriers must be removed present common factual and legal questions, class certification is appropriate.

Third, the claims of the named Plaintiffs are typical of the claims of other disabled residents. Each putative class member has been denied program access, and otherwise discriminated against, on the basis of his or her disabilities. Indeed, Defendants have even failed, among other things: to implement the required transition plans to remove access barriers to persons with disabilities; to adopt effective evacuation plans for the disabled; to follow an effective policy or procedure to respond to reasonable accommodation requests; and to ensure that disabled residents of KPT and Kuhio Homes otherwise have access to public housing. These are among the many common injuries that typify the inequities and

injuries that Plaintiffs and other disabled residents must endure absent systemic, class-wide relief.

Fourth, the representative Plaintiffs and their counsel will fairly and adequately protect the interests of the class members. Plaintiffs and the putative class are represented by a coalition of established and experienced public interest and private law firms who have an extensive and successful track record in prosecuting and defending civil rights class actions involving public entities.

II. PROPOSED CLASS DEFINITION

To redress the systemic and pervasive barriers to equal access faced by all present and future disabled residents at KPT and Kuhio Homes, Plaintiffs respectfully request that the Court certify the following class under Rule 23(b)(2):

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

Class certification will allow the Court to fairly and efficiently manage and adjudicate the merits of Plaintiffs' claims and fashion comprehensive systemic relief that will meaningfully improve the lives of present and future disabled tenants at KPT and Kuhio Homes.

III. STATEMENT OF FACTS AND GOVERNING SUBSTANTIVE LAW

Defendants have a long history of failing to comply with and remedy discriminatory barriers and health and safety risks that pervade KPT and Kuhio Homes in violation of Section 504, the ADA, and the FHAA. The claims of the class representatives and putative class members are all based on the same course of discriminatory conduct on the part of Defendants. As the evidence set forth below shows, Defendants' conduct has caused shocking and systemic discrimination and safety risks to putative class members. Residents of KPT and Kuhio Homes with disabilities:

- Face numerous hazardous obstacles and access barriers in their paths of travel, in the common areas, and in their individual units;
- Are forced to breathe toxic smoke from frequent trash chute fires;
- Are unaware of any evacuation plans or procedures;
- Are often either unable to enter or leave their units due to inoperable elevators or are forced to attempt to navigate the dark, wet, slippery, and unsanitary stairs;
- Have been, and are being denied reasonable modifications/accommodations for their disabilities despite requests for even basic accommodations such as bathroom grab bars; and
- As a result of these and other discrimination conditions, suffer from a loss of independence and dignity.

This evidence also confirms that the experiences of the class representatives are typical of the disabled residents and that class certification

under Rule 23(b)(2) provides the most efficient and fairest procedure for resolving this lawsuit.

A. THE DEFENDANTS' OBLIGATIONS UNDER THE ADA, SECTION 504, AND THE FHAA.

Title II , Section 504 and the FHAA prohibit discrimination, and require that persons with disabilities be provided with full and equal access to the benefits provided to the public by government entities such as Defendants. Title II provides, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Section 504 contains a similar prohibition that applies to federally-funded activities. 29 U.S.C. § 794(a).

Under the regulations adopted pursuant to Title II and Section 504, Defendants are obligated to make all of its programs, services and activities "readily accessible to and usable by" persons with disabilities. 28 C.F.R. § 35.150(a). This regulation requires public entities to locate their programs, services and activities in facilities that are fully accessible to persons with disabilities. *See, e.g., Layton v. Elder,* 143 F.3d 469, 473 (8th Cir. 1998) ("We emphasize, however, that if the county intends to continue using the county courthouse to provide services, programs and activities, it must make the parking accommodations and the building accessible to individuals with disabilities in

accordance with 28 C.F.R. § 35.151."); *Ramirez v. District of Columbia,* 2000 U.S. Dist. LEXIS 4161, *10 (D.D.C. 2000) ("[T]his Court holds that DCPS's program for disabled students…was not readily accessible to Freddy, because it did not provide a restroom for him to use independently.").

The ADA also requires public entities to make reasonable modifications to their policies, practices and procedures in order to provide program access to disabled individuals. 28 C.F.R. § 35.130(b)(7) ("[A] public entity shall 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,"); *Crowder v. Kitagawa,* 81 F.3d 1480, 1488 (9th Cir. 1996). Similar requirements are imposed by Section 504 and the FHAA. 24 C.F.R. § 8.33; 42 U.S.C. § 3604(f)(3)(B).

B. THE CLASS REPRESENTATIVES ARE TENANTS WITH DISABILITIES WHO HAVE EXPERIENCED NUMEROUS ACCESS BARRIERS.

As shown in the attached Declarations of Hazel McMillon, Gene Strickland, Trudy Sabalboro, Katherine Vaiola, and Lee Sommers, the proposed class representatives in this case, the Plaintiffs are disabled and live at KPT or Kuhio Homes . *See* McMillon Decl. ¶¶ 2-3; Sabalboro Decl. ¶¶ 2-3; Sommers Decl. ¶¶ 2-3; Vailoa Decl. ¶¶ 2-3; Strickland Decl. ¶¶ 2-3. All class

representatives have mobility impairments and the majority use either wheelchairs or other devices for mobility. *See* McMillon Decl. ¶ 3; Sabalboro Decl. ¶ 3; Sommers Decl. ¶ 4; Vailoa Decl. ¶ 4; Strickland Decl. ¶ 4. 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.

As documented by Plaintiffs' access expert,[1] barriers pervade the facilities at 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.)

Plaintiffs also experience access barriers in their own units. 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

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

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 request for a ramp to enter her front door, building management refused. (Vaiola Decl. ¶ 7.) Instead, her friend built a makeshift ramp. (*Id.*)

C. THE DEFENDANTS HAVE FAILED 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[2] ("Muniz Decl.") at ¶¶ 29-37.) 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.)[3]

Significantly, residents with disabilities are not informed of emergency evacuation procedures or policies, have never been told whether they

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

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

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. ¶ 19.) 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.)

D. THE DEFENDANTS HAVE FAILED 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 on a consistent basis. (Compl. ¶¶ 40-44.) Hazardous environmental conditions include smoke from fires, sewage backups, slippery stairwells, roach droppings, and unregulated water temperature. (Declaration of Rob Scofield ("Scofield Decl.") ¶¶ 10-16; Sommers Decl. ¶ 11; Strickland Decl. ¶ 15; Sabalboro Decl. ¶ 7; Silva Decl. ¶ 25, McMillon Decl. ¶ 10; Boswell Decl. ¶¶ 20-23.) 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.) The frequent sewage backups at KPT, for instance, pose unique risks to disabled residents with compromised immune

systems or who are subject to an increased risk of bacterial infections. (Scofield Decl. ¶ 13.) Exposure to such hazards is not theoretical. Plaintiff Lee Sommers, who is at such constant risk of a bacterial infection that she often has to visit the hospital for IV antibiotic treatments, has endured approximately eight sewage back ups in her unit, which she has been forced to clean up herself. (Sommers Decl. ¶¶ 4-5, 11.)

For years, during most hours of most days, there had been no hot water at KPT. Residents now report excessively hot water from the tap. (Scofield Decl. ¶ 16.) The unregulated water temperature can cause scald burns. (*Id.*) Residents with diseases such as diabetes who may be unable to feel heat in some regions of the body are particularly vulnerable to burns. (Scofield ¶ 16.)

E. THE DEFENDANTS HAVE FAILED 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. (McMillon Decl. ¶ 4.)[4] When

[4] Defendants' failure to ensure reliable elevator service is a clear violation of the ADA and Section 504. *See, e.g., Cupolo v. BART,* 5 F.Supp.2d 1078, 1084-86 (N.D. Cal. 1997). In *Cupolo,* the court held:

> 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. The difficulties class members have encountered with BART's elevators have therefore interfered with the

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; 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;

> accomplishment of the ADA's policy of assuring equal opportunity, full participation, independent living, and economic self-sufficiency to individuals with disabilities. *Id.* at 1084.

In addition to failing to ensure working elevators, Defendants have also failed to adopt an elevator maintenance policy as required by 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); 28 C.F.R. Pt. 35, App. A (Section 35.133) ("Maintenance of Accessible Features") ("This section recognizes that it is not sufficient to provide features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them. Inoperable elevators, locked accessible doors, or "accessible routes" that are obstructed by furniture, filing cabinets, or potted plants are neither "accessible to" nor "usable by" individuals with disabilities.").

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.)

F. THE DEFENDANTS HAVE FAILED 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; Boswell Decl. ¶¶ 9-10.) 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; Boswell ¶ 13.) In some cases, residents' requests, often accompanied by doctors' notes, date back more than five 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; Boswell ¶ 13.)[5] According to Defendants' own policy, Realty Laua is supposed to submit reasonable accommodation requests to the HPHA's Compliance Officer, and the

[5] 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).

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.* Residents remain in inaccessible units for years while waiting for an accessible unit to become available. (Sabalboro Decl. ¶ 11-12; Vaiola Decl. ¶¶ 10, 11, 14; Tuia Decl. ¶ 13; Sommers Decl. ¶ 13.)

G. PLAINTIFFS AND OTHER DISABLED RESIDENTS HAVE SUFFERED COMMON, SYSTEMIC AND PERVASIVE INJURIES.

There are many other residents, as shown in the attached declarations of putative class members Melissa Boswell, James Silva and Sii Tuia, with disabling medical conditions that constitute disabilities. (*See* Boswell Decl. ¶¶ 2, 4, 6-8; Silva Decl. ¶¶ 2-6, 25; Tuia Decl. ¶¶ 2 & 3.). The declaration testimony of the other putative class members shows that they have suffered the same injuries as the class representatives as a result of Defendants' failure to comply with federal law. Plaintiffs and putative class members have been discriminated against and denied access to public housing because of their disabilities. This Declaration testimony shows that the systemic inaccessibility of KPT and Kuhio Homes, as well as Defendants' failure to implement sufficient policies and procedures to address this inaccessibility, have resulted in physical and psychological injuries to members of the Plaintiff class. These Declarations confirm that the experiences of the class representatives are typical of those of other persons with disabilities who live at KPT and Kuhio Homes.

III. ARGUMENT

A. CLASS CERTIFICATION IS APPROPRIATE AND NECESSARY UNDER RULE 23 TO ENSURE THE FAIR AND EXPEDITIOUS ADJUDICATION OF THIS ACTION.

In deciding motions for class certification, the Court must apply Rule 23 liberally and flexibly. *See Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997). The allegations of the Complaint, which must be taken as true, *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975), demonstrate the existence of common claims that are best addressed through class-wide relief.

Absent the ability to obtain systemic, class-wide injunctive relief under Rule 23(b)(2), the low-income, disabled residents of KPT and Kuhio Homes will continue to live in inaccessible housing. The explicit legislative purpose in adding Rule 23(b)(2) in 1966 was to "facilitate the bringing of class actions in the civil rights area." Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d, § 1775, p. 470 (1986). The present case is the prototypical civil rights action in which liability turns solely on the Defendants' acts and omissions. These acts and omissions which resulted in architectural barriers, programmatic barriers, and failures to implement adequate safety policies are ***common to all class members***.

The Ninth Circuit, like other federal courts across the nation, has uniformly certified classes of disabled individuals challenging architectural and programmatic barriers to access. *See, e.g., Armstrong v. Davis*, 275 F.3d 849-869-

70, 879 (9th Cir. 2001), *cert denied*, 537 U.S. 812 (2002) (affirming the certification of a class of prisoners and parolees with sight, hearing, learning, developmental and mobility disabilities for ADA and Section 504 violations); *Amone v. Aveiro,* 226 F.R.D. 677 (D. Haw. 2005) (certifying a class of disabled public housing tenants who were not informed of right to request reduced rents); *Bates v. United Parcel Serv.*, 204 F.R.D. 440, 448 (N.D. Cal. 2001) (certifying a nationwide class of hearing-impaired employees for ADA violations); *Access Now, Inc. v. Ambulatory Surgery Center Group*, 197 F.R.D. 522, 524 n.1 (S.D. Fla. 2000) (certifying Rule 23(b)(2) class of persons with mobility, hearing and sight disabilities who challenged architectural and communications barriers in defendants' facilities under the ADA); *Trautz v. Weisman*, 846 F. Supp. 1160, 1169-70 (S.D.N.Y. 1994) (certifying class of disabled persons in damages action challenging conditions at adult care facility under Section 504).[6]

This case is no exception to the well-established body of law favoring certification of a class of disabled plaintiffs against systemic violations of federal nondiscrimination laws. Because Plaintiffs' proposed class seeks systemic injunctive relief that will benefit all members of the putative class, this action is appropriate for class certification pursuant to Rule 23(b)(2).

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[6] *See also* Appendix of Disability Cases in Which Classes Have Been Certified.

Class certification should be granted because, as discussed further below, Plaintiffs are able to demonstrate that all the requirements of Fed.R.Civ.P. 23(a) and 23(b)(2) are satisfied. Rule 23(a) provides that class certification is appropriate if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of either law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *See, e.g., Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). And Rule 23(b)(2) permits maintenance of a class action if the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2).

B. THE PROPOSED CLASS SATISFIES THE REQUIREMENTS OF RULE 23(A).

1. The Class Is So Numerous That Joinder of All Members Is Impracticable.

Plaintiffs satisfy the "numerosity" requirement of Rule 23(a)(1), as the proposed class is "so numerous that joinder of all members is impracticable." To meet the numerosity requirement, "the exact number of potential members need not be established nor do the members of the class need to be identified

individually." *San Antonio Hispanic Police Officers' Organization, Inc. v. City of San Antonio*, 188 F.R.D. 433, 442 (W.D. Tex. 1999) "When the exact number of class members cannot be ascertained, the court may make common sense assumptions to support a finding of numerosity." *Susan J. v. Riley*, 254 F.R.D. 439, 458 (M.D. Ala. 2008). In addition to looking to the number of plaintiffs in the class, courts also look to whether other factors – such as the plaintiffs' socio-economic status which affect the likelihood of separate actions being brought – also make joinder impracticable. *See Amone*, 226 F.R.D. at 684. In this case, Plaintiffs meet both the numerosity requirement as well as the impracticability requirement.

Here, the number of putative class members makes joinder impracticable, if not impossible. Prevailing consensus is that the class is sufficiently numerous if there are as many as 40 class members. *See Amone,* 226 F.R.D. at 684 (holding that present and past disabled residents of public housing fulfilled the numerosity requirement since the potential class likely exceed 40 members although the precise number and identity of the members were not definitively ascertained); Newberg and Conte, *Newberg on Class Actions* § 3.6 (4th ed. 2002); *see also Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 & nn. 9-10 (9th Cir. 1982), *vacated and remanded on other grounds*, 459 U.S. 810, 103 S. Ct. 35 (1982).

The size of the class in this action well exceeds 40, and by reasonable calculation from known facts, it exceeds 200: there are 614 units in two 16-story towers at KPT and 134 units across several low-rise complexes at Kuhio Homes. Based on a conservative assumption of three individuals living in each unit, there are over 2,000 residents at KPT and Kuhio Homes. According to the 2000 United States Census, 12.5 per cent of the non-institutionalized population over 5 years of age is disabled. *See* U.S. Census Bureau, 2000 PHC-T-32 – Disability Status of the Civilian Noninstitutionalized Population by Sex and Selected Characteristics for the United States and Puerto Rico (first published April 14, 2004). And the prevalence of disabled individuals is likely to be significantly higher in publicly-subsidized housing than the U.S. population at large, as disabled individuals for obvious reasons have greater difficulty than non-disabled individuals in earning sufficient income to afford housing at market rates. Therefore, there are almost certainly hundreds of present and future residents who meet the broad definition of a "disabled" or "handicapped" individual under federal law living in these units affected by architectural and programmatic barriers and hazardous conditions complained of herein. The number of putative class members satisfies Rule 23's numerosity requirement.

Joinder is further impracticable because the putative class is comprised exclusively of poor people "whose financial circumstances may prevent

them from pursuing individual litigation, who are unlikely to know that a cause of action exists, and whose individual claims are likely to be too small to make individual litigation feasible." *Amone*, 226 F.R.D. at 684; *see also Matyasovszky v. Housing Authority of City of Bridgeport*, 226 F.R.D. 35 (D. Conn. 2005) (finding numerosity especially in light of the low-income, disabled class members in an action against a municipal housing authority for violation of the Fair Housing Act and other federal and state statutes). The putative class is without exception comprised of low-income tenants with physical disabilities. It is highly unlikely that the tenants would bring individual actions against Defendants if the class is not certified. Bringing individual actions would be impracticable and burdensome. Accordingly, considerations of impracticality lean heavily towards certification of this class.

Moreover, joinder is impracticable as a matter of law because of the inclusion of future members in the proposed class. The inherent difficulty in identifying who will reside at KPT and Kuhio Homes in the future makes joinder impracticable. Indeed, the courts have held that joinder is impracticable based upon this factor alone even where the potential class was composed of relatively few identified members. For example, in *Pederson v. Louisiana State University,* 213 F.3d 858 (5th Cir. 2000), the Fifth Circuit reversed the district court's decision to decertify a class of women athletes because of lack of numerosity, holding that

the inclusion of future female students satisfied numerosity. "We have found the inclusion of future members in the class definition a factor to consider in determining if joinder is impracticable." *Id.* at 686, n. 11. *See also Jordan, supra,* 669 F.2d at 1320 ("[T]he class is composed of unnamed and unknown future black applicants who may be discriminated against by the County's employment practices. The joinder of unknown individuals is inherently impracticable.").

2. There Are Numerous Questions of Law And Fact Common To The Class.

Rule 23(a)(2) requires questions of law or fact that are common to the class. "Commonality" is established by "***the existence of shared legal issues with divergent factual predicates***" or, in the alternative, "***a common core of salient facts coupled with disparate legal remedies within the class***." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir. 1998) (emphasis added); *see also Doe v. Los Angeles Unified School Dist.*, 48 F.Supp.2d 1233, 1241-42 (C.D. Cal. 1999). The Ninth Circuit "considers the requirements for finding commonality under Rule 23(a)(2) to be 'minimal.'" *Bates v. United Parcel Serv.,* 204 F.R.D. 440, 445 (N.D. Cal. 2001) (*citing Hanlon*, 150 F.3d at 1020). This case presents numerous questions of common facts and law and more than satisfies this "minimal" requirement.

In a similar action challenging disability access under the ADA and Section 504, the Ninth Circuit held that commonality was satisfied because "the

lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis,* 275 F.3d 849, 868 (9th Cir. 2001), *cert. denied,* 537 U.S. 812 (2002). The Ninth Circuit's ruling in *Armstrong* is directly on point and controls the case at bar. *See also Colorado Cross-Disability Coalition v. Taco Bell Corp.,* 184 F.R.D. 354, 359 (D. Col. 1999) ("Where a class of persons sharing a common disability complains of the identical architectural barrier based upon the same alleged violations of law, commonality is unquestionably established."); *Access Now v. Ambulatory Surgery Center Group,* 197 F.R.D. 522, 524 n.1 (S.D. Fla. 2000 (collecting numerous cases in which class certification was granted in systemic challenges to architectural barriers); *Arnold v. United Artists Theatre Circuit, Inc.,* 158 F.R.D. 439, 449 (N.D. Cal. 1994) ("Inadequate wheelchair accommodations at particular theaters are very likely to affect all wheelchair users in the same way …Thus the state of such accommodations at defendant's various theaters, and the legal adequacy of those accommodations, are issues of fact and law common to all those disabled persons affected by them.").

When a systemic policy is challenged, differences in the types and severity of Plaintiffs' disabilities do not preclude certification. In *Armstrong*, the Ninth Circuit rejected defendants argument that the variations in the plaintiffs' disabilities precludes a finding of commonality, and held that the " the differences

that exist here do not justify requiring groups of persons with different disabilities, ***all of whom suffer similar harm from the Board's failure to accommodate their disabilities***, to prosecute separate actions." *Id.* (emphasis added); *see also Clark v. State of California*, 1998 U.S. Dist. Lexis 6770, *19 (N.D. Cal. 1996) (denying defendants' motion to decertify class of inmates with mental disabilities based on differences in those disabilities because "the policies and practices causing harm to the named plaintiffs are in place throughout the system").

Like the disabled plaintiffs in *Armstrong*, Plaintiffs in this action challenge a system-wide practice or policy of denying architectural and programmatic access. A "common core of salient facts" is similarly evident in this case:

- The Defendants' receipt of federal financial assistance;
- The programs, services and activities provided by Defendants;
- Whether Defendants have adopted and implemented a self-evaluation and transition plan, as required by Title II and Section 504 and their accompanying regulations, to provide accessible housing to persons with disabilities;
- The Defendants' policies, procedures, and practices for providing reasonable accommodations to persons with disabilities;
- The existence of access barriers in common areas, individual units, paths of travel, and parking lots, and what needs to be done to remove those barriers; and
- Whether Defendants have an evacuation plan for disabled residents

Furthermore, there are numerous "shared legal issues" regarding the policies at KPT and Kuhio Homes, which are common to all class members, such as:

- Whether Defendants provide programmatic access to persons with disabilities;
- Whether Defendants' policies and procedures deprive disabled tenants with full and equal enjoyment of the public housing complex;
- Whether Defendants have adopted and implemented a self-evaluation and transition plan that complies with the minimum requirements established by Title II of the ADA and Section 504 and their accompanying regulations;
- Whether Defendants have taken sufficient steps to prevent persons with disabilities from being excluded, denied services, segregated or otherwise discriminated against because of the presence of architectural barriers;
- Whether Defendants have taken sufficient steps to maintain access features as required by federal law;
- Whether Defendants' practices, policies, and omissions violate the ADA, Section 504, and/or the FHAA;
- Whether such violations were "intentional" or based on "reckless indifference; and
- The measures that are legally required to bring KPT and Kuhio Homes into compliance with the ADA, Section 504 and/or the FHAA.

Based on the foregoing, there can be no reasonable doubt that there are numerous issues of both law and fact that are common to the class, and that Defendants' systemic failure to make KPT and Kuhio Homes accessible to persons with disabilities creates a common nucleus of operative facts which satisfies the

test for commonality. *See, e.g., Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir. 1992) ("A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2).").

3. Plaintiffs' Claims Are Typical of the Class.

To satisfy the requirement of typicality, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *General Tel. Co. of S.W. v. Falcon,* 457 U.S. 147, 156, 102 S.Ct. 2364 (1982). In *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir. 1998), the Ninth Circuit held that "[t]he typicality prerequisite of Rule 23(a) is fulfilled if 'the claims or defenses of the representative parties are typical of the claims or defense of the class.' Fed.R.Civ.P. 23(a)(3). ***Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical*.**" (emphasis added).

In *Amone*, Judge Kay relied on the Ninth Circuit's reasoning in *Armstrong* and found that typicality was established:

> [D]espite differences in the members' disabilities, the injuries allegedly suffered as the result of defendants' conduct are identical. Counsel for Defendants have conceded that as of the August 18, 2004 filing of the Complaint, Defendants were not in compliance with the statutes and regulations at issue in this matter. Thus…the method of Defendants' discrimination is common to all prospective class members. The Court finds that the typicality requirement is met.

Id. at 686.

The claims of the named Plaintiffs are typical of the claims of the other putative class members. Each member has been denied program access, and otherwise discriminated against, on the basis of their disabilities. Plaintiffs have no avenue for achieving program access or obtaining reasonable modifications so that they may live in accessible and non-discriminatory housing, because Defendants have failed and refuse to take the affirmative steps required to ensure program access under federal law. Defendants have further failed to implement an evacuation, reasonable modification/accommodation policy or adopt effective grievance procedures. These are the same injuries that members of the proposed class are suffering, and, unless this Court grants relief, will continue to suffer. Injunctive relief enjoining Defendants' discriminatory policies and procedures will benefit every class member. Because Plaintiffs do not seek class-wide determinations regarding entitlement to individual modifications or accommodations, there can be no reasonable dispute that Plaintiffs meet the typicality requirement.

4. Plaintiffs Will Fairly and Adequately Protect the Interests of the Class.

Representation is adequate if (a) the named representative appears able to prosecute the action vigorously through qualified counsel; and (b) the class representative is not disqualified by any interest antagonistic to the remainder of

the class. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). Plaintiffs' counsel have unique expertise in both class action, civil rights and disability law and are capable of adequately representing Plaintiffs in the prosecution of this high-impact and important civil rights litigation. Specifically, Plaintiffs are represented by a coalition of established and experienced public interest and private law firms with offices and resources in Hawai`i and the mainland.

The Legal Aid Society has extensive experience in litigating class actions and complex civil litigation. *See* Declaration of Claudia Center. Alston Hunt Floyd & Ing and Lawyers for Equal Justice, also both have experience in representing members of minority groups in complex civil rights litigation and were deemed adequate representatives in *Amone*. *See* Declaration of Paul Alston; Declaration of William Dunham; *Amone*, at 686.

Furthermore, there is no reason to believe that any of the class representatives have any interest antagonistic to that of the class. Like all class members, the class representatives are disabled tenants of KPT and Kuhio Homes. Any benefit obtained for the class will also benefit them individually.

The Plaintiffs are adequate class representatives and are represented by qualified counsel. Thus, the proposed class meets the adequacy requirement of Rule 23(a)(4).

C. THE PROPOSED CLASS ALSO MEETS THE REQUIREMENTS OF RULE 23(B)(2) AND SHOULD BE CERTIFIED.

Because Plaintiffs' proposed class seeks systemic injunctive relief that will benefit all putative class members, Plaintiffs' class definition also satisfies the requirements of Rule 23(b)(2). Rule 23(b)(2) permits maintenance of a class action if the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). It is not necessary that every single class member has been injured or aggrieved in the same way by the defendant's conduct, or that the defendant has acted directly against each member of the class. It is sufficient if defendant's actions "affect all persons similarly situated." *Christman v. American Cyanamid Co.*, 92 F.R.D. 441, 453 (N.D.W.Va. 1981).

The Defendants have discriminated against all members of the proposed class by failing and refusing to comply with the ADA, the FHAA, and Section 504. The fact that this is a civil rights action where the class representative seeks primarily injunctive and declaratory relief against discriminatory practices and procedures makes it particularly well suited for certification under 23(b)(2). *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) cases); *Taylor v. Housing Authority of New Haven*, ---

F. Supp. 2d ---, 2009 WL 650381, *8 (D. Conn. Mar. 9, 2009) ("Where, as here, plaintiffs allege discriminatory and unlawful systemic or policy-level actions, certification under Rule 23(b)(2) is proper."). Indeed, subdivision (b)(2) was added to Rule 23 in 1966 "primarily to facilitate the bringing of class actions in the civil rights area." Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d, § 1775, p. 470 (1986); *Dukes v. Wal-Mart Stores, Inc.,* 222 F.R.D. 137, 170 (N.D. Cal. 2004).

Certification under Rule 23(b)(2) is not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages. The Ninth Circuit allows certification under Rule 23(b)(2) even when monetary damages are not merely "incidental damages." *Molski v. Gleich*, 318 F.3d 937, 939, 949 (9th Cir. 2003) (incidental damages are defined as damages "that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."). In *Molski*, the court declined to adopt the bright line rule barring certification under Rule 23(b)(2) where non-incidental damages were sought. *Id.* at 950. Instead, the Court engaged in an analysis of whether injunctive relief predominates the remedies sought by "focus[ing] on the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit." *Id.* The court concluded that injunctive relief predominated in that ADA case because the plaintiff "alleged that [the defendant] acted in a manner

generally applicable to the class by deny access to [defendant's] facilities" and because the primary goal of the litigation and settlement agreement appeared to be injunctive relief.

Likewise, the Plaintiffs' primary intent in bringing this suit is to obtain injunctive relief, *inter alia*, to remove architectural barriers and to correct discriminatory policies and practices that have deprived disabled tenants full and equal enjoyment of the federal public housing complexes. As the action is aimed at obtaining injunctive relief to end Defendants' ***centralized policy*** of non-compliance with federal nondiscriminatory laws, this action is proper for class certification despite the fact that Plaintiffs also seek damages.

The purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101. The case at bar falls within the traditional parameters and purposes of a Rule 23(b)(2) class action, and the Defendants' policy of discrimination against the disabled in Hawai'i's largest public housing implicates important public policy considerations under the ADA's stated goal of setting a "national mandate" to protect the rights of the disabled.

The alternative to a class action, individual suits by each disabled tenant, would not effectively vindicate the putative class's legal rights because the proposed class is a traditionally disempowered group of disabled and poor

plaintiffs who have limited ability and resources to defend their interests. In these circumstances, only the class action mechanism can further the federal policy of prohibiting discrimination against persons with disabilities.

IV. CONCLUSION

For all the reasons stated above, the Court should certify the class proposed by Plaintiffs in this matter.

DATED: Honolulu, Hawai`i, June 3, 2009.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

HAZEL MCMILLON; et al.,	) CIVIL NO. CV 08 00578 JMS LEK
	) (Civil Rights Action; Class Action)
Plaintiffs,	)
	) **CERTIFICATE OF WORD COUNT**
v.	)
	)
STATE OF HAWAI`I; et al.,	)
	)
Defendants.	)
___________________________________	)

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.5, I hereby certify that the Memorandum of Points and Authorities in Support of Motion contains 6,909 words, exclusive of case caption, table of contents, table of authorities, exhibits, declarations, certificates of counsel, and certificate of service.

DATED: Honolulu, Hawai`i, June 3, 2009.

/s/ Jason H. Kim
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