IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HAZEL MCMILLON; GENE STRICKLAND; TRUDY SABALBORO; KATHERINE VAIOLA; and LEE SOMMERS, each individually and on behalf of a class of present and future residents of Kuhio Park Terrace and Kuhio Hones who have disabilities affected by architectural barriers and hazardous conditions, Plaintiffs, vs. STATE OF HAWAII; HAWAII PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawaii limited liability company, Defendants.	CIVIL NO. 08-00578 JMS/LEK ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS STATE OF HAWAII AND HAWAII PUBLIC HOUSING AUTHORITY'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT ON PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES, FILED DECEMBER 18, 2008

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS STATE OF HAWAII AND HAWAII PUBLIC HOUSING AUTHORITY'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT ON PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES, FILED DECEMBER 18, 2008

I. INTRODUCTION

On December 18, 2008, Plaintiffs filed a Complaint against the State of Hawaii and the Hawaii Public Housing Authority (collectively "HPHA") and Realty Laua LLC ("Realty Laua") (collectively, "Defendants") alleging violations by HPHA of Title II of the Americans with Disabilities Act ("Title II"), Section 504 of the Rehabilitation Act ("Section 504"), and the Fair Housing Act Amendments ("the FHAA"), and violations by Realty Laua of Title V of the ADA and the FHAA. Plaintiffs' claims are based on, among other things, Defendants' alleged failures to provide safe and accessible housing, prepare and implement evacuation plans, remedy hazardous environmental conditions, maintain safe and accessible elevators, and implement an effective system for receiving and responding to requests for accommodations at Kuhio Park Terrace ("KPT") and Kuhio Homes, where Plaintiffs reside.

Currently before the court is HPHA's Motion to Dismiss Plaintiffs' Complaint for mootness, failure to exhaust administrative remedies, failure to state a claim and/or for summary judgment, and because Plaintiffs are not entitled to injunctive relief against HPHA.[1] Based on the following, the court DISMISSES

[1] HPHA styled its Motion as a motion to dismiss, but submitted exhibits and recognized that the court's consideration of those exhibits would convert the motion into one for summary judgment for at least some of its arguments. *See* HPHA Mot. 13. Given HPHA's recognition (continued...)

the FHAA claim against HPHA and DENIES HPHA's Motion in all other respects.[2]

II. BACKGROUND

A. Factual Background

KPT and Kuhio Homes are public housing projects that receive federal financial assistance and are owned, operated and controlled by HPHA and managed by Realty Laua. Compl. ¶ 2. KPT consists of two 16-story towers containing 614 units, while Kuhio Homes is a low-rise complex with 134 units. *Id.* ¶ 23. As alleged in the Complaint, Plaintiffs are low-income persons with disabilities who live in KPT and Kuhio Homes and bring this action on behalf of themselves and others similarly situated who have been denied access to the facilities, programs, services, and/or activities of Defendants and/or have been discriminated against because of architectural barriers and/or hazardous

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[1](...continued)
that it is effectively seeking summary judgment, it remains a mystery why HPHA did not follow the Local Rules requiring HPHA to submit a concise statement of facts. *See* Local Rule 56.1. HPHA is warned that it must follow the Local Rules; HPHA cannot subvert them by simply labeling its Motion as a motion to dismiss while at the same seeking summary judgment.

[2] Realty Laua filed a Joinder to HPHA's Motion, but provides no explanation how HPHA's arguments apply to Plaintiffs' claims against Realty Laua. Because the only grounds on which the court grants HPHA's Motion is inapplicable to Realty Laua (*i.e.*, Eleventh Amendment immunity on Plaintiffs' FHAA claim), the court neither determines how HPHA's arguments apply to the claims against Realy Laua nor determines the propriety of Realty Laua's joinder.

conditions.[3]

1. Conditions at KPT and Kuhio Homes

The Complaint alleges that KPT and Kuhio Homes are characterized by architectural barriers, leaking and bursting plumbing, an almost total lack of hot water, rat and roach infestations, nonfunctioning and dangerous elevators, overflowing and burning trash piles, toxic air, and a lack of basic fire safety equipment. Compl. ¶ 29.

a. Elevators at KPT

The Complaint alleges that Defendants have failed to maintain the elevators at KPT. Each tower at KPT has two tenant elevators and one freight elevator. When working, the elevators are often unable to stop at every floor or be called from every floor, resulting in residents waiting for up to an hour for elevator service. Compl. ¶ 34; Sommers Decl. ¶ 8; McMillon Decl. ¶ 4; Strickland Decl. ¶ 5. Frequently, the tenant elevators are either not working properly or completely out of service, resulting in KPT staff operating the freight elevator for tenant use. McMillon Decl. ¶ 5. The freight elevators pose risks to certain disabled individuals because access is obstructed by vertical edges, gaps, and short steep ramps across the expansion joint. Mastin Decl. ¶ 96.

[3] By reciting these allegations, the court makes no determination regarding the propriety of Plaintiffs' separate motion seeking class certification.

There are also times when all the elevators are broken, which either traps mobility-impaired individuals or forces those that can walk to take stairs that are poorly lit, wet, and smell of urine. Sommers Decl. ¶ 9; McMillon Decl. ¶¶ 7-8; McMillon Exs. A-B; Sabalboro Decl. ¶ 4; Silva Decl. ¶ 23; Strickland Decl. ¶¶ 6-7; Tuia Decl. ¶ 5. Some individuals have fallen on the stairs and suffered injuries, requiring medical attention. McMillon Decl. ¶¶ 7-8; Strickland Decl. ¶¶ 7-8; Tuia Decl. ¶ 5. Further, given the frequency that the elevators break down, mobility-impaired individuals feel trapped in their apartments for fear of having to take the stairs or stand waiting for an elevator. Strickland Decl. ¶ 9.

b. Fire safety

The Complaint alleges that KPT has frequent fires in the trash and other areas. Compl. ¶ 38. In 2007 alone, the Honolulu Fire Department responded to fires at KPT at least 60 times, many of which were caused by lack of maintenance at KPT. Muniz Decl. ¶¶ 11(a), 12. Despite these numerous fires, the facilities lack functioning, system-wide fire alarms, hoses and fire extinguishers, and many housing units lack functioning smoke detectors. Muniz Decl. ¶ 14; McMillon Decl. ¶ 11; Sabalboro Decl. ¶ 5. Further, Plaintiffs are not informed of KPT's evacuation procedures and policies regarding evacuation of disabled tenants, and have never participated in any fire drills. *See, e.g.*, McMillon Decl.

¶ 11; Sabalboro Decl. ¶ 6; Silva Decl. ¶ 26; Strickland Decl. ¶ 15; Tuia Decl. ¶ 17.

Defendants have apparently sought and received fire code exemptions on the condition that they comply with other requirements,[4] *see also* Fo Ex. 2, yet Defendants have not complied with those requirements. Muniz Decl. ¶¶ 29-36.

c. Environmental conditions and hot water

The Complaint alleges that the air at KPT is filled with hazardous particulates such as soot dust from trash fires, roach dust, rat allergens, and toxins from faulty plumbing and wastewater, which exacerbate, trigger, and create respiratory distress. Compl. ¶ 40; *see also* Scofield Decl. ¶¶ 10-15 (opining that the conditions at KPT and Kuhio Homes are hazardous and can aggravate respiratory illnesses and bacterial infections); McMillon Decl. ¶ 16 (describing roach problem); Sommers Decl. ¶ 11 (describing sewage backups). Plaintiffs have experienced breathing problems, bronchitis, and worsened asthma due to these conditions. *See* McMillon Decl. ¶ 10; Sabalboro Decl. ¶ 7; Silva Decl. ¶ 25; Strickland Decl. ¶ 15.

The Complaint also alleges that during most hours of most days, there is no hot water at KPT and bathing in the cold water triggers and/or worsens individuals' medical conditions and opens the door to opportunistic infections.

[4] The Muniz Declaration refers to an attached "Exhibit B" discussing these requests and exemptions, but none was filed.

Compl. ¶ 44; McMillon Decl. ¶ 9 (stating that the cold water worsens her arthritis).

d. Architectural barriers

The Complaint alleges that architectural barriers pervade Defendants' facilities, making individuals who use wheelchairs unable to travel through exterior or interior doors, use bathroom and kitchen areas, access laundry rooms, and operate environmental controls. Compl. ¶ 45; *see also* Mastin Decl. ¶¶ 110-20; Sabalboro Decl. ¶ 8; Vaiola Decl. ¶ 8. Plaintiffs' access expert, Jeff Mastin, describes that pathways are non-accessible due to raised edges, cross slopes, running slopes, and drop offs. Mastin Decl. ¶¶ 32-77. There is also inadequate accessible parking at Tower B of KPT, and no accessible parking at Tower A, the management office, or the health facility. *Id.* ¶ 78.

Out of all of the units in KPT and Kuhio Homes, only seven units may be borderline accessible at Kuhio Homes. *See* Center Decl. Ex. A. Disabled tenants have been told that there are no accessible units available and that it may take years on a waiting list before being moved to an accessible unit. *See* Tuia Decl. ¶ 13; *see also* Sommers Decl. ¶¶ 13, 15. In the meantime, however, disabled tenants must make do with their current apartments. Plaintiff Katherine Vaiola uses a wheelchair due to a diabetes-related leg amputation, yet her apartment consists of two stories with the bathroom and bedrooms upstairs. Vaiola Decl. ¶¶

3-5. Vaiola cannot access these upstairs rooms and therefore bathes herself in the kitchen and uses a portable toilet in her living room. *Id.* ¶ 6. Vaiola's request for a ramp to enter her front door was refused by management and she instead had a friend build a makeshift one. *Id.* ¶ 7.

2. Defendants' Attempts to Remedy Problems at KPT and Kuhio Homes

HPHA spends approximately $10,000 per month on regular maintenance at KPT,[5] Fo Decl. ¶ 3, and continuously schedules and plans repairs. Taniguchi Decl. ¶ 3. HPHA is planning several repairs at KPT, including modernizing the six elevators, designing and constructing a fire alarm system, replacing the trash chute system, and repairing plumbing and sewer lines. Fo Ex. 1.

3. Complaint Process

HPHA has set procedures and forms for any eligible, disabled resident to request reasonable accommodation, and grieve any denial of a requested accommodation. *See* Taniguchi Decl. ¶ 4; Taniguchi Exs. 1-3. Every tenant receives HPHA's Notice of Right of Reasonable Accommodation, which notifies tenants that if they have a disability and need a change regarding their living conditions, they may request a reasonable accommodation. Inafuku Decl.

[5] Given that there are 614 units, $10,000 per month on maintenance equates to $16.29 per unit per month.

¶ 3; Inafuku Ex. 1. HPHA's application for public housing also asks whether the applicant is disabled or handicapped and whether the applicant or any household member requires a wheel-chair accessible unit. Inafuku Decl. ¶ 6; Inafuku Ex. 4. Further, at the time they enter into their rental agreement with HPHA, every tenant is advised of the procedure for requesting a reasonable accommodation. Faleafine Decl. ¶ 5.

A disabled tenant may also request an accommodation during tenancy by filling out an HPHA form. Inafuku Ex. 2. Under the management contract between HPHA and Realty Laua, Realty Laua is required to immediately send to the HPHA Compliance Office any written request for reasonable accommodation. Inafuku Decl. ¶ 7. The HPHA Compliance Office will then make a determination on the request and inform Realty Laua of the decision, who in turn informs the resident. *Id.* ¶ 9. From 2006 through the present, HPHA's records show that all residents who have both followed HPHA's procedures for requesting accommodation and whose qualifications and eligibility have been verified, have been or are in the process of being accommodated. *Id.* ¶ 12.

Despite HPHA's records, Plaintiff Lee Sommers filled out an accommodation request form when she first moved to KPT, listing that a "lower floor, freight elevator [is] regular 'down,' and an air conditioner" were needed.

Sommers Decl. ¶ 12; Sommers Ex. B. Sommers was placed on the second floor, and never received a response regarding the request for an air conditioner. Sommers Decl. ¶ 12. Sommers later requested a unit on the ground floor, using HPHA's accommodation request form, *id.* ¶ 13, Sommers Ex. D, but was told no units were available. Sommers Decl. ¶ 13. HPHA admits that due to the limited number of accessible ground floor units at KPT and Kuhio Homes, eligible disabled residents who have followed the procedure are placed on a waiting list for available accessible units at other housing projects in the area. Fo Decl. ¶ 8.

Despite the procedure and forms for requesting accommodation, Plaintiffs other than Sommers have requested reasonable modifications and/or complained about the conditions at KPT and Kuhio Homes. *See* McMillon Decl. ¶¶ 9, 12; Sabalboro Decl. ¶¶ 4, 12; Silva Decl. ¶¶ 10-13; Strickland Decl. ¶ 10; Tuia Decl. ¶ 6; Vaiola Decl. ¶ 10. In response, Defendants have taken no action, told individuals that they had lost the paperwork, and rarely provide tenants with the forms described above. McMillon Decl. ¶¶ 13, 19; Sabalboro Decl. ¶ 12; Silva Decl. ¶¶ 14, 21; Strickland Decl. ¶¶ 16-17; Vaiola Decl. ¶¶ 12-14; Sommers Decl. ¶¶ 13-15.

III. STANDARDS OF REVIEW

A. Rule 12(b)(1): Mootness

Mootness is a jurisdictional issue, which the court reviews under Federal Rule of Civil Procedure 12(b)(1). *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Pursuant to Rule 12(b)(1), a party may make a jurisdictional attack that is either facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A factual attack, such as the case here, occurs when the movant "disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* at 1039. The moving party "should prevail [on a motion to dismiss] only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Casumpang v. Int'l Longshoremen's & Warehousemen's Union*, 269 F.3d 1042, 1060-61 (9th Cir. 2001) (citation and quotation signals omitted); *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001).

B. Prudential Exhaustion

"When a statute does not provide for exhaustion of administrative remedies, a trial court may require exhaustion in the exercise of its discretion." *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1302 (9th Cir. 1992).

C. Rule 12(b)(6): Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6) permits a motion to dismiss a claim for "failure to state a claim upon which relief can be granted[.]"

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008). This tenet -- that the court must accept as true all of the allegations contained in the complaint -- "is inapplicable to legal conclusions." *Id.* Accordingly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1949 (citing *Twombly*, 550 U.S. at 556). Factual allegations that only permit the court to infer "the mere possibility of misconduct" do not show that the pleader is entitled to relief as required by Rule 8. *Id.* at 1950.

D. Summary Judgment

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Rule 56(c) mandates summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Broussard v. Univ. of Cal. at Berkeley*, 192 F.3d 1252, 1258 (9th Cir. 1999).

"A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (citing *Celotex*, 477 U.S. at 323); *see also Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1079 (9th Cir. 2004). "When the moving party has carried its burden under Rule 56(c) its opponent must do more than simply show that there is some metaphysical doubt as to the material facts [and] come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586-87 (1986) (citation and internal quotation signals omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

248 (1986) (stating that a party cannot "rest upon the mere allegations or denials of his pleading" in opposing summary judgment).

"An issue is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is 'material' only if it could affect the outcome of the suit under the governing law." *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008) (citing *Anderson*, 477 U.S. at 248). When considering the evidence on a motion for summary judgment, the court must draw all reasonable inferences on behalf of the nonmoving party. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *see also Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1126 (9th Cir. 2008) (stating that "the evidence of [the nonmovant] is to be believed, and all justifiable inferences are to be drawn in his favor." (citations omitted)).

IV. DISCUSSION

HPHA raises an assortment of arguments claiming that the Complaint should be dismissed and/or summary judgment should be granted, none of which is supported by law. The court addresses each argument in turn.

A. Mootness

HPHA argues that Plaintiffs' allegations relating to conditions at KPT "might" be moot because HPHA has already taken steps to correct and repair the

these problems. HPHA Mot. 27.

"Ordinarily, a contention of mootness must be resolved as a threshold matter, since the court would lack jurisdiction to decide a moot case." *Coral Constr. Co. v. King County*, 941 F.2d 910, 927 (9th Cir. 1991); *see also Wilbur v. Locke*, 423 F.3d 1101, 1106 (9th Cir. 2005) ("[W]e conclude that jurisdictional issues should be decided before reaching the Rule 19 issue."). HPHA has a heavy burden in demonstrating mootness:

> Only if "subsequent events [have] made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," [*United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)], and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation," *L.A. County v. Davis*, 440 U.S. 625, 631 (1979), may a case be found moot because the defendant has ceased the complained-of conduct.

Porter v. Bowen, 496 F.3d 1009, 1017 (9th Cir. 2007); *see also Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 574 (2d Cir. 2003) (applying standard in ADA action); *Layton v. Elder*, 143 F.3d 469, 471 (8th Cir. 1998) (applying standard in ADA action).

HPHA does not address this standard for mootness anywhere in its Motion, and its assertion that it has made plans to correct some of the problems that Plaintiffs identify shows neither that these problems are in fact eradicated nor

that the wrongful behavior will not recur. The court therefore DENIES HPHA's Motion to Dismiss for mootness.

B. Whether Plaintiffs' Claims Are Barred by Eleventh Amendment Immunity

HPHA argues that Plaintiffs cannot seek injunctive relief against HPHA because there is no waiver of Eleventh Amendment immunity. HPHA Mot. 28-29. Although HPHA limits its argument to whether Plaintiffs are entitled to injunctive relief, Plaintiffs conceded during the hearing that Eleventh Amendment bars their FHAA claim against HPHA. Based on the following, the court agrees and finds that Plaintiffs cannot state their FHAA claim directly against the HPHA.[6]

In general, "[u]nless a State has waived its Eleventh Amendment immunity or Congress has overridden it, . . . a State cannot be sued directly in its own name regardless of the relief sought." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (citing *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam)). The

[6] HPHA does not identify what standard should apply to its argument regarding the Eleventh Amendment, while Plaintiffs assert that it should be viewed pursuant to Rule 12(b)(7), failure to join an indispensable party. Eleventh Amendment immunity does not raise an issue of failure to join an indispensable party, and the Ninth Circuit has provided somewhat conflicting guidance regarding whether it should be reviewed pursuant to Rule 12(b)(1) or Rule 12(b)(6). *See Maizner v. Hawaii*, 405 F. Supp. 2d 1225, 1227-28 (D. Haw. 2005) (discussing caselaw). Whether the court reviews this issue under Rule 12(b)(1) or Rule 12(b)(6) makes no difference, however, because the standards are similar under these facts. To the extent viewed under Rule 12(b)(1), at issue is whether the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). To the extent viewed under Rule 12(b)(6), the issue is whether the Complaint states a claim against HPHA.

Ninth Circuit has expressly held, however, that Congress has abrogated the states' Eleventh Amendment immunity under Title II and Section 504. *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1184-86 (9th Cir. 2003); *Lovell v. Chandler*, 303 F.3d 1039, 1051-52 (9th Cir. 2002).[7] Accordingly, Plaintiffs may bring their Title II and Section 504 claims directly against HPHA without naming a State official as a defendant and may seek all appropriate relief.

Regarding Plaintiffs' FHAA claim, however, Congress has not abrogated the states' Eleventh Amendment immunity. This court has previously addressed this precise question in *Kalai v. Hawaii*, 2008 WL 3874616 (D. Haw. Aug. 20, 2008), and applied the Eleventh Amendment immunity framework requiring the court to "'resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority.'" 2008 WL 3874616, at *2 (quoting *Tennessee v. Lane*, 541 U.S. 509, 517 (2004)). This court found that because Congress did not unequivocally express its intent to abrogate the states' Eleventh Amendment immunity, claims for damages under the

[7] The Supreme Court has held that Congress abrogated Eleventh Amendment immunity for Title II cases implicating the right of access to the courts, while not addressing Title II cases generally. *See Tennessee v. Lane*, 541 U.S. 509, 518 (2004). *Lane* does not overrule or otherwise limit Ninth Circuit cases holding that "Congress has validly abrogated state immunity under Title II." *See Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1185 (9th Cir. 2003).

FHAA were barred. *Id.* at *3.

The reasoning in *Kalai* applies in this case -- for their FHAA claim, Plaintiffs cannot state a claim against HPHA and may only seek prospective injunctive relief against a state official. *See Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007) (explaining that *Ex parte Young*, 209 U.S. 123 (1908), provides an exception to Eleventh Amendment immunity by allowing a suit for prospective injunctive relief against state officers in their official capacities). The court therefore DISMISSES Plaintiffs' FHAA claim against HPHA.[8]

C. Failure to Exhaust Administrative Remedies

HPHA argues that administrative exhaustion or the doctrine of primary jurisdiction applies such that the court should decline jurisdiction over this action until Plaintiffs exhaust their administrative remedies.[9] HPHA's argument lacks merit.

Administrative exhaustion is not a necessary prerequisite for Plaintiffs' claims. *See Bogovich v. Sandoval*, 189 F.3d 999, 1002 (9th Cir. 1999)

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[8] In their opposition, Plaintiffs "seek leave to add as named Defendants the relevant officials of the state Defendants." Pls.' Opp'n 34. The court DENIES this request without prejudice for Plaintiffs to file a proper motion seeking specific amendment of the Complaint.

[9] HPHA is apparently confused regarding the difference between prudential and jurisdictional exhaustion. On the one hand, HPHA states that this case raises a "prudential matter," but then argues that the court lacks subject matter jurisdiction pursuant to Rule 12(b)(1). These two exhaustion doctrines are separate concepts -- a plaintiff's failure to comply with prudential exhaustion has no effect on the court's subject matter jurisdiction. *See Wilson v. MVM, Inc.*, 475 F.3d 166, 174 (3d Cir. 2007); *Stauffer Chem. Co. v. Food & Drug Admin.*, 670 F.2d 106, 107 (9th Cir. 1982).

("There is no exhaustion requirement for claims brought under Title II of the ADA." (citations omitted)); *Smith v. Barton*, 914 F.2d 1330, 1338 (9th Cir. 1990) ("[P]rivate plaintiffs suing under section 504 [of the Rehabilitation Act] need not first exhaust administrative remedies."); *see also Tsombanidis*, 352 F.3d at 579 (noting that "neither the FHAA nor the ADA require a plaintiff to *exhaust* the state or local administrative procedures").

Nor does the doctrine of primary jurisdiction apply. This doctrine applies "when a claim is cognizable in federal court but requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency[, or] when a case presents a far-reaching question that requires expertise or uniformity in administration." *Brown v. MCI WorldCom Network Servs.*, 277 F.3d 1166, 1172 (9th Cir. 2002) (citation and quotation signals omitted). HPHA claims that this doctrine applies because Housing and Urban Development regulates HPHA for ADA compliance. *See* HPHA Mot. 25. This argument, however, comes nowhere near meeting the standard for invoking primary jurisdiction. *See Brown*, 277 F.3d at 1172 (stating that the doctrine does not apply "every time a court is presented with an issue conceivably within the agency's ambit"). Indeed, the court could find no cases applying primary jurisdiction to disability discrimination claims and Plaintiffs'

claims are neither particularly complicated nor present a far-reaching question requiring administrative expertise. The court therefore DENIES HPHA's Motion to dismiss for failure to exhaust administrative remedies.

D. Failure to State a Claim/Summary Judgment

1. Defendants' Knowledge of Plaintiffs' Disabilities

HPHA argues that the court should dismiss and/or grant summary judgment on Plaintiffs' Title II and Section 504 claims because Plaintiffs cannot show that HPHA knew or should have known that Plaintiffs were disabled and needed accommodation. HPHA Mot. 16-17. HPHA suggests that it was not aware of Plaintiffs' disabilities because only Lee Sommers requested an accommodation using HPHA's form. In opposition, Plaintiffs argue that their claims regarding program access do not depend on a request for accommodation, *see* Pls.' Opp'n 15, and that they have properly stated claims for failure to accommodate. *Id.* at 25.

There are two different types of disability claims -- those based on failure to accommodate and those based on lack of accessibility. *See Putnam v. Oakland Unified Sch. Dist.*, 1995 WL 873734, at *13 (N.D. Cal. June 9, 1995) (stating that "[p]rogram accessibility and reasonable individual accommodation are separate requirements"). To illustrate, a claim for failure to accommodate may be based on a defendant's refusal to install grab bars in the bathroom of an individual

who is mobility-impaired. In comparison, a claim for lack of accessibility may be based on a defendant's failure to install ramps that would allow mobility-impaired individuals access around the grounds of a housing development. To determine whether Plaintiffs have failed to state a claim and/or Defendants are entitled to summary judgment due to Plaintiffs' failure to request certain accommodations, the court analyzes first the necessary elements of Title II and Section 504 claims, and then these differing theories on summary judgment.

a. Motion to dismiss: elements of Title II and Section 504 claims

Starting first with the statutory language, Title II and Section 504 both prohibit discrimination on the basis of disability generally, with Title II applying only to public entities, and Section 504 proscribing discrimination in all federally-funded programs. *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). Title II provides that "[n]o 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 . . . ." 42 U.S.C. § 12132. Similarly, Section 504 provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794.

Given the similar language in Title II and Section 504, the elements for stating a claim pursuant to either statute also parallel one another:

> To establish a violation of Title II of the ADA, a plaintiff must show that (1) she is a qualified individual with a disability; (2) she was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities, and (3) such exclusion or discrimination was by reason of her disability. To establish a violation of [Section 504], a plaintiff must show that (1) she is handicapped within the meaning of the [Rehabilitation Act]; (2) she is otherwise qualified for the benefit or services sought; (3) she was denied the benefit or services solely by reason of her handicap; and (4) the program providing the benefit or services receives federal financial assistance.

Lovell, 303 F.3d at 1052 (citing *Weinreich v. L.A. County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997)).

From a plain reading, these generic elements apply regardless of whether a plaintiff's claim is based on failure to accommodate or inaccessibility.[10] Thus, Plaintiffs need not allege that Defendants knew of Plaintiffs' disabilities to survive a Rule 12(b)(6) motion. Further, Plaintiffs have alleged facts supporting

[10] Indeed, these elements reflect that discrimination comes in various forms, with intentional discrimination being only one type. *See* 42 U.S.C. § 12101(a)(5) (recognizing that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities").

each of the elements of a Title II or Section 504 claim -- Plaintiffs assert that they are qualified individuals with disabilities, *see* Compl. ¶¶ 7-11, they have been denied access and discriminated against because of various architectural barriers and/or hazardous conditions at KPT and Kuhio Homes, *id.* ¶¶ 15, 28-45, this denial is because of their disabilities, *id.*, and Defendants receive federal financial assistance. *Id.* ¶¶ 12-14. The court therefore DENIES HPHA's Motion to dismiss Plaintiffs' Title II and Section 504 claims for failure to state a claim.

b. Summary Judgment

While the necessary elements for stating a claim pursuant to Title II and Section 504 do not differ whether the claim is based on failure to accommodate or lack of accessibility, there are differences in both the regulatory bases for these claims and the caselaw developing these theories. The court therefore separately analyzes each theory.

i. Failure to accommodate

The obligation that a public entity make reasonable accommodations pursuant to Title II is codified at 28 C.F.R. § 35.134(b)(7), which states that "[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."[11] Courts addressing claims based on failure to accommodate have found that an entity's obligation to provide a reasonable accommodation is usually "triggered by a request." *Kiman v. N.H. Dept. of Corr.*, 451 F.3d 274, 283 (1st Cir. 2006) (quotations and footnote omitted); *see also Robertson v. Las Animas County Sheriff's Dept.*, 500 F.3d 1185, 1197 (10th Cir. 2007).

There are, however, exceptions to this general rule. First, this rule presumes that the defendant has a functioning request system that efficiently allows individuals to request accommodation. Where the actual procedure for requesting accommodations is faulty, the failure to make a proper request is not a bar to suit. *See Clarkson v. Coughlin*, 898 F. Supp. 1019, 1045 (S.D.N.Y. 1995) ("It should be noted here that Defendants argue that the absence of requests exonerates them of any duty to make reasonable accommodations or provide assistive services under the ADA and the Rehabilitation Act. Rather, this absence is indicative only of DOCS' failure to comply with their obligation to create and maintain procedures for requests and grievances regarding accommodations and assistance."). Second, courts have recognized that a claim may still go forward

[11] "Although Title II of the ADA uses the term 'reasonable modification,' rather than 'reasonable accommodation,' these terms create identical standards." *McGary v. City of Portland*, 386 F.3d 1259, 1266 n.3 (9th Cir. 2004) (citation omitted).

where the individual's need for accommodation is "obvious." *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001) ("When the plaintiff has alerted the public entity to his need for accommodation (*or where the need for accommodation is obvious*, or required by statute or regulation), the public entity is on notice that an accommodation is required . . . ." (emphasis added)); *see also Robertson*, 500 F.3d at 1197; *Chisolm v. McManimon*, 275 F.3d 315, 330 (3d Cir. 2001).

Plaintiffs argue that they have asserted claims based on failure to accommodate and to the extent the Complaint could be so construed, the court finds that there are genuine issues of material fact precluding summary judgment on such claims. A question of fact remains whether Plaintiffs' disabilities were obvious and/or should have been known to Defendants given the extent of Plaintiffs' limitations. In addition, even if some of Plaintiffs' limitations are not "obvious," it is a question of fact whether Defendants' procedures for individuals to request accommodation were so faulty that Plaintiffs need not have formally requested accommodation before bringing suit. Indeed, Plaintiffs have put forth evidence that they requested accommodations and that Defendants rarely provide the forms, take no action and/or tell individuals that they have lost the paperwork. McMillon Decl. ¶¶ 13, 19; Sabalboro Decl. ¶ 12; Silva Decl. ¶¶ 14, 21; Strickland

Decl. ¶¶ 16-17; Vaiola Decl. ¶¶ 12-14; Sommers Decl. ¶¶ 13-15. The court therefore DENIES HPHA's Motion for summary judgment on Plaintiffs' claims for failure to accommodate.

ii. Lack of accessibility

The duty to make programs and services accessible is codified in 28 C.F.R. § 35.150(a), which states:

> 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. This paragraph does not--
>
> (1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities.

See also 28 C.F.R. § 41.57(a) (providing similar language regarding Section 504).

Unlike a public entity's duty to make reasonable accommodations, its duty to make programs accessible is an affirmative obligation regardless of whether an individual has requested access. Indeed, Title II sets a deadline for compliance "within three years of January 26, 1992, but in any event as expeditiously as possible."[12] 28 C.F.R. § 35.150(c). Further, this court agrees with

[12] Section 504 also sets a deadline for compliance "as soon as practicable, but in no event later than three years after the effective date of the agency regulation." 28 C.F.R. § 41.57(b). This deadline as applied to public housing was later suspended. *See* Order No. 1301-88, 53 Fed. Reg. 37754 (Sept. 28, 1988).

other courts specifically finding that a plaintiff need not request an accommodation to prove an accessibility claim. *See Bacon v. City of Richmond*, 386 F. Supp. 2d 700, 707 (E.D. Va. 2005) ("The law does not require, as City Defendants suggest, that Plaintiffs' request some specific form of accommodation as a prerequisite to a valid ADA claim. This argument is frankly ludicrous."); *Panzardi-Santiago v. Univ. of P.R.*, 200 F. Supp. 2d 1, 18 (D. Puerto Rico 2002) ("Cases involving access generally [prescribe] to the theory that a plaintiff bringing a claim alleging inadequate access to a facility does not have to formally request accommodation." (citing *Layton v. Elder*, 143 F.3d 469 (8th Cir. 1998) and *Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329 (S.D. Cal. 1997))); *Putnam*, 1995 WL 873734, at *10 ("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."); *Tyler v. City of Manhattan*, 857 F. Supp. 800, 815 (D. Kan. 1994) ("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, as required by the key language of 28 C.F.R. § 35.105(a).").

Applying these principles, Plaintiffs assert claims for lack of

accessibility due to, among other things, nonworking elevators, hazardous air conditions, lack of fire safety equipment and evacuation procedures, and inaccessible paths of travel. Defendants have had years to make their facilities readily accessible and their purported lack of knowledge of Plaintiffs' specific disabilities and the lack of requests for specific accommodations does not alter Defendants' affirmative obligation to comply with the requirements of Title II and Section 504.[13] Accordingly, the court DENIES HPHA's Motion for summary judgment on Plaintiffs' claims for lack of accessibility.

2. Whether the Conditions at KPT and Kuhio Homes Establish a Federal Claim

HPHA argues that summary judgment should be granted on Plaintiffs' claims because all tenants were subject to the same conditions at KPT and Kuhio Homes such that disabled individuals were not treated differently than non-disabled individuals. HPHA Mot. 18-19, 25-26; HPHA Reply 4. HPHA's argument again demonstrates a misunderstanding of disability discrimination law.

As explained above and based on the statutory framework, Defendants have an *affirmative* obligation "to make their programs accessible to qualified

[13] The court recognizes that Title II and Section 504 do not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities," 28 C.F.R. § 35.150, and in its Reply, HPHA argues that it is not required to make the specific facilities of KPT and Kuhio Homes accessible. *See* HPHA Reply 8-9. Because HPHA raises this argument for the first time in its Reply, the court does not address it.

individuals with disabilities, except where compliance would result in a fundamental alteration of services or impose an undue burden." *Toledo v. Sanchez*, 454 F.3d 24, 32 (1st Cir. 2006); *see Ferguson v. City of Phoenix*, 157 F.3d 668, 679 (9th Cir. 1998). Stated differently, although Title II and Section 504 do not require that substantively *different* services be provided to the disabled, they do require that covered entities make reasonable accommodations to enable meaningful access to such services and programs that are provided. *Wright v. Giuliani*, 230 F.3d 543, 548 (2d Cir. 2000).

Plaintiffs are not seeking additional or different substantive benefits than those that are available non-disabled individuals; rather, Plaintiffs bring this action seeking access to those benefits available to non-disabled individuals, *i.e.*, safe, accessible housing. For instance, the alleged lack of working elevators may not pose an obstacle to individuals who can easily take the stairs, but it traps Plaintiffs with mobility impairments in their apartments. As such, when the elevators do not work, mobility-impaired Plaintiffs are not afforded the same accessibility to and from their apartments as other individuals. Plaintiffs' claims asserting lack of accessibility are precisely the types of claims Title II and Section 504 were enacted to address. *See, e.g.*, *McGary v. City of Portland*, 386 F.3d 1259, 1266 (9th Cir. 2004) ("[T]he crux of a reasonable accommodation claim is a

facially neutral requirement that is consistently enforced."); *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1086 (9th Cir. 2004) (explaining that the ADA "defines discrimination as a public accommodation treating a disabled patron the same as other patrons despite the former's need for a reasonable modification"); *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996) (holding that "[a]lthough Hawaii's quarantine requirement applies equally to all persons entering the state with a dog, its enforcement burdens visually-impaired persons in a manner different and greater than it burdens others," and, therefore, necessitates accommodation); *Riel v. Elec. Data Sys. Corp.*, 99 F.3d 678, 681 (5th Cir. 1996) ("The ADA mandate that employers must accommodate sets it apart from most other anti-discrimination legislation. Race discrimination statutes mandate equality of treatment, in most cases prohibiting consideration of race in any employment decision. In contrast, an employer who treats a disabled employee the same as a non-disabled employee may violate the ADA. By requiring reasonable accommodation, the ADA shifts away from similar treatment to different treatment of the disabled by accommodating their disabilities."). The court therefore DENIES Defendants' Motion for Summary Judgment on this basis.

3. Whether the Removal of Barriers is Readily Achievable

HPHA argues that Plaintiffs cannot plead or show that barrier removal at KPT and Kuhio Homes is "readily achievable" as required by 42 U.S.C. § 12182(b)(2)(A)(iv). Again, HPHA's argument misses the mark.

Significantly, 42 U.S.C. § 12182(b)(2)(A)(iv) applies to Title III of the ADA concerning public accommodations, not Title II concerning public entities. Accordingly, this "readily achievable" standard that HPHA asks the court to apply to Plaintiffs' Title II claims is wholly inapplicable.[14] *See Schotz v. Cates*, 256 F.3d 1077, 1081 n.4 (11th Cir. 2001) (noting that "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," such that the court would not apply the "readily achievable" standard to a Title II claim).

V. CONCLUSION

Based on the above, the court GRANTS in part and DENIES in part HPHA's Motion to Dismiss and/or for Summary Judgment. The court DISMISSES Plaintiffs' FHAA claim against HPAA. Plaintiffs' claims pursuant to

[14] In its Reply, HPHA argues summary judgment should be granted because addressing Plaintiffs' complaints would cause an "undue financial hardship or administrative burden." *See* HPHA Reply 6-9 (citing 28 C.F.R. § 35.150(a)(3), 28 C.F.R. § 8.24(a)(2)). The court does not address arguments raised for the first time in reply.

Title II and Section 504 against HPHA, and all of Plaintiffs' claims against Realty Laua, remain.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 19, 2009.

/s/ J. Michael Seabright
J. Michael Seabright
United States District Judge

McMillon et al. v. State of Hawaii et al., Civ. No. 08-00578 JMS/LEK, Order Granting in Part and Denying in Part Defendants State of Hawaii and Hawaii Public Housing Authority's Motion to Dismiss And/or for Summary Judgment on Plaintiffs' Complaint for Declaratory and Injunctive Relief and Damages, Filed December 18, 2008