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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

TONY KORAB, TOJIO CLANTON and KEBEN ENOCH, each individually and on behalf of those persons similarly situated,

Plaintiffs,

vs.

LILLIAN B. KOLLER in her official capacity as Director of the State of Hawaii Department of Human Services; and KENNETH FINK in his official capacity as State of Hawai'i, Department of Human Services, Med-QUEST Division Administrator,

Defendants.

CIVIL NO. 10-00483 JMS KSC

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED (FRCivP, Rule 12(b)(6)); MEMORANDUM IN SUPPORT; DECLARATION OF JOHN F. MOLAY; EXHIBITS A-D; CERTIFICATE OF SERVICE

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Comes now, Defendants Lillian B. Koller and Kenneth Fink, through their undersigned counsel, and hereby move this Honorable Court to grant their motion to dismiss the First Amended Complaint pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(6), and dismiss this action as to Plaintiffs, and give judgment in favor of Defendants, with all costs, including attorneys' fees.

This motion is brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCivP") and is based on the memorandum in support of the motion and the records and files before this court.

DATED: Honolulu, Hawaii, September 9, 2010.

/s/ John F. Molay .
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MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

1. A Motion to Dismiss is Appropriate Where Plaintiffs Have Failed to State a Claim Upon Which Relief May Be Granted

Defendants seek dismissal of Plaintiffs' claims under Rule 12(b)(6), for failure "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the factual allegations in the Complaint must "be enough to raise a right to relief above the speculative level." *Williams ex rel. Tabiu v. Gerber Products Co.,* 523 F.3d 934, 938 (9th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955, 1965 (2007)). "Dismissal of a [42 U.S.C. Section] 1983 claim for the lack of an enforceable right amounts to a dismissal for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6)." *Day v. Apoliona,* 496 F.3d 1027, 1030 (9th Cir. 2007) (citations omitted).

In reviewing dismissal under Rule 12(b)(6), a Court must take "[a]ll allegations of material fact in the complaint ... as true and construe[] [them] in the light most favorable to the plaintiff." *Williams,* 523 F.3d at 937 (quotation and citations omitted). But the Court is not "required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint"; nor must it "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.,* 328 F.3d 1136, 1139 (9th Cir. 2003) (citations omitted).

2. The Underlying Facts Support Defendants' Motion to Dismiss

On July 1, 2010 the State of Hawai'i, Department of Human Services (DHS) implemented a state-funded medical assistance plan for non-pregnant adults, aged 19 or older, lawfully resident in Hawai'i, who are citizens of countries with Compacts of Free Association with the United States (COFA Residents). (Complaint ¶ 1) This new program also included non-pregnant adult immigrants, aged 19 or older, who have been residents of the United States for less than five years (New Residents). (Complaint ¶ 1) The new state-funded medical assistance program is called Basic Health Hawaii (BHH) and provides less benefits to COFA Residents and New Residents than the QUEST and QUEST Expanded Access (QExA) Medicaid Programs. (Complaint ¶¶ 1, 31, 39)

DHS limits or eliminates health care benefits for COFA Residents and New Residents solely on the basis of their nationality, immigration status, and/or alienage. (Complaint ¶ 1, 2, 15, 30, 35, 39) New Residents have not received health coverage from the DHS since 1996. (Complaint ¶ 21)

Plaintiffs Tony Korab and Tojio Clanton, citizens of the Republic of the Marshall Islands, were disenrolled from QExA and enrolled into BHH by the DHS. (Complaint ¶¶ 5, 7, 9, 11) Plaintiff Keben Enoch, also a citizen of the Republic of Marshall Islands had no health coverage since December 2009. (Complaint ¶ 13-

14) In June 2010, Plaintiff Enoch applied for, and was denied medical assistance benefits, by DHS because of his citizenship. (Complaint ¶¶ 13 - 15) All named Plaintiffs have resided in the United States in excess of five years, therefore they are not New Residents. (Complaint ¶¶ 5, 9, 13)

Defendant Lillian B. Koller is the Director of DHS. (Complaint ¶ 17) Defendant Kenneth Fink is the Administrator of the Med-QUEST Division of DHS. (Complaint ¶ 18) Both Defendants have been sued in their official capacities only. (Complaint ¶¶ 17,18)

DHS has been voluntarily providing health care coverage for financially-eligible COFA Residents since approximately 1997. (Complaint ¶ 25) The Defendants initially attempted to create a medical benefit program for COFA Residents in 2009. (Complaint ¶ 27) This Court issued a temporary restraining order (TRO) stopping that program, based on a perceived violation of the Plaintiffs' procedural due process rights. (Complaint ¶ 27) The Defendants voluntarily agreed to extend the TRO for the purpose of allowing DHS to complete the rulemaking process for creation of a new BHH program. (Complaint ¶ 27) That process has been completed, including the required public hearings. (Complaint ¶ 28, HAR Chapter 1722.3)

The newly-created BHH program has limited medical benefits. (Complaint ¶ 31, HAR § 17-1722.3-18) It specifically excludes a number of benefits, such as

out-of-state services, organ transplants, durable medical equipment, and transportation. (Complaint ¶ 32, HAR § 17-1722.3-19) Dialysis treatments are covered as an emergency medical service, which Plaintiffs believe is not sufficient. (Complaint ¶ 37) Treatment for cancer is not provided for beyond the benefits given to all recipients of BHH benefits. (Complaint ¶ 38)

Eligible COFA Residents and New Residents who exhaust their BHH benefits are eligible for emergency medical care through a separate program called the Medical Assistance to Aliens and Refugees (MAAR) program. (Complaint ¶ 44 , HAR Chapter 1723) MAAR requires patients to wait until they have developed a serious medical condition posing a serious threat to bodily health, and then seek treatment in a hospital setting. (Complaint ¶ 45)

Although not relevant for purposes of this Motion, the QUEST and QExA federal medical assistance programs for which the COFA Residents are no longer eligible provide more comprehensive benefits. (Complaint ¶ 39)

3. The Equal Protection Clauses of the Hawai‘i and United States Constitutions are Construed in the Same Manner

Plaintiffs have pled a separate cause of action for violation of the Hawai‘i State Constitution’s equal protection clause. For the reasons that follow, the Defendants believe that this cause of action is duplicative of its cause of action for violation of the equal protection clause of the United States Constitution.

In pertinent part, Article I, Section 5 of the Hawai‘i State Constitution states "[n]o person shall be . . . denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." The Hawai‘i Supreme Court has held that the protection under the Hawai‘i State Constitution is the same as that extended under the U.S. Constitution:

> The guarantee of equal protection of the laws under the Hawaii **and** United States Constitutions requires that person similarly situated with respect to the legitimate purpose of the law receive equal treatment . . . . In the absence of a suspect classification or an intrusion upon a fundamental constitutional right, the challenged classification must bear some rational relationship to legitimate state purposes.

*State v. Miller*, 84 Haw. 269, 276 (1997) (citations omitted, emphasis added).

Defendants are aware of no Hawai‘i case holding that the equal protection clause of the Hawai‘i Constitution provides more protection than the equal protection clause of the U.S. Constitution as they pertain to alienage.[1] Based on the above, this Court may use federal law as guidance in ruling upon Defendants' Motion.

[1] Plaintiffs apparently believe that the equal protection clause of the Hawai‘i Constitution has previously been found to afford greater protection than the U.S. Constitution to certain classes of people. This is true only for gender, not for alienage. *See Baehr v. Lewin*, 74 Haw. 530, 562, 580 (1993) (noting the inclusion of "sex" in the plain language of Article I, Section 5 of the Hawai‘i Constitution and holding that sex is a "suspect category" deserving of "strict scrutiny").

4. BHH Did Not Violate Plaintiffs' Equal Protection Rights Under the Hawai'i State and United States Constitutions

Congress, not Defendants, has elected to exclude certain aliens -- including COFA Residents and New Residents -- from coverage in federal public benefit programs such as Medicaid. Despite the lack of federal funding, the State historically has recognized the health care needs of ineligible aliens, particularly COFA Residents, and has therefore opted to voluntarily provide health coverage to these groups with state dollars.

Far from discriminating on the basis of alienage, the State is affirmatively dedicating resources to providing health care to those whom the federal government has refused to cover. Nothing in the Equal Protection Clause requires the State to create such a program; nor does it require the State, if it chooses to provide benefits, to provide the same level that it provides under the Medicaid program with federal support. BHH passes muster under rational basis review, which is all that is required when the State is not excluding individuals based on alienage but affirmatively offering state-funded benefits to aliens who do not qualify for Medicaid coverage. Moreover, in light of Congress's authority over immigration, even strict scrutiny would not invalidate the State's application of the congressionally-established Medicaid eligibility categories. To the extent that COFA Residents and New Residents believe they should receive benefits comparable to those provided under Medicaid, their remedy is with Congress, not this Court.

A. The Federal Government, Not the State, Has Chosen to Exclude COFA Residents From Medicaid Coverage

Congress has decreed that "Non-Qualified Aliens," including COFA Residents and New Residents, cannot be covered under Medicaid. The Medicaid program, established in 1965, is "a cooperative federal-state program that directs federal funding to states to assist them in providing medical assistance to low-income individuals." *Ball v. Rodgers,* 492 F.3d 1094, 1098 (9th Cir. 2007) (citation and quotation marks omitted). "A state is not required to participate in Medicaid, but once it chooses to do so, it must create a plan that conforms to the requirements of the Medicaid statute and the federal Medicaid regulations." *Dep't of Health Servs. v. Sec'y of Health & Human Servs*., 823 F.2d 323, 325 (9th Cir. 1987). In return for its conformity with federal requirements, participating state governments get partial reimbursement, in the form of "federal financial participation" or "FFP" from the federal government. *Spry v. Thompson*, 487 F.3d 1272 , 1273 (9th Cir. 2007); *Children's Hosp. & Health Ctr. v. Belshe*, 188 F.3d 1090, 1093 (9th Cir. 1999).

As part of the Personal Responsibility Work Opportunities Reconciliation Act (PRWORA), enacted in 1996, Congress directed that eligibility for Medicaid and other federal benefit programs be limited to "qualified aliens." 8 U.S.C. §§ 1611, *et. seq*. With limited exceptions, PRWORA provides that "an alien who is not a qualified alien [hereinafter, "nonqualified alien"] . . . is not eligible for any Federal public benefit." 8 U.S.C. § 1611(a); *see* 8 U.S.C. § 1641(b). Thus,

Congress has decreed that any noncitizen who does not satisfy the definition of qualified alien or meet one of the exceptions is ineligible for Medicaid, even if he or she meets all other Medicaid eligibility requirements.

Qualified aliens include legal permanent residents, asylees, refugees, certain aliens granted temporary parole into the United States for a period of at least one year, aliens whose deportation has been withheld, aliens granted conditional entry, aliens who are Cuban and Haitian entrants, and certain aliens and their children who have been battered or subjected to extreme cruelty. 8 U.S.C. § 1641(b)-(c).

While qualified aliens are generally eligible for federal benefits, PRWORA provides that those who entered the United States after August 22, 1996 (the date of PRWORA's enactment), are ineligible for any "Federal means-tested public benefit" for a period of five years following their date of entry. 8 U.S.C. § 1613(a). Refugees, asylees, and veterans and their families are exempted from the waiting period. *Id*. at § 1613(b). Medicaid is a means-tested program, and the U.S. Department of Health and Human Services has confirmed that qualified aliens applying for Medicaid are subject to the five-year waiting period. 62 Fed. Reg. 46,256 (August 26, 1997). Thus, most qualified aliens entering the U.S. after August 22, 1996 must wait five years to become eligible for Medicaid; New Residents -- those within the five-year bar -- are ineligible.[2]

[2] Recent legislation made an exception to this bar for pregnant women and children. Pub. L. No. 111-3 § 214. Hawai'i immediately took advantage of this provision to include these groups in Medicaid.

COFA Residents are "nonimmigrants" who do not fall within any of the qualified alien categories and thus are not eligible for federal benefits under Medicaid. The Compacts for Free Association allow citizens of the Freely Associated States (FAS) to enter the United States as "nonimmigrant[s]." Pub. L. No. 99-239 § 141. A nonimmigrant alien is a person admitted to the U.S. for a temporary period of time and for a specific purpose, as set forth in the Immigration and Naturalization Act. 8 U.S.C. § 1101(a)(15). Examples of "nonimmigrants" are representatives of foreign governments, foreign students, and tourists. *Id*.

Under the immigration laws, "nonimmigrants" (including COFA Residents) are considered to have their permanent residence outside the United States and to be in this country only temporarily. The Department of Homeland Security has confirmed that citizens of the FAS "may reside, work and study in the United States, but they are not 'lawful permanent residents.'" (U.S. Citizenship & Immigration Servs., Fact Sheet: Status of the Citizens of the Freely Associated States of the Federated States of Micronesia & the Republic of the Marshall Islands, Ex. A at 4-5, and Fact Sheet: Status of Citizens of the Republic of Palau, Ex. B at 3.)

B. The Centers for Medicare & Medicaid Services Has Prohibited Coverage for Non-Qualified Aliens in QUEST, QExA, QUEST-Net, and QUEST-ACE

Medicaid is overseen at the federal level by the Department of Health and Human Services ("HHS") through HHS's Centers for Medicare and Medicaid Services ("CMS"). See *Robert F. Kennedy Med. Ctr. v. Leavitt*, 526 F.3d 557, 558

(9th Cir. 2008). Section 1115 of the Social Security Act authorizes the Secretary to approve experimental or demonstration projects to encourage states to adopt innovative programs that are likely to assist in promoting the objectives of Medicaid. *See* 42 U.S.C. § 1315(a). *See generally Spry v. Thompson*, 487 F.3d 1272; *Pharm. Research & Mfrs. of Am. v. Thompson*, 354 U.S. App. D.C. 150, 313 F.3d 600, 602 (D.C. Cir. 2002). Under an approved Section 1115 demonstration project, a State can be given the authority to modify its Medicaid program to provide benefits, use delivery systems (such as managed care), or cover groups that would not otherwise be eligible for Medicaid. *See Spry*, 487 F.3d at 1273-74. Once the waiver is granted, the State is subject to "Special Terms and Conditions" or STCs that govern how the waiver program will operate.

Hawai'i has a Section 1115 waiver from CMS which enables it to provide, with federal matching funds, several different health care benefit packages to different populations in the State. The original QUEST waiver was implemented in 1993, and it gave the State the authority to provide Medicaid state plan benefits through managed care to Medicaid enrollees who were covered under Medicaid's various coverage categories for children and parents. The State also received authority to cover certain groups (with federal funding) who were not otherwise eligible for Medicaid. These are known as "demonstration-eligibles" because they are made eligible for coverage pursuant to the Section 1115 demonstration project. As it has developed over time, the principal non-Medicaid group eligible for

QUEST coverage is non-disabled, childless adults with incomes below the federal poverty level. Under the terms of the waiver, that group is subject to an enrollment cap, although there are various exceptions to imposition of the cap.

In 1996, the State implemented the "QUEST-Net" program through its Section 1115 demonstration program. QUEST-Net provides full Medicaid coverage to children and a less comprehensive package of benefits to adults who otherwise have too much income or assets to qualify for Medicaid. Adult enrollment in QUEST-Net is limited to those who previously had QUEST coverage but no longer meet those eligibility requirements.

When the QUEST demonstration project was renewed in 2006 as "QUEST Expanded" ("QEx") the State received the authority to cover additional adults through "QUEST Adult Coverage Expansion" or "QUEST-ACE," which provides coverage to adults who cannot be enrolled in QUEST due to the enrollment cap. Benefits under QUEST-ACE are equivalent to those available under QUEST-NET.

Most recently, the waiver was renewed to include "QUEST Expanded Access" or "QExA." QExA adds institutional and home-and-community-based long term care benefits to the QUEST benefit package to individuals who qualify for Medicaid coverage in an aged, blind, or disabled eligibility group.

The STCs for both the QEx waiver, granted in 2006, and the QExA waiver, granted in 2008, state that the "demonstration eligibles" for those waivers (which include QUEST, QUEST-NET, QUEST-ACE, and QExA) "specifically excludes

unqualified aliens, including aliens from the Compact of Free Association countries." (Ex. C at 2, 5; Ex D at 3, 5, 6, 10, 15 – 21). Therefore, although the waivers do provide federal funding for some groups not otherwise eligible for Medicaid, the terms of the waivers make clear that there is no federal funding available for non-qualified aliens, including COFA residents.

C. Despite the Federal Restrictions, the State Has Chosen to Use Its Own Funds to Provide Health Benefits to Ineligible Aliens

Although prohibited by PRWORA and the terms of its waivers from extending Medicaid coverage or coverage through QUEST, QUEST-Net, QUEST-ACE, or QExA to non-qualified aliens, the State, nonetheless, chose to provide health benefits using only state tax dollars, without federal financial participation, as follows:[3] HAR § 1722.3-1.

First, alien children and pregnant women who were not eligible for enrollment in Medicaid but who otherwise met QUEST eligibility criteria were provided the equivalent of full QUEST coverage. (See footnote 2, above)

[3] The State of Hawai'i does receive an annual federal grant, pursuant to the terms of the COFA (48 U.S.C. § 1904(e)(6)), to offset the financial impact of COFA Residents on the State's educational and social services programs. However, the approximately $10 million it receives from the Department of Interior does not nearly cover the expenses it incurs in providing benefits to COFA Residents and is far less even than the FFP it would receive if COFA Residents were eligible for Medicaid.

Second, all other non-qualified aliens who otherwise meet the eligibility criteria for enrollment in QUEST, QUEST-Net, QUEST-ACE, or QExA are to be provided benefits through BHH.

Third, pursuant to federal regulations, non-qualified aliens who otherwise meet the eligibility criteria for enrollment in the State's Medicaid program (including QUEST, QUEST-Net, QUEST-ACE and QExA) are eligible for emergency services if the absence of immediate medical attention could reasonably be expected to result in (i) placing the patient's health in serious jeopardy; (ii) serious impairment to bodily functions; or (iii) serious dysfunction of any bodily organ or part. *See* 42 C.F.R. 440.255(c). Although they are not provided to Medicaid beneficiaries, the State receives FFP for these emergency services. *Id*. Based on litigation in other States, the State has concluded that dialysis should be considered an emergency service under the terms of this regulation.

Plaintiffs allege that their enrollment in BHH, rather than the QUEST, QUEST-Net, QUEST-ACE, and QExA programs, violates equal protection principles.

D. The Equal Protection Clause Does Not Require That the State Create a Health Care Program for Aliens Whom Congress Has Chosen Not to Cover

When Congress passed the PRWORA, it excluded certain groups of aliens, including COFA Residents and New Residents, from receiving federal public benefits such as Medicaid. *See* 8 U.S.C. §§ 1611(a), 1613(a). Nothing in federal

or state law, including the PRWORA and the equal protection clauses of the United States and Hawai‘i constitutions, **requires** the State to create its own benefit program for these aliens whom Congress has excluded from coverage.

The Fourteenth Amendment provides that "[n]o state . . . shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Article I, Section 5 of the Hawai‘i Constitution provides that "[n]o person shall be . . . denied the equal protection of the laws . . . ." The word "person" in this context includes "lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside." *Graham v. Richardson*, 403 U.S. 365, 371 (1971). "Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis [i.e. rational basis review]." *Id.*; *accord Baehr v. Levin*, 74 Haw. 530, 572 (1993) ("[w]here suspect classifications or fundamental rights are not at issue, this court has traditionally employed the rational basis test"). "This is so in 'the area of economics and social welfare.'" *Graham*, 403 U.S. at 371 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). However, "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny [i.e. strict scrutiny]." *Id*. at 372.

Plaintiffs' argument regarding equal protection appears to rest on the Supreme Court's decision in *Graham v. Richardson*, *supra*. In that case, the

Supreme Court held that States on their own cannot treat aliens differently from citizens without a compelling justification. *Id*. at 372-76. *Graham* resolved a consolidated appeal of two cases in which legal aliens challenged welfare programs in Arizona and Pennsylvania on equal protection grounds. *Id*. at 366-69. Arizona limited eligibility for federally funded programs for persons who were disabled, in need of old-age assistance, or blind, to U.S. citizens and persons who had resided in the U.S. for at least 15 years. *Id*. Pennsylvania limited eligibility for a state-funded welfare program to residents who were U.S. citizens or who had filed a declaration of intention to become citizens. *Id*. at 368. The Supreme Court observed that "the Arizona and Pennsylvania statutes in question create two classes of needy persons, indistinguishable except with respect to whether they are or are not citizens of this country." *Id*. at 371. Consequently, the Court reviewed these classifications under strict scrutiny and concluded "that a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania's making non-citizens ineligible for public assistance, and Arizona's restricting benefits to citizens and longtime resident aliens." *Id*. at 374.

*Graham* is not applicable here, however, where it is Congress, not the State, that has excluded aliens from federally funded Medicaid coverage. In a case decided three years after *Graham*, the Supreme Court held that the federal government may treat aliens differently from citizens so long as the classification satisfies rational basis review. *Mathews v. Diaz*, 426 U.S. 67, 78-83 (1976). In

that case, the Court upheld Congress's decision to "condition an alien's eligibility for participation in [Medicare] on continuous residence in the United States for a five-year period and admission for permanent residence." *Id*. at 69. The Court emphasized Congress's broad constitutional power over naturalization and immigration and noted that "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Id*. at 80-81. Therefore, the Court applied rational basis review and held that "it is unquestionably reasonable for Congress to make an alien's eligibility [for federal Medicare benefits] depend on both the character and the duration of his residence." *Id*. at 82-83.

Following *Mathews*, lower courts have uniformly applied rational basis review to uphold federal statutes that exclude certain aliens from various welfare programs, even if those programs are administered by the States. *See, e.g.*, *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001) (upholding under rational basis review PRWORA restrictions on alien eligibility for state-administered pre-natal Medicaid benefits); *Aleman v. Glickman*, 217 F.3d 1191, 1197 (9th Cir. 2000) (same for food stamps); *City of Chicago v. Shalala*, 189 F.3d 598, 603-05 (7th Cir. 1999) (same for supplemental social security income and food stamps); *Rodriguez v. United States*, 169 F.3d 1342, 1346-50 (11th Cir. 1999). Thus, the PRWORA provisions that exclude COFA Residents and New Residents from receiving federal Medicaid benefits are clearly constitutional.

The Equal Protection Clause does not require States to fill in the gaps where Congress has excluded aliens from federal benefits but has given states discretion to furnish aliens with such benefits using state funds. *See, e.g.*, *Khrapunskiy v. Doar*, 909 N.E.2d 70, 77 (N.Y. 2009) ("Simply put, the right to equal protection does not require the State to create a new public assistance program in order to guarantee equal outcomes . . . . Nor does it require the State to remediate the effects of the PRWORA."); *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 414 (Mass. 2002) (finding that Massachusetts was not required to establish a state-funded program where the PRWORA barred qualified aliens from receiving federal temporary assistance for needy families until they had resided in the U.S. for five years but gave states discretion to provide such benefits to those aliens using state funds); *see also Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004) (holding that states do not discriminate against aliens in violation of the Equal Protection Clause when states choose not to provide aliens with the maximum benefits permitted by federal law).

E. To the Extent the State Has Chosen to Create a Program Just for Non-Qualified Aliens, It is Subject to a Rational Basis Standard of Review

In the PRWORA, Congress not only specified the categories of aliens that were eligible and ineligible for federal benefit programs, it also included rules governing coverage of aliens by state or local benefit programs. The statute defines a "state or local public benefit" as a "health . . . benefit for which payments or assistance are provided to an individual, household, or family eligibility unit"

that is provided "by an agency of a State or local government or by appropriated funds of a State or local government." 8 U.S.C. § 1621(c)(1)(B).

The PRWORA does not require states to create benefit programs for aliens whom Congress has barred from receiving federal coverage. However, if states choose to commit their own resources to establish programs that help fill in those coverage gaps that Congress created, the PRWORA does delineate some eligibility rules for aliens. The statute provides that state programs may not exclude certain groups of qualified aliens, *see* 8 U.S.C. § 1622(b), but must exclude other groups, *see id*. § 1621(a). Neither COFA Residents nor New Residents are among the groups that must be included or excluded. Instead, the PRWORA gives states the discretion to determine the eligibility of such aliens, including Plaintiffs, for state-funded benefits. *See id*. § 1622(a) ("a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien . . . [and] a nonimmigrant under the Immigration and Nationality Act").

Several courts have addressed whether States that maintain state benefit programs may constitutionally exclude those aliens for whom Congress has made coverage optional. These courts have applied rational basis review where a State has created an optional state-funded benefit program exclusively for aliens and where it has decided to terminate such a program. In 2002, for example, the Massachusetts Supreme Court upheld as constitutional a state law that created a supplemental state-funded welfare program with a six-month residency

requirement to provide benefits for aliens who became ineligible after the PRWORA imposed the five-year residency requirement for federally funded benefits. *Doe v. Comm'r of Transitional Assistance*, 773 N.E.2d 404, 406, 414-15 (Mass. 2002). The court found that "the Massachusetts Legislature was not required to establish the supplemental program" for aliens who did not meet the federal criteria and concluded that, having done so, its six-month waiting period was based on residency, not alienage, and thus was not subject to strict scrutiny. *Id*. at 411, 414-15. In concluding that rational basis review applied, the court also considered:

> the context in which the supplemental program was enacted; its purpose and the clearly noninvidious intent behind its promulgation; the effect of its implementation on mitigating the harm to qualified alien families that might otherwise be without substantial assistance for five years under the requirements of the welfare reform act [PRWORA]; and the potential harm to those families if the Legislature could only choose to create an all-or-nothing program as a remedy to their disqualification from federally funded programs.

*Id*. at 414.

Applying the rational basis standard, the court observed that Massachusetts's state benefit program was "consistent with national policies regarding alienage[] and places no additional burdens on aliens beyond those contemplated by the [PRWORA]." *Id*. at 414-15. The court concluded that the program furthered "the Federal policy of self-sufficiency and self-reliance with respect to welfare and immigration by ensuring that aliens first attempt to be self-sufficient before

applying for State-funded welfare benefits. In addition, the six-month residency requirement encourages aliens to develop enduring ties to Massachusetts." *Id*. at 415. Finally, the court found that "[t]he fact that the Legislature might have been able to satisfy the requirements of the [PRWORA] in a different way does not mean that the legislative decision to enact [the state program] was irrational or constitutionally impermissible." *Id*.

In 2004, the Tenth Circuit upheld as constitutional Colorado's decision to mitigate a budget shortfall by eliminating its optional coverage of certain aliens from Medicaid (those whom, unlike COFA Residents and New Residents, a State may cover under Medicaid). *Soskin v. Reinertson*, 353 F.3d 1242, 1246, 1254-57 (10th Cir. 2004). After conducting an extensive discussion of *Graham* and *Mathews*, the court concluded that neither case determined the result. "Unlike *Graham*, here we have specific Congressional authorization for the state's action, the PRWORA. Unlike *Mathews*, here we have a state-administered program, and the potential for states to adopt coverage restrictions with respect to aliens that are not mandated by federal law." *Id*. at 1251. Instead, "[t]his case fits somewhere in between." *Id*.

The Tenth Circuit noted that, unlike the federal law at issue in *Mathews*, the PRWORA "gives states a measure of discretion" that can take into account the impact on the state budget. *Id*. That is because states are "addressing the Congressional concern (not just a parochial state concern) that 'individual aliens

not burden the public benefits system.'" *Id*. (quoting 8 U.S.C. §1601(4)). The court commented that "[t]his may be bad policy, but it is Congressional policy; and we review it only to determine whether it is rational." *Id*.

Finally, the Tenth Circuit borrowed reasoning from the Massachusetts Supreme Court's *Doe* opinion to explain how equal protection principles apply in cases that fall within the gray area between the bright lines of *Graham* and *Mathews*. The court described what Congress did in the PRWORA as, "in essence," creat[ing] two welfare programs, one for citizens and one for aliens . . . . The decision to have separate programs for aliens and citizens is a Congressional choice, subject only to rational-basis review." *Id*. (citing *Mathews*, 426 U.S. at 78-83). When a state exercises the option to include more or fewer aliens in the aliens-only program, that decision "should not be treated as discrimination against aliens as compared to citizens. That aspect of the discrimination is Congress's doing . . . ." *Id*. at 1255-56. Thus, the Tenth Circuit held that rational basis review applies to such classifications. *Id*.

The only time a court has applied strict scrutiny and declared a state program unconstitutional occurred when, following passage of the PRWORA, New York created a state-funded medical assistance program for U.S. citizens that completely excluded non-qualified aliens from eligibility. *See Aliessa v. Novello*, 754 N.E.2d 1085, 1090, 1094-99 (N.Y. 2001). The New York program provided the equivalent of Medicaid coverage to citizens that met Medicaid income

requirements but did not meet categorical eligibility. The court rejected the state's argument that its exclusion of non-qualified aliens was merely "implement[ing] title IV's Federal immigration policy and should therefore be evaluated under the less stringent 'rational basis' standard." *Id*. at 1095. The court held that Congress's attempt to give states discretion not to extend state benefits to non-qualified aliens "produc[es] not uniformity, but potentially wide variation . . . . Considering that Congress has conferred upon the states such broad discretionary power to grant or deny aliens State Medicaid [i.e., state-funded medical assistance], we are unable to conclude that title IV reflects a uniform national policy." *Id*. at 1098. It held that the state's attempt to exclude non-qualified aliens from its state-only medical assistance program did not pass strict scrutiny and violated the Equal Protection Clause.[4] However, a subsequent case from New York made clear that, despite the holding in *Aliessa*, "the right to equal protection does not require the State to create a new public assistance program in order to

[4] An Arizona state court, addressing that State's exclusion of aliens from a program for non-Medicaid eligibles, upheld the constitutionality of the program under strict scrutiny, on the ground that Congress in the PRWORA intended to give States the discretion to exclude all but a small group of aliens from their state programs. *See Avila v. Biedess,* 78 P.3d 280, 283 (Ariz. Ct. App. 2003), discussed at pages 27-28, *infra*. The PRWORA provides that "a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601(7).

guarantee equal outcomes . . . Nor does it require the State to remediate the effects of the PRWORA." *Khrapunskiy v. Doar*, 909 N.E.2d 70, 77 (N.Y. 2009).

In this case, the State is not excluding aliens from a state-funded program. Rather, it is creating a benefit program specifically for ineligible aliens, as did Massachusetts. The State did not draw classifications between citizens and aliens; it drew classifications between residents who were eligible for Medicaid and those who were ineligible. Among the ineligible residents, the State drew further distinctions pursuant to federal law based on age and pregnancy, providing coverage comparable to Medicaid for pregnant women and children, and coverage comparable to QUEST-Net and QUEST-ACE for all others. Because none of those classifications constitutes a suspect class, the state need only satisfy rational basis review. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."); *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974) (holding that a distinction based on pregnancy is not a sex-based classification subject to heightened scrutiny); *Daoang v. Dept' of Education*, 63 Haw. 501 (1981) (finding rational basis for compulsory retirement age for state employees); *Nagle v. Bd. of Educ.*, 63 Haw. 389, 394 (1981) ("age is not a suspect classification"). Unlike in *Aliessa*, Hawai'i did not create a state-funded benefit program that covers citizens but excludes aliens. On the contrary, Hawai'i instituted a state-funded benefit

program so that COFA Residents and New Residents would not be left without health coverage. Therefore, strict scrutiny is not appropriate in this case.

Plaintiffs contend that Hawai‘i is drawing impermissible classifications between citizens and aliens because BHH provides less medical coverage than federal benefit programs provide to citizens under Medicaid. However, "[t]hat aspect of the discrimination is Congress's doing," *Soskin*, 353 F.3d at 1256, when it excluded Plaintiffs from Medicaid and refused to provide states with any federal funding for Plaintiffs' medical care. By contrast, Hawai‘i remains committed to furnishing health care benefits to COFA Residents and other aliens that Congress has turned its back on, despite the State's current budget crisis.

Plaintiffs do not appear to dispute that Hawai‘i could completely eliminate state-funded medical assistance to COFA Residents and other Medicaid-ineligible aliens. Instead, Plaintiffs allege that, as long as Hawai‘i maintains a state-funded program such as BHH, the Equal Protection Clause mandates that Hawai‘i provide the same coverage that citizens receive through Medicaid. Otherwise, in Plaintiffs' view, the discrepancy in coverage constitutes discrimination based on alienage and is subject to strict scrutiny.

Plaintiffs' argument is doubly flawed. First, it is not distinguishing between groups of people based on their alienage. Rather, the State simply chose to provide a benefit to persons who are ineligible for federal Medicaid due to the impact of

PRWORA. Federal program eligibility is not a suspect classification and, thus, only triggers rational basis review.

Second, as previously discussed, neither the PRWORA nor the Equal Protection Clause compels Hawai‘i to create a state-funded benefit program to provide health care coverage for aliens whom Congress has excluded from Medicaid. *See, e.g.*, *Khrapunskiy*, 909 N.E.2d at 77; *Doe*, 773 N.E.2d at 414. It defies logic to interpret equal protection principles as permitting Hawai‘i to provide non-qualified aliens with no medical coverage, but not permitting Hawai‘i to provide them with some medical coverage. To adopt Plaintiffs' all-or-nothing view and invalidate BHH would create perverse incentives for states -- particularly in times of budgetary crisis -- to eliminate, rather than merely scale back, state-funded medical assistance to non-qualified aliens in order to avoid alleged constitutional infirmity.

F. There is a Rational Basis for the State to Provide to Non-Eligible Aliens With Different Benefits Than It Provides to Those Who Are Eligible for Federally-Funded Benefits

Defendants' decision to provide non-eligible aliens with a lesser level of benefits than it provides to those who are eligible for federally-funded Medicaid benefits satisfies rational basis review. "[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic" of government choices. *Heller v. Doe*, 509 U.S. 312, 319 (1993). Therefore, the state's decision to provide health benefits to non-eligible aliens

through BHH must be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id*. at 320; *accord Baehr*, 74 Haw. at 572 ("[u]nder the rational basis test, we inquire as to whether a statute rationally furthers a legitimate state interest").

Furthermore, a State "that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification." *Id*. (quotation omitted). Rather, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *accord Baehr*, 74 Haw. at 572 ("[o]ur inquiry seeks only to determine whether any reasonable justification can be found for the legislative enactment"). The state "has no obligation to produce evidence to sustain the rationality of a statutory classification"; "[t]he burden is on [Plaintiffs] to negative every conceivable basis which might support it." *Heller*, 509 U.S. at 320.

Although it is under no legal obligation to do so, Hawai'i chose to use state funds to provide health benefits to non-eligible aliens through BHH. While not as comprehensive as the full Medicaid package, it is not illegitimate for the State, in making this determination, to take into account its current budget situation, given Congress's goal in the PRWORA that "individual aliens not burden the public benefits system." 8 U.S.C. § 1601(4); *see also Aleman v. Glickman*, 217 F.3d 1191, 103 (9th Cir. 2000) (recognizing that concern about the fiscal impact of

providing benefits constitutes a legitimate government objective). Plaintiffs do not, nor can they, dispute that the state's decision to transfer COFA residents and other non-eligible aliens to BHH was rationally related to these legitimate state and federal governmental interests. Therefore, the state has satisfied rational basis review and has not violated Plaintiffs' rights under the Equal Protection Clause.

G. Even if Strict Scrutiny Applies, the State's Classification of Non-Eligible Aliens is Suitably Tailored to Serve a Compelling State Interest

The state's decision to provide benefits to Plaintiffs through BHH still comports with Equal Protection, even if strict scrutiny applies. Under strict scrutiny review, Hawai'i must show that its classification of non-eligible aliens is "suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

In 2003, an Arizona appeals court applied strict scrutiny and upheld Arizona's decision to exclude qualified aliens with less than five years of residency from a state-funded program that extended medical benefits to individuals who were ineligible for Medicaid due to income restrictions. *Avila v. Biedess*, 78 P.3d 280, 283, 287-88 (Ariz. Ct. App. 2003); Review Denied and Ordered Depublished, *Avila v. P Biedess/AHCCCS*, 207 Ariz. 257, 85 P.3d 474 (Ariz. Mar 16, 2004). Defendants note that although the case has no precedential value, it is being offered because they believe the *Avila* court's reasoning is sound. Notably, the Arizona Supreme Court did not reverse the decision of the Arizona appeals court. The court determined that the state program was "essentially a state-funded

extension of the federally-funded [Medicaid] program," and the state's interest in having uniform eligibility criteria for both programs satisfied strict scrutiny. *Id*. at 288. The court reasoned that "[t]he combination of the federal policy [expressed in the PRWORA] and the benefits of uniform eligibility criteria for different parts of the state's program create the rare circumstance when a state classification based on alien status satisfies strict scrutiny." *Id*.

> [W]e believe it would be an impractical and strained application of the Equal Protection Clause to bar a state from using federal eligibility criteria for a state program when a mandatory federal policy applies to one portion of a program and the state merely acts to implement uniform rules of alien eligibility for another [state-funded] part of the same program.

*Id*.

While not directly on point, *Avila* is instructive to the present case. In *Avila*, the state exercised its discretion under the PRWORA to completely exclude aliens from its state-funded medical assistance program. *Id*. at 283. By contrast, Hawai'i used its discretion to reduce the full Medicaid-like benefits the Plaintiffs used to receive, and instead implemented the BHH Program. If Arizona's decision to mimic Congress and exclude aliens from coverage satisfies strict scrutiny, Hawai'i's decision to be more generous than Congress and include aliens in a state-funded benefit program must also satisfy that standard.

As previously discussed, Hawai'i also could have avoided potentially violating the Equal Protection Clause simply by eliminating medical benefits for

non-eligible aliens, which is precisely what Congress did when it passed the PRWORA. *See, e.g.*, *Khrapunskiy*, 909 N.E.2d at 77; *Doe*, 773 N.E.2d at 414. If the Court holds that BHH was unconstitutional, the state's only economically feasible and constitutional option may be to deny Plaintiffs any state-funded health benefits. Such a perverse and impractical reading of the Equal Protection Clause should not be adopted. Instead, even if strict scrutiny applies in the present case, the Court should find that the State complied with equal protection principles.

5. Plaintiffs Have Not Stated a Claim for Discrimination Based on Disability

Title II of the Americans with Disabilities Act (ADA) provides that "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.

In order to establish a violation under Title II of the ADA, a plaintiff must show that:

> (1) he is a "qualified individual with a disability"; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities or was otherwise discriminated against by the public entity; (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.

*Townsend v. Quasim*, 328 F.3d 511, 516 (9th Cir. 2003) (quoting *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001)).

A "qualified individual with a disability" is defined under Title II as

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices ... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

Plaintiffs are not qualified individuals with a disability. Plaintiffs allege that they are being discriminated against by being excluded from QUEST and QExA, both federal public benefit programs. As noted above, COFA Residents and New Residents are excluded from federal public benefit programs by virtue of PRWORA, and the State's Section 1115 waivers. They do not meet the essential eligibility requirements for receiving medical benefits.

Even assuming, *arguendo*, that one or more of the Plaintiffs constitute a qualified individual with a disability, and assuming, without conceding, that Plaintiffs have been denied a benefit offered by DHS,[5] **there are no facts in the Complaint that establish that the denial of any benefit to the Plaintiffs was by reason of their disabilities**. The Complaint clearly alleges that any denial of benefits was based on **alienage**, not disability status. The decision to place Plaintiffs into BHH has absolutely nothing to do with the disability status of any of the Plaintiffs. Plaintiffs have simply not been denied a benefit they would have

[5] Defendants reserve the right to dispute this at a later time.

otherwise received had they not been disabled. Therefore, Plaintiffs have failed to state facts that support a claim for discrimination based on disability.

6. Plaintiffs are Barred From Bringing an Action Based on Alleged Violation of the Hawai‘i State Constitution

42 U.S.C. § 1983 provides a remedy for violations of **federal** constitutional rights. It does not provide a remedy for violations of state law. See *Moreland v. Las Vegas Metro. Police Dep't.,* 159 F.3d 365, 371 (9th Cir. 1998) ("state law violations do not, on their own, give rise to liability under section 1983[1") (citation omitted). There is no Hawai‘i statutory or case-law equivalent to 42 U.S.C. § 1983. See *Figueroa v. State,* 61 Haw. 369, 383 (1979) (sovereign immunity bars a private cause of action for damages for violation of the Hawai‘i Constitution as against the State). Plaintiffs are barred from bringing an action against the Defendants based on alleged violations of the Hawai‘i State Constitution by sovereign immunity, and the action must be dismissed.

Defendants offer *Alston v. Read*, 678 F.Supp.2d 1061 (D. Haw. 2010) as support for their position. There, Judge King stated:

> [T]here apparently is no State statutory or case-law equivalent to 42 U.S.C. § 1983. *See, e.g., Mow by Mow v. Cheeseborough,* 696 F.Supp. 1360, 1365 (D.Haw.1988) (dismissing similar claim, reasoning that "Hawaii state appellate courts have yet to enunciate whether the State recognizes a cause of action for damages arising from a deprivation of rights under the Hawaii Constitution as against individuals").[FN10] The Court thus will not allow Count Five to remain, even as a State-law claim pendent or supplemental to a federal claim under Section 1983. Count Five is dismissed. *See, e.g., Galario v.*

> *Adewundmi,* Civ. No. 07-00159 DAE-KSC, 2009 WL 1227874, at *11 (D. Haw. filed May 1, 2009) (granting summary judgment against a plaintiff because such a cause of action has not been recognized).

*Id*. at 1074

In footnote 10 Judge King went on to point out:

> By case law, the U.S. Supreme Court has recognized a non-statutory federal remedy, similar to a remedy under Section 1983, to enforce violations of federal law by federal (not state) officials. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). The parties have not cited, and the Court is unaware of, any opinion from a Hawaii appellate court recognizing a similar State-law remedy for a State Constitutional violation.

Defendants urge this Court to adopt the reasoning of Judges King and Ezra (the judge in *Galario)* and dismiss the cause of action, with prejudice, as no such cause of action has yet been recognized by the Hawai‘i courts. In the alternative this Court could decline to exercise supplemental jurisdiction over claims arising from alleged violations of the Hawai‘i state constitution, and allow a Hawai‘i state court to rule on that issue.

Defendants further note that federal courts do not have the power to require state actors to conform their behavior to **state** law, where the state has not consented to such a suit in federal court. *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 105 (1984) The State of Hawai‘i has clearly not consented to be sued in federal court for alleged violations of Hawai‘i state law. HRS § 661-1.

7. Plaintiffs' Allegations of Loss of "Right to Life" are Analyzed Under the Due Process Clause

Plaintiffs are apparently taking the language of Article I, Section 2 of the Hawai'i Constitution literally. This section states, in pertinent part: "All person are free by nature and are equal in their inherent and inalienable rights. Among the rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property." The words "life," "liberty," and "property" as used in constitutions are representative terms and are intended to cover every right to which a member of the body politic is entitled under the law. *Gillespie v. People*, 188 Ill. 176, 58 N.E. 1007 (1900); *McKinster v. Sager*, 163 Ind. 671, 72 N.E. 854 (1904); *Lawrence E. Tierney Coal Co. v. Smith's Guardian*, 180 Ky. 815, 203 S.W. 731(1918), modified on other grounds, 181 Ky. 764, 205 S.W. 951 (1918); *In re Flukes*, 157 Mo. 125, 57 S.W. 545 (1900). The guarantee of due process protects the liberty of the individual. *Gilmer v. State*, 389 Md. 656, 887 A.2d 549 (2005).

In practice the protection of individual equality has been undertaken pursuant to the Equal Protection clauses of the Hawai'i and U.S. Constitutions, while protection of life is implemented under the Due Process clauses.

As to Plaintiffs' due process claim of deprivation of "life" because the State of Hawai'i is voluntarily offering Plaintiffs medical benefits they would not otherwise be entitled to receive, Defendants note that in order to sustain a claim of

deprivation of rights under either the federal or state constitutions the Plaintiffs must show they have more than an abstract need or desire for the benefit. They must show the benefit is one they are **entitled** to receive by statute or that they have a legitimate claim of entitlement to it. *Bush v. Hawaiian Homes Commission*, 76 Haw. 128 (1994); *Alejado v. City and County of Honolulu*, 89 Haw. 221 (Haw. App. 1998) (A constitutionally protected property interest must be founded in a source of independent law); *In re Robert's Tours and Transportation, Inc.*, 104 Haw. 98 (2004).

As noted above, Plaintiffs have no **right** to receive medical benefits under either federal or state law. Even assuming that Plaintiffs may pursue a cause of action for violation of the Hawai‘i State Constitution, they fail because Plaintiffs can point to no source of a **right** to continue to receive payment for medical care.

8. Conclusion

For the reasons set forth above, Defendants ask this Court to grant their Motion to Dismiss, and dismiss this action, with prejudice.

DATED: Honolulu, Hawai‘i, September 9, 2010.

/s/ John F. Molay .
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Attorney for Defendants

LILLIAN B. KOLLER and
KENNETH FINK

CERTIFICATION OF LENGTH OF MEMORANDUM

Using the "workcount" tool in Word 2003, Counsel for Defendants certifies the length of this Memorandum is 8,416 words.

DATED: Honolulu, Hawai'i, September ___, 2010.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

TONY KORAB, TOJIO CLANTON and KEBEN ENOCH, each individually and on behalf of those persons similarly situated,

Plaintiffs,

vs.

LILLIAN B. KOLLER in her official capacity as Director of the State of Hawaii Department of Human Services; and KENNETH FINK in his official capacity as State of Hawai'i, Department of Human Services, Med-QUEST Division Administrator,

Defendants.

CIVIL NO. 10-00483 JMS KSC

CERTIFICATE OF SERVICE OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

CERTIFICATE OF SERVICE OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

I hereby certify that on August 17, 2010, I electronically filed the foregoing document with the Clerk of Court for the United States District Court for the District of Hawaii by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served electronically by the CM/ECF system.

I further certify that for the participants in the case are not registered CM/ECF users, I mailed the foregoing document by First- Class Mail, postage prepaid, to the address or addresses listed below:

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