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LAWYERS FOR EQUAL JUSTICE

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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

JAN 03 2005

at 2 o'clock and 36 min. P.M.
WALTER A.Y.H. CHINN, CLERK

ALSTON HUNT FLOYD & ING
Attorneys At Law
A Law Corporation

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARA AMONE individually, and)
on behalf of all persons similarly)
situated,)

Plaintiff,

v.

CIVIL NO. CV04-00508 ACK/BMK

) **NOTICE OF MOTION;**
) **PLAINTIFF'S MOTION FOR**
) **CLASS CERTIFICATION;**
) **MEMORANDUM IN SUPPORT OF**
) **MOTION; EXHIBIT "A";**
) **DECLARATION OF SHELBY**

STEPHANIE AVEIRO, in her)
official capacity as the Executive)
Director of the Housing and)
Community Development)
Corporation of Hawaii; HOUSING)
AND COMMUNITY)
DEVELOPMENT CORPORATION)
OF HAWAII, a duly organized)
and recognized agency of the)
State of Hawaii.)

Defendants.)

**ANNE FLOYD; DECLARATION OF
GAVIN THORNTON;
CERTIFICATE OF SERVICE**

DATE: FEB 28 2005

TIME: 9:30

JUDGE: ALAN C. KAY

NOTICE OF MOTION

TO: MARK BENNETT
Attorney General
JOHN WONG
Deputy Attorneys General
465 S. King Street, Room B2
Honolulu, Hawaii 96813

Attorneys for Defendants

PLEASE TAKE NOTICE that the following Motion for Class Certification will be heard before the Honorable Alan Kay in his courtroom in the United States Courthouse, 300 Ala Moana Boulevard, Honolulu, Hawaii on FEB 28 2005, ~~2004~~, at 9:30 a.m., or as soon thereafter as counsel can be heard.

DATED: Honolulu, Hawai'i, December 30, 2004.

A handwritten signature in black ink, appearing to be 'S. A. Floyd', is written over a horizontal line.

SHELBY ANNE FLOYD
GAVIN THORNTON
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MARA AMONE individually, and) CIVIL NO. CV04-00508 ACK/BMK
on behalf of all persons similarly)
situated,) **PLAINTIFF'S MOTION FOR**
) **CLASS CERTIFICATION**
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Plaintiffs,)
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STEPHANIE AVEIRO, in her)
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DEVELOPMENT CORPORATION)
OF HAWAII, a duly organized)
and recognized agency of the)
State of Hawaii.)
)
Defendants.)
_____)

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff Mara Amone, by and through her counsel, hereby moves this Court for an Order allowing this cause to be maintained as a class action, and requiring notice to be provided to all class members.

This Motion is made pursuant to Rules 7, 23(a) and (b)(2) and (3) of the Federal Rules of Civil Procedure. It is based on the attached Memorandum in Support of Motion, the Declaration of Shelby Anne Floyd, and the Declaration of Gavin Thornton.

In support of this Motion, Plaintiffs assert that:

1. The class for which certification is sought should be defined as disabled persons that currently reside, or have resided within the last two years, in an Housing and Community Development Corporation of Hawaii ("HCDCH") public housing project in which resident receive utility allowances, whose special needs arising from their disability require them to consume utilities in excess of the amount provided for in the standard public housing utility allowances.
2. The class is so numerous that joinder of all its members is impracticable.
3. There are questions of law and/or fact common to the class.
4. The claims of the named Plaintiff are typical of the claims of the class.


5. The named Plaintiff will fairly and adequately represent the claims of the entire class.

6. The Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

7. Questions of law and fact predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

WHEREFORE, Plaintiffs pray that this action be certified as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, and that Defendants be ordered to provide notice of the pendency of this action to all class members.

DATED: Honolulu, Hawai'i, December 30, 2004.


SHELBY ANNE FLOYD
GAVIN THORNTON
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARA AMONE individually, and)
on behalf of all persons similarly)
situated,)

Plaintiff,)

v.)

STEPHANIE AVEIRO, in her)
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Defendants.)

CIVIL NO. CV04-00508 ACK/BMK

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
CLASS CERTIFICATION;
EXHIBIT "A"**

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**

I. INTRODUCTION

Plaintiff seeks declaratory and injunctive relief against Defendant Aveiro, in her official capacity as the Director of the Housing and Community Development Corporation of Hawai'i ("HCDCH") for failing to establish and implement criteria and procedures for granting

adjustments to the utility allowance in public housing for disabled residents whose special needs require them to consume excess utilities, all in violation of Plaintiff's rights under the U.S. Housing Act and 42 U.S.C. § 1983. Incident to Plaintiff's primary request for declaratory and injunctive relief, Plaintiff also seeks to establish the right to compensatory damages for the violations of her rights.

II. THE PROPOSED CLASS

The proposed class for certification is defined as disabled persons that currently reside, or have resided within the last two years, in an HCDCH public housing project in which residents receive utility allowances, whose special needs arising from their disability require them to consume utilities in excess of the amount provided for in the standard public housing utility allowances.

III. THE REQUIREMENTS OF RULE 23(a) ARE MET

To certify a class action, Plaintiffs must establish that all of the requirements of Federal Rule of Civil Procedure ("FRCP") 23(a) are met, and must also establish that at least one of the alternative requirements of FRCP 23(b) is met. Daly v. Harris, 209 F.R.D. 180, 184 (D. Haw. 2002).

FRCP 23(a) requires a finding that:

- (1) The class is so numerous that joinder of all members is impracticable;
- (2) There are questions of law or fact common to the class;
- (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) The representative parties will fairly and adequately protect the interests of the class.

As discussed below, Plaintiffs meet each of the requirements of FRCP 23(a).

A. The Plaintiff Class is so Numerous that Joinder is Impracticable

To satisfy the "numerosity" requirement of FRCP 23(a)(1), Plaintiffs need not satisfy a set numerical formula; rather, the critical inquiry is whether joinder of all class members would be impracticable. Difficulty in identifying and locating affected persons is relevant in determining that joinder is impracticable. Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913 (9th Cir. 1964) ("Impracticability" does not mean "impossibility" but only the difficulty

or inconvenience of joining all members of a class); Ham v. Dericks, 162 F.R.D. 628, 633-634 (D. Haw. 1995).

In this case, the size of the class members currently residing in public housing is unknown. See Declaration of Shelby Anne Floyd ("Floyd Dec.") attached hereto. The additional numbers of class members who are no longer residing in public housing, but who would have been entitled to reduced rents when they did reside in public housing is difficult to determine at this time. At some point, Defendants' records may have to be searched to determine all disabled former tenants of public housing. Thus, the requirements of FRCP 23(a)(1) are met in this case.

B. There Are Questions of Law or Fact Common to the Class

To satisfy the "commonality" requirement of FRCP 23(a)(2), Plaintiffs need only present a single issue of law or fact common to all class members. Blackie v. Barrack, 524 F.2d 891, 904 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976); Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 145 (N.D. Cal. 2004).

The gravamen of Plaintiffs' claims is the fact that Defendants had an obligation to notify disabled public housing tenants of their right to request reduced rents (higher utility allowances) because of the need to spend higher than normal amounts on electricity to operate medical equipment prescribed by a physician. Defendants collected information annually on the presence of disabled tenants in each public housing unit, but did not notify these disabled tenants of their rights, and thus no increased utility allowances were ever applied. As a result, disabled tenants needing electrically operated medical equipment paid a higher rent than similarly-situated non-disabled tenants. Both the fact and method of Defendants' discrimination are common to all prospective class members.

C. The Representative Plaintiff's Claims are Typical of the Class' Claims

The FRCP 23(a)(3) requirement that the named Plaintiff's claims be typical of the class' claims overlaps considerably with the other requirements of Rule 23(a). Dukes, supra, at 144. Courts have devised several tests to determine whether this criterion is met. The requirement is satisfied where there is no antagonism between the

claims of the named Plaintiff and the claims of the class. Fowler v. Birmingham News Co., 608 F.2d 1055, 1058 (5th Cir. 1979). The requirement is also satisfied where the named representative's claims are similar enough to the class claims to ensure that the named Plaintiff will adequately represent them. Cruz v. Bowen, 672 F. Supp. 1300, 1305 (N.D. Cal. 1987) (quoting General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982)).

Plaintiff Amone seeks relief that is appropriate to all of the members of the proposed class. Her claims are in no way antagonistic to the interests of other class members. If Plaintiff prevails on the merits the interest of the class members in eliminating discriminatory rents in public housing will be furthered.

Plaintiff Amone will fairly and adequately represent the claims of the Plaintiff class. She is a disabled individual who resides in public housing. As a result of her disability, she uses an oxygen machine for breathing at night, a nebulizer, and an air conditioner. Although her monthly income is \$572, her actual utility bill is as much as \$174 monthly, while the utility allowance that she has received since she moved into the apartment where she currently resides was, until

recently, \$41. Because of the gross insufficiency in the utility allowance that she has been receiving, instead of paying only one-third of her monthly income in rent, she has paid roughly one-half her income for rent.

D. The Named Plaintiff Will Fairly and Adequately Protect the Interests of the Class

The fourth requirement of FRCP 23(a) is satisfied where (1) the class representatives have common interest with the unnamed members of the class, and (2) the representatives will be able to prosecute the class claims vigorously. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). In the case at bar, both these requirements are met.

First, lead counsel for Plaintiff has litigated numerous individual and class actions concerning rights guaranteed by Section 504 of the Rehabilitation Act. See Declaration of Shelby Anne Floyd. Gavin Thornton of Lawyers for Equal Justice has advocated on the behalf of many public housing tenants, and is familiar with the requirements of the federal housing act. See Declaration of Gavin

Thornton. Together they are adequate advocates for Plaintiff and the class, and will prosecute the class claims vigorously.

Second, as in other class actions where plaintiffs sought agency compliance with statutory and constitutional requirements, the key interests of the Plaintiffs are co-extensive with the class members' interests. See, e.g., Perez-Funez v. District Director, INS, 611 F. Supp. 990, 997 (C.D. Cal. 1984); Cornelius v. Mintner, 395 F. Supp. 616 (D.C. Mass. 1974).

IV. NOTICE SHOULD BE PROVIDED TO ALL CLASS MEMBERS

Pursuant to FRCP 23(d), the Court has the discretion to order that notice of the pendency of a Rule 23(b)(2) class action be provided to all class members. In this case, the delivery of individual notice to members of the class who currently reside in public housing is practical and efficient as those tenants received monthly rent notices from HCDCH in any event. Inserting notice of the pendency of this action will not cost Defendants any significant amount, nor unduly burden them. The number of disabled former public housing tenants no longer residing in public housing is not known precisely, but it is estimated by Defendants to be small. See Floyd Dec. Defendants have

addresses for the majority of tenants who have left public housing in the last two years, and therefore, direct mailings can be made to these tenants. Therefore, Plaintiffs request that Defendants are ordered to notify the class of the claims asserted herein, as follows:

1. Each current and former public housing tenant identified as disabled by HCDCH be given a notice in the form attached as Exhibit A.
2. A notice in the form attached as Exhibit A be posted in a conspicuous location at each public housing project.

The final requirements for class certification are contained in FRCP Rule 23(b), and Plaintiffs submit that they also meet these qualifications.

V. PLAINTIFFS SATISFY THE REQUIREMENTS OF RULE 23(b)

FRCP 23(b) allows class certification where the defendant has acted or failed to act on the grounds generally applicable to the plaintiff class. The Rule does not require that every member of the class suffer identical injury, so long the injury is based on generally applicable grounds, and the injury is threatened sufficiently to make

declaratory and injunctive relief necessary and appropriate. See Molski v. Gleich, 318 F.3d 937, 947 (9th Cir. 2003).

Common issues must predominate for class certification under Rule 23(b)(3); however, no such requirement exists under Rule 23(b)(2). Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998). "It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." *Id.*

In this case, Defendants' practices are generally applicable to all class members, and, thus, this action challenging those procedures is appropriate for class certification under FRCP 23(b)(2).

Suits against state agencies to secure plaintiffs' rights to receive public benefits have previously been certified as Rule 23(b)(2) class actions in this and other districts. See e.g., Granito v. Sunn, 594 F.Supp. 410 (D. Haw. 1984); Stephenson v. Shalala, 1994 WL 465831 (E.D. Cal. 1994); Valdivia v. California Dept of Health Services, 1992 WL 554299 (E.D. Cal. 1992); Sherman v. Griepentrog, 775 F. Supp.

1383 (D. Nev. 1991); *c.f.*, Geobel v. Colorado Dept. of Institutions, 764 P.2d 785 (Co. 1988).

Class actions certified under FRCP 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek damages if that claim is incidental to a primary claim for injunctive or declaratory relief. Molski v. Gleich, 318 F.3d 937, 950 (9th Cir. 2003); Kanter v. Warner-Lambert Co., 265 F.3d 852, 860 (9th Cir. 2001); Probe v. State Teachers' Retirement System, 780 F.2d 776, 780 (9th Cir. 1986), *cert. denied*, 476 U.S. 1170 (1986). An action properly brought under subdivision (b)(2) may be continued even though defendant's conduct has obviated the need for injunctive relief and only a question relating to damages remains. *See, e.g.*, Arkansas Ed. Ass'n v. Board of Ed. Of Portland, Ark. School Dist., 446 F.2d 763, 768-69 (8th Cir. 1971); Rodgers v. U.S. Steel Corp., 69 F.R.D. 382, 386-87 (W.D. Pa. 1975).

A claim for damages is "incidental" to injunctive relief where it is a secondary goal of the litigation. Molski, supra, at 950. To determine whether monetary relief is predominate or secondary, the court looks to the intent of the plaintiffs bringing suit, and may compare the value

of the injunctive and monetary relief. Id. Here, the Plaintiffs' non-monetary claims are for injunctive relief requiring HCDCH to establish (1) procedures for notifying disabled public housing tenants of their right to request increased utility allowances (and thus lower rents), and (2) procedures for determining how utility allowances will be adjusted to prevent discrimination against disabled tenants.

Complaint ¶¶38-40. These claims clearly predominate over claims for monetary damages, as they will impact the rights not only of present public housing tenants, but of future tenants as well. Moreover, disabled tenants who have the right to receive notice that their utility allowances could be adjusted, and thus are appropriate members of the class for injunctive relief, do not necessarily have high utility consumption, and may have no damages at all. In addition, the number of disabled persons who left public housing and therefore may have monetary claims appears to be negligible. For all these reasons, this Court clearly has the discretion to certify the class pursuant to Rule 23(b)(2).

VII. CONCLUSION

Plaintiffs submit that this action meets all of the requirements for class certification prescribed by Rule 23 of the Federal Rules of Civil Procedure. For the foregoing reasons, Plaintiffs respectfully request that this Court certify this action as a class action, pursuant to FRCP 23(a) and 23(b)(2).

DATED: Honolulu, Hawaii, December 30, 2004.


SHELBY ANNE FLOYD
GAVIN THORNTON
Attorneys for Plaintiffs

Of Counsel:

LAWYERS FOR EQUAL JUSTICE

GAVIN K. THORNTON
SUSAN K. DORSEY
P.O. Box 37952
Honolulu, Hawai'i 96837-0952
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Kamuela, Hawai'i 96743
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Email: sfloyd@ahfi.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

MARA AMONE individually, and) CIVIL NO. CV04-00508 ACK/BMK
on behalf of all persons similarly)
situated,) **IMPORTANT NOTICE TO CLASS**
) **AND ORDER**
Plaintiff,)

v.)	
)	
STEPHANIE AVEIRO, in her)	DATE:
official capacity as the Executive)	TIME:
Director of the Housing and)	JUDGE:
Community Development)	
Corporation of Hawaii; HOUSING)	
AND COMMUNITY)	
DEVELOPMENT CORPORATION)	
OF HAWAII, a duly organized)	
and recognized agency of the)	
State of Hawaii.)	
)	
Defendants.)	
)	

IMPORTANT NOTICE TO CLASS AND ORDER

TO: ALL DISABLED PERSONS RESIDING IN PUBLIC HOUSING UNITS OWNED BY THE HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII BETWEEN MAY 15, 1998 AND THE PRESENT

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, you are hereby notified:

1. The above captioned class action is pending in this Court. It was brought on behalf of a class consisting of disabled persons that currently reside, or have resided within the last two years, in a public housing project in which residents receive utility allowances, whose special needs arising from their disability require them to consume

utilities is excess of the amount provided for in the standard public housing utility allowances. The suit claims that the Housing and Community Development Corporation of Hawai'i ("HCDCH) failed to notify disabled tenants of their rights under the U.S. Housing Act, Section 504 of the Rehabilitation Act, The Americans with Disabilities Act, and the Fair Housing Act; failed to adopt procedures to increase utility allowances for qualified disabled tenants, and charged qualified disabled tenants rents in excess of that allowed by law. The suit seeks an injunction requiring HCDCH to comply with the law, and compensatory damages for eligible class members.

2. On [date to be inserted], the Court entered an order preliminarily certifying this action as a class action and defining the class as set forth in paragraph 1. The Court also approved the attorneys below as Class Counsel.

3. This notice is given to you in belief that you may be a member of the above class whose rights may be affected by this lawsuit. It should not be understood as an expression of any opinion by the Court concerning your right to recovery of damages. This notice

is intended merely to advise you of the pendency of this action and of your rights with respect thereto.

4. If you are a member of the class described in paragraph 1, you will be included in the class and will be bound by the judgment whether favorable or unfavorable. You will not be responsible for any Court costs.

5. Attached to this Notice is a Proof of Claim. If you are a member of the class, and believe that you have incurred excessive electrical bills because of your disability, you may submit the Proof of Claim to the Class Counsel, at the address shown, no later than [date to be inserted].

6. You may also write or call attorneys for the class at the address and phone number below to request a Proof of Claim form or to inquire as to any other matter concerning this notice:

SHELBY ANNE FLOYD, Esq.
Alston Hunt Floyd & Ing
P.O. Box 2281
Honolulu, HI 96804-2281
Telephone: (808) 885-6762 (Island of Hawai'i)

7. This notice shall be mailed by Defendants, by first class mail, postmarked on or before [date to be inserted] to all public housing tenants known to be disabled, and to the last known address of all known former tenants who were disabled.

8. In addition, this notice shall be posted in a conspicuous location at each public housing project.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, _____.

Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARA AMONE individually, and)
on behalf of all persons similarly)
situated,)

Plaintiff,)

v.)

STEPHANIE AVEIRO, in her)
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Defendants.)

CIVIL NO. CV04-00508 ACK/BMK

**DECLARATION OF SHELBY
ANNE FLOYD**

DECLARATION OF SHELBY ANNE FLOYD

Pursuant to 28 U.S.C. § 1746, I declare that:

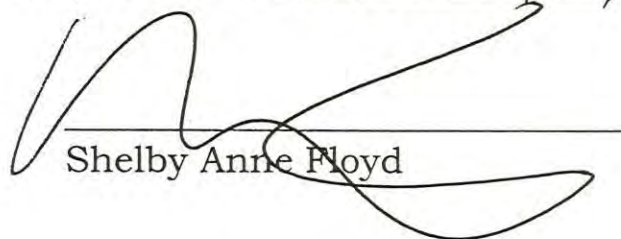
1. I am an attorney with the law firm of Alston Hunt Floyd & Ing, counsel for Plaintiff herein.
2. I make this declaration based on my personal knowledge and am competent to testify as to the matters set forth herein.
3. I am lead counsel in this matter because of my training and experience in the handling of complex federal and class action litigation. I received my J.D. degree from Columbia University School of Law in 1975, and was admitted to the bar in California in 1975 and in Hawaii in 1976. I have been admitted to practice before the Ninth Circuit Court of Appeals and the United States Supreme Court.
4. My class action experience includes being named lead counsel in *Felix v. Waihee* (now *Lingle*), Civ. No. 93-367 DAE, U.S. District Court for the District of Hawaii, *Burns-Vidlak v. Chandler*, Civ. No. 95-892 ACK, and *Sterling v. Chandler*, Civil No. 97-435 BMK, all of which involved enforcement of federal rights in complex class actions. In both

Burns-Vidlak and *Sterling*, monetary damages were sought as well as injunctive relief.

5. After this action was filed, I discussed the issue of the probable size of the class with counsel for Defendant Housing and Community Development Corp. of Hawaii. He stated that his client maintains data on the number of disabled tenants in public housing, and has estimated that approximately 300 disabled tenants reside in HCDCH housing. It is unknown how many disabled former public housing tenants no longer reside in public housing.

6. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Kamuela, Hawai'i on December 8, 2014



Shelby Anne Floyd

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARA AMONE individually, and) CIVIL NO. CV04-00508 ACK/BMK
on behalf of all persons similarly)
situated,) **DECLARATION OF GAVIN**
) **THORNTON**
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and recognized agency of the)
State of Hawaii.)
)
Defendants.)
_____)

DECLARATION OF GAVIN THORNTON

Pursuant to 28 U.S.C. 1746, I declare that:

1. I am an attorney with the law firm of Lawyers for Equal Justice, counsel for Plaintiff herein.
2. I make this declaration based on my personal

knowledge and am competent to testify as to the matters set forth herein.

3. I received my J.D. degree from the University of Virginia School of Law in 2002, and was admitted to the bar in Washington State in 2002, and Hawaii in 2003.

4. I began working with the Legal Aid Society of Hawaii in 2002. Since that time, the focus of my practice has been on advocating for public housing tenant rights. I have attended extensive trainings in public housing law and am a member of the Housing Justice Network, a nationwide organization of attorneys specializing in public housing law. I am especially familiar with the portions of the U.S. Housing Act applicable to the federally subsidized housing projects that are the subject of this litigation.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed in Honolulu, Hawai'i on December 30, 2024



Gavin Thornton

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was duly served upon the following party on this date, by depositing said copy, postage prepaid, first class, in the United States Post Office, at Honolulu, Hawaii, addressed as set forth below:

John Wong, Esq.
Margaret Leong, Esq.
Office of the Attorney General
Kekuanao'a Building, Room B-2
465 South King St.
Honolulu, Hawai'i 96824

Attorneys for Defendants

DATED: Honolulu, Hawaii, December 30, 2004.


SHELBY ANNE FLOYD
GAVIN THORNTON
Attorneys for Plaintiffs

Of Counsel:

LAWYERS FOR EQUAL JUSTICE

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LODGED

DEC 30 2004

CLERK, U.S. DISTRICT COURT
DISTRICT OF HAWAII

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Attorneys At Law
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Director of the Housing and)	CERTIFICATE OF SERVICE
Community Development)	
Corporation of Hawaii; HOUSING)	
AND COMMUNITY)	DATE:
DEVELOPMENT CORPORATION)	TIME:
OF HAWAII, a duly organized)	JUDGE:
and recognized agency of the)	
State of Hawaii.)	
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)	
Defendants.)	
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NOTICE OF MOTION

TO: MARK BENNETT
Attorney General
JOHN WONG
Deputy Attorneys General
465 S. King Street, Room B2
Honolulu, Hawaii 96813

Attorneys for Defendants

PLEASE TAKE NOTICE that the following Motion for Class Certification will be heard before the Honorable Alan Kay in his courtroom in the United States Courthouse, 300 Ala Moana Boulevard, Honolulu, Hawaii on _____, _____, 2004, at _____ a.m., or as soon thereafter as counsel can be heard.

DATED: Honolulu, Hawai'i, December 30, 2004.



SHELBY ANNE FLOYD
GAVIN THORNTON
Attorneys for Plaintiffs

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This Motion is made pursuant to Rules 7, 23(a) and (b)(2) and (3) of the Federal Rules of Civil Procedure. It is based on the attached Memorandum in Support of Motion, the Declaration of Shelby Anne Floyd, and the Declaration of Gavin Thornton.

In support of this Motion, Plaintiffs assert that:

1. The class for which certification is sought should be defined as disabled persons that currently reside, or have resided within the last two years, in an Housing and Community Development Corporation of Hawaii ("HCDCH") public housing project in which resident receive utility allowances, whose special needs arising from their disability require them to consume utilities in excess of the amount provided for in the standard public housing utility allowances.
2. The class is so numerous that joinder of all its members is impracticable.
3. There are questions of law and/or fact common to the class.
4. The claims of the named Plaintiff are typical of the claims of the class.

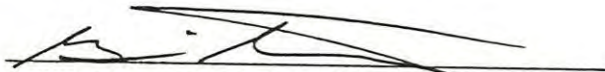
5. The named Plaintiff will fairly and adequately represent the claims of the entire class.

6. The Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

7. Questions of law and fact predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

WHEREFORE, Plaintiffs pray that this action be certified as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, and that Defendants be ordered to provide notice of the pendency of this action to all class members.

DATED: Honolulu, Hawai'i, December 30, 2004.


SHELBY ANNE FLOYD
GAVIN THORNTON
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARA AMONE individually, and)
on behalf of all persons similarly)
situated,)

Plaintiff,)

v.)

STEPHANIE AVEIRO, in her)
official capacity as the Executive)
Director of the Housing and)
Community Development)
Corporation of Hawaii; HOUSING)
AND COMMUNITY)
DEVELOPMENT CORPORATION)
OF HAWAII, a duly organized)
and recognized agency of the)
State of Hawaii.)

Defendants.)

CIVIL NO. CV04-00508 ACK/BMK

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
CLASS CERTIFICATION;
EXHIBIT "A"**

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**

I. INTRODUCTION

Plaintiff seeks declaratory and injunctive relief against Defendant Aveiro, in her official capacity as the Director of the Housing and Community Development Corporation of Hawai'i ("HCDCH") for failing to establish and implement criteria and procedures for granting

adjustments to the utility allowance in public housing for disabled residents whose special needs require them to consume excess utilities, all in violation of Plaintiff's rights under the U.S. Housing Act and 42 U.S.C. § 1983. Incident to Plaintiff's primary request for declaratory and injunctive relief, Plaintiff also seeks to establish the right to compensatory damages for the violations of her rights.

II. THE PROPOSED CLASS

The proposed class for certification is defined as disabled persons that currently reside, or have resided within the last two years, in an HCDCH public housing project in which residents receive utility allowances, whose special needs arising from their disability require them to consume utilities in excess of the amount provided for in the standard public housing utility allowances.

III. THE REQUIREMENTS OF RULE 23(a) ARE MET

To certify a class action, Plaintiffs must establish that all of the requirements of Federal Rule of Civil Procedure ("FRCP") 23(a) are met, and must also establish that at least one of the alternative requirements of FRCP 23(b) is met. Daly v. Harris, 209 F.R.D. 180, 184 (D. Haw. 2002).

FRCP 23(a) requires a finding that:

(1) The class is so numerous that joinder of all members is impracticable;

(2) There are questions of law or fact common to the class;

(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) The representative parties will fairly and adequately protect the interests of the class.

As discussed below, Plaintiffs meet each of the requirements of FRCP 23(a).

A. The Plaintiff Class is so Numerous that Joinder is Impracticable

To satisfy the "numerosity" requirement of FRCP 23(a)(1), Plaintiffs need not satisfy a set numerical formula; rather, the critical inquiry is whether joinder of all class members would be impracticable. Difficulty in identifying and locating affected persons is relevant in determining that joinder is impracticable. Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913 (9th Cir. 1964)

“Impracticability” does not mean “impossibility” but only the difficulty

or inconvenience of joining all members of a class); Ham v. Dericks, 162 F.R.D. 628, 633-634 (D. Haw. 1995).

In this case, the size of the class members currently residing in public housing is unknown. See Declaration of Shelby Anne Floyd ("Floyd Dec.") attached hereto. The additional numbers of class members who are no longer residing in public housing, but who would have been entitled to reduced rents when they did reside in public housing is difficult to determine at this time. At some point, Defendants' records may have to be searched to determine all disabled former tenants of public housing. Thus, the requirements of FRCP 23(a)(1) are met in this case.

B. There Are Questions of Law or Fact Common to the Class

To satisfy the "commonality" requirement of FRCP 23(a)(2), Plaintiffs need only present a single issue of law or fact common to all class members. Blackie v. Barrack, 524 F.2d 891, 904 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976); Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 145 (N.D. Cal. 2004).

The gravamen of Plaintiffs' claims is the fact that Defendants had an obligation to notify disabled public housing tenants of their right to request reduced rents (higher utility allowances) because of the need to spend higher than normal amounts on electricity to operate medical equipment prescribed by a physician. Defendants collected information annually on the presence of disabled tenants in each public housing unit, but did not notify these disabled tenants of their rights, and thus no increased utility allowances were ever applied. As a result, disabled tenants needing electrically operated medical equipment paid a higher rent than similarly-situated non-disabled tenants. Both the fact and method of Defendants' discrimination are common to all prospective class members.

C. The Representative Plaintiff's Claims are Typical of the Class' Claims

The FRCP 23(a)(3) requirement that the named Plaintiff's claims be typical of the class' claims overlaps considerably with the other requirements of Rule 23(a). Dukes, supra, at 144. Courts have devised several tests to determine whether this criterion is met. The requirement is satisfied where there is no antagonism between the

claims of the named Plaintiff and the claims of the class. Fowler v. Birmingham News Co., 608 F.2d 1055, 1058 (5th Cir. 1979). The requirement is also satisfied where the named representative's claims are similar enough to the class claims to ensure that the named Plaintiff will adequately represent them. Cruz v. Bowen, 672 F. Supp. 1300, 1305 (N.D. Cal. 1987) (quoting General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982)).

Plaintiff Amone seeks relief that is appropriate to all of the members of the proposed class. Her claims are in no way antagonistic to the interests of other class members. If Plaintiff prevails on the merits the interest of the class members in eliminating discriminatory rents in public housing will be furthered.

Plaintiff Amone will fairly and adequately represent the claims of the Plaintiff class. She is a disabled individual who resides in public housing. As a result of her disability, she uses an oxygen machine for breathing at night, a nebulizer, and an air conditioner. Although her monthly income is \$572, her actual utility bill is as much as \$174 monthly, while the utility allowance that she has received since she moved into the apartment where she currently resides was, until

recently, \$41. Because of the gross insufficiency in the utility allowance that she has been receiving, instead of paying only one-third of her monthly income in rent, she has paid roughly one-half her income for rent.

D. The Named Plaintiff Will Fairly and Adequately Protect the Interests of the Class

The fourth requirement of FRCP 23(a) is satisfied where (1) the class representatives have common interest with the unnamed members of the class, and (2) the representatives will be able to prosecute the class claims vigorously. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). In the case at bar, both these requirements are met.

First, lead counsel for Plaintiff has litigated numerous individual and class actions concerning rights guaranteed by Section 504 of the Rehabilitation Act. See Declaration of Shelby Anne Floyd. Gavin Thornton of Lawyers for Equal Justice has advocated on the behalf of many public housing tenants, and is familiar with the requirements of the federal housing act. See Declaration of Gavin

Thornton. Together they are adequate advocates for Plaintiff and the class, and will prosecute the class claims vigorously.

Second, as in other class actions where plaintiffs sought agency compliance with statutory and constitutional requirements, the key interests of the Plaintiffs are co-extensive with the class members' interests. See, e.g., Perez-Funez v. District Director, INS, 611 F. Supp. 990, 997 (C.D. Cal. 1984); Cornelius v. Mintner, 395 F. Supp. 616 (D.C. Mass. 1974).

IV. NOTICE SHOULD BE PROVIDED TO ALL CLASS MEMBERS

Pursuant to FRCP 23(d), the Court has the discretion to order that notice of the pendency of a Rule 23(b)(2) class action be provided to all class members. In this case, the delivery of individual notice to members of the class who currently reside in public housing is practical and efficient as those tenants received monthly rent notices from HCDCH in any event. Inserting notice of the pendency of this action will not cost Defendants any significant amount, nor unduly burden them. The number of disabled former public housing tenants no longer residing in public housing is not known precisely, but it is estimated by Defendants to be small. See Floyd Dec. Defendants have

addresses for the majority of tenants who have left public housing in the last two years, and therefore, direct mailings can be made to these tenants. Therefore, Plaintiffs request that Defendants are ordered to notify the class of the claims asserted herein, as follows:

1. Each current and former public housing tenant identified as disabled by HCDCH be given a notice in the form attached as Exhibit A.
2. A notice in the form attached as Exhibit A be posted in a conspicuous location at each public housing project.

The final requirements for class certification are contained in FRCP Rule 23(b), and Plaintiffs submit that they also meet these qualifications.

V. PLAINTIFFS SATISFY THE REQUIREMENTS OF RULE 23(b)

FRCP 23(b) allows class certification where the defendant has acted or failed to act on the grounds generally applicable to the plaintiff class. The Rule does not require that every member of the class suffer identical injury, so long the injury is based on generally applicable grounds, and the injury is threatened sufficiently to make

declaratory and injunctive relief necessary and appropriate. See Molski v. Gleich, 318 F.3d 937, 947 (9th Cir. 2003).

Common issues must predominate for class certification under Rule 23(b)(3); however, no such requirement exists under Rule 23(b)(2). Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998). "It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." *Id.*

In this case, Defendants' practices are generally applicable to all class members, and, thus, this action challenging those procedures is appropriate for class certification under FRCP 23(b)(2).

Suits against state agencies to secure plaintiffs' rights to receive public benefits have previously been certified as Rule 23(b)(2) class actions in this and other districts. See e.g., Granito v. Sunn, 594 F.Supp. 410 (D. Haw. 1984); Stephenson v. Shalala, 1994 WL 465831 (E.D. Cal. 1994); Valdivia v. California Dept of Health Services, 1992 WL 554299 (E.D. Cal. 1992); Sherman v. Griepentrog, 775 F. Supp.

1383 (D. Nev. 1991); c.f., Geobel v. Colorado Dept. of Institutions, 764 P.2d 785 (Co. 1988).

Class actions certified under FRCP 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek damages if that claim is incidental to a primary claim for injunctive or declaratory relief. Molski v. Gleich, 318 F.3d 937, 950 (9th Cir. 2003); Kanter v. Warner-Lambert Co., 265 F.3d 852, 860 (9th Cir. 2001); Probe v. State Teachers' Retirement System, 780 F.2d 776, 780 (9th Cir. 1986), cert. denied, 476 U.S. 1170 (1986). An action properly brought under subdivision (b)(2) may be continued even though defendant's conduct has obviated the need for injunctive relief and only a question relating to damages remains. See, e.g., Arkansas Ed. Ass'n v. Board of Ed. Of Portland, Ark. School Dist., 446 F.2d 763, 768-69 (8th Cir. 1971); Rodgers v. U.S. Steel Corp., 69 F.R.D. 382, 386-87 (W.D. Pa. 1975).

A claim for damages is "incidental" to injunctive relief where it is a secondary goal of the litigation. Molski, supra, at 950. To determine whether monetary relief is predominate or secondary, the court looks to the intent of the plaintiffs bringing suit, and may compare the value

of the injunctive and monetary relief. Id. Here, the Plaintiffs' non-monetary claims are for injunctive relief requiring HCDCH to establish (1) procedures for notifying disabled public housing tenants of their right to request increased utility allowances (and thus lower rents), and (2) procedures for determining how utility allowances will be adjusted to prevent discrimination against disabled tenants.

Complaint ¶¶38-40. These claims clearly predominate over claims for monetary damages, as they will impact the rights not only of present public housing tenants, but of future tenants as well. Moreover, disabled tenants who have the right to receive notice that their utility allowances could be adjusted, and thus are appropriate members of the class for injunctive relief, do not necessarily have high utility consumption, and may have no damages at all. In addition, the number of disabled persons who left public housing and therefore may have monetary claims appears to be negligible. For all these reasons, this Court clearly has the discretion to certify the class pursuant to Rule 23(b)(2).

VII. CONCLUSION

Plaintiffs submit that this action meets all of the requirements for class certification prescribed by Rule 23 of the Federal Rules of Civil Procedure. For the foregoing reasons, Plaintiffs respectfully request that this Court certify this action as a class action, pursuant to FRCP 23(a) and 23(b)(2).

DATED: Honolulu, Hawaii, December 30, 2004.


SHELBY ANNE FLOYD
GAVIN THORNTON
Attorneys for Plaintiffs

Of Counsel:

LAWYERS FOR EQUAL JUSTICE

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARA AMONE individually, and)	CIVIL NO. CV04-00508 ACK/BMK
on behalf of all persons similarly)	
situated,)	IMPORTANT NOTICE TO CLASS
)	AND ORDER
Plaintiff,)	

v.)	
)	
STEPHANIE AVEIRO, in her)	DATE:
official capacity as the Executive)	TIME:
Director of the Housing and)	JUDGE:
Community Development)	
Corporation of Hawaii; HOUSING)	
AND COMMUNITY)	
DEVELOPMENT CORPORATION)	
OF HAWAII, a duly organized)	
and recognized agency of the)	
State of Hawaii.)	
)	
Defendants.)	
)	

IMPORTANT NOTICE TO CLASS AND ORDER

TO: ALL DISABLED PERSONS RESIDING IN PUBLIC HOUSING UNITS OWNED BY THE HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII BETWEEN MAY 15, 1998 AND THE PRESENT

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, you are hereby notified:

1. The above captioned class action is pending in this Court. It was brought on behalf of a class consisting of disabled persons that currently reside, or have resided within the last two years, in a public housing project in which residents receive utility allowances, whose special needs arising from their disability require them to consume

utilities is excess of the amount provided for in the standard public housing utility allowances. The suit claims that the Housing and Community Development Corporation of Hawai'i ("HCDCH) failed to notify disabled tenants of their rights under the U.S. Housing Act, Section 504 of the Rehabilitation Act, The Americans with Disabilities Act, and the Fair Housing Act; failed to adopt procedures to increase utility allowances for qualified disabled tenants, and charged qualified disabled tenants rents in excess of that allowed by law. The suit seeks an injunction requiring HCDCH to comply with the law, and compensatory damages for eligible class members.

2. On [date to be inserted], the Court entered an order preliminarily certifying this action as a class action and defining the class as set forth in paragraph 1. The Court also approved the attorneys below as Class Counsel.

3. This notice is given to you in belief that you may be a member of the above class whose rights may be affected by this lawsuit. It should not be understood as an expression of any opinion by the Court concerning your right to recovery of damages. This notice

is intended merely to advise you of the pendency of this action and of your rights with respect thereto.

4. If you are a member of the class described in paragraph 1, you will be included in the class and will be bound by the judgment whether favorable or unfavorable. You will not be responsible for any Court costs.

5. Attached to this Notice is a Proof of Claim. If you are a member of the class, and believe that you have incurred excessive electrical bills because of your disability, you may submit the Proof of Claim to the Class Counsel, at the address shown, no later than [date to be inserted].

6. You may also write or call attorneys for the class at the address and phone number below to request a Proof of Claim form or to inquire as to any other matter concerning this notice:

SHELBY ANNE FLOYD, Esq.
Alston Hunt Floyd & Ing
P.O. Box 2281
Honolulu, HI 96804-2281
Telephone: (808) 885-6762 (Island of Hawai'i)

7. This notice shall be mailed by Defendants, by first class mail, postmarked on or before [date to be inserted] to all public housing tenants known to be disabled, and to the last known address of all known former tenants who were disabled.

8. In addition, this notice shall be posted in a conspicuous location at each public housing project.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, _____.

Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARA AMONE individually, and)
on behalf of all persons similarly)
situated,)

Plaintiff,)

v.)

STEPHANIE AVEIRO, in her)
official capacity as the Executive)
Director of the Housing and)
Community Development)
Corporation of Hawaii; HOUSING)
AND COMMUNITY)
DEVELOPMENT CORPORATION)
OF HAWAII, a duly organized)
and recognized agency of the)
State of Hawaii.)

Defendants.)

CIVIL NO. CV04-00508 ACK/BMK

**DECLARATION OF SHELBY
ANNE FLOYD**

DECLARATION OF SHELBY ANNE FLOYD

Pursuant to 28 U.S.C. § 1746, I declare that:

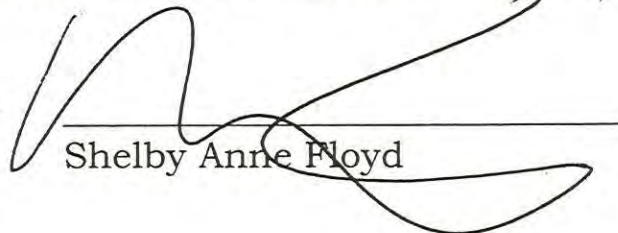
1. I am an attorney with the law firm of Alston Hunt Floyd & Ing, counsel for Plaintiff herein.
2. I make this declaration based on my personal knowledge and am competent to testify as to the matters set forth herein.
3. I am lead counsel in this matter because of my training and experience in the handling of complex federal and class action litigation. I received my J.D. degree from Columbia University School of Law in 1975, and was admitted to the bar in California in 1975 and in Hawaii in 1976. I have been admitted to practice before the Ninth Circuit Court of Appeals and the United States Supreme Court.
4. My class action experience includes being named lead counsel in *Felix v. Waihee* (now *Lingle*), Civ. No. 93-367 DAE, U.S. District Court for the District of Hawaii, *Burns-Vidlak v. Chandler*, Civ. No. 95-892 ACK, and *Sterling v. Chandler*, Civil No. 97-435 BMK, all of which involved enforcement of federal rights in complex class actions. In both

Burns-Vidlak and *Sterling*, monetary damages were sought as well as injunctive relief.

5. After this action was filed, I discussed the issue of the probable size of the class with counsel for Defendant Housing and Community Development Corp. of Hawaii. He stated that his client maintains data on the number of disabled tenants in public housing, and has estimated that approximately 300 disabled tenants reside in HCDCH housing. It is unknown how many disabled former public housing tenants no longer reside in public housing.

6. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Kamuela, Hawai'i on December 8, 2014



Shelby Anne Floyd

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARA AMONE individually, and) CIVIL NO. CV04-00508 ACK/BMK
on behalf of all persons similarly)
situated,) **DECLARATION OF GAVIN**
) **THORNTON**
)
Plaintiff,)
v.)
)
STEPHANIE AVEIRO, in her)
official capacity as the Executive)
Director of the Housing and)
Community Development)
Corporation of Hawaii; HOUSING)
AND COMMUNITY)
DEVELOPMENT CORPORATION)
OF HAWAII, a duly organized)
and recognized agency of the)
State of Hawaii.)
)
Defendants.)
_____)

DECLARATION OF GAVIN THORNTON

Pursuant to 28 U.S.C. 1746, I declare that:

1. I am an attorney with the law firm of Lawyers for Equal Justice, counsel for Plaintiff herein.
2. I make this declaration based on my personal

knowledge and am competent to testify as to the matters set forth herein.

3. I received my J.D. degree from the University of Virginia School of Law in 2002, and was admitted to the bar in Washington State in 2002, and Hawaii in 2003.

4. I began working with the Legal Aid Society of Hawaii in 2002. Since that time, the focus of my practice has been on advocating for public housing tenant rights. I have attended extensive trainings in public housing law and am a member of the Housing Justice Network, a nationwide organization of attorneys specializing in public housing law. I am especially familiar with the portions of the U.S. Housing Act applicable to the federally subsidized housing projects that are the subject of this litigation.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed in Honolulu, Hawai'i on December 30, 2004


Gavin Thornton


CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing served upon the following party on this date, by depositing postage prepaid, first class, in the United States Post Office, Honolulu, Hawaii, addressed as set forth below:

John Wong, Esq.
Margaret Leong, Esq.
Office of the Attorney General
Kekuanao'a Building, Room B-2
465 South King St.
Honolulu, Hawai'i 96824

Attorneys for Defendants

DATED: Honolulu, Hawaii, December 30, 2004.


SHELBY ANNE FLOYD
GAVIN THORNTON
Attorneys for Plaintiffs