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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TIMOTHY SHEA, MARY	)	CIVIL NO. 09-00480 DAE LEK
JACQUELINE LEE, DON E.	)	[Contract]
MURDOCK, each individually and on	)	[Declaratory Judgment]
behalf of those persons similarly	)	Class Action
situated,	)	
	)	
Plaintiffs,	)	CAPTION CONTINUED ON NEXT PAGE

v. ) **PLAINTIFFS’ MOTION FOR**  
 ) **CLASS CERTIFICATION;**  
 ) **MEMORANDUM IN SUPPORT;**  
KAHUKU HOUSING FOUNDATION, ) **DECLARATION OF VICTOR**  
INC., and HAWAIIAN PROPERTIES, ) **GEMINIANI, EXHIBITS “A-D”;**  
LTD., ) **DECLARATION OF TIMOTHY**  
 ) **SHEA, EXHIBIT “A”;**  
Defendants. ) **DECLARATION OF DON E.**  
 ) **MURDOCK, EXHIBIT “A-B”;**  
 ) **DECLARATION OF MARY**  
 ) **JACQUELINE LEE, EXHIBIT “A”;**  
 ) **EXHIBIT “1” (PROPOSED CLASS**  
 ) **NOTICE); CERTIFICATE OF**  
 ) **SERVICE**

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Judge: Hon. Leslie E. Kobayashi  
Hon. Susan Oki Mollway

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

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behalf of those persons similarly	)	Class Action
situated,	)	
	)	
Plaintiffs,	)	<b>PLAINTIFFS' MOTION FOR</b>
	)	<b>CLASS CERTIFICATION;</b>
	)	
vs.	)	
	)	
KAHUKU HOUSING FOUNDATION,	)	
INC., and HAWAIIAN PROPERTIES,	)	
LTD.,	)	
	)	
Defendants.	)	
_____	)	

**PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Plaintiffs Timothy Shea, Mary Jacqueline Lee and Don E Murdock, individually and on behalf of all persons similarly situated, move for an order certifying the following class under Federal Rule of Civil Procedure ("Rule") 23:

The Class: All persons who are, were, or will be head of household tenants at Kahuku Elderly Housing are entitled to receive utility allowances from Kahuku Elderly Housing Foundation and/or Hawaiian Properties as part of their

Section 8 subsidy at any time during which Defendants failed or fails to provide properly-calculated utility allowances for Kahuku Elderly Housing.

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

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

DATED: Honolulu, Hawai'i, February 23, 2010

Respectfully submitted,

/s/ Elizabeth Dunne  
VICTOR GEMINIANI  
WILLIAM DURHAM  
ELIZABETH DUNNE  
*LAWYERS FOR EQUAL JUSTICE*

JASON KIM  
PAUL ALSTON  
*ALSTON HUNT FLOYD & ING*

ATTORNEYS FOR PLAINTIFF

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MURDOCK, each individually and on	)	[Declaratory Judgment]
behalf of those persons similarly	)	Class Action
situated,	)	
	)	<b>MEMORANDUM IN SUPPORT.</b>
Plaintiffs,	)	
	)	
v.	)	
	)	
KAHUKU HOUSING FOUNDATION,	)	
INC., and HAWAIIAN PROPERTIES,	)	
LTD.,	)	
	)	
Defendants.	)	
_____	)	

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## I. INTRODUCTION

Plaintiffs seek class certification of their claims for damages and declaratory and injunctive relief against Kahuku Elderly Housing Foundation and Hawaiian Properties, Inc. Plaintiffs allege defendants overcharged tenants at the Kahuku Elderly Housing Project (“Kahuku”) in violation of the U.S. Housing Act and its supporting regulations and their lease contracts with Plaintiffs by failing for several years to update utility allowances to account for increased utility costs. Plaintiffs further seek damages, including trebled damages, for the Defendants’ unfair and deceptive practice of certifying each year that they had properly calculated Plaintiffs’ utility allowances.

## II. FACTS AND GOVERNING LAW

### A. DEFENDANTS HAVE OVERCHARGED PLAINTIFFS FOR RENT, IN VIOLATION OF FEDERAL LAW.

Kahuku Elderly Housing, owned and operated by the Defendants, is a 64-unit low-income housing project subsidized by the federal “Section 8 Loan Management program.” Among other things, the United States Housing Act generally requires that “rent” for tenants residing in federally-subsidized public housing projects not exceed 30% of tenant income.<sup>1</sup> Utilities are included in that

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<sup>1</sup> 42 U.S.C. § 1437a(a)(1); 24 C.F.R. §5.628; *Wright v. Roanoke Redevelopment Auth.*, 479 U.S. 418 (1987); *Dorsey v. Hous. Auth. of Baltimore*

rent calculation.<sup>2</sup> Because of this, where tenants are responsible for their utilities, as in Kahuku, the project owner must provide tenants with a utility allowance.<sup>3</sup>

Utility allowances must be sufficient to cover “the monthly cost of a reasonable consumption of...utilities...by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.”<sup>4</sup> Federal regulations require regular revision of the utility allowance to ensure it is sufficient to cover the reasonable utility consumption, thereby ensuring that rents do not exceed 30% of tenant income.<sup>5</sup> Project managers must review and adjust their utility allowances whenever a rent adjustment is made and, in between reviews, if there is a change in utility rates greater than 10%.<sup>6</sup>

Sometime prior to 2005, Defendants determined the reasonable consumption for Kahuku Elderly Housing, at then-existing rates, allowed for \$33 each month in utilities.<sup>7</sup> Since that time, utility rates have drastically increased, yet Defendants continued to provide this same outdated and grossly inadequate utility allowance to

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*City*, 984 F.2d 622, 624 (4th Cir. 1993).

<sup>2</sup> 24 C.F.R. §§ 5.603(b) and 5.634(a).

<sup>3</sup> *Id.*

<sup>4</sup> 24 C.F.R. § 5.603(b)

<sup>5</sup> 24 C.F.R. § 886.126.

<sup>6</sup> *Id.*

<sup>7</sup> See Exhibit “A” attached to Declaration of Don E. Murdock (“Murdock Dec.”).

all tenants at Kahuku Elderly Housing, until October 1, 2008. The lack of updating for over 6 years resulted in rent charges in excess of federal limits.<sup>8</sup>

Further, each year, Defendants falsely certified that rents were properly calculated.<sup>9</sup> In the HUD Form 50059, provided to each head of a Kahuku household each year, Defendants are required to certify that “this Tenant’s eligibility, rent and assistance payments have been computed in accordance with HUD’s regulations and administrative procedures and that all required verifications have been obtained.”<sup>10</sup> This deceptive certification, which is uniform throughout the class and the years for which certification is sought, constitutes an unfair and deceptive trade practice forbidden by Hawai’i Law.<sup>11</sup> Also, the Defendants’ acts breached their uniform rental agreements with the tenants at Kahuku, which incorporate by reference the terms of the applicable HUD Form 50059.<sup>12</sup>

### III. ARGUMENT

Class certification is the only appropriate method of resolving claims of all injured Kahuku tenants against the Defendants. The proposed class meets all the requirements of Rule 23(a):

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<sup>8</sup> See Exhibit “B” to Murdock Dec.

<sup>9</sup> See, e.g., Exhibits “A”-“B” to Murdock Dec.

<sup>10</sup> *Id.*

<sup>11</sup> H.R.S. § 480-2.

<sup>12</sup> See Exhibit “C” attached to the Declaration of Mary Jacqueline Lee.

- The class consists of hundreds of present, former, and future tenants at Kahuku who have been or will be injured absent court intervention who cannot practicably be joined as parties.
- The named Plaintiffs' claims and those of the class arise from the same conduct — the Defendants' failure to update the utility allowances.
- The named Plaintiffs' claims are typical of the class, as all have been injured by the Defendants' failure to adjust the allowance in the same manner and to the same extent as the proposed class; and
- The named Plaintiffs are represented by able counsel and are capable of adequately protecting the interests of the class.

Further, the proposed class qualifies for certification under both Rule

23(b)(2) and (b)(3):

- In their calculation of utility allowances, failure to update those allowances, and representations about those allowances, Defendants have acted on grounds generally applicable to the class and Plaintiffs are seeking injunctive relief to require Defendants to adjust utility allowances — both now and into the future — to comply with the applicable laws and regulations; and
- The common questions of law and fact — whether the utility allowance was insufficient, what the appropriate of allowance should have been, and were the Defendants' certifications unfair and deceptive practices — predominate over questions affecting individual class members.

Certification will allow Plaintiffs to secure a remedy that matches the scope of

Defendants' violations and insure compensation to all persons injured by

Defendants' conduct.

Both federal and state courts in Hawai'i have recently certified classes

of subsidized-housing tenants in cases alleging that utility allowances were calculated incorrectly. Judge Kay of this Court certified a class in *Amone v. Aveiro*, 226 F.R.D. 677 (D. Haw. 2005) in a case alleging that the State of Hawai'i provided inadequate utility allowances for disabled residents living in federally-subsidized housing. In *Beverly Blake et al v. Craig Nishimua et al*, Civ. No. 08-00281, Judge Kobayashi of this Court approved a settlement including class certification in a case identical to this action which alleged that the City/County of Honolulu had provided inadequate utility allowance subsidies to Section 8 tenants of the Westlake Apartments. And in *Waters v. Housing and Community Development Corp. of Hawaii*, Civ. No. 05-1-0815-05 EEH05-1-0815-05 EEH, the Circuit Court for the First Circuit certified a class of all tenants of federally-subsidized housing managed by the State of Hawai'i who are or were eligible for utility allowances from May 6, 2003 to the entry of the order.<sup>13</sup> *Waters* was quite similar to this case: plaintiffs alleged that the State had failed to update utility allowances to account for increased utility rates as required by federal laws and regulations. As explained in more detail below, class certification is just as appropriate in this case as it was in *Blake* and *Waters*.

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<sup>13</sup> See Exhibit "D" to attached Declaration of Victor Geminiani ("Geminiani Dec.").

**A. THE PROPOSED CLASS**

All persons who are, were, or will be head of household tenants at Kahuku Elderly Housing Project entitled to receive utility allowances from the City and County of Honolulu as part of their Section 8 subsidy at any time during which Defendants failed or fails to provide properly-calculated utility allowances for Kahuku Elderly Housing.

**B. THE REQUIREMENTS OF RULE 23(A) ARE MET.**

In deciding motions for class certification, the Court must apply Rule 23 liberally and flexibly.<sup>14</sup> The allegations of the Complaint, which must be taken as true,<sup>15</sup> demonstrate the existence of common claims that are best addressed through class-wide relief.

Under Rule 23, Plaintiffs must meet the four requirements of Rule 23(a) and at least one of Rule 23(b). The elements of Rule 23(a) are:

(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.

The proposed class satisfies all these criteria.

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<sup>14</sup> See *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997).

<sup>15</sup> *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975), *cert. denied*, 492 U.S. 816 (1976).

**1. Joinder is impractical given the large number of potential class members and the difficulty of identifying all former and future potential plaintiffs.**

Plaintiffs satisfy the “numerosity” requirement of Rule 23(a)(1), as the proposed class is “so numerous that joinder of all members is impracticable.”

Impracticability, as used in Rule 23, does not mean impossibility, but merely the inconvenience of joining all members in a single action.<sup>16</sup>

In determining impracticability, Courts first look to the size of the class — size alone can provide a basis for certification.<sup>17</sup> A proposed class presumptively satisfies the numerosity requirement where the class exceeds 40 members.<sup>18</sup>

The proposed class is sufficiently large to meet the numerosity requirement: all present, former, and future tenants at Kahuku who received or will in the future receive inadequate utility allowances. Kahuku consists of 64 subsidized units. Potential class members include: the 64 present heads of household at Kahuku, all heads of households who have left Kahuku and who

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<sup>16</sup> *Harris v. Palm Springs Alpine Estates Inc.*, 329 F.2d 909, 913-914 (9th Cir. 1964).

<sup>17</sup> *Stewart v. Abraham*, 275 F.2d 220, 226-26 (3d Cir. 2001), *cert. denied*, 536 U.S. 958 (2002).

<sup>18</sup> *See Amone*, 226 F.R.D. 677, 684 (D. Haw. 2005); *see also Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9<sup>th</sup> Cir. 1964), *vacated on other grounds*, 459 U.S. 810 (1982) (indicating an inclination to find class cert solely based on the existence of 39 class members); *Harris*, 329 F.2d at 913-4.



received inadequate utility allowances, and all future heads of households who will move into Kahuku before the allowance is recalculated as units turn over. The sheer size of this group meets the numerosity requirement.

Courts also consider other indicia of impracticability as plus factors in determining numerosity, such as the difficulty of locating affected persons, the existence of unknown future members, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought.<sup>19</sup> Each of these plus factors weighs in favor of certification. First, former heads of household may be difficult to locate and information about them is held solely in the Defendants' private records. Second, the class includes unknown future members. Third, the individual claimants have low-incomes and relatively small claims, so they are unlikely to pursue separate suits. Finally, injunctive and declaratory relief are among the remedies sought.

This large group of plaintiffs could not be practically joined in a single action. Further, litigating each of the potential plaintiff's claims in separate actions would be a costly and unnecessary complication and burden upon the Court. Given the size and characteristics of the class, the numerosity requirement is met.

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<sup>19</sup> *Jordan*, 669 F.2d at 1319-1320

**2. There are questions of law or fact common to the class.**

Plaintiffs satisfy the “commonality” requirement of Rule 23(a)(2) as there are “questions of law or fact common to the class.” All that is required to meet this test is a single question of law or fact related to the resolution of the litigation.<sup>20</sup> Commonality is given a “permissive application, and it is usually found to be satisfied.”<sup>21</sup>

The core legal and factual issues that need be decided would be necessary to the resolution of any case by a Kahuku tenant on the adequacy of the utility allowance. Utility allowances are calculated based on estimates of reasonable consumption levels and, once properly determined, apply uniformly to all class members (with the exception of households with disabled members who have medical needs that require additional utility consumption). The common questions of fact and law raised in this action are:

- Did the Defendants fail to raise utility allowances in violation of law?
- If so, when should they have raised the utility allowances and to what amount?
- Did the Defendants’ uniform misrepresentations that the rents had been calculated in accordance with federal law constitute unfair and deceptive practices under Hawai’i law?

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<sup>20</sup> *Jordan*, 669 F.2d at 1320; *Blackie*, 524 F.2d at 904.

<sup>21</sup> *Hum v. Dericks*, 162 F.R.D. 628, 638 (D. Haw. 1995).

- Did the Defendants breach the terms of their form leases with Kahuku tenants by miscalculating utility allowances?

These questions do not require case-by-case analysis, but apply to the class as a whole. For this reason, the commonality requirement is met.

**3. The named plaintiffs' claims are typical of the class' claims and are not subject to unique defenses.**

Plaintiffs satisfy the “typicality” requirement of Rule 23(a)(3) as “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” The typicality and commonality requirements overlap and tend to merge.<sup>22</sup>

Typicality checks to ensure that the named plaintiffs' claims are similar to those of class members, not subject to unique defenses, and not unique cases alleging harm different from those of the class.<sup>23</sup>

Here, Plaintiffs' injuries are not unique, but rather are characteristic of those suffered by every other member of the class. In cases like this where the claims of the named plaintiffs are based on the “same course of injurious conduct”

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<sup>22</sup> See *Gen'l Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (“The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiffs claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence”).

<sup>23</sup> See generally *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

as the proposed class claims — namely the Defendants’ failure to update the utility allowances and false certifications — their interests will be sufficiently aligned to satisfy the typicality requirement.<sup>24</sup>

Because the conduct leading to the named plaintiffs injuries are identical to those of the proposed class members, the typicality requirement is met.

**4. The named plaintiffs will adequately and fairly represent the interests of the class.**

Plaintiffs satisfy the “adequacy” requirement of Rule 23(a)(4) because they can “fairly and adequately protect the interest of the class.” The named Plaintiffs are adequate because (1) their “attorneys are qualified, experienced, and generally capable to conduct the litigation” and (2) their “interests are not antagonistic to the interests of the class.”<sup>25</sup>

First, Plaintiffs’ counsel has litigated numerous individual and class actions involving federal regulatory and statutory schemes, including cases specific to utility allowances in federally subsidized housing, and is undoubtedly qualified and capable to conduct the litigation. The extensive class action experience of

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<sup>24</sup> See *Jordan*, 669 F.2d at 1321; *Amone*, 226 F.R.D. at 686.

<sup>25</sup> *Jordan*, 669 F.2d at 1323. See also *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

proposed class counsel is detailed in the attached declarations.<sup>26</sup>

Second, as in other actions where plaintiffs sought agency compliance with statutory and constitutional requirements, the key interests of the Plaintiffs are co-extensive with the class.<sup>27</sup> In the absence of actual or potential conflicts, this part of the adequacy requirement is met.<sup>28</sup> Here, all named Plaintiffs and unnamed class members, including potential future residents, have identical interests in pursuing an accurate determination of what prior utility allowances should have been and an appropriate permanent injunction setting appropriate rates for the future.

As Plaintiffs are represented by appropriate counsel and no inherent conflict exists between the named Plaintiffs and the class, the proposed class representatives will fairly and adequately protect the interests of the class.

**C. THE REQUIREMENTS OF RULE 23(B)(2) ARE MET.**

In addition to satisfying the prerequisites of Rule 23(a), Plaintiffs can satisfy the requirement of Rule 23 to meet at least one of the three standards set forth in Rule 23(b). Plaintiffs seek certification under both Rule 23 (b)(2) and (b)(3). Rule 23(b)(2) provides:

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<sup>26</sup> See *Geminiani Dec.*

<sup>27</sup> *Jordan*, 669 F.2d at 1323; *Amone*, 226 F.R.D. at 686.

<sup>28</sup> See, e.g., *Hanlon*, 150 F.3d at 1020.

A class action may be maintained if Rule 23(a) is satisfied and if ... (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief is appropriate respecting the class as a whole.

As explained above, Defendants calculated the utility allowances for the plaintiff class in a uniform manner and uniformly failed to update those allowances. Defendants also made uniform misrepresentations stating that rent had been properly calculated and entered into uniform leases that incorporated by reference the requirement that Defendants properly calculate rent. In short, Defendants acted and refused to act in the same way with respect to the class as a whole. Plaintiffs are seeking final injunctive relief on behalf of the entire class to require that the utility allowances be updated, both now and in the future. Compl. at ¶ 6. Certification is plainly appropriate pursuant to Rule 23(b)(2).

The fact that Plaintiffs are also seeking monetary damages does not bar certification under Rule 23(b)(2).<sup>29</sup>

In any event, as discussed below, certification is also appropriate pursuant to Rule 23(b)(3) and so this Court need not decide whether Plaintiffs are

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<sup>29</sup> See *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir. 1986) (“Class actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages.”); see also *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003) (whether damages was predominant relief sought so as to make certification under Rule 23(b)(3) more appropriate than certification under Rule 23(b)(2) is based on “the specific facts and circumstances of each case”).

seeking predominantly injunctive relief as opposed to damages. Alternatively, this Court could certify a subclass as to injunctive relief pursuant to Rule 23(b)(2) and a subclass as to damages pursuant to Rule 23(b)(3).

**D. THE REQUIREMENTS OF RULE 23(B)(3) ARE MET.**

Rule 23(b)(3) provides:

A class action may be maintained if Rule 23(a) is satisfied and if: ...

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

- (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

The common issues predominate over any individual differences, which will necessarily be limited to applying a formula to calculate damages. Further, a class action is far superior to the federal court and Defendants being faced with over a hundred nearly identical claims by individual Plaintiffs premised on identical theories and requiring identical discovery. For these reasons, the predominance requirement is met.

**1. The common questions of fact and law predominate over any individual differences.**

Questions common to the class predominate over questions affecting only individual members. Common questions will be found to predominate where there is a common course of conduct over a period of time directed against members of the class and violating common statutory provisions.<sup>30</sup> Here, Defendants' breaches of its statutory, regulatory, and contractual obligations are common to all prospective class members and are the main issue of the suit.

The Defendants' calculation of the utility allowance is applicable to all residents of Kahuku Elderly Housing Project (except for certain disabled persons, as noted above). For all members of the putative class, the Defendants failed to regularly revise the utility allowances as utility rates increased. As a result, all members were damaged by not being provided a sufficient utility allowance and being charged over 30% of their income for rent.

Though the damages each class member has suffered is different — depending on the time frames that members resided at Kahuku — these differences are minor when viewing these claims as a whole. Individual damage issues do not prevent class certification where damages are ascertainable and can be computed

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<sup>30</sup> *Epstein v. Weiss*, 50 F.R.D. 387, 391 (D.C.E.D. La. 1970) citing *Harris*, 329 F.2d at 914.



and distributed by formula, as is the case here.<sup>31</sup>

The method of calculating damages will be consistent across the class. Each household at Kahuku currently receives a \$68 utility allowance. To structure relief, the Court must determine, based on when increases to utility rates occurred, when the Defendants' should have raised the allowance for the project and to what dollar amount. Once the Court determines this new schedule of what the allowances should have been during each relevant period, each individual class member's recovery can be calculated formulaically by applying the schedule to the periods during which a class member resided at Kahuku.

**2. The proposed class action is superior to any other method of resolution.**

Resolution of all class members' claims in a single action is superior to other methods for the fair and efficient adjudication of this controversy. The Defendants' acts are common to all class members and a class action will allow the court to consolidate their identical causes of actions into a single suit.<sup>32</sup> Further, class action treatment is the only way to achieve fairness in this case, since few

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<sup>31</sup> See *In re Hawai'i Beer Antitrust Litigation*, 1978 U.S. Dist. LEXIS 15905, \*15 (D. Haw. 1978).

<sup>32</sup> See *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1235 (9th Cir. 1996) ("Last, but certainly not least, the district court must find that a class action is superior to other methods of adjudication. Fed. R. Civ. P. 23(b). Where class wide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation.")

potential class members would have the means to undertake individual litigation to recover the relatively modest individual damages at issue.<sup>33</sup>

In the absence of class certification, few class members would have any practical, meaningful redress against the Defendants. As such, a class action is the superior method of resolving this case.

Because the requirements of 23 are met, the class should be certified.

**E. NOTICE SHOULD BE PROVIDED TO ALL CLASS MEMBERS IN THE ATTACHED FORM.**

When a class action is certified under Rule 23(b)(3), class members must be provided the “best notice that is practicable under the circumstances.” Fed. R. Civ. P. 23(c)(2)(B). The best notice available here is individual notice to class members by mailings incorporated into the Defendants’ correspondence with its tenants, as conducted in the regular course of business, and separate mailings to former tenants. Current and former tenants should be easily identifiable from within the Defendants’ existing records. Individual notification by mail is required

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<sup>33</sup> See *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344, (7th Cir. 1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.”)

where, as here, the names and addresses of most class members are known.<sup>34</sup>

Plaintiffs proposed notice is attached as Exhibit “1”.

The proposed notice meets all the requirements of Rule 23(c)(2): it fairly and accurately describes the action, the class, the claims and defenses, the right of class members to enter an appearance through an attorney, the right to be excluded, the exclusion process, and the binding effect of a class judgment in plain, easily understood language.

The Court has broad discretion to allocate notification tasks and costs under Rule 23(c)(2).<sup>35</sup> A well-recognized exception to the general rule that a party seeking the class action must bear the costs of notice is “when the task ordered can be performed as part of the defendant’s regular course of business.”<sup>36</sup> Defendants should be responsible for mailing the notifications to current tenants at least because they communicate with their tenants on a monthly basis concerning the tenants’ income and rents and can include the notice as part of their regular course

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<sup>34</sup> See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974); 1 Herber Newberg & Alba Conte, *Newberg on Class Actions* §8:2 (4th ed. 2002).

<sup>35</sup> See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355; 98 S. Ct. 2380, 2391-92 (1978) (“Rule 23(d) ... authorizes a district court in appropriate circumstances to require a defendant’s cooperation in identifying the class members to whom notice must be sent.”).

<sup>36</sup> *Id.* at 358, 98 S. Ct. at 2393 (where court requires defendant to perform tasks necessary for class notice, “it may be appropriate to leave the costs where it falls because the task ordered is one that the defendant must perform in any event in the ordinary course of its business”).

of business at little or no additional cost.

#### IV. CONCLUSION

This action meets all the requirements for class certification prescribed by Rule 23. For the foregoing reasons, Plaintiffs respectfully request that this Court certify this action as a class action.

DATED: Honolulu, Hawai'i, February 23, 2010

/s/ Elizabeth Dunne

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

TIMOTHY SHEA, MARTY JACQUELINE	)	CIVIL NO. 09-00480 DAE/ LEK
LEE, DON E. MURDOCK individually, and	)	
on behalf of all persons similarly situated,	)	(Contract) (Declaratory Judgment)
	)	(Other Civil Action)
Plaintiffs,	)	Class Action
	)	
vs.	)	<b>CERTIFICATE OF SERVICE</b>
	)	
KAHUKU HOUSING FOUNDATION, INC.	)	(Re: Plaintiff's Motion for Class
AND HAWAIIAN PROPERTIES, LTD.	)	Certification)
Defendants.	)	
	)	
_____	)	

**CERTIFICATE OF SERVICE**

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

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DATED: Honolulu, Hawai'i, February 23, 2010.

/S/ ELIZABETH DUNNE  
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