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STATE OF HAWAII and
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HAZEL MCMILLON; GENE STRICKLAND; TRUDY SABALBORO; KATHERINE VAIOLA; and LEE SOMMERS, each individually and on behalf of a class of present and future residents of Kuhio Park Terrace and Kuhio Homes who have disabilities affected by architectural barriers and hazardous conditions,	CIVIL NO. CV 08 00578 JMS/ LEK (Class Action) **DEFENDANTS STATE OF HAWAII AND HAWAII PUBLIC HOUSING AUTHORITY'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND**

Plaintiffs, v. STATE OF HAWAII; HAWAII PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawaii limited liability company, Defendants.	**DAMAGES, FILED DECEMBER 18, 2008; MEMORANDUM IN SUPPORT OF MOTION; EXHIBIT "A"; DECLARATION OF CHAD TANIGUCHI, EXHIBITS "1" – "3"; DECLARATION OF GLORI INAFUKU. EXHIBITS "1" – "5"; DECLARATION OF STEPHANIE L. FO, EXHIBITS "1" – "2"; DECLARATION OF ROBERT FALEAFINE, EXHIBITS "1" – "3"; CERTIFICATE OF SERVICE**

DEFENDANTS STATE OF HAWAII AND HAWAII PUBLIC HOUSING AUTHORITY'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES, FILED DECEMBER 18, 2008

Defendants STATE OF HAWAII and the HAWAII PUBLIC HOUSING AUTHORITY (collectively referred here as "HPHA") by and through their attorneys, Mark J. Bennett, Attorney General, Caron M. Inagaki and John M. Cregor, Jr., Deputy Attorneys General, hereby move this Court for an order dismissing Plaintiffs Complaint For Declaratory And Injunctive Relief and Damages, filed December 18, 2008 on the grounds that the Plaintiffs: (1) Fail to state a claim under Title II of the American with Disability Act, 42 U.S.C. § 12132 ("Title II"), under Section 504 of the Rehabilitation Act ("Section 504") or the Fair Housing Act Amendments, 42 U.S.C. § 3604(f) ("Fair Housing Act"); (2) Fail to show that Kuhio Park Terrace ("KPT") and Kuhio Homes are in violation of Title III of American with Disability Act, 42 U.S.C. § 12182 or Title II; (3) Failed to

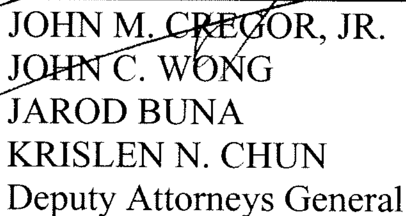
pursue State administrative remedies before filing suit in Federal Count; (4) Have no federal claim for alleged conditions at KPT and Kuhio Homes upon which relief can be granted by this Court; (5) Cannot show that the alleged claims are not moot; and (6) Cannot seek injunction relief for lack of an indispensible party under FRCP Rule 19.

This motion is made pursuant to Rules 7 and 12(b) of the Federal Rules of Civil Procedure, and is based on the memorandum in support of motion and attachments hereto, the records and files herein.

DATE: Honolulu, Hawaii, March 31, 2009.

STATE OF HAWAII

MARK J. BENNETT
Attorney General
State of Hawaii



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HAZEL MCMILLON; GENE STRICKLAND; TRUDY SABALBORO; KATHERINE VAIOLA; and LEE SOMMERS, each individually and on behalf of a class of present and future residents of Kuhio Park Terrace and Kuhio Homes who have disabilities affected by architectural barriers and hazardous conditions, Plaintiffs, v. STATE OF HAWAII; HAWAII PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawaii limited liability company, Defendants.	CIVIL NO. CV 08 00578 JMS/ LEK (Class Action) **MEMORANDUM IN SUPPORT OF MOTION**

MEMORANDUM IN SUPPORT OF MOTION

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I. INTRODUCTION

Defendants STATE OF HAWAII and the HAWAII PUBLIC HOUSING AUTHORITY (collectively referred here as "HPHA") hereby move this Court to dismiss the Complaint filed December 18, 2008.

This motion is brought pursuant to FRCP Rules 7 and 12(b) on the grounds that the Plaintiffs: (1) Fail to state a claim under Title II of the American with Disability Act, 42 U.S.C. § 12132 ("Title II"), under Section 504 of the Rehabilitation Act ("Section 504") or the Fair Housing Act Amendments, 42 U.S.C. § 3604(f) ("Fair Housing Act"); (2) Fail to show that Kuhio Park Terrace ("KPT") and Kuhio Homes are in violation of Title III of American with Disability Act, 42 U.S.C. § 12182 or Title II; (3) Failed to pursue State administrative remedies before filing suit in Federal Count; (4) Have no federal claim for alleged conditions at KPT and Kuhio Homes upon which relief can be granted by this Court; (5) Cannot show that the alleged claims are not moot; and (6) Cannot seek injunction relief for lack of an indispensible party under FRCP Rule 19.

II. STATEMENT OF FACTS

On December 18, 2008, five residents (Hazel McMillon, Gene Strickland, Trudy Sabalboro, Katherine Vaiola, and Lee Sommers) at Kuhio Park Terrace ("KPT") and Kuhio Homes filed this class-action lawsuit and a similar State (Civil No. 08-1-2608-12 SSM) court action against HPHA and the State of Hawaii.

Plaintiffs seek to represent present and future residents who have disabilities and who would be affected by architectural barriers and hazardous conditions, and who would be denied the equal use and enjoyment of the housing at KPT and Kuhio Homes.

Plaintiffs allege that tenants at KPT and Kuhio Homes are residing under poor living conditions and that disabled tenants are not being afforded basic accommodations. Specifically, the they allege (1) Disability-based discrimination in violation of Title II of The Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, (2) disability-based discrimination in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, (3) Disability-based discrimination in violation of The Fair Housing Act Amendments, 42 U.S.C. § 3604(f) and generally being subjected to substandard living conditions. They seek declaratory and injunctive relief together with damages and attorney's fees and costs.

Plaintiffs' allegations are without merit. Given their age, KPT and Kuhio Homes are well maintained low income housing communities located in Kalihi. Because of the age of each project (KPT and Kuhio Homes are both approximately 44 years old), repairs to various equipment and systems are ongoing and constant. *See* Declaration of Chad Taniguchi ¶3. Assertions that disabled tenants at KTP and Kuhio Homes have not been afforded basic accommodations are unfounded. Whenever KPT tenants have properly requested reasonable accommodations

because of a verified disability, they have been accommodated. *See* Declaration of Stephanie Fo ¶7.

A. KPT AND KUHIO HOMES

Built in 1965, KPT and Kuhio Homes are two separate low income public housing projects. Both are operated by the State of Hawaii, and governed by HPHA with extensive financing, oversight, regulation and enforcement by the United States Department of Housing and Urban Development (HUD).

KPT is one of HPHA's 12 Asset Management Projects ("AMPS"), or public housing projects on the Island of Oahu. HPHA has contracted the daily management of the projects to Defendant REALTY LAUA, LLC ("Realty"). Declaration of Robert Faleafine ¶4, Exhibit 1. KPT, itself, consists of two twin 16 story buildings containing a total of 614 dwelling units, ranging from one to four bedrooms. Both KTP buildings are constructed of reinforced cement and cinderblocks with two elevator shafts running down the middle. Because of this structure, it is impossible to alter the structural layout of any given unit at KPT. This includes such garden-variety Americans with Disabilities Act ("ADA") modifications as not being able to modify the width of doorway or enlarge bathrooms to accommodate tenants with wheelchairs. When a KPT tenant becomes disabled due to a mobility impairment, and submits the proper request for accommodation form, with the appropriate medical verification, that tenant is, as

soon as practicable, relocated to another housing project that can accommodate his/her needs. Fo Declaration at ¶8.

Unfortunately because of KPT's age, structural inflexibility and overwhelming size, HPHA spends approximately in excess of $120,000 annually on repairs and maintenance. *See* Fo Declaration at ¶3. Comparable public housing structures in other states have been razed and replaced with more modern, low rise buildings. HUD has twice denied Hawaii's request to raze and replace KPT. Recently, a private developer has approached HPHA with a proposal to "privatize" KPT: that is, the company would buy the building, completely refurbish it and rent it out as mixed use, retaining a high number of low income housing units. The developer would make money primarily through tax incentives. HUD has approved such privatizations in other states. The Board has resolved to publicly invite additional proposals for review and consideration.

Unlike KPT, Kuhio Homes is a series of low-rise, two-story buildings containing 134 units constructed primarily of wood and are more easily reconfigurable to accommodate mobility impaired people. Some accommodations can be provided, such as wheelchair ramps; however, because of the units' age and being 2-stories with a stairway linking the first floor to the second, only limited accessibility accommodations are possible.

Like many public housing projects across the country, both KPT and Kuhio Homes suffer from malcontents and vandals who constantly damage the physical facilities. While there are many KPT and Kuhio Homes residents who take pride in their homes, many of the structural concerns outlined in the Plaintiffs' Complaint have been repeatedly repaired and redamaged because of vandals. Fo Declaration at ¶4. These include but are not limited to elevators, emergency fire hoses, fire alarms, light bulbs, signage and garbage/trash chutes and receptacles. Surveillance equipment is currently being installed to try to mitigate the vandalism.

It is estimated that there are up to 40% more people living on the premises than the project was originally designed for. Many of those people are "unregistered long-term guests" or extended family. Because of the KPT and Kuhio Homes buildings age and over-crowding, there are several maintenance projects are currently taking place, including:

(1) Replacement of hot-water boilers in both buildings and solar panels in Building A. HPHA contemplates a reasonable completion date of year end. Fo Declaration, Exhibit 1.

(2) HPHA is presently installing new state of the art fire alarms in KPT. Fo Declaration at ¶4, Exhibit 1 and at ¶3 at Exhibit 2. Individual fire hoses will not be replaced because, on December 2008, HFD issued an exemption to HPHA stating that fire hoses are not required at KPT. Fo Declaration at ¶2.

(3) A contract has been awarded to Kone, Inc., for the complete replacement and modernization of all six (6) elevators at KPT with estimated completion by 2010. Kone, Inc. also presently has the maintenance contract with HPHA for the continued maintenance and service of the elevators. Fo Declaration, Exhibit 1.

(4) HPHA is currently reviewing options for a new pest control exterminating contract to cover all of KPT .

(5) HPHA has received an appropriation of approximately $884,000 for the modernization and replacement of the KPT garbage chutes. HPHA contemplates a reasonable completion date of early 2010. *Id.*

(6) Approximately 14 units at KPT are out of service[1] due to occasional sewage back ups. An engineering study has been funded and is underway to develop an appropriate and economical fix to the sewage problems.

(7) Several other projects are also in the early stages of consideration.

Contrary to the Plaintiffs' assertions that these repairs are evidence of HPHA's neglect, they are in fact but part of an appropriate ongoing repair and maintenance plan. Throughout the Complaint, Plaintiffs allege various "deplorable" conditions at KPT, e.g. paragraphs 31, 40. As these are entirely

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[1] Any removal of any unit from service requires HUD approval.

different than the accessibility allegations and do not constitute federal claims, they will be discussed separately in the Argument section.

HPHA and each of its projects are under the authority of the Department of Housing and Urban Development (HUD). Historically, there are two major pieces of legislation that provide for the federal housing programs by which all public housing authorities, including HPHA, administer for HUD: the National Housing Act of 1934 ("NHA") and the United States Housing Act of 1937 ("USHA"). 12 U.S.C. §§ 1701 – 1730(W), *as amended,* 42 U.S.C. § 1437. These two laws have the same policy goal of establishing a national program for the development of low-income housing.

The NHA provides accessibility of mortgage credit and mortgage loan guarantees to developers of low income housing projects. Congress enacted the USHA in 1937 to correct "the acute shortage of decent, safe and sanitary housing for lower income families" caused by the Depression.[2] 42 U.S.C. § 1437 (1982). The USHA's main function is to subsidize the operation of local public housing

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[2] The broad policy goals of the USHA are set out as follows: "It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit…to assist the several states and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income and…to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." *Id.*

authorities ("PHAs") through the Department of Housing and Urban Development ("HUD"). *Id.*

In 1978, Congress determined that the goal of providing decent housing was not being met because a number of housing projects had defaulted on their mortgage loans, resulting in HUD foreclosing on and taking over the properties. *See* S. REP. NO. 871, 89TH Cong. 2d Sess. 23, *reprinted in 1978* U.S. CODE CONG. & ADMIN NEWS 4773, 4796. Congress found that while under HUD ownership, a number of these properties had deteriorated due to the agency's failure to properly maintain them. *Id.* In response to this, Congress enacted the Housing and Community Development Act of 1978 which required HUD to take "affirmative steps" to maintain its properties in a manner consistent with the statutory purpose of the USHA. 12 U.S.C. § 1701z-11(a).

This obligation to properly maintain the public housing units is also delegated to housing projects operated by local PHAs. Under the USHA, HUD and the local PHA, in this case HPHA, enter into an Annual Contributions Contract ("ACC") by which HPHA receives HUD subsidies for the operation of the housing projects in exchange for properly maintaining the housing units and following all HUD rules and regulations. 24 C.F.R. § 941.302, *et seq.*

Pursuant to the above statutes, the national mandated standard for federally subsidized public housing is "decent, safe, and sanitary." HUD has more fully

defined that standard at 24 C.F.R. § 5.703. HUD not only fleshes out the definition of the standard but is also charged with administering it, overseeing compliance and has broad powers to enforce it. *See e.g.* 24 C.F.R. § 901.150 and § 901.200 *et seq*. Enforcement powers range from simply giving notice of a deficiency to requiring repairs within 24 hours, to placing the entire public housing authority into receivership. As substantially correctly stated in Plaintiffs' Complaint Paragraphs 24 to 27, earlier in this decade, HUD did find significant deficiencies in HPHA's performance, ordered corrective action and designated HPHA a "troubled agency." HPHA did make the corrective actions as prescribed by HUD and did enter into a Memorandum of Understanding which resulted in the removal of the troubled agency designation.

HUD has available to it several assessment and investigating tools, one of the major ones being the Real Estate Assessment Center ("REAC")[3]. REAC involves a thorough inspection and rating assessment of one or more housing projects by independent contractors retained by HUD.

In February 2008, HUD conducted a REAC inspection of KPT with a follow up inspection later that year. KPT received a score of 40 out 100. Although

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[3] REAC's "mission" is simply to investigate and report on the conditions of public housing projects in HUD's portfolio. It provides an assessment, not an enforcement function, and the scores and detail are intended to provide objective criteria to HPHA as well as to HUD, as to what it items, systems or conditions need to be improved

admittedly low, that score standing alone is virtually meaningless. The purpose of the REAC inspection is to determine what issues and work need to be done. Several of the current problems listed in this lawsuit contributed to the low REAC score; however they are currently being addressed. Several other matters such as potholes in the parking lot and conditions in individual units, which were solely the responsibility of the tenant, also contributed to the low score. Tellingly, with all of this past and present knowledge available, HUD did not issue any order or a finding against HPHA or KPT, nor determine that the conditions there are not "decent, safe or sanitary." Similarly, no governmental or regulatory agency, including HUD, has ever determined or made a finding that either KPT or Kuhio Homes are uninhabitable and/or are in violation of any code or regulation where the health or safety of persons is imminently threatened. Taniguchi Declaration at ¶2.

B. HPHA'S CURRENT EFFORTS TO ACCOMMODATE THE DISABLED AT KPT AND KUHIO HOMES

HPHA has established procedural requirements and forms for any eligible, disabled resident to request an ADA reasonable accommodation as a result of a disability. Taniguchi Declaration at ¶¶ 4 and 5; Inafuku Declaration ¶2. These procedures are required by HUD under 24 C.F.R. Part 8, 24 C.F.R. § 960, *et seq.*, and the Admissions and Continued Occupancy Policy ("ACOP") required by HUD for the federally assisted Public Housing Program under 24 C.F.R. Titles V, VII

and IX. A Notice of the procedures is provided to every applicant upon their admission into public housing and again annually. Inafuku Declaration at ¶3, Exhibit 1. These procedures require the resident to submit to the building manager a Request for Reasonable Accommodation Form ("RA form") which describes the specific accommodation being requested, together with appropriate medical verification. Inafuku Declaration at ¶7. Upon receiving the RA form, the building manager must promptly forward it to the HPHA Compliance Office which makes the determination. Faleafine Declaration at ¶¶ 4 and 6.

After determination, HPHA's Compliance Office notifies the building manager of the decision on the reasonable accommodation request, and the manager in turn informs the resident of the outcome. Inafuku Declaration at ¶9. If the request is granted, steps are initiated to move the applicant to a more suitable unit or whatever is necessary. If, on the other hand, HPHA denies the request, the resident has the right to appeal the decision via HPHA's Grievance Procedure which has been duly promulgated in Hawaii Administrative Rules ("H.A.R.") 17-2021. Taniguchi Declaration at ¶8, Exhibit 3. Following any further denial of the request via HPHA's Grievance Procedure, the resident can appeal the decision to the Circuit Courts of the State of Hawaii, pursuant to § 91-14, H.R.S.

The HPHA accommodation process works. HPHA's records show that it has acted on all requests for accommodations that have been properly submitted. Fo Declaration ¶11.

C. FOUR OF THE FIVE PLAINTIFFS FAILED TO SUBMIT A REASONABLE REQUEST FOR ACCOMMODATIONS FORM

Except for Plaintiff Lee Sommers, there are no records or evidence in either HPHA's Compliance Office files or the files of Realty, that any of the Plaintiffs (Hazel McMillon, Gene Strickland, Trudy Sabalboro, Katherine Vaiola) ever submitted a RA form for a specific accommodation. Inafuku Declaration at ¶11. Further, there are no records in HPHA's Compliance Office files that it issued any denials of any request for accommodation to any of the Plaintiffs. *Id.*

D. LEE SOMMERS REQUEST FOR A REASONABLE ACCOMMODATION

Records of Realty Laua disclose Plaintiff Lee Sommers did make a reasonable accommodation request in January 2007 for a ground floor unit and an air conditioner. Sommers was advised by Realty that there were no one-bedroom ground floor units available at that time in the KPT/Kuhio Homes AMP. Sommers elected then to remain in the second floor KPT unit while being placed on the waiting list for an appropriate Kuhio Homes unit. Apparently, because this request was temporarily resolved between Sommers and the management company, it was not forwarded to HPHA.

III. STANDARD OF REVIEW

When considering a motion to dismiss pursuant to F.R.C.P. 12(b)(6), the Court must accept as true the allegations in the Complaint, draw all reasonable inferences therefrom, and view them in the light most favorable to plaintiffs. *Love v. United States*, 871 F.2d 1488, 1491 (9th Cir. 1989); *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

The United States Supreme Court has recently clarified this standard of review, explaining that "[a] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do" without the allegation of sufficient facts in support." *Bell Atl. Corp. v. Twombly*, 550 U.S.544, 127 S.Ct. 1955, 1965 (2007). "In order to survive a motion to dismiss, a plaintiff must allege facts that raise **a right to relief** above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* *(Emphasis added.)*

If matters outside of the pleadings are presented on a motion to dismiss pursuant to Rule (12)(b)(6), the motion must be treated as one for summary judgment under Rule 56. Rule 12(d), F.R.C.P.

"[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the [trial] court is not restricted to the face of the pleadings, but may review any

evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. U. S.*, 850 F.2d 558, 560 (citations omitted); *see* also 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990). Norris v. Hawaiian Airlines, Inc., 74 Haw. 235, 239-40, 842 P.2d 634, 637 (1992) (brackets in original).

The Ninth Circuit Court of Appeals has held that the failure to exhaust nonjudicial remedies is subject to an unenumerated Rule 12(b) motion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2002).

IV. ARGUMENTS

A. THE PLAINTIFFS FAIL TO STATE A CLAIM UNDER TITLE II, SECTION 504, OR THE FAIR HOUSING ACT

Read liberally and in the light most favorable to the Plaintiffs, the Complaint simply does not state a claim for disability discrimination. The Plaintiffs allege that the Defendants discriminated against the Plaintiffs, in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, and Section 504 in that Defendants wrongfully denied or simply ignored their requests for reasonable accommodations. Claims brought under "Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act are normally treated together because the statutes' standards are so similar." *Weixel v. Bd. of Educ.*, 287 F.3d 138, 146 (2d Cir.2002) ("Because Section 504 of the Rehabilitation Act and the ADA impose identical requirements, we consider these

claims in tandem."). *See also Henrietta D. v. Bloomberg*, 331 F .3d 261, 272 (2d Cir.2003).

Section 504 protects disabled individuals from discrimination in public services. This act provides in pertinent part that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794(a) (emphasis added).

To establish a violation of Section 504 or ADA, a plaintiff must demonstrate that: (1) they are individuals with a disability; (2) they are otherwise qualified for benefits under a federally funded program[4]; (3) they have been denied those benefits because of their disability; and (4) that the program in question receives federal financial assistance. *Burns-Vidlak by Burns v. Chandler,* 939 F.Supp. 765, 769 (D.Hawaii, 1996); *Dempsey v. Ladd*, 840 F.2d 638, 640 (9th Cir.1987); *Bonner v. Lewis*, 857 F.2d 559, 562-63 (9th Cir.1988); *Smith v. Barton*, 914 F.2d 1330, 1338 (9th Cir.1990); *see also Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir. 1998). *See also Weixel, supra*. Section 504 and the ADA are interpreted similarly. *See, e.g., CERCPAC v. Health & Hosp. Corp.*, 147 F.3d 165, 167 (2d Cir.1998).

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[4] HPHA is a federally funded program.

1. Disability

"The ADA does not consider every impaired person to be disabled as defined under the statute." *DeMar v. Car-Freshner Corp.*, 49 F.Supp.2d 84, 90 (N.D.N.Y.1999). Section 504 and the ADA define a "disabled individual" as any person who "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B); 42 U.S.C. § 12102(2). A substantial limitation involves the significant restriction or inability to perform a major life activity. *DeMar*, 49 F.Supp.2d at 90.

2. HPHA Cannot Deny Benefits or Retaliate When It Is Unaware of Plaintiff's Disability

Of the five Plaintiffs, only Plaintiff Sommers submitted a HUD approved Request for reasonable accommodation with the proper medical verification in accordance with HPHA and HUD procedures. In order for HPHA to accommodate disabilities, HPHA must (1) receive notice that a tenant is disabled with proper medical verification; (2) determine that the tenant's condition substantially limits a major life activity and otherwise warrants protection under Section 504 and the ADA. "Not every impairment that affects an individual's major life activities is a substantially limited impairment." *Knapp v. Northwestern Univ.*, 101 F.3d 473, 481 (7th Cir.1996).

To allege that "HPHA knew or should have known" what Plaintiffs disability were, and therefore should have known what accommodations they needed is simply not good enough. Not only do HUD regulations require HPHA to demand details including medical verification but, under Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), HPHA cannot independently seek such information, nor even initiate a dialog with the tenant about even an obvious disability. 45 C.F.R. Part 160, Part 162, Part 164.

Further HUD requires that the HPHA establish procedures, including forms, to verify a resident's disability and the medical justification. Plaintiffs' failure to follow these procedures in the first instance, let alone exhaust available administrative remedies if an RA request had been denied, renders their Complaint premature. "No Form = No Notice = No Accommodation." Likewise oral requests are insufficient.

HPHA's established procedures for managing accommodation requests are reasonable, nonintrusive and, more importantly, required under the applicable laws and HUD regulations.

3. No Retaliation

The Complaint does not allege a cognizable retaliation claim. *See, e.g.*, *Kodengada v. International Bus. Mach. Corp.*, 88 F.Supp.2d 236, 243 (S.D.N.Y.2000); *Chappell v. School Board of Virginia Beach*, 12 F.Supp.2d 509,

516 (E.D.Va.1998). The Plaintiffs fail to plead any adverse action taken by Defendants for any protected activity under Section 504 or the ADA.

The elements of a claim for retaliation under Section 504 and the ADA are: (i) a plaintiff was engaged in protected activity; (ii) the alleged retaliator knew that plaintiff was involved in protected activity; (iii) an adverse decision or course of action was taken against plaintiff; and (iv) a causal connection exists between the protected activity and the adverse action. *Weissman v. Dawn-Joy Fashions, Inc.*, -- 214 F.3d 224 (2d Cir. Jun. 5, 2000) (ADA retaliation claim); *Sands v. Runyon,* 28 F.3d 1323, 1331 (2d Cir.1994) (Section 504 retaliation claim); *see also* 29 C.F.R. § 1614.101(b); 42 U.S.C. § 12203(a).

Moreover, the central purpose of Section 504 and the ADA is to assure disabled individuals receive "evenhanded treatment" in relation to the nondisabled. *Traynor v. Turnage*, 485 U.S. 535, 548 (1988) (citations omitted). "[Section 504] does not require all handicapped persons to be provided with identical benefits." *P.C. v. McLaughlin*, 913 F.2d 1033, 1041 (2d Cir.1990). Rather, the statute "mandate[s] only that services provided [nondisabled] individuals not be denied because [the person is disabled.]" *Id.*

Assuming Plaintiffs did qualify as a disabled tenants, Plaintiffs have failed to allege how they were denied a benefit which was made available to non-disabled tenants. Where is the different treatment between Plaintiffs and any other tenants

at KPT or Kuhio Homes? "[C]overage of [Section 504] is not open-ended or based on every dream or desire that a person may have." *Knapp*, 101 F.3d at 481; *Flight v. Gloeckler*, 68 F.3d 61, 63-64 (2d Cir.1995) (refusal by New York State Education Department to fund plaintiff's modifications to a van did not rise to discrimination under Section 504/ADA). Here, all the tenants at KPT and Kuhio Homes experience the maintenance and repair problems equally.

Plaintiffs also claim that HPHA has failed to comply with HUD's requirements that a specific percentage of the public housing at KPT and Kuhio Homes be fully accessible to the disabled. Complaint at 58. Not only is that requirement not project specific, but rather applicable systemwide, but also Plaintiffs' claim is without merit because there exists no private cause of action to enforce those HUD regulations. *Three Rivers Center for Independent Living v. Housing Authority of the City of Pittsburgh*, 382 F. 3d 412 (3rd Cir. 2004); *Gonzaga University v. Doe*, 536 U.S. 273, 385, 122 S.Ct. 2268 (2002); *Zatuchni v. Richman*, 2008 WL 3408554, (E.D. Pa. Aug. 12, 2008).

Similarly, HPHA cannot be held liable for unlawful discrimination under the Fair Housing Act without notification of the Plaintiffs disability.[5] There is

[5] The Fair Housing Act prohibits "discrimination against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of... that person."42 U.S.C. § 3604(f)(2)(A). Under the Act, unlawful discrimination is defined to include "a refusal to make reasonable accommodations in rules, policies,

absolutely no record that HPHA was on notice of the alleged disabilities. Accordingly, Defendants' motion to dismiss the discrimination claims under Section 504, Title II and Fair Housing Act should be granted.

4. Class Certification is Impossible

IT follows that a class of all qualified present and future residents of KPT and Kuhio Homes who have mobility impairments or other disabling medical conditions that constitute "disabilities" under federal disability nondiscrimination laws, and "who have been denied the right to full and equal access to the facilities, programs, services," simply does not exists.

B. THE PLAINTIFFS CANNOT SHOW THAT KPT AND KUHIO HOMES ARE IN VIOLATION OF TITLE II OR TITLE III

Albeit not artfully pled, Plaintiffs also attempt to allege a violation of Title III. However, their allegations are also without merit. Title III regulates building accessibility under two distinct systems – (1) one that applies to places of public accommodation built prior to the effective date of the ADA ("existing facilities"), and (2) another that applies to places of public accommodation built or altered after the effective date of the ADA ("new facilities"). *See* 42 U.S.C. §§ 12182(a)(2)(A)(iv) and (v), 12183(a). As KPT is hardly a "new facility" we need only address existing facilities regarding the identification and remedies of barriers

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practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).

to accessibility. For existing facilities, the DOJ Standards are merely a guide among many factors, such as demand. *See Access Now, Inc. v. South Florida Stadium*. Corp., 161 F.Supp.2d 1357, 1368 (S.D.Fla. 2001). And whereas new facilities must remove barriers except where to do so would be "structurally impracticable," 42 U.S.C. § 12183(a)(4), by contrast, existing facilities must remove barriers only where such removal is considered "readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv).

Similarly, Title II does not require HPHA to make each of its existing facilities (like KPT or Kuhio Homes) accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.150 (a)(1). Nor does it require a HPHA to take any action that it can demonstrate would result...in undue financial and administrative burdens. 28 C.F.R. § 35.150 (a)(3).

1. The Less Onerous "Readily Achievable" Standard Applies to KPT and Kuhio Homes

The applicable, "readily achievable" standard is defined as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9). "The readily achievable standard does not require barrier removal that requires extensive restructuring." 28 C.F.R. Pt. 36, App. B. *See also Coalition of Montanans Concerned with Disabilities, Inc. v. Gallatin Airport Auth.*, 957 F.Supp. 1166, 1168 (D.Mont. 1997) (finding that "[t]he overall policy of the ADA is to require relatively few changes to existing buildings, but to impose extensive design

requirements when buildings are modified or replaced").

Factors to be considered in determining whether an action is readily achievable are listed at 42 U.S.C. § 12181(9), including the nature and cost of the action; the overall financial resources of the facility; the impact upon the operation of the facility; the number of employees at the subject facility; and the type of operations at the facility. (*Id.*) Moreover, the regulations set forth "a wide-ranging list of the types of modest measures that may be taken to remove barriers and that are likely to be readily achievable." 28 C.F.R. Pt. 36, App. B. Such "modest measures" include repositioning shelves, rearranging tables and chairs, repositioning telephones, installing accessible door hardware, and installing full-length bathroom mirrors. 28 C.F.R. § 36.304.

2. The Plaintiffs Bear the Initial Burden of Pleading and Proving that Barriers Exist and that Removal is Readily Achievable

In a case where, as here, a plaintiff alleges that certain barriers to access exist at an existing facility and that those alleged barriers should be removed, the initial burden is placed on the plaintiff to plead and produce evidence of those barriers and that the proposed methods of barrier removal are "readily achievable." *Colorado Cross Disability Coalition v. Hermanson Family L.P.L*, 264 F.3d 999, 1002 (10th Cir. 2001); *South Florida Stadium Corp.*, 161 F.Supp.2d at 1363. The District Court in this case articulated the parties' respective burdens as follows:

> ...the plaintiff has the initial burden of production to show (1) that an architectural barrier exists; and (2) that the proposed method of architectural barrier removal is "readily achievable," *i.e.,* "easily accomplishable and able to be carried out without much difficulty or expense" under the particular circumstances of a case.

(R7-107, 14-15) (quoting *Colorado Cross Disability Coalition*, 264 F.3d at 1007). Only when the plaintiff's burden is met does the burden shift to the defendant who is then "required to assume the burden of persuasion that a barrier does not exist and removal is not readily achievable.

3. The Plaintiffs Have Not Pled Nor Can They Show Barrier Removal At KPT and Kuhio Homes is Readily Achievable

Plaintiffs allege that numerous barriers to access exist at KPT and Kuhio Homes - ranging from issues with narrow doorways to inaccessible kitchens and bathrooms for mobility impaired tenants. As discussed above expense involved with modifying KPT and even Kuhio Homes is extremely high. Estimated cost to upgrade existing dwelling units to comply with ADA/UFAS standards is approximately $18.0 million.

Defendants do, however offer an alternative, readily achievable solution to the Plaintiffs: "If there are barriers to your mobility at KPT, submit an RA request and we will move you to more accommodating housing."

C. <u>THE NAMED PLAINTIFF MUST PURSUE STATE ADMINISTRATIVE REMEDIES BEFORE FILING SUIT IN FEDERAL COURT</u>

In the absence of a statutory requirement, *e.g. Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378 (2006), exhaustion of administrative remedies is a prudential matter when "policy matters favor it and it is not inconsistent with Congressional intent." *Western Radio Services Co., v. Qwest Corp.*, 530 F.3d 1186, 1199 (9th Cir. 2008); *McGee v. United States*, 402 U.S. 479, 483-86, 91 S.Ct. 1565 (1971).

Under a 12(b)(1) analysis, the Court lacks subject-matter jurisdiction under the exhaustion doctrine because Plaintiffs failed not only to exhaust their administrative remedies, but they failed in the first instance to even initiate their administrative request for an accommodation. A bare reading of the ADA, FHA and Section 504 should allow this Court to conclude that HPHA's procedures relating to accommodation requests must first be followed to allow the agency "to function effectively." <u>Id.</u> Even though not specifically stated, exhaustion of an agency's reasonable accommodation procedures is clearly "not inconsistent with the Congressional intent" and purposes of the ADA, FHA and Section 504. To do otherwise, would allow disabled residents, such as Plaintiffs here, to make bare allegations of "discrimination" based on their disability, and to proceed without establishing any record that their disability required any type of accommodation, let alone a reasonable one.

Additionally, HUD has primary jurisdiction over HPHA and the Court should defer to HUD, which is better suited to regulate HPHA. Under the "primary jurisdiction" doctrine, in cases raising issues not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. *Cavanagh Communities Corp. v. New York Stock Exchange, Inc.*, D.C.N.Y., 422 F.Supp 382, 385, 306.[6] Here, HUD can and does regulate HPHA in the fields of ADA compliance and those other issues associated with habitability, thus the Court should defer to the administrative agency created by Congress to deal with such problems.[7] *Kerr v. Department of Game*, 14 Wash.App. 427, 542 P.2d 467, 469.

D. THE PLAINTIFFS FAIL TO SHOW HOW THE ALLEGED CONDITIONS AT KPT AND KUHIO HOMES ESTABLISH A FEDERAL CLAIM

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[6] The doctrine of "primary jurisdiction" does not involve jurisdiction in the technical sense, but it is a doctrine predicated on an attitude of judicial self-restraint and is applied when the court feels that the dispute should be handled by an administrative agency created by the legislature to deal with such problems. *Kerr v. Department of Game*, 14 Wash.App. 427, 542 P.2d 467, 469. The doctrine of "primary jurisdiction" is properly invoked whenever the enforcement of a claim, which is originally cognizable in the courts, requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. *W. U. Tel. Co. v. Graphic Scanning Corp.*, D.C.N.Y., 360 F.Supp. 503, 595.

[7] Section 504 does not provide a private right of action to enforce HUD regulations. *Three Rivers Center for Independent Living v. Housing Authority of the City of Pittsburgh*, 382 F. 3d 412 (3rd Cir. 2004).

Throughout the Complaint, Plaintiffs have alleged various "deplorable" conditions as existing at KPT, e.g. paragraphs 31, 40. Other than under those statutes cited above, there is no federal constitutional nor statutory right involved here. *See e.g., Lindsey v. Normet,* 405 U.S. 56, 74, 92 S.Ct. 862 (1972); *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502 (1980); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981). Further, the law is settled that there is no cause of action for indecent housing. *Perry v. Housing Authority of the City of Charleston*, 664 F. 2d 1210 (4th Cir. 1981).

Citing to Supreme Court's decision in *Cort v. Ash*, 433 U.S. 66, 95 S. Ct. 2080 (1975). The *Perry* Court said:

> It is plain that the federal enactments sought to create neither rights in the tenants nor duties in the landlords. *See also, Touche Ross,* 442 at 569, 99 S.Ct at 2485. The statutes themselves, on which the plaintiffs rely, e.g. §§1437, 1441, 1441(a), are simply precatory statements of Congress' designs: even §1437d(c)4(C) is at best a mandate only to HUD. None of these provisions can be said to intend the creation of the kind of rights to which a remedy in favor of tenants such as plaintiffs could attach.

As to the more general conditions of the housing project at large, the federal standard is decent, safe, and sanitary housing, as entrusted to HUD to administer, oversee and enforce. (*See* statutes and regulations cited above). Clearly, HUD has current information available to it and has determined to take no action which supports the inference that HUD does not believe that KPT as fallen below the

applicable standard. Because of HUD's clear deep involvement in this issue, the doctrine of primary jurisdiction applies and because Section 504 does not provide a private right of action to enforce HUD regulations,[8] this court should abstain from any involvement in those issues. At the very least, this court should defer to the expertise and specialized knowledge and experience of the appropriate regulatory agency.

E. THE PLAINTIFFS' CLAIMS ARE MOOT

Moreover, the allegations relating to conditions at KPT might in fact be moot, as HPHA is already taking substantial and significant steps to correct and repair the various systems at the project. An action must remain a live controversy at all stages of review, not simply at the date the action is initiated. *See Doe v. Madison Sch. Dist. No. 321,* 177 F.3d 789, 797 (9th Cir. 1999)(en banc). "If an action or claim loses its character as a live controversy, then the action or claim becomes 'moot', and we lack jurisdiction to resolve the underlying dispute." Although a case does not become moot simply because a project has been completed, a court that cannot order any effective relief may not continue to retain jurisdiction. *See Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1094 (9th Cir. 2003) (noting that a case is moot where "no effective relief for the alleged

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[8] *Three Rivers Center for Independent Living v. Housing Authority of the City of Pittsburgh*, *supra*.

violation can be given") (quoting *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065 (9th Cir.2002)); *see also Or. Natural Resources Council v.BLM*, 470 F.3d 818 (9th Cir. 2006).

Here, HPHA's records show that it has acted on all requests for accommodations that have been properly submitted. Fo Declaration at ¶8. There are no records in HPHA's Compliance Office files that it issued any written denials of any request for accommodation to any of the Plaintiffs. *Id.* Any claim that the Plaintiffs represent a class of disabled tenants who were denied a reasonable accommodation is moot. Similarly, any claims associated with the (1) elevators, (2) garbage chutes, (3) sewerlines, (4) extermination and (5) hot water are moot because HPHA has already started the repair process.

F. NO INJUNCTIVE RELIEF

Plaintiffs' prayer for relief generally requests declaratory and injunctive relief, without specifying the legal basis for that relief. To the extent that there are no waivers of the Eleventh Amendment, such relief must be predicated on *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441. Due to the nature of the legal fiction that underlies *Ex Parte Young*, a suit cannot be against the State directly but rather against the individual State officer who is responsible for the continuing violations of federal law (therefore, not acting within any official capacity) and who has the power to correct the violation if so ordered by the Court.

A federal court can only issue an injunction **to a state official** to cease violating federal law. The named state official must have a proper nexus with the enforcement of the law that is the subject of the injunction. *Moore's, Federal Practice*, § 123.40[3][v.]. The named state official's connection to the issue "must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1991)(citing *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir.1992); *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946, 953 (9th Cir.1983)). That connection must be determined under state law depending on whether and under what circumstances a particular defendant has a connection with the challenged state law.

Here, the Plaintiffs failed to join as a party any state official thus have no jurisdiction for injunctive relief.

V. CONCLUSION

It is not the Defendant's position that the law allows HPHA to ignore disabled tenants at KPT or Kuhio Homes. Unfortunately, physical barriers at KPT and Kuhio Homes are a fact of life and prevent HPHA from accommodating a large number of disabled tenants at KPT or Kuhio Homes. This is why it is so important that a disabled tenant fill out a reasonable accommodation request, so

that HPHA can begin the process of finding an appropriate unit in another local project.

Based on the foregoing, the State Defendants respectfully request that the Complaint against them be dismissed.

DATED: Honolulu, Hawaii; March 31, 2009.

MARK J. BENNETT
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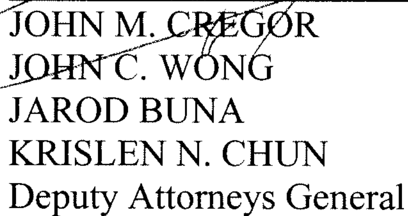

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