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Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

RODELLE SMITH, SHEILA TOBIAS, BARBARA BARAWIS, and LEWIS GLASER individually, and on behalf of all persons similarly situated, Plaintiffs, v. HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I, a duly organized and recognized agency of the State of Hawai'i.	CIVIL NO. 04-1 0069K (Contract) Class Action **PLAINTIFFS' MOTION FOR CLASS CERTIFICATION; MEMORANDUM IN SUPPORT OF MOTION; EXHIBITS "A"-"E" DECLARATION OF SHELBY ANNE FLOYD; EXHIBIT "1"; DECLARATION** **(Title continued on next page)** HEARING: DATE: September 20, 2005 TIME: 8:00 A.M. JUDGE: HON. ELIZABETH STRANCE

Defendant.	) OF GAVIN; THORNTON; EXHIBITS) "A"-"C";) NOTICE OF MOTION AND) CERTIFICATE OF SERVICE

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs RODELLE SMITH, SHEILA TOBIAS, BARBARA BARAWIS, and LEWIS GLASER, by and through their counsel, hereby move 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)(3) of the Hawai'i 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. Plaintiffs seek certification of a class and subclass as follows:

Class: persons that currently reside, or resided at any point from May 17, 2002 to the present in a federally funded public housing project in which residents receive or should receive utility allowances

Subclass: persons that resided at any point between May 17, 1998 to May 16, 2002 in a federally funded public housing project in which residents receive or should receive utility allowances.[1]

2. The class and subclass is so numerous that joinder of all its members is impracticable.

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[1]Plaintiffs may later seek to certify a class of tenants residing in public housing prior to May 17, 1998 depending on information derived through discovery.

3. There are questions of law and/or fact common to the class and subclass.

4. The claims of the named Plaintiff are typical of the claims of the class and subclass.

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

6. The Defendants have acted on grounds generally applicable to the class and subclass, thereby making appropriate final injunctive and declaratory relief with respect to the classes 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 (b)(3) of the Hawai'i 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, August 10, 2005.

SHELBY ANNE FLOYD
THOMAS E. BUSH
GAVIN THORNTON
Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

RODELLE SMITH, SHEILA TOBIAS, BARBARA BARAWIS, and LEWIS GLASER individually, and on behalf of all persons similarly situated, Plaintiffs, v. HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I, a duly organized and recognized agency of the State of Hawai'i. Defendant.	) CIVIL NO. 04-1 0069K)) **MEMORANDUM IN SUPPORT OF MOTION**

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Plaintiff seeks declaratory relief and damages against Defendant Housing and Community Development Corporation of Hawai'i ("HCDCH") for failing to adjust utility allowances in public housing as utility rates increased, in violation of Plaintiffs' rights under the U.S. Housing Act, the Annual Contributions Contract ("ACC") between HCDCH and the U.S. Department of Housing and Urban Development ("HUD"), and the rental agreement between public housing residents and HCDCH.

The United States Housing Act requires that shelter costs for tenants residing in federally subsidized public housing projects do not exceed 30% of tenant income. 42 U.S.C. § 1437a(a), 24 C.F.R. §§ 965.501-965.508. *See also Dorsey v. Housing Authority of Baltimore City*, 984 F.2d 622, 624 (4th Cir. 1993). Utilities are included in rent. *Id.* Where tenants are directly responsible for the payment of utility service, the supporting federal regulations require public

housing authorities (PHAs) like HCDCH to provide the tenants with a utility allowance. 24 C.F.R. §§ 965.501-965.508.

In establishing the utility allowances, a PHA must approximate 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." 24 C.F.R. § 965.505(a). Sometime prior to 1997, HCDCH determined the amounts of utility consumption by public housing residents that were reasonable and in accordance with 24 C.F.R. § 965.505(a). Based on its determination, HCDCH established a utility allowance schedule set in terms of consumption per kilowatt hour of electricity or cubic foot of gas (hereinafter "consumption allowances"). A copy of the HCDCH consumption allowance schedule is attached hereto as Exhibit "A" to the Declaration of Gavin Thornton. Because tenants at different projects pay for different utilities (e.g. some tenants might pay for only electric lighting and refrigeration, while others might pay for electric lighting and refrigeration plus gas for cooking and a hot water heater), the consumption allowances set forth the consumption amounts in different categories (e.g. the amount of gas required for one month's use of a hot water heater) and according to the number of bedrooms in a unit. For example, a family residing in a three-bedroom unit at a project where tenants pay electricity bills for lighting, refrigeration, and cooking would have a consumption allowance of 480 kilowatt hours of electricity per month. *See* Exhibit "A" to Declaration of Gavin Thornton.

To allow tenants to purchase the quantity of utilities provided for in the consumption allowances, at some point HCDCH applied the utility rates at the time to the consumption allowances to convert them into terms of dollar amounts (hereinafter "dollar allowances"). When the rents for public housing tenants are calculated, HCDCH factors in a rent credit in the amount of the dollar allowances in an attempt to ensure that the tenant's total rent, including the cost of utilities, does not exceed 30% of tenant income.

While the consumption allowances are applicable to all public housing tenants who pay their own utilities, because of differences in the cost of utilities, the dollar allowances differ depending on the location of the housing project. For example, a tenant on Maui who resides in a one-bedroom unit and pays for utilities to cover lighting and refrigeration would be provided the same consumption allowance as a tenant on Oahu living in a one-bedroom unit and paying for lighting and refrigeration. However, the dollar allowances provided to the Oahu resident and the Maui resident would be different because of differences in the cost of electricity on each island.

The federal regulations require regular revisions to the dollar allowances to ensure that the rent credits tenants receive continue to be sufficient to cover the reasonable utility consumption amounts provided for in the consumption allowances, thereby ensuring that rents do not exceed 30% of tenant income. PHAs are required to annually review and adjust their utility allowances. 24 C.F.R. § 965.507(a). Additionally, in between annual reviews, where there is a change in the utility rates of greater than 10%, PHAs must make interim adjustments to their allowances. 24 C.F.R. § 965.507(b).

Since sometime prior to 1997, HCDCH has failed to annually review the utility allowances and make adjustments to the dollar allowances to account for utility rate increases. Because utility rates have increased substantially since the dollar allowances were last adjusted, the rent credits provided to residents under the dollar allowances were grossly insufficient to purchase the amount of utilities provided for in HCDCH's consumption allowance schedule. Only recently, after a suit seeking injunctive relief was filed by Plaintiffs in the United States District Court for the District of Hawaii, did HCDCH update the dollar allowances to account for changes in utility rates since the allowances were last revised.[11]

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[1] Two related class action suits were filed in the United States District Court for the District of Hawaii. The suits are briefly described below:

Smith, et al. v. Aveiro, et al., Civil No. 04-00309 DAE KSC, was filed on

Attached as Exhibit "B" to Declaration of Gavin Thornton is an HCDCH spreadsheet indicating the difference between the old dollar allowances and the new allowances. As the spreadsheet indicates, prior to the revisions public housing tenants were receiving utility allowances that were as much as $150 per month less than what they should have been receiving. As a result, tenants have had to pay rent charges well in excess of 30% of tenant income.

In addition to violating the U.S. Housing Act and its supporting regulations, by failing to comply with the HUD requirements for development and operation of public housing, HCDCH breached the Annual Contributions Contract between HUD and HCDCH. Furthermore, HCDCH breached the rental agreements between HCDCH and public housing tenants that required HCDCH to provide tenants with a utility allowance in accordance with the applicable allowances, namely the HCDCH consumption allowance.

II. THE PROPOSED CLASS

To avoid unnecessary argument at this stage of the litigation, Plaintiffs seek certification of a class and subclass. The proposed class for certification is defined as persons that currently reside, or resided at any point

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May 13, 2004. The suit sought equitable relief on behalf of all public housing tenants who pay their own utilities for rent over-charges arising out of HCDCH's failure to adjust utility allowances as utility rates increased. In October 2004, HCDCH adjusted its utility allowances retroactive to September 2004 in accordance with the amounts indicated in Exhibit "B", attached to the Declaration of Gavin Thornton. The suit was dismissed as moot on July 12, 2005, based on a determination that HCDCH's update of the utility allowances brought them into compliance with federal law.

Amone v. Aveiro, et al., Civ. No. 04-508ACK, was filed in August 2004 by disabled public housing tenants who have been denied their rights to receive notice of and request increased utility allowances as a result of their need for medical devices using electricity. On June, 17, 2005, the court issued an order granting a permanent injunction requiring HCDCH to comply with federal regulations governing the provision of utility allowance adjustments to disabled public housing tenants and declaring that class members were entitled to have their rents adjusted.

from May 18, 2002 to the present in an HCDCH public housing project in which residents receive or should receive utility allowances. The proposed subclass is defined as persons that resided at any point between May 18, 1998 to May 17, 2002 in an HCDCH public housing project in which residents receive or should receive utility allowances.

Certification of a class and subclass to address potential issues relating to the statute of limitations, and to reserve rulings on complex issues such as the date of accrual of the claim and equitable tolling is consistent with the recent practice of other Hawaii courts. In a statewide class action in which substitute teachers challenged the Department of Education's failure to pay statutory wages, *Garner v. Department of Education*, Civil No. 03-1-000305, First Circuit Court, State of Hawaii, the First Circuit Court certified a class and subclass based on statute of limitations categories. See Exhibit 1 to Declaration of Shelby Anne Floyd attached.

The Court has the discretion to alter or amend the class certification order at any time before a decision on the merits, HRCP 23(c)(1), as "the scope and contour of a class may change radically as discovery progresses and more information is gathered about the nature of the putative class members' claims." *See Prado-Steiman v. Prado, M.C.*, 221 F.3d 1266, 1273 (11th Cir. 2000).

III. THE REQUIREMENTS AND PURPOSES OF RULE 23 ARE MET

The provisions of the Hawai'i Rules of Civil Procedure ("HRCP") regarding certification and maintenance of a class, HRCP 23(a) and (b), are identical to rules 23(a) and (b) of the Federal Rules of Civil Procedure ("FRCP"). Hawai'i State courts often rely on federal precedent relating to class certification under the Federal Rules to interpret the HRCP requirements for class certification. *See e.g. Life of the Land v. Land Use Commission*, 63 Haw. 166 (Haw. 1981); *Life of the Land v. Burns*, 59 Haw. 244 (Haw. 1978); *Akua v. Olohana*, 65 Haw. 383 (Haw. 1982).

Class actions have two primary purposes: (1) to protect rights of persons who might not be able to present claims on an individual basis, and (2) to accomplish judicial economy by avoiding multiple suits. *Haley v Medtronic, Inc.*, 169 FRD 643 (C.D. Cal. 1996). *See also Levi v. University of Hawaii*, 67 Haw. 90, 93 (Haw. 1984) (stating, "[o]ne of the purposes of a class action suit is to prevent multiplicity of actions, thereby preserving the economies of time, effort and expense"). The former purpose is clearly served in the instant case where it would be impracticable, if not impossible, for the members of the proposed class to secure the redress available to the named plaintiffs. As residents of low-income public housing, almost every member of the putative class will be poor. It is doubtful that many of them could afford to use their scarce resources to obtain counsel to secure relief for the rent overcharges with which they have been burdened. Additionally, the amount of damages each member would be eligible to recover, while substantial in respect to the members' incomes and cumulatively quite large, would probably not be sufficient to cover the costs of bringing a suit on an individual basis in most cases.

The purpose of judicial economy is clearly served in the instant case as well. It would be unduly burdensome on the courts to litigate the claims of each of the, what will likely be, over 3000 class members on an individual basis, especially when the matter can be properly handled as a class action. The legal and factual claims for each of the members in this case are nearly identical. As discussed further below, the only differences between the claims will be in regard to the amount of the damages caused to each class member, which will be based on a few easily determinable variables. The questions of law and fact that are common to all the members of the proposed class predominate over any questions that affect only individual members.

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

To certify a class action, Plaintiffs must establish that all of the requirements of HRCP 23(a) are met, and must also establish that at least one of

the alternative requirements of HRCP 23(b) is met. *Daly v. Harris*, 209 F.R.D. 180, 184 (D. Haw. 2002).

HRCP 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 HRCP 23(a).

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

While there is no minimum number of plaintiffs required to maintain a class action, generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the numerosity prerequisite is satisfied. *Stewart v. Abraham*, 275 F.3d 220, 226-227 (3d Cir. 2001). *See also Life of the Land v. Land Use Commission of the State of Hawaii*, 63 Haw. 166, 623 P.2d 431 (1981) (finding the numerosity requirement to be satisfied where a defendant class was composed of over 150 identifiable members); *Wolkenstein v. Reville*, 539 F.Supp. 87 (W.D. N.Y. 1982), *aff'd* 694 F.2d 35 (2d Cir. 1982) (finding that the numerosity requirement is generally satisfied when the number of class members exceeds 40, and particularly when the number exceeds 100 or 1000); *Penk v. Oregon State Bd. of Higher Education*, 93 F.R.D. 45 (D.C. Or. 1981) (holding that a putative class consisting of approximately 1500 present members and 350 past members was clearly too large to join all members); *Polich v. Burlington Northern*, 116 FRD 258 (D.C. Mont. 1987) (finding that a class consisting of 60 potential members is sufficiently large to raise a presumption that joinder is impracticable).

There are over 2600 housing units in the HCDCH federally subsidized public housing projects where residents directly pay for their own utilities and should receive utility allowances. *See* Exhibit "C" to Declaration of Gavin Thornton (an HCDCH spreadsheet indicating, *inter alia*, the number of units per housing project where utility allowances are provided). The State has identified the heads of household who, at some point since May 1, 2002, resided in HCDCH federally subsidized public housing projects where residents directly pay for their own utilities and should receive utility allowances. While the exact number of members of the entire class is not known, the list indicates that there were over 3000 persons eligible for inclusion in the class just since 2002. *See* Declaration of Gavin Thornton.

Though the sheer size of the putative class in this case makes joinder impracticable, there are other relevant considerations that make the impracticability of joinder even more obvious. These relevant considerations include, *inter alia*, the financial resources of class members, the ability of claimants to institute individual suits, the size of individual claims, and the inefficiency inconvenience that would result from being required to bring multiple individual claims. *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993). When these considerations are applied to the present case, in addition to the size of the class, it is clear that joinder is impracticable for the following reasons: (1) the members of the class lack the financial resources to bring individual claims; (2) the size of individual claims would often not support individual claims; and (3) requiring each member of the proposed class to bring an individual action would be extremely inefficient given that each claim is practically identical.

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

To satisfy the "commonality" requirement of HRCP 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).