

Of Counsel:

LAWYERS FOR EQUAL JUSTICE

VICTOR GEMINIANI 4354

WILLIAM H. DURHAM 8145

GAVIN K. THORNTON 7922

P.O. Box 37952

Honolulu, HI 96837

Telephone: (808) 779-1744

Email: victor@lejehawaii.org

william@lejehawaii.org

gavin@lejehawaii.org

ALSTON HUNT FLOYD & ING

PAUL ALSTON 1126

JASON H. KIM 7128

American Savings Bank Tower

1001 Bishop Street, 18th Floor

Honolulu, HI 96813

Telephone: (808) 524-1800

Fax: (808) 524-4591

Email: palston@ahfi.com

jkim@ahfi.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

BEVERLY BLAKE, STEPHANIE)	CIVIL NO. 08-00281 SPK LEK
CAMILLERI, ARLENE SUPAPO,)	(Contract)(Declaratory
individually, and on behalf of all persons))	Judgment)(Other Civil Action)
similarly situated,)	Class Action
)	
Plaintiffs,)	ORDER GRANTING
)	PLAINTIFFS' MOTION FOR
vs.)	CLASS CERTIFICATION
)	
CRAIG NISHIMURA, in his official)	
capacity as Acting Director of the)	
Department of Facility Maintenance,)	
City and County of Honolulu; CITY)	
AND COUNTY OF HONOLULU, a)	
municipal corporation,)	
)	
Defendants.)	
_____)	

—

**ORDER GRANTING
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Plaintiffs bring an action under the United States Housing Act, Hawai‘i Unfair and Deceptive Practices law, and Hawai‘i Contract law, claiming Defendants overcharged tenants in the Westlake Apartments complex, a federally subsidized housing project. Plaintiffs are tenants of Westlake Apartments. Plaintiffs move for class certification under Federal Rule of Civil Procedure 23(a), 23(b)(2), and 23(b)(3).

For the reasons set forth below and in Plaintiffs’ unopposed motion for class certification, Plaintiffs’ motion for class certification is GRANTED.

PROCEDURAL HISTORY

On June 12, 2008, Plaintiffs filed a Complaint, seeking injunctive relief, damages, and attorneys' fees. (Doc. 1). On September 5, 2008, Plaintiffs filed a Motion for Class Certification. (Doc. 18). Defendants did not file a response. On October 17, 2008, the Court vacated hearing on the Motion for Class Certification and granted the motion. (Doc. 30).

BACKGROUND

The United States Housing Act

The United States Housing Act generally requires that "rent" for tenants residing in federally-subsidized public housing projects not exceed 30% of tenant income. 42 U.S.C. § 1437a; 24 C.F.R. § 5.628; Wright v. Roanoke Redevelopment Auth., 479 U.S. 418 (1987); Dorsey v. Hous. Auth. of Baltimore City, 984 F.2d 622, 624 (4th Cir. 1993). Utilities are included in that rent calculation. 24 C.F.R. §§ 5.603(b) and 5.634(a).

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." 24 C.F.R. § 5.603(b).

Plaintiffs' Allegations

Plaintiffs allege that Westlake Apartments is a federally subsidized 95-unit

low-income housing project managed by the Defendants. Plaintiffs allege that Westlake tenants are responsible for their utilities and the project owner must provide tenants with a utility allowance.

Plaintiffs allege that sometime prior to 1998, the Defendants determined the reasonable consumption for Westlake Apartments, at then-existing rates, allowed for \$40 each month in utilities. Plaintiffs allege that, since that time, utility rates have drastically increased, but the Defendants have not updated the rate.

Plaintiffs allege that Defendants falsely certified to tenants and the federal government each year, on HUD Form 50059, that the rents were properly calculated. Plaintiffs further allege that Defendants' actions constitute violation of Hawai'i unfair and deceptive practices law and Hawai'i contract law.

Putative Class for Certification

Plaintiffs have requested that they be certified as representatives of a class representing all persons who are, were, or will be head of household tenants at Westlake Apartments 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 Westlake Apartments.

LEGAL STANDARD

Rule 23(a) requires that all of the following four factors be met: “(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.” F.R.C.P. Rule 23(a).

ANALYSIS

I. CLASS CERTIFICATION

A. Rule 23(a)

Plaintiffs have the burden of showing that the proposed class satisfies the requirements of numerosity, commonality, typicality, and adequacy. Fed.R.Civ.P. Rule 23(a).

1. The Numerosity Requirement Is Satisfied

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. Harris v. Palm Springs Alpine Estates Inc., 329 F.2d 909, 913-914 (9th Cir. 1964).

The proposed class of past, present, and future tenants is sufficiently large to meet the numerosity requirement. Westlake consists of 95 subsidized units.

Potential class members include: the 95 present heads of household at Westlake, all heads of households who have left Westlake and who received inadequate utility allowances, and all future heads of households who will move into Westlake before the allowance is recalculated as units turn over. The size of this group meets the numerosity requirement.

Given the size and characteristics of the class, the numerosity requirement is met.

2. The Commonality Requirement is Satisfied.

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. Jordan, 669 F.2d at 1320; Blackie v. Barrack, 524 F.2d 891, 904 (9th Cir. 1975), *cert. denied*, 492 U.S. 816 (1976). Commonality is given a “permissive application, and it is usually found to be satisfied.” Hum v. Dericks, 162 F.R.D. 628, 638 (D. Haw. 1995).

The core legal and factual issues that need be decided would be necessary to the resolution of any case by a Westlake tenant on the adequacy of the utility allowance. Plaintiffs raise common questions of fact and law as to the adequacy of the utility allowances, the requirements of the U.S. Housing Act regarding such

allowances, whether Defendants' certifications constitute unfair and deceptive practices, and whether the Defendants' rent practices violated the Plaintiffs' leases.

For these reasons, the commonality requirement is met.

3. The Typicality Requirement is Satisfied.

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.

See Gen. Tel. Co., 457 U.S. at 157 n.13 ("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").

Typicality basically 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. See Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992).

Here, Plaintiffs' alleged 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"

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. See Jordan, 669 F.2d at 1321.

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

4. Plaintiffs Provide Adequate Representation.

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 “attorn[ey]s are] qualified, experienced, and generally capable to conduct the litigation” and (2) their “interests [are not] antagonistic to the interests of the class.” Jordan, 669 F.2d at 1323; see also Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998).

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

B. The Requirements of Rule 23(b) are met.

Plaintiffs move to certify the class under Rule 23(b)(2) and 23(b)(3). Certification is appropriate under either standard.

1. Plaintiffs meet the requirements of 23(b)(2).

Rule 23(b)(2) provides: “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.” Here, Plaintiffs allege that Defendants calculated the utility allowances for the plaintiff class in a uniform manner and uniformly failed to update those allowances. Plaintiffs also allege that Defendants 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, Plaintiffs allege that 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.

The fact that Plaintiffs are also seeking monetary damages does not bar certification under Rule 23(b)(2). 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”). Here, damages are not the predominant relief sought as Plaintiffs are

seeking an injunction requiring Defendants to update utility allowances on an ongoing basis that will benefit Westlake's current and future tenants for years to come.

2. Plaintiffs meet the requirements of 23(b)(3).

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.

For the following reasons, the predominance requirement is met.

First, the common questions presented by Plaintiffs predominate over any individual differences. 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. Epstein v. Weiss, 50 F.R.D. 387, 391 (D.C.E.D. La. 1970) (citing Harris, 329 F.2d at 914). Here, Defendants' alleged breaches of 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 Westlake Apartments. For all members of the putative class, Plaintiffs

allege that 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.

Although the alleged damages each class member has suffered is different — depending on the time frames that members resided at Westlake — 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 and distributed by formula, as is the case here. See In re Hawai'i Beer Antitrust Litigation, 1978 U.S. Dist. LEXIS 15905, *15 (D. Haw. 1978).

The relief sought by Plaintiffs can be calculated by a consistent method across the class based on when increases to utility rates occurred, when the Defendants should have raised the allowance for the project and to what dollar amount.

Second, 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. 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 Plaintiffs have successfully fulfilled the Requirements of Rule 23(a) and 23(b), the Court holds that certification of the putative class is warranted. Plaintiffs' Motion for Class Certification is GRANTED.

IT IS HEREBY FURTHER ORDERED:

1. Pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure, the

Court hereby certifies this matter as a class action. The class is defined as follows:

All persons who are, were, or will be head of household tenants at Westlake Apartments 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 Westlake Apartments.

2. The Court hereby designates Plaintiffs Beverly Blake, Stephanie Camilleri, and Arlene Supapo as the Class Representatives.
3. The Court hereby appoints William Durham, Esq., Gavin Thornton, Esq., and Victor Geminiani, Esq. Lawyers for Equal Justice, P.O. Box 37952, Honolulu, HI 96837 (808) 587-7605; and Paul Alston and Jason Kim, Alston Hunt Floyd & Ing, 1001 Bishop Street, 18th Floor, Honolulu, HI 96813 (808) 524-1800 as Class Counsel.
4. The Court hereby makes the following findings:
 - a. The class is sufficiently numerous that joinder of all class members is impracticable;
 - b. There are questions of fact and law common to all class members;
 - c. The class representatives' claims are typical of the class's claims;
 - d. The class representative can fairly and adequately represent the class's interests;
 - e. Defendants have acted or refused to act on grounds

generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole; and

- f. The questions of law or fact common to class members predominate over any questions affecting only individual members and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.
5. The Class claim is defined as follows:
- The actions and pattern, practices, and policies of the Defendants that unlawfully violate the United States Housing Act, Hawai‘i’s unfair trade and deceptive practices act, and Hawai‘i contract law.
6. Accordingly, pursuant to Rule 23(a), (b)(2), and (b)(3), the Court hereby certifies the classes defined in ¶ 1, above.
7. The Court further orders the parties to meet and confer within 10 calendar days of the filing of this Order to agree on the proposed notice to potential class members pursuant to F.R.C.P. Rule 23(d)(2) and to agree on a method for ascertaining the identity of class members and providing the best notice practicable under the

circumstances to those class members. The notice shall be submitted to the Court within 20 calendar days of the filing of this Order.

DATED: Honolulu, Hawai`i, October 30, 2008.



/S/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States Magistrate Judge

BEVERLY BLAKE, ET AL. V. CRAIG NISHIMURA, ET AL; CIVIL NO. 08-00281 SPK-LEK; ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION