



Plaintiff-Intervenor,  
v.  
ALOHA BED & BREAKFAST, a Hawai'i  
sole proprietorship,  
Defendant

) **PHYLLIS YOUNG; DECLARATION**  
) **OF SHAWN A LUIZ; EXHIBITS "1"-**  
) **"19"; NOTICE OF HEARING MOTION;**  
) **CERTIFICATE OF SERVICE**

) HEARING:  
) DATE: \_\_\_\_\_  
) TIME: \_\_\_\_\_  
) JUDGE: Edwin C. Nacino  
)  
) Trial Date: November 4, 2013  
)  
)  
)

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant ALOHA BED & BREAKFAST, a Hawai'i sole proprietorship, above-named, and hereby files its motion for summary judgment in accordance with Hawai'i Rules of the Circuit Courts, Rule 7, and in accordance with Hawai'i Rules of Civil Procedure, Rules 7 and 56, the Memorandum in Support, the attached exhibits, declaration of counsel and the records and files herein.

Dated: Honolulu, Hawai'i, February 20, 2013.



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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAI'I

DIANE CERVELLI and TAEKO BUFFORD, )  
 )  
 Plaintiffs, ) CIVIL NO. 11-1-3103-12 ECN  
 ) (Other Civil Action)  
 )  
 WILLIAM D. HOSHIJO, as Executive ) **MEMORANDUM IN SUPPORT OF**  
 Director of the Hawai'i Civil Rights ) **DEFENDANT'S SUMMARY**  
 Commission, ) **JUDGMENT MOTION**  
 )  
 Plaintiff-Intervenor, )  
 )  
 v. )  
 )  
 ALOHA BED & BREAKFAST, a Hawai'i )  
 sole proprietorship, )  
 Defendant )  
 . )  
 )  
 \_\_\_\_\_ )

**MEMORANDUM IN SUPPORT OF DEFENDANT'S**  
**SUMMARY JUDGMENT MOTION**

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## Introduction

At the center of this lawsuit stands a house. It sits on a quiet street and is a typical family home. It contains 1,926 square feet and has four bedrooms, two and a half bathrooms, a family room, dining room, living room, and kitchen. It is functional, and comfortable, but not extravagant. The house is similar to countless others. To the casual observer there would not appear to be anything special about this house. But the house *is* special. It is *home* to Don and Phyllis Young. It is very special to *them*, just as the homes of the Judge, attorneys, and other litigants in this case are special to them. Don and Phyllis have owned their home for 35 years. They forged the bonds of their marriage there. They raised their children there. They laughed and played there. They entertained there. Their memories are there, in this house, their family home.

Now in their retirement years, the Youngs rent up to three rooms in their home from time to time to supplement their income and pay the mortgage. Mrs. Young calls her rental business Aloha Bed & Breakfast (“Aloha”). The Youngs still live there, in their family home. It is still the gathering place for their (now) adult son and daughter and their families. But in addition to providing shelter and memories at every turn, it now provides a small amount of income.

In this action, Plaintiffs Diane Cervelli and Taeko Bufford (the “Plaintiffs”) allege that Mrs. Young refused to rent them a room in her home because of their sexual orientation. Mrs. Young admits this. Renting to a cohabitating same-sex couple violates her sincerely held religious beliefs. Despite this, Plaintiffs filed a complaint, alleging that Mrs. Young violated Hawai’i Revised Statutes, Chapter 489 (the “Public Accommodations Law”), which prohibits discrimination on the basis of sexual orientation in places of public accommodation. (Ex. 1, *Complaint, passim.*)

The Plaintiffs' complaint against Aloha fails as a matter of law for three reasons. First, Aloha is not subject to the Public Accommodations Law. Rather, it is the home and residence of Mr. and Mrs. Young. So the rental of rooms in Aloha is subject to Hawai'i Revised Statutes, Chapter 515 (the "Fair Housing Law"), not the Public Accommodations Law. And the Fair Housing Law exempts Aloha from discrimination claims. *See infra*, Part I. Second, constitutional principles forbid the State from forcing Mrs. Young to rent a room in her own home to someone she does not want to, and thus the constitutional avoidance doctrine demonstrates that Aloha is not subject to the Public Accommodations law. *See infra*, Part II. Third, even if Aloha were subject to the Public Accommodations Law, applying that statute to compel Mrs. Young to rent a room to unwanted guests would violate myriad state and federal constitutional rights, including the right to privacy, intimate association, and free exercise of religion. *See infra*, Part III.

### **Statement of Facts**

Mr. and Mrs. Young reside in their family home at 909 Kahauloa Place, Honolulu, HI. (*Declaration of Phyllis Young* ("Young Decl."), ¶ 1.) It contains 1,926 square feet and has 10 ½ rooms. (*Young Decl.*, ¶¶ 2-3.) There are 4 bedrooms, 2 ½ bathrooms, a family room, dining room, living room, and kitchen. (*Young Decl.*, ¶ 3.) Mr. and Mrs. Young have owned this house for 35 years. (*Young Decl.*, ¶ 4.) It is their family home, where they raised their children and are visited by their grandchildren. (*Young Decl.*, ¶¶ 5-7.) Mrs. Young sometimes rents a room, or two or three, of her home. (*Young Decl.*, ¶ 7.) Mrs. Young calls her rental business "Aloha Bed & Breakfast." (*Young Decl.*, ¶ 8.) Aloha has no checking account. (*Young Decl.*, ¶ 9.) All payments for rooms in Aloha are made payable to Mrs. Young. (*Young Decl.*, ¶ 9.)

Unlike hotels, Aloha has no employees. (*Young Decl.*, ¶ 10.) There is no clerk, or office into which members of the public enter. (*Young Decl.*, ¶¶ 10-11.) In fact, people may not enter

Mrs. Young's home without her permission. (*Young Decl.*, ¶ 12.) She generally keeps her door locked, just like other homeowners. (*Young Decl.*, ¶ 12.) No one has ever even knocked on her door and asked to stay in Aloha. (*Young Decl.*, ¶ 13.) "Aloha" is not listed in the phone book. (Ex. 20, ¶ 14.) The residence's listing is under the name of Don and Phyllis Young. (*Young Decl.*, ¶ 14.) When someone phones, Mrs. Young answers with some variation of, "Hello, this is Phyllis." (*Young Decl.*, ¶ 15.) She does not reference Aloha when answering the phone. (*Young Decl.*, ¶ 15.)

Mrs. Young tries to make each guest's visit to Aloha special. For instance, she and her husband sometimes share dinner or wine with her guests. (*Young Decl.*, ¶¶ 17-18.) She allows children staying in Aloha to play with her own children's and grandchildren's toys and books. (*Young Decl.*, ¶ 18.) Mrs. Young has, on occasion, prayed with her guests. (*Young Decl.*, ¶ 19.) She has invited them to attend the Thursday night Bible study she and her husband host in their home. (*Young Decl.*, ¶ 20.) She has also shared Christian-themed movies with her guests. (*Young Decl.*, ¶ 21.) Sometimes Mrs. Young takes guests to Costco with her. (*Young Decl.*, ¶ 22.) Mrs. Young notes that "people come in as guests and leave as friends." (*Young Decl.*, ¶ 23.) Guests frequently hug her husband and her when their stay is finished. (*Young Decl.*, ¶ 24.) Guests also regularly invite Mrs. Young and her husband to visit them and stay for free. (*Young Decl.*, ¶ 25.)

At any given time, Mrs. Young will rent between one and three rooms in her home. (*Young Decl.*, ¶ 7.) She never has rented more than three rooms. (*Young Decl.*, ¶ 7.) Mrs. Young gives her guests a key that opens all doors to her home. (*Young Decl.*, ¶ 12.) Guests use Mrs. Young's personal washing machine and dryer. (*Young Decl.*, ¶ 27.) She, her husband, and her guests all share the living space of the house, including the family room, bathrooms and kitchen. (*Young Decl.*, ¶ 26.) The Youngs and their guests "rub shoulders" in the house. For instance,

sometimes they find themselves relaxing in the family room at the same time. (*Young Decl.*, ¶ 26.) Mrs. Young stores some of her personal belongings in the closet of each room she rents to her guests. (*Young Decl.*, ¶ 28.) She also allows guests to use her personal computer, located in her own bedroom. (*Young Decl.*, ¶ 27.) Because of the intimate living arrangements Mrs. Young shares with her guests, she is selective in determining who she will welcome into her home. (*Young Decl.*, ¶ 29.) And she will not allow couples to stay in Aloha if allowing them to do so would violate her sincerely held religious convictions. (*Young Decl.*, ¶ 30.)

The Plaintiffs asked to rent a room in Mrs. Young's home. (*Young Decl.*, ¶ 31.) Mrs. Young declined because allowing a lesbian couple to share a room with only one bed in her home violates Mrs. Young's sincerely held religious beliefs. (*Young Decl.*, ¶¶ 32-33.) The Plaintiffs complained to the Civil Rights Commission and then filed this lawsuit.<sup>1</sup> If Mrs. Young is subjected to the Public Accommodations Law, she will cease renting rooms rather than violate her religious beliefs. (*Young Decl.*, ¶ 34.) The Youngs may then lose their home, as they cannot pay the mortgage without renting rooms in their home. (*Young Decl.*, ¶ 35.)

## **Argument**

### **Standard of Review**

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 104, 839 P.2d 10, 22,

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<sup>1</sup> Aloha moved to dismiss the Plaintiffs' complaint because the two year statute of limitations had run. *See* Haw. Rev. Stat. § 657-7. (*Defendant's Mot. to Dismiss*, Doc. 10, Jan. 10, 2012.) The Court denied Aloha's motion. (*Order*, Doc. 21, Feb. 21, 2012.) Aloha does not raise its statute of limitations defense in this motion for summary judgment, but does preserve the defense, and the Court's denial of it, for appeal.

*recons. den.*, 74 Haw. 650, 843 P.2d 144 (Haw. 1992); *see also* Haw. R. of Civ. Pro. Rule 56(c). “A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.” *Hulsman v. Hemmeter Dev. Corp.*, 65 Haw. 58, 61, 647 P.2d 713, 716 (1982); *Foytik v. Chandler*, 88 Haw. 307, 314, 966 P.2d 619, 626 (1998). “The evidence must be viewed in the light most favorable to the non-moving party.” *Coon v. City and County of Honolulu*, 98 Haw. 233, 244, 47 P.3d 348, 359 (Haw. 2004). The moving party bears the burden “to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law.” *French v. Hawai’i Pizza Hut, Inc.*, 105 Haw. 462, 470, 99 P.3d 1046, 1054 (Haw. 2004). Aloha meets this standard. Summary judgment is appropriate.

#### **I. Aloha Is Subject To the Fair Housing Law, Not the Public Accommodations Law.**

The Plaintiffs allege that Aloha discriminated against them on the basis of their sexual orientation, in violation of Hawai’i’s Public Accommodations Law, which is codified at Hawai’i Revised Statutes, Chapter 489. (Ex. 1 at ¶¶ 29-39.) The threshold question is whether Aloha is a public accommodation subject to that statute. If not, the Plaintiffs’ claims fail as a matter of law.

Aloha is not a public accommodation subject to Chapter 489. Rather, Aloha is a private residence whose owner rents rooms within it. Such real estate transactions are subject to the Fair Housing Law, codified at Hawai’i Revised Statutes Chapter 515 *et seq.* Aloha therefore cannot be found to have engaged in illegal discrimination under the Public Accommodations Law. Further, Aloha has not engaged in illegal discrimination under the Fair Housing Law. Summary judgment in favor of Aloha is therefore warranted.

The Fair Housing Law, which is codified at Hawai’i Revised Statutes Chapter 515, applies to all real estate transactions, Haw. Rev. Stat. § 515-3, which it defines to include “the

sale, exchange, *rental, or lease of real property*[,]” Haw. Rev. Stat. § 515-2 (emphasis added). While the Public Accommodations Law is concerned with businesses generally open to the public, *see* Haw. Rev. Stat. § 489-2, the Fair Housing Law is concerned with more modest “housing accommodation[s],” which it defines as including “any improved or unimproved real property, or part thereof, which is used or occupied . . . *as the home or residence of one or more individuals.*” Haw. Rev. Stat. § 515-2 (emphasis added). So, for example, the Public Accommodations Law applies to inns, hotels, and motels—indeed, it lists them as “public accommodations.” Haw. Rev. Stat. § 489-2. They are open to the public. Anyone can walk through their doors, at any hour of the day or night, without any invitation from the owner. Often they have a restaurant into which the public may come during normal dining hours to purchase food and eat their meals whether they have rented a room or not. Their doors are rarely if ever locked and they stand open to all comers. They are public accommodations.

But Aloha is different. It is a private home. Mrs. Young and her husband live there. Her grandchildren visit there. Her belongings are there. The public may not walk through its doors without invitation. Rather, Aloha’s doors are locked. The only people who may enter are those who the Youngs invite inside. Aloha is thus notably different from an inn or hotel. It is what Chapter 515 calls a “housing accommodation,” Haw. Rev. Stat. § 515-2, “occupied . . . as the home or residence of one or more individuals[.]” *id.* And the rental of rooms within it is subject to Chapter 515’s provisions relating to the “rental or lease” of such property, *id.*, not Chapter 489’s provisions relating to public accommodations.

**A. The Text of the Law Confirms That Aloha Is Subject To the Fair Housing Law, Not the Public Accommodations Law.**

The Fair Housing Law prohibits discriminatory selling, leasing, and rental practices. Haw. Rev. Stat. § 515-3. But it “does not apply [] [t]o the rental of a room or up to four rooms in

a housing accommodation by an owner or lessor if the owner or lessor resides in the housing accommodation.<sup>2</sup> Haw. Rev. Stat. § 515-4(a)(2). This comports with the “Mrs. Murphy” exemption in federal law, which exempts those who rent four or fewer rooms in their own homes from the provisions of Title VIII of the Civil Rights Act of 1968. 42 U.S.C. § 3603(b)(2).<sup>3</sup>

The conditions to receive a “Mrs. Murphy’s” exemption, as codified in both federal and Hawai’i law, perfectly describe Aloha. Its owner, Mrs. Young, resides within it. And when she rents, she rents no more than three rooms. Mrs. Young, and Aloha, therefore qualifies for a “Mrs. Murphy’s” exemption under both federal law and Hawai’i’s Fair Housing Law.

This is significant. It clarifies that Aloha is exempt from the applicable antidiscrimination law. It also demonstrates that Hawai’i’s legislature contemplated that homeowners who sometimes rent rooms, like the Youngs do, are subject to the Fair Housing Law, which addresses them and their situation, instead of the Public Accommodations Law, which does not.

**B. Principles of Statutory Construction Confirm That Aloha Is Subject To the Fair Housing Law, Not the Public Accommodations Law.**

It strains believability to suppose that the legislature intended in Chapter 515 to give property owners like Mrs. Young immunity from laws prohibiting discrimination on the basis of sexual orientation, only to make them subject to such laws in Chapter 489. It is even more unbelievable to think that the legislature intended to classify as “illegal discrimination” in Chapter 489 *the very same act* it said was not illegal discrimination in Chapter 515, namely, the renting of fewer than five rooms in a housing accommodation. As applied to Aloha, the

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<sup>2</sup> A “housing accommodation” includes “any improved or unimproved real property, or part thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home or residence of one or more individuals.” Haw. Rev. Stat. § 515-2.

<sup>3</sup> This is known as “Mrs. Murphy” exemption because the law would not reach the proverbial “Mrs. Murphy’s boardinghouse.” *U.S. v. Space Hunters, Inc.*, 429 F.3d 416, 425 (2d Cir. 2005) (quoting 114 Cong. Rec. 2495, 3345 (1968)).

nondiscrimination provisions in the Public Accommodations Law and the Fair Housing Law stand in conflict with one another. One cannot be applied without abrogating the other.

Hawai'i courts recognize that where—as here—there is an irreconcilable conflict between a general statute and a specific one, the specific statute controls. *Wong v. Takeuchi*, 88 Haw. 46, 53, 961 P.2d 611, 618 (Haw. 1998) (*quoting State v. Vallesteros*, 84 Hawai'i 295, 303, 933 P.2d 632, 640, *recons. den.*, 84 Hawai'i 496, 936 P.2d 191 (Haw. 1997)). As applied to Aloha, the Public Accommodations Law is general while the Fair Housing Law, which addresses Aloha's actual situation, is specific. The Fair Housing Law's specific exemption to the antidiscrimination provision for owners who rent fewer than five rooms of the home where they themselves reside is controlling: Aloha is subject to the Fair Housing Law, not the Public Accommodations Law.<sup>4</sup>

**C. Honolulu's Land Use Ordinance Confirms That Aloha Is Subject To the Fair Housing Law, Not the Public Accommodations Law.**

Honolulu's Land Use Ordinance defines a “bed and breakfast *home*” as a house “in which overnight accommodations are provided to guests for compensation, for periods of less than 30 days, in the same detached dwelling as that occupied by an owner, lessee, operator or proprietor of the detached dwelling.” LUO § 21-10.1 (emphasis added). A “detached dwelling” is “a building containing one or two dwelling units, entirely surrounded by yards or other separation from buildings on adjacent lots.”*Id.* A “dwelling unit” is “a room or rooms connected together, constituting an independent housekeeping unit for a family and containing a single kitchen.” *Id.* Aloha perfectly fits the statutory definition for a “bed and breakfast home.” But it does not fit the definition for a hotel, which is “a building or group of buildings containing

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<sup>4</sup> Plaintiff Bufford sent Mrs. Young an email admitting that an exemption from the antidiscrimination law was available to Mrs. Young. *See* Exs. 3, 5. This admission against interest demonstrates that she knew that a private home was not a public accommodation.

lodging and/or dwelling units offering transient accommodations, and a lobby, clerk's desk or counter with 24 hour clerk service, and facilities for registration and keeping of records relating to hotel guests." LUO § 21-10.1. Aloha does not have those things. *See* Statement of Facts. So Aloha is zoned as a home, not a hotel. *Hotels* are subject to the Public Accommodations Law. But a bed and breakfast home is equivalent to a "housing accommodation" as defined in the Fair Housing Law. Aloha is subject to the Fair Housing Law, not the Public Accommodations Law.

**D. Persuasive Case Law Shows That The Public Accommodations Law Does Not Apply.**

The federal Americans with Disabilities Act (the "ADA"), codified at 42 U.S.C. §§ 12181-89, prohibits public accommodations from discriminating on the basis of disability. 42 U.S.C. § 12182(a). But the Ninth Circuit Court of Appeals ruled that entities are not subject to the ADA, even when they meet the ADA's definition of public accommodation, if they are not open to the general public but require an invitation from the owner to enter. *Jankey v. Twentieth Century Fox Film Corp.*, 212 F.3d 1159, 1161 (9th Cir. 2000).

*Jankey* is persuasive. Twentieth Century Fox operated a film and production facility, which only Fox employees and their guests could enter it. *Id.* An Automatic Teller Machine (ATM), commissary, and store were inside. *Id.* The ADA defines restaurants, sales and rental establishments, and banks or other service establishments as "public accommodations" falling within its parameters. *Id.* The plaintiff, who was confined to a wheelchair, often visited the facility on a visitor's pass. *Id.* He alleged that because the ATM, commissary, and store were not wheelchair accessible, Fox violated the ADA. *Id.* The Ninth Circuit ruled otherwise. Although the ATM, commissary, and store fit within the ADA's definition of public accommodation, the Ninth Circuit ruled that they were not public accommodations subject to the ADA because they

were not open to the general public. *Id.* The court noted that another federal statute exempted establishments not open to the public from complying with the antidiscrimination laws. *Id.*

*Jankey* thus establishes that federal public accommodations law does not include entities that the general public may not enter without invitation, particularly where another federal statute exempts those entities from antidiscrimination law. Similarly, here, the general public may not enter Aloha without an invitation from Mrs. Young, and another Hawai'i statute specifically exempts housing accommodations from antidiscrimination laws when their owner resides within them and they rent four or fewer rooms. *See infra* Part I.A. This Court should follow the Ninth Circuit's lead and rule that the Public Accommodations Law cannot apply to Aloha.

In sum, the Plaintiffs allege only that Aloha violated the Public Accommodations Law. But Aloha is not subject to the Public Accommodations Law. Further, Aloha is exempt from the only antidiscrimination law that arguably applies to it. The Plaintiffs' claims therefore fail as a matter of law and summary judgment in Aloha's favor is appropriate.

## **II. Hawai'i's Antidiscrimination Laws Should Be Interpreted to Avoid Constitutional Difficulties Rising From Intimate Association Guarantees.**

Both the United States and Hawai'i Constitutions protect the right to intimate association in our own homes. The source of this right is found, among other places, in the First, Third, Fourth, and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 4, 5, 6, 7, and 18 of the Hawai'i Constitution. "[T]he freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty[.]" *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). The Court "ha[s] not attempted to mark the precise boundaries of this type of constitutional protection." *Id.* But "cohabitation" is a protected intimate association. *Id.* (noting that "cohabitation with relatives" is protected and that "we have not held that constitutional protection is restricted to relationships

among family members.”). The Court looks to “such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship” to determine whether a relationship is an intimate association. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984). Relationships without those qualities, “such as a large business enterprise[,]” are not intimate associations. Relevant factors for deciding whether an association is an intimate one “include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.” *Id.*

It is difficult to imagine an intimate association greater than the one we have with those with whom we choose to share our homes. Indeed, constitutional provisions provide great protection from State intrusion into our homes. The Fourth Amendment to the federal Constitution and Article I, Section 7 of the Hawai’i Constitution prohibit the State from entering our home without our permission unless it obtains a court warrant. The Third Amendment to the federal Constitution and Article I, Section 18 of the Hawai’i Constitution prohibit the State from forcing us to take soldiers into our homes during peacetime. “[I]t is beyond dispute that the home is entitled to special protection as the center of the private lives of our people.” *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).

Not only do constitutional principles prevent the State bursting uninvited into our homes or quartering soldiers in our homes, they also protect us from being forced to take guests into our homes. As the Supreme Court recognized, “[w]e are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings.” *Minnesota v. Olson*, 495 U.S. 91, 99 (1990). We naturally want to maintain “a high degree of selectivity,” *Roberts*, 468 U.S. at 620, in determining with whom we share our homes. Constitutional protection for intimate associations guarantees our right to do so.

Subjecting Aloha to the Public Accommodations Law would violate this constitutional guarantee by forcing Mrs. Young to share her private home with housemates she does not desire. Constitutional guarantees cannot tolerate this level of State intrusion into our homes.

The Ninth Circuit Court of Appeal's recent decision in *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012), is instructive. An online service ("Roommate") asked users to identify their sex, sexual orientation, and familial status. *Id.* at 1218. Roommate also asked users to identify their preferences for their roommates' sex, sexual orientation, and familial status. *Id.* It used those responses to match roommates. *Id.* The plaintiffs sued, alleging that Roommate's practices violated the federal Fair Housing Act (the "FHA"), 42 U.S.C. 3601 *et seq.*, which prohibits discrimination on the basis of "race, color, religion, sex, familial status, or national origin" in the "sale or rental of a dwelling."<sup>5</sup> *Id.* That case thus presented the same question that this case does: may the State apply nondiscrimination statutes against private homeowners to compel them to take all comers into their homes as housemates?

The Ninth Circuit held that nondiscrimination laws would raise severe intimate associational concerns if applied to homeowners inviting roommates into their private homes. *Id.* at 1222. The court recognized that "it's hard to imagine a relationship more intimate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, and even bedrooms." *Id.* at 1221. It further explained that "[h]olding that the FHA applies inside a home or apartment would allow the government to restrict our ability to choose roommates compatible with our lifestyles." *Id.* at 1221. Because "[t]aking on a roommate means giving him full access to the space where we are most vulnerable[.]" such a decision "would be a serious invasion of

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<sup>5</sup> 42 U.S.C. § 3604(b). The FHA defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families." 42 U.S.C. § 3602(b). This is materially similar to Hawai'i's Fair Housing Law's "housing accommodation," which is defined above.

privacy, autonomy and security.” *Id.* That is why the Department of Housing and Urban Development dismissed a complaint against a young woman who advertised that she was “looking for a female christian roommate.” *Id.* at 1222 (*citing Fair Hous. Ctr. of W. Mich. v. Tricia*, No. 05-10-1738-8 (Oct. 28, 2010) (Determination of No Reasonable Cause)).

To avoid these constitutional concerns, the Ninth Circuit interpreted the FHA so that it did not apply to private homeowners sharing space with others in their own homes. *Id.* at 1222. This followed the “well-established principle that statutes will be interpreted to avoid constitutional difficulties.” *Id.* (*citing Frisby v. Schultz*, 487 U.S. 474, 483 (1988)). This Court should likewise interpret Hawai’i’s nondiscrimination laws so as not to violate intimate association guarantees. Mrs. Young accepts serial roommates into her private home. She shares living space with them. They have access to her house and belongings. The same intimate association concerns identified by the Ninth Circuit in *Fair Housing Council* are present here.

The constitutional avoidance doctrine is even more warranted here because (as discussed below) the constitutional right to privacy, one source of the right to intimate associations in a person’s own home, is even stronger under Hawai’i’s Constitution than under the United States Constitution. *State v. Kam*, 69 Haw. 483, 491, 748 P.2d 372, 377 (Haw. 1988).

This Court can avoid these constitutional problems by recognizing that Aloha is subject to the State’s Fair Housing Law, not the Public Accommodations Law. *See supra*, Part I. Under the Fair Housing Law, Aloha has a “Mrs. Murphy” exemption from the nondiscrimination requirement. Haw. Rev. Stat. § 515-4. Interpreting the law this way avoids the constitutional problems caused by the State compelling a homeowner to accept a housemate she does not want.

### **III. Subjecting Aloha To the Public Accommodations Law Violates Multiple Constitutional Rights and Fails the Required Strict Scrutiny Review.**

Applying the Public Accommodations Law to Mrs. Young's home violates many rights under the United States Constitution and the Hawai'i Constitution. Because such an application cannot survive strict scrutiny review, the Plaintiffs' claims must fail as a matter of law.

#### **A. Strict Scrutiny Applies To Burdens On Privacy Rights.**

Hawai'i's Constitution provides that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." Haw. Const. art. 1, § 6. The Hawai'i Constitution must be construed with regard to the intent of the framers and the people adopting it. *State v. Miyasaki*, 62 Haw. 269, 281, 614 P.2d 915, 922 (Haw. 1980). The framers declared that the right to privacy is "the most important right of all—the right to be left alone"—and stated that "it is treated as a fundamental right subject to interference only when a compelling state interest is demonstrated." *Kam*, 69 Haw. at 493, 748 P.2d at 378 (*citing* Stand. Comm. Rep. No. 69, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 674–75 (1980) *and* Committee of the Whole Rep. No. 15, at 1024)). They also explained that "this privacy concept encompasses the notion that in certain highly personal and intimate matters, the individual should be afforded freedom of choice absent a compelling state interest [i.e., the strict scrutiny standard]." *Id.* (*citing* Committee of the Whole Rep. No. 15, at 1024).

People have a right to privacy in their own home. *See State v. Matias*, 51 Haw. 62, 66, 451 P.2d 257, 260 (Haw. 1969) (finding that even an overnight guest had a right to privacy in his place of lodging). The Hawai'i Supreme Court ruled in *Matias* that a right to privacy exists "wherever" people "may legitimately be and reasonably expect freedom from governmental intrusion[.]" *Id.* The Hawai'i Constitution explicitly guarantees the people the right to be "secure in their . . . houses" against State intrusion. Haw. Const. art. 1, § 7. The constitutional,

fundamental right to privacy therefore extends to homes, including Mrs. Young's home. Strict scrutiny must apply.

**B. Strict Scrutiny Applies To Burdens On Intimate Association Rights.**

As discussed in Section II above, constitutional rights of intimate association will not tolerate the State forcing a homeowner to accept a housemate with whom she does not want to share her residence. The Plaintiffs allege that Mrs. Young discriminated against them by refusing to allow them to stay in her private home. Because applying the Public Accommodations Law to Mrs. Young would force her to accept anyone protected by that statute as an overnight guest in her home, this would impose a direct and substantial burden on her intimate association rights. Strict scrutiny thus applies. *See Louisiana Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1498 (5th Cir. 1995) (discussing *Rotary Club of Duarte*, 481 U.S. at 544). Moreover, application of this heightened standard is bolstered by the Hawai'i Constitution's strong protection of privacy rights, as discussed in the previous section.

**C. Strict Scrutiny Applies To Burdens On Free Exercise Rights Under the Hawai'i Constitution.**

Applying the Public Accommodations Law would substantially burden Mrs. Young's free exercise rights. A substantial burden on free exercise exists where the State pressures a person to violate her religious convictions by conditioning a benefit or right on faith-violating conduct. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981). By forcing Mrs. Young "to choose between following the precepts of her religion and forfeiting [the right to rent rooms], on the one hand, and abandoning one of the precepts of her religion in order to [maintain that right], on the other hand," this application of the Public Accommodations Law would impose a substantial "burden upon the free exercise of

religion.” See *Sherbert*, 374 U.S. at 404; see also *Thomas*, 450 U.S. at 717-18 (“While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.”).

Strict scrutiny should apply to this burden on free exercise rights under the Hawai’i Constitution. This was the standard that prevailed for both state and federal free exercise claims until 1990, when the U.S. Supreme Court limited the federal constitutional protection in some cases, stating that “the right of free exercise [under the United States Constitution] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

In response, twenty-nine States insisted that all laws burdening their citizens’ free exercise of religion must survive heightened review. Eighteen States enacted Religious Freedom Restoration Acts, which restored strict scrutiny for laws burdening the free exercise of religion.<sup>6</sup> Another twelve States’ supreme courts have interpreted their state constitutions’ free exercise protections to require heightened constitutional scrutiny.<sup>7</sup> Hawai’i has not definitively decided whether it will follow *Smith*’s approach or the twenty-nine States that have adopted an approach

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<sup>6</sup> Ala. Const. art. I, § 3.01; Ariz. Rev. Stat. Ann. § 41-1493; Conn. Gen. Stat. Ann. § 52-571b; Fla. Stat. Ann. §§ 761.01-05; Idaho Code Ann. § 73-402; 775 Ill. Comp. Stat. Ann. 35/1-99; Mo. Rev. Stat. § 1.302; N.M. Stat. Ann. §§ 28-22-1 to -5; Okla. Stat. Ann. tit. 51, § 251; 71 Pa. Stat. Ann. § 2404; R.I. Gen. Laws §§ 42-80.1-1 to -4; S.C. Code Ann. §§ 1-32-10 to -60; Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001 to .012; La. Rev. Stat. Ann. § 13:5233; Tenn. Code Ann. § 4-1-407; VA. Code Ann. § 57-2.02.

<sup>7</sup> *Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me. 2005); *Larson v. Cooper*, 90 P.3d 125, 131 (Ala. 2004); *Valley Christian School v. Mont. High School Ass’n*, 86 P.3d 554 (Mont. 2004); *Odenthal v. Minnesota Conf. of Seventh-Day Adventists*, 649 N.W.2d 426, 442 (Minn. 2002); *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment*, 744 N.E.2d 443, 445-51 (Ind. 2001); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *Open Door Baptist Church v. Clark County*, 995 P.2d 33, 39 (Wa. 2000); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 466 (N.Y. 2006); *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998); *State v. Miller*, 549 N.W.2d 235, 238-42 (Wis. 1996); *Attorney General v. Desilets*, 636 N.E.2d 233, 235-41 (Mass. 1994).

more protective of religious liberty. But there are at least two reasons why this Court should find that strict scrutiny applies to a Free Exercise claim under the Hawai'i Constitution.

First, and most important, the Hawai'i Supreme Court has already indicated how it will proceed when the scrutiny question is presented to it. In *Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan*, 87 Haw. 217, 247, 953 P.2d 1315, 1345 (Haw. 1998), the Court said it would apply strict scrutiny to laws burdening free exercise rights. *Id.* Although the Court's statement is dicta, it provides explicit guidance to lower courts and should be followed here. Because the Public Accommodations Law, as applied to Aloha, burdens Mrs. Young's free exercise rights, and because the Hawai'i Supreme Court has given such clear guidance as to the level of scrutiny it would apply to laws burdening such rights, this Court should apply strict scrutiny.

Second, the Hawai'i Supreme Court has "long recognized" that it is "free to give broader protection under the Hawai'i Constitution than that given by the federal constitution." *State v. Viglielmo*, 105 Haw. 197, 211, 95 P.3d 952, 966 (Haw. 2004) (citations omitted). It has regularly done so with various state constitutional rights. *See, e.g., Kam*, 69 Haw. at 491, 748 P.2d at 377 (privacy rights); *State v. Rogan*, 91 Haw. 405, 423, 984 P.2d 1231, 1249 (Haw. 1999) (double jeopardy rights); *State v. Santiago*, 53 Haw. 254, 266, 492 P.2d 657, 664 (Haw. 1971) (freedom from self-incrimination); *State v. Hoey*, 77 Haw. 17, 36, 881 P.2d 504, 523 (Haw. 1994) (custodial interrogation rights). And the Hawai'i Supreme Court has already signaled in *Korean Buddhist* that broader protection exists under the state Free Exercise Clause and that strict scrutiny applies to laws burdening those rights.<sup>8</sup>

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<sup>8</sup> A departure under the Hawai'i Constitution from the federal free exercise standards adopted in *Smith* is additionally warranted because *Smith* is flawed and has been resoundingly criticized. *See, e.g.,* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1111 (1990); Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591, 592-93 (1991).

**D. Strict Scrutiny Applies To Burdens On Free Exercise Rights Under the United States Constitution Because Other Constitutional Rights Are Also Burdened.**

In *Smith*, the U.S. Supreme Court explained that it applies strict scrutiny to laws burdening First Amendment free exercise rights when some other constitutional right is also burdened. *Smith*, 494 U.S. at 881. As discussed above, applying the Public Accommodations Law here would burden privacy and intimate association rights in addition to free exercise rights. Thus, strict scrutiny applies to the federal free exercise analysis.

Additionally, this application of the Public Accommodations Law will burden Mrs. Young's property rights under the Fifth Amendment to the United States Constitution and Article 1, Section 5 of the Hawai'i Constitution, both of which prohibit the taking of property by the State.<sup>9</sup> Because of her religious beliefs, Mrs. Young will be forced to cease renting rooms if the Public Accommodations Law is applied to her. This amounts to a taking of her right to rent her property. Also, the Youngs may lose their home, since they cannot pay their mortgage without their rental income. This too will amount to a taking of the Youngs' property.

**E. The Public Accommodations Law Fails Strict Scrutiny.**

To survive strict scrutiny, the State must demonstrate that the law furthers a "compelling state interest" and is "narrowly tailored" to that interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Narrow tailoring requires that the State employ "the least restrictive means" for achieving its compelling interest. *Thomas*, 450 U.S. at 718.

Strict scrutiny requires a particularized focus. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (discussing cases showing that strict scrutiny analysis demands a particularized focus on the parties and circumstances). The relevant

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<sup>9</sup> These constitutional property rights not only bolster free exercise claims; they provide an independent constitutional reason why the Public Accommodations Law cannot apply here.

government interest for strict scrutiny analysis thus is not the State's general interest in prohibiting discrimination, but its particular interest in forcing Mrs. Young to allow same-sex couples to rent a room in her home. *See Attorney Gen. v. Desilets*, 418 Mass. 316, 325-26, 636 N.E.2d 233, 238 (1994) ("The general objective of eliminating discrimination . . . cannot alone provide a compelling State interest that justifies the application of that section in disregard of the defendants' right to free exercise of their religion. The analysis must be more focused."). But *this*—forcing a homeowner to rent a room in her own home to a same-sex couple—would permit exactly what the constitutional rights of privacy and intimate association forbid. Overriding the Constitution in this manner is not even a legitimate interest, let alone a compelling one. The Public Accommodations Law, as applied to Mrs. Young and Aloha, must fail strict scrutiny.

Even if, contrary to U.S. Supreme Court guidance, the relevant interest is characterized more broadly—as ensuring that entities providing goods or services to the public treat same-sex couples the same as opposite-sex couples—the Plaintiffs cannot show that the State considers this to be a compelling government interest. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (alterations omitted). Here, because same-sex couples may not marry each other in Hawai'i, *see* Haw. Rev. Stat. § 572-1, the State and its political subdivisions treat same-sex couples differently than opposite-sex couples for myriad marriage-related purposes when providing services to the public. The State, quite plainly then, does not consider there to be a compelling government interest in eliminating a form of differential treatment that it authorizes and practices in its own operations.

Furthermore, even if the relevant interest is characterized even more broadly—such as ensuring that everyone has a place to stay in public accommodations—applying the Public

Accommodations Law to Mrs. Young is not the least restrictive means to achieve the interest. It is simply not necessary to force private homeowners to accept guests into their private homes to ensure that everyone has a place to stay in public accommodations. The State's interest is readily achieved through nondiscrimination laws applied to inns, hotels, and other establishments open to the general public. Applying the law to private homeowners and intruding into their choice of who to share their home with goes too far. It is not narrowly tailored and fails strict scrutiny.

Because the Public Accommodations Law as applied to Aloha cannot satisfy strict scrutiny review, it is unconstitutional as applied, thus warranting summary judgment for Aloha.

### **Conclusion**

This Court should grant summary judgment for Aloha. It is not a place of public accommodation subject to the Public Accommodations Law. It is Mr. and Mrs. Young's private home. As such, it is subject to the Fair Housing Act, which exempts it from antidiscrimination prohibitions. But even if the Public Accommodations Law did apply to Aloha, this application of the law cannot survive strict scrutiny review, and therefore cannot undergird the Plaintiffs' claims. Defendant Aloha Bed & Breakfast therefore respectfully asks this Court to grant its motion for summary judgment.

Dated: Honolulu, Hawai'i, February 20, 2013.



SHAWN A. LUIZ  
JAMES HOCHBERG  
JOSEPH P. INFRANCO (*Admitted Pro Hac Vice*)  
JOSEPH E. LA RUE (*Admitted Pro Hac Vice*)  
HOLLY L. CARMICHAEL (*Admitted Pro Hac Vice*)  
Attorneys for Defendant  
ALOHA BED & BREAKFAST

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAI'I

DIANE CERVELLI and TAEKO BUFFORD, ) CIVIL NO. 11-1-3103-12 ECN  
) (Other Civil Action)  
Plaintiffs, )  
) **DECLARATION OF PHYLLIS YOUNG**  
WILLIAM D. HOSHIJO, as Executive )  
Director of the Hawai'i Civil Rights )  
Commission, )  
)  
Plaintiff-Intervenor, )  
)  
v. )  
)  
ALOHA BED & BREAKFAST, a Hawai'i )  
sole proprietorship, )  
Defendant )  
\_\_\_\_\_ )

**DECLARATION OF PHYLLIS YOUNG**

I, Phyllis Young, hereby make the following declaration pursuant to Hawaii Rules of the Circuit Courts, Rule 7(g):

1. I reside, along with my husband Don Young, in our family home, which is located at 909 Kahauloa Place, Honolulu, HI. Wherever the word, "home," is used in this Declaration, I am referring to this family home that I share with Don and in which we both reside.
2. Our home contains 1,926 square feet.
3. Our home has 10 ½ rooms. It contains 4 bedrooms, 2 ½ bathrooms, a family room, dining room, living room, and kitchen.
4. Don and I have owned our home since 1978.
5. Don and I raised our children in this home.
6. Our home is still the gathering place for our adult children, their spouses, and their children—our grandchildren. Our children and grandchildren visit us in our home.

7. On occasion, I sometimes rent a room, or two, or three, of our home. I do this to provide income to help make ends meet and pay the mortgage. I have never rented more than three rooms at a time.

8. Although I had been renting out up to three of the rooms in the home from time to time for many years before 2008, on May 1, 2008 I registered the trade name "Aloha Bed & Breakfast" with the State of Hawaii, Department of Commerce and Consumer Affairs, Business Registration Division.

9. I do not have a separate checking account for Aloha Bed & Breakfast ("Aloha"). When someone rents one of the rooms in our home they make their payment payable to me, not to Aloha.

10. Aloha, does not have any employees—not even a maid or a clerk.

11. Aloha also does not have an office that is kept open to the general public.

12. As a general rule, I keep the doors to my home locked. The only people who can come into my home are those who I have invited inside. However, I give all my guests a key that opens all the doors to my home.

13. No one has ever knocked on my door to ask to rent a room in my home.

14. I do not list "Aloha" in the phone book. The only listing for my home is under the name of Don and Phyllis Young.

15. When the phone rings, I answer, "Hello, this is Phyllis," or with something comparable. I do not ever answer, "Hello, this is Aloha Bed & Breakfast." Nor do I ever reference Aloha when answering the phone.

16. I try to make the visit of every guest to my home special.

17. Sometimes Don and I share dinner or wine with our guests.

18. I let children who stay in our home play with my children's and grandchildren's toys and books.

19. Sometimes I pray with our guests.

20. I also sometimes invite our guests to attend the Thursday night Bible study we host in our home.

21. Sometimes I share Christian-themed movies with our guests.

22. On occasion, I even take my guests shopping at Costco with me.

23. My experience has been that people come in as guests and leave as friends. I try to make that true for all my guests.

24. Our guests frequently hug Don and me when their stay with us is finished.

25. Our guests also regularly invite Don and me to visit them when we are in their area and stay with them free of charge.

26. Our guests share all the living space of our home with Don and me. They are free to use our family room, bathrooms and kitchen. We have close contact with our guests in our home. Sometimes we find ourselves in the family room relaxing at the same time.

27. Our guests use our washing machine and dryer. They also are allowed to use my personal computer, which is located in Don's and my bedroom.

28. Our guests also have access to the closets in the rooms they rent. I store some of Don's and my personal belongings in those closets.

29. Because our guests are truly *guests* in my home, with full access to my home, I am very selective about whom I choose to allow to stay with Don and me.

30. I will never allow guests to stay with me if renting to them would violate my sincerely held religious beliefs.

31. Plaintiff Cervelli telephoned me and asked to rent one of the rooms in my house.

32. Upon learning that Ms. Cervelli wanted to stay in my house with her lesbian partner, and wanted to rent a room for them with a single bed, I declined to rent to her.

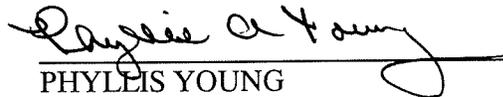
33. Renting a room with a single bed to a homosexual couple violates my sincerely held religious beliefs.

34. I will cease renting rooms in my home if my home is subject to the Public Accommodations Law so that I have to rent to everybody, even when doing so violates my sincerely held religious beliefs. I will not compromise my faith or violate it.

35. Don and I will struggle to make our mortgage payments without the extra income we acquire by renting rooms in our home.

I declare under penalty of law that the foregoing is true and correct to the best of my knowledge.

Executed on February 19, 2013 at Honolulu, Hawaii.

  
PHYLLIS YOUNG

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAI'I

DIANE CERVELLI and TAEKO BUFFORD, )  
 ) CIVIL NO. 11-1-3103-12 ECN  
Plaintiffs, ) (Other Civil Action)  
 )  
WILLIAM D. HOSHIJO, as Executive )  
Director of the Hawai'i Civil Rights )  
Commission, )  
 )  
Plaintiff-Intervenor, )  
 ) **DECLARATION OF SHAWN A. LUIZ**  
v. )  
 )  
ALOHA BED & BREAKFAST, a Hawai'i )  
sole proprietorship, )  
Defendant )  
 )  
 )  
 )

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**DECLARATION OF SHAWN A. LUIZ**

I, Shawn A. Luiz, Esq., counsel for Defendant ALOHA BED & BREAKFAST, a Hawai'i sole proprietorship, above-named, hereby makes the following declaration pursuant to Hawaii Rules of the Circuit Courts, Rule 7(g):

1. Attached as Exhibit 1 is a true and correct copy of the complaint in this matter.
2. Attached as Exhibit 2 is a true and correct copy of the first amended answer in this matter.
3. Attached as Exhibit 3 is a true and correct copy of the Plaintiff Ty Bufford's admission acknowledging that Plaintiffs' dispute with Defendant in this matter involves the applicability of the "Mrs. Murphy exemption" of fair housing

statutes [cited by Plaintiff herself] rather than the public accommodation statutes.

4. Attached as Exhibit 4 is a true and correct copy of the subject property in this matter in order to show that the subject property is a private home rather than a public accommodation.
5. Attached as Exhibit 5 is a true and correct copy of Excerpts of Defendant's Deposition and Exhibits 14 to 19, attached hereto.
6. Attached as Exhibit 6 is a true and correct copy of HRS Sections 515-1; 515-2, and 515-4, including the "tight-living" exemption.
7. Attached as Exhibit 7 is a true and correct copy of 2005 Haw. Sess. Laws, Act 214, to demonstrate that the Hawaii Legislature noted in the Legislative History of HRS Chapter 515, that "Housing laws presently permit landlords to follow their individual value systems in selecting tenants to live in the landlords' own homes (or duplexes)". Plaintiffs and Plaintiff-Intervener are attempting to vastly expand the civil rights statutes in contravention of the Hawaii Legislators' intent.
8. Attached as Exhibit 8 is a true and correct copy of HRS 515-4, including the "tight-living" exemption, and its legislative history from the State Archives.
9. Attached as Exhibit 9 is a true and correct copy of Hawaii Civil Rights Commission's testimony from the State Archives.
10. Attached as Exhibit 10 is a true and correct copy of HRS Section 515-2.
11. Attached as Exhibit 11 is a true and correct copy of 2006 Haw. Sess. Laws, Act 76, § 1, to demonstrate the intent of the amendments were to make HRS

Chapter 489 cover restaurants and stores and not private homes as HRS

Chapter 378 already covered employment and HRS 515 already covered real estate transactions (including the rental of private homes or rooms in private homes).

12. Attached as Exhibit 12 is a true and correct copy of the legislative history of HRS 489 from the State Archives.
13. Attached as Exhibit 13 is a true and correct copy of Hawaii Civil Rights Commission's testimony from the State Archives.
14. Attached as Exhibit 14 is a true and correct copy HRS 281-31.
15. Attached as Exhibit 15 is a true and correct copy ROH Figure 21-10.3.
16. Attached as Exhibit 16 is a true and correct copy of Fair Hous. Council v. Roommate.com, LLC, 666 F.3d 1216, 1218 (9th Cir. Cal. 2012).
17. Attached as Exhibit 17 is a true and correct copy of Jankey v. Twentieth Century Fox Film Corp., 212 F.3d 1159, 1161 (9th Cir. Cal. 2000).
18. Attached as Exhibit 18 is a true and correct copy of Clegg v. Cult Awareness Network, 18 F.3d 752, 755 n.3 (1994).
19. Attached as Exhibit 19 is a true and correct copy of Patel v. Holley House Motels, 483 F. Supp. 374, 381 (S.D. Ala. 1979).

I declare under penalty of law that the foregoing is true and correct to the best of my knowledge.

Dated: Honolulu, Hawai'i, February 13, 2013.

  
SHAWN A. LUIZ

Exhibit 1

1ST CIRCUIT COURT  
STATE OF HAWAII  
FILED

2011 DEC 19 AM 8:14

S. TAMANAHA  
CLERK

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LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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Attorneys for Plaintiffs  
DIANE CERVELLI and TAEKO BUFFORD

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DIANE CERVELLI and TAEKO BUFFORD,

Plaintiffs,

vs.

ALOHA BED & BREAKFAST, a Hawaii sole proprietorship,

Defendant.

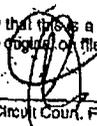
CIVIL NO. 11-1-3103-12 E C N  
(Other Civil Action)

**COMPLAINT FOR INJUNCTIVE  
RELIEF, DECLARATORY RELIEF,  
AND DAMAGES; SUMMONS**

**COMPLAINT FOR INJUNCTIVE RELIEF,  
DECLARATORY RELIEF, AND DAMAGES**

Plaintiffs Diane Cervelli ("Diane") and Taeko Bufford ("Taeko") (collectively "Plaintiffs"), by and through their undersigned counsel, file this complaint for injunctive relief, declaratory relief, damages, and other relief against Defendant Aloha Bed & Breakfast ("Defendant"), and allege as follows:

4821-4779-1630.2

I do hereby certify that this is a full, true, and correct copy of the original on file in this office.  
  
Clerk, Circuit Court, First Circuit

**EXHIBIT 1**

declaratory relief, damages, and other relief against Defendant Aloha Bed & Breakfast (“Defendant”), and allege as follows:

**I. INTRODUCTION**

1. This case involves the refusal by a for-profit, commercial business establishment to provide accommodations at a bed and breakfast to a lesbian couple because of their sexual orientation, in violation of Hawaii’s law prohibiting discrimination in public accommodations. The owner of the business maintains that she need not comply with any part of the law, which prohibits discrimination in public accommodations on the basis of race, sex, gender identity or expression, sexual orientation, color, religion, ancestry, and disability.

2. Plaintiffs file this suit to enforce Hawaii’s compelling state interest in eradicating discrimination in Hawaii’s public marketplace and to protect the rights of all persons to access public accommodations free from unfair discrimination. The discriminatory practice of barring the doors of a business to a disfavored group causes significant harm to the excluded individuals who, in addition to other injuries, are deprived of their personal dignity and sense of belonging in society by being shunned by a business open to others. It also harms society itself, by fomenting social strife and obstructing the free and open flow of commerce vital to the state economy. These discriminatory practices have a long and painful history. Hawaii’s antidiscrimination laws are intended to eradicate the societal stain of invidious discrimination, forbidding a business owner from targeting customers for unlawful exclusion based on the owner’s negative attitudes toward their race, sex, gender identity or expression, color, religion, ancestry, disability or, in this case, sexual orientation.

## **II. PARTIES**

1. Plaintiffs Diane Cervelli and Taeko Bufford are lesbian women who are in a committed relationship with one another. They reside in the City of Long Beach in Los Angeles County, California.

2. Defendant is a sole proprietorship that does business as Aloha Bed & Breakfast in the City and County of Honolulu, State of Hawaii. Defendant offers bed and breakfast services to the general public. Defendant's trade name is registered with the Business Registration Division of the Hawaii Department of Commerce & Consumer Affairs. Upon information and belief, Defendant or its sole proprietor remits payment for general excise tax and transient accommodations tax in connection with Defendant's provision of transient accommodations.

## **III. JURISDICTION AND VENUE**

1. This Court has jurisdiction over this action pursuant to Hawaii Revised Statutes ("HRS") §§ 603-21.5(a)(3), 632-1, et seq., 489-7.5(a), and Hawaii Rules of Civil Procedure ("HRCP") Rules 57 and 65.

2. Venue is proper in this Court pursuant to HRS § 603-36, because conduct that gave rise to the claim for relief occurred in this Circuit and Defendant is domiciled in this Circuit.

## **IV. FACTS**

1. Diane and Taeko are a loving, devoted same-sex couple who have been in a committed relationship for approximately five years. Diane is a veterinary technician and is pursuing a degree in nursing. Taeko is a mental health clinician who works with homeless and mentally ill adults at a community mental health center.

2. Defendant, a Hawaii sole proprietorship that operates under the trade name Aloha Bed & Breakfast, is a for-profit, commercial business that offers bed and breakfast services to the general public and provides lodging and food to customers who stay temporarily at its bed and breakfast facilities. Upon information and belief, Phyllis Young is the sole proprietor of Defendant and owns and operates Defendant as a for-profit, commercial business.

3. Defendant's facilities are perched on a hillside in the Mariners Ridge section of Hawaii Kai with sweeping panoramic views of the Pacific Ocean. There are multiple rooms available for rent, including rooms with views of the ocean, Koko Marina, and Koko Crater. Upon information and belief, Defendant's facilities are valued at approximately \$900,000.

4. Defendant advertises its bed and breakfast services to the public through a wide range of outlets, including several Internet web sites used by the general public to locate bed and breakfast facilities. For example, Defendant maintains a web site advertising its bed and breakfast services to the public at <http://home.roadrunner.com/~alohaphyllis>. The web site specifies a two-person occupancy limit per room; a required three-night minimum stay; and the daily rates to rent the rooms, which currently range from eighty-five dollars (\$85.00) to one hundred dollars (\$100.00) per day. The web site also features pictures of views from some of the rooms. The web site states that the bed and breakfast "offers many pluses," including the following amenities:

- a. "Wireless Access;"
- b. A "large lanai (deck) greets you with a partial ocean view, the patio table being the perfect place to have breakfast or to relax in the early evening just to soak in the ambiance of Hawaiian living;"
- c. "A large swimming pool is available for your enjoyment;"

- d. "Breakfasts are customized to your diet and preferences;"
  - e. "Minutes from famed snorkeling beach, Hanauma Bay and Halamana Cove next to Blow Hole, and other lovely beaches;"
  - f. "Two award-winning restaurants five to ten minutes away;"
  - g. "Three nearby shopping centers with host of fast food choices as well;"
- and
- h. "Waikiki about 20 minutes away."

5. Defendant's services also are currently advertised or listed through the following web sites: The International Bed and Breakfast Pages, Frommer's Travel Guides, TripAdvisor, Yahoo! Travel, bnbHawaii.com, and Pamela Lanier's Bed and Breakfasts, Inns and Guesthouses International. Upon information and belief, Defendant's bed and breakfast services were advertised or profiled, and continue to be advertised or profiled, through these or similar Internet web sites used by the general public to locate bed and breakfast facilities at all relevant times for purposes of this lawsuit. Upon information and belief, Defendant has operated its business or held itself out as a business open to the public since at least 2003 and has had hundreds of customers stay in its facilities.

6. In 2007, Diane began planning a trip for her and Taeko to visit a friend in Hawaii Kai, and to spend time with the friend's newborn baby.

7. Diane and Taeko had anticipated staying with their friend, but the baby experienced health issues, including loss of appetite and weight loss, which caused the baby to cry more than normal at times. These issues were stressful for Diane and Taeko's friend, who was a first-time mother, and she suggested that Diane and Taeko consider alternative

accommodations to give themselves occasional breaks from the baby's crying and the family stress.

8. Diane and Taeko agreed, and looked for alternative accommodations to reduce the burden on their friend of hosting visitors. The unexpected expense of paying for lodging made renting a car prohibitively expensive, so they searched for lodging near their friend's residence. Staying near their friend was important to Diane and Taeko because their friend could not drive long distances to pick them up given her newborn's health issues.

9. Diane and Taeko's friend suggested that Diane contact certain bed and breakfast businesses, one of which was Defendant.

10. On October 16, 2007, Diane emailed Defendant to inquire whether Defendant had a room available from December 27, 2007 through January 7, 2008. Diane received an email from Phyllis Young on the same day stating that the bed and breakfast could accommodate Diane from January 1, 2008 through January 7, 2008. After confirming that Diane and Taeko's friend could accommodate the couple for the first few nights when the bed and breakfast was unavailable, Diane called the phone number for Defendant on November 5, 2007 and spoke with Phyllis, who confirmed that the room was still available. Phyllis asked if someone would be staying with Diane, and then asked for the second person's name. When Diane responded with words to the effect of "her name is Taeko Bufford," Phyllis asked pointedly, "Are you lesbians?"

11. Diane was shocked by the question, but answered truthfully that they were. Phyllis then refused to rent a room to Diane and Taeko by informing Diane that Phyllis would be very uncomfortable having lesbians in her house. Diane was stunned and said, "What?" Phyllis repeated that she was very uncomfortable renting a room to lesbians.

12. Diane and Phyllis ended the phone call. Diane felt deeply upset, distressed, and humiliated by Phyllis's statements and Defendant's refusal to rent her a room, and called Taeko in tears to explain what had happened. In disbelief, Taeko called Phyllis back, explained that the couple wanted to rent the room, and requested that they be allowed to do so. Phyllis again refused access to Defendant's accommodations. Taeko asked, "Is it because we are lesbians that you will not rent to us?" to which Phyllis replied, "Yes." Phyllis stated that she felt uncomfortable renting a room to homosexuals, citing her personal religious views.

13. Taeko told Phyllis that she was discriminating in violation of the law, but Phyllis insisted that she could exclude whomever she wanted to exclude from Defendant's accommodations. Phyllis eventually hung up the phone on Taeko. Taeko felt extremely upset and distressed by the conversation and by Defendant's refusal to equally afford her and Diane accommodations provided to other customers. Taeko tried calling Defendant back to finish the conversation, but no one answered. Taeko eventually spoke with Phyllis again later that day, and Phyllis reiterated her personal religious views and again insisted that she could exclude whomever she wanted.

14. Diane and Taeko each found Defendant's refusal of accommodations to them profoundly insulting and hurtful, and felt degraded by being treated as inferior and unworthy of equal treatment in even a routine business transaction. Diane cried throughout the day, found it difficult to function at work, and experienced chest and stomach pain. Taeko also felt distressed and wondered whether they would encounter similar discrimination once they arrived in Hawaii. Defendant's refusal of equal accommodations to Diane and Taeko based on their sexual orientation, through Phyllis's statements to each of them respectively, caused Diane and Taeko injury and damages.

15. Diane and Taeko subsequently were able to rent accommodations at a condo, but it was not close to their friend's home. The burden on Diane and Taeko's friend of driving with a sick newborn baby to the condo meant that Diane and Taeko were able to have only a few visits together with their friend and her newborn baby, which was very disappointing to Diane and Taeko. This undermined the purpose of their trip as well as the enjoyment they would have otherwise derived from it, absent Defendant's unlawful discriminatory conduct.

16. Upon information and belief, although Defendant continues to provide accommodations to the general public, Defendant continues to refuse to provide accommodations to same-sex couples, based on their sexual orientation. Upon information and belief, Defendant continues to believe that the entirety of Hawaii's public accommodations antidiscrimination law does not apply to it, and that Defendant therefore may refuse customers because of their race, sex, gender identity or expression, sexual orientation, color, religion, ancestry, or disability, without violating that law.

17. Diane and Taeko each timely complained regarding Defendant's unlawful discriminatory conduct to the Hawaii Civil Rights Commission ("HCRC"), the state agency charged with enforcement of the law prohibiting discrimination in public accommodations, among other laws.

18. During the course of HCRC's investigation, Phyllis admitted that she told Diane and Taeko that she would not rent them a room because they were lesbians. Phyllis expressed to HCRC her view that homosexuality is "detestable" and that it "defiles our land."

19. Diane and Taeko are not yet married, nor are they reciprocal beneficiaries, registered domestic partners, or parties to a civil union. However, Phyllis stated to HCRC that it

did not matter to her whether Diane and Taeko were married or unmarried; the reason they were denied accommodations was because of their sexual orientation, not their marital status.

20. Phyllis also confirmed to HCRC that Defendant rents lodging on a daily basis; that it does not offer permanent housing to customers; that it does not allow rooms to be rented on a month-to-month basis; that it does not enter into rental agreements with customers; and that it does not provide cooking privileges to customers. Upon information and belief, all or virtually all of Defendant's customers are transient guests who do not permanently reside at Defendant's establishment.

21. After conducting its investigation, HCRC on March 3, 2010 issued a Notice of Reasonable Cause to Believe That Unlawful Discriminatory Practices Have Been Committed.

22. On November 21, 2011, Diane and Taeko received copies of notices of their right to sue from HCRC. Diane and Taeko timely filed this suit within 90 days after receipt of the notices, pursuant to HRS § 368-12.

### **CLAIM FOR RELIEF**

#### **Discriminatory Denial of Public Accommodations Based on Sexual Orientation Pursuant to HRS § 489-1, *et seq.***

29. Plaintiffs reallege and incorporate herein by reference the allegations contained in Paragraphs 1 through 28 above, as if fully set forth herein.

30. Hawaii's law prohibiting discrimination in public accommodations serves a compelling state interest in eradicating the stain of discrimination from public society in Hawaii. That law's "purpose . . . is to protect the interests, rights, and privileges of all persons within the State with regard to access and use of public accommodations by prohibiting unfair discrimination." HRS § 489-1. Plaintiffs bring this claim to vindicate that purpose.

31. HRS § 489-3 provides that “[u]nfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of . . . sexual orientation . . . are prohibited.”

32. Defendant is a “place of public accommodation” within the meaning of HRS § 489-2 because Defendant is a “business” and an “accommodation . . . whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors.” Defendant also is a form of public accommodation specifically covered and enumerated by the law because Defendant is “[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests,” within the meaning of HRS § 489-2(2). Defendant rents its rooms for a daily rate. Defendant offers accommodations, goods, services, facilities, privileges, and advantages that include rooms to rent, access to wireless Internet, use of a lanai and swimming pool, and customized breakfasts. Defendant’s services are made available to the general public as customers through its own web site advertising its services, and through web sites available to the public as detailed above. Defendant qualifies as an inn or other establishment that provides lodging to transient guests because it provides lodging to customers who stay temporarily at its bed and breakfast facilities.

33. Defendant engaged in unfair discriminatory practices prohibited by HRS § 489-3 by denying Plaintiffs “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of” Plaintiffs’ “sexual orientation.” Specifically, Defendant refused to allow Diane and Taeko to make a reservation for, or to rent, any of the rooms it offers to the general public, as well as to obtain the

services, privileges, and other advantages provided to those renting a room, based on Diane and Taeko's sexual orientation.

34. Defendant's denial of public accommodations to Diane and Taeko because they are lesbians constitutes a prohibited discriminatory practice based on Diane and Taeko's sexual orientation within the meaning of HRS § 489-2. As alleged above, when Diane attempted to reserve a room and identified herself and Taeko as lesbians in response to Phyllis's question, Defendant denied them access to all of Defendant's bed and breakfast accommodations and services, which Phyllis explained was based on personal views that made her uncomfortable offering accommodations to lesbians. As further alleged above, when Taeko also attempted to reserve a room, Defendant again denied the couple access to all of Defendant's bed and breakfast accommodations and services, and Phyllis reiterated her personal views and discomfort with lesbians as the reason for the denial.

35. Diane and Taeko each have been injured and damaged as a direct and proximate result of Defendant's discriminatory refusal to provide them with equal access to its bed and breakfast facilities and services. Defendant's actions have caused emotional distress and pain, as well as actual damages. Defendant's refusal of equal treatment caused Diane and Taeko to feel upset, distressed, and humiliated, as well as profoundly devalued by being treated as inferior and unworthy of equal treatment.

36. Defendant's discrimination against Diane and Taeko in violation of HRS § 489-3 was intentional, willful, wanton, or committed with gross negligence.

37. As alleged above, Diane and Taeko timely exhausted administrative remedies by complaining to HCRC, pursuant to HRS § 368-11, and timely filed this suit within 90 days after receipt of notices of their right to sue from HCRC, pursuant to HRS § 368-12.

**DECLARATORY AND INJUNCTIVE RELIEF**  
**HRS §§ 632-1, ET SEQ. AND 489-7.5(A); HRCP RULES 57 AND 65**

38. Diane and Taeko are entitled to a declaration that Defendant is covered by and must comply with Hawaii's laws prohibiting discrimination in public accommodations set forth HRS § 489-1, et seq. and that Defendant's denial of public accommodations to them based on their sexual orientation, and its ongoing refusal to offer accommodations on equal terms to lesbians and gay men, violate those laws. An actual controversy exists between Diane and Taeko, on the one hand, and Defendant, on the other, over the couple's concrete interest in, and assertion of legal rights to, equal access to the accommodations that Defendant offers to the general public. A declaratory judgment will terminate the present uncertainty concerning whether Defendant's denial of equal accommodations violates HRS § 489-1, et seq.

39. Diane and Taeko are entitled to permanent injunctive relief pursuant to HRS § 489-7.5, which permits injured persons to bring proceedings to enjoin unlawful discriminatory practices. Injunctive relief is also appropriate because Diane and Taeko will prevail on the merits, the balance of irreparable damage favors the issuance of an injunction, and the public interest supports granting an injunction to end Defendant's invidious discrimination based on sexual orientation.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for judgment as follows:

A. Entering a declaratory judgment that Defendant's denial of public accommodations to Plaintiffs based on their sexual orientation and its ongoing refusal to provide accommodations to lesbians and gay men on terms equal to those provided to heterosexuals violates Hawaii's laws prohibiting discrimination in public accommodations pursuant to HRS § 489-1, et seq.;

B. Permanently enjoining Defendant (and its officers, agents, servants, employees, attorneys, and all persons acting or purporting to act in concert or participation with Defendant) from engaging in discriminatory practices that deny Plaintiffs and other members of the public equal access to Defendant's goods, services, facilities, privileges, advantages, and accommodations based on sexual orientation in violation of HRS § 489-1, et seq.;

C. Awarding Plaintiffs damages in an amount to be proven at trial including actual, compensatory, statutory, treble, special, and punitive damages pursuant to HRS §§ 368-17 & 489-7.5;

D. Awarding Plaintiffs pre-judgment and post-judgment interest;

E. Awarding reasonable attorneys' fees, costs, and other expenditures incurred as a result of bringing this action, pursuant to all applicable laws and doctrines; and

F. Awarding Plaintiffs further relief as this Court may deem just and equitable.

DATED: Honolulu, Hawaii, December 16, 2011.



PETER C. RENN (*admission pro hac vice pending*)  
JAY S. HANDLIN  
LINDSAY N. MCANEELEY

Attorneys for Plaintiffs  
DIANE CERVELLI and TAEKO BUFFORD

<b>STATE OF HAWAII</b> CIRCUIT COURT OF THE FIRST CIRCUIT	<b>SUMMONS</b> TO ANSWER CIVIL COMPLAINT	CASE NUMBER <b>11-1-3103-12 E C N</b>
PLAINTIFF, DIANE CERVELLI and TAEKO BUFFORD	VS.	DEFENDANT, ALOHA BED & BREAKFAST, a Hawaii sole proprietorship
PLAINTIFF'S ADDRESS (NAME, ADDRESS, TEL. NO.) Jay S. Handlin 8661; Lindsay N. McAneeley 8810 ASB Tower, Suite 2200 1001 Bishop Street Honolulu, Hawaii 96813  Telephone: (808) 523-2500; Facsimile: (808) 523-0842		
<p align="center"><b>TO THE ABOVE-NAMED DEFENDANT(S)</b></p> <p>You are hereby summoned and required to file with the court and serve upon  <u>Jay Handlin &amp; Lindsay McAneeley</u>          plaintiff's attorney, whose address is stated above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.</p> <p align="center"><b>THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS.</b></p> <p align="center"><b>A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.</b></p>		
DATE ISSUED  <b>DEC 19 2011</b>	CLERK  <b>S. TAMANAHA</b> 	
I do hereby certify that this is full, true, and correct copy of the original on file in this office	Circuit Court Clerk	



In accordance with the Americans with Disabilities Act and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the First Circuit Court Administration Office at PHONE NO. 539-4333, FAX 539-4322, or TTY 539-4853, at least ten (10) working days prior to your hearing or appointment date.

Exhibit 2



**FIRST AMENDED ANSWER AND AFFIRMATIVE DEFENSES  
TO COMPLAINT FILED DECEMBER 19, 2011**

Defendant Aloha Bed & Breakfast (hereinafter, "Aloha") by and through its undersigned counsel, hereby files its First Amended Answer and Affirmative Defenses to Plaintiffs' Complaint filed December 19, 2011, as follows:

**I. INTRODUCTION**

1. Aloha admits that it rents three rooms within the home of Ms. Young, the owner of Aloha, and that it declined to rent a room to Plaintiffs based on Plaintiffs' representations that they intended share the room, which has only one bed, as a lesbian couple. Aloha admits that Plaintiffs identified themselves to Aloha as a lesbian couple. Aloha does not respond to the conclusions of law stated in this paragraph as they do not require a response. To the extent they require a response, they are denied. Aloha denies the allegations regarding Plaintiffs' characterization of Aloha's position in connection with the application of the law to Aloha.

2. Aloha has insufficient knowledge to admit or deny the allegations and characterizations set out in this paragraph, and on that basis denies the same. Moreover, to the extent Plaintiffs are alleging harm to non-parties, such alleged harms are not properly before this Court.

**II. PARTIES**

1. Aloha has insufficient knowledge to admit or deny the allegations contained in this paragraph, and on that basis denies the same.

2. Aloha admits the allegations contained in this paragraph.

### III. JURISDICTION AND VENUE

1. Aloha denies the allegations contained in this paragraph.
2. Aloha admits that the conduct described in the Complaint occurred in this Circuit. Aloha denies that it is domiciled in this Circuit, as the law does not provide for the domicile of a trade name such as Aloha.

### IV. FACTS

1. Aloha has insufficient knowledge to admit or deny the allegations contained in this paragraph and on that basis denies the same.
2. Aloha admits that it enters into real estate transactions with renters of one or more of its three rooms and that it receives income from renting three or fewer rooms within Ms. Young's home and does business as a sole proprietorship under the name Aloha Bed and Breakfast.
3. Aloha has insufficient knowledge to admit or deny allegations regarding the home's value, and on that basis denies the same, but admits that it rents three or fewer rooms to overnight guests in Ms. Young's home.
4. Aloha denies that it advertises "through a wide range of outlets," but it admits the existence of a website as alleged in this paragraph. Aloha admits that the utilities, facilities, and other aspects of the property that is Ms. Young's home are made available to those who stay there as guests, with the exception of areas that are reserved for Ms. Young's private use.
5. Aloha admits that it advertises through bnbHawaii.com and Pamela Lanier's Bed and Breakfasts, Inns and Guesthouses International, denies that it currently advertises through the International Bed and Breakfast Pages, and has insufficient knowledge to admit or deny the remaining allegations contained in this paragraph regarding where it is listed or advertised, and on that basis denies the same. Aloha admits that it has been open to the public since at least

2003 but Aloha has insufficient knowledge to admit or deny the number of guests that have stayed there, and on that basis denies the same.

6. Aloha has insufficient knowledge to admit or deny the allegations contained in this paragraph, and on that basis denies the same.

7. Aloha has insufficient knowledge to admit or deny the allegations contained in this paragraph, and on that basis denies the same.

8. Aloha has insufficient knowledge to admit or deny the allegations contained in this paragraph, and on that basis denies the same.

9. Aloha has insufficient knowledge to admit or deny the allegations contained in this paragraph, and on that basis denies the same.

10. Aloha admits the allegations contained in this paragraph regarding Plaintiff's communications with Ms. Young, but has insufficient knowledge to admit or deny the remaining allegations in this paragraph concerning Plaintiffs' confirmation with a non-party, and on that basis denies the same.

11. Aloha denies the allegations in this paragraph regarding the alleged statements made in that conversation and has insufficient knowledge to admit or deny the remaining allegations contained in this paragraph regarding Plaintiff's feelings, and on that basis denies the same.

12. Aloha has insufficient knowledge to admit or deny the allegations contained in this paragraph regarding Plaintiff's feelings and discussions between Plaintiffs, and on that basis denies the same. Aloha admits the allegation in this paragraph regarding the initial discussion between Ms. Young and Plaintiff Bufford.

13. Aloha admits that the description of the initial discussion with Plaintiff Bufford in this paragraph is substantively accurate. Aloha has insufficient knowledge to admit or deny the

allegations contained in this paragraph regarding Plaintiff's feelings or efforts to call again, and on that basis denies the same. Aloha also admits that Plaintiff Bufford spoke with Ms. Young again when Plaintiff Bufford returned Ms. Young's call, but Aloha denies the description of that conversation in this paragraph.

14. Aloha has insufficient knowledge to admit or deny the allegations contained in this paragraph, and on that basis denies the same.

15. Aloha has insufficient knowledge to admit or deny the allegations contained in this paragraph, and on that basis denies the same.

16. Aloha admits that it continues to rent rooms in Ms. Young's home but denies that it has refused to provide accommodations to any same-sex couple since the events that gave rise to this lawsuit. Aloha denies the allegations in this paragraph regarding its position in connection with the application of the law to Aloha.

17. The allegations set out in this paragraph are conclusions of law that do not require a response. To the extent they require a response, they are denied.

18. Aloha admits the allegation in the first sentence of this paragraph. Aloha denies the remaining allegations stated in this paragraph. Moreover, it is Aloha's position that to the extent that any statements attributed to Aloha were made during the HCRC conciliation process, those statements are confidential and not to be used as evidence in any subsequent proceedings.

19. Aloha has insufficient knowledge to admit or deny the allegations contained in this paragraph, and on that basis denies the same. Moreover, it is Aloha's position that to the extent that any statements attributed to Aloha were made during the HCRC conciliation process, those statements are confidential and not to be used as evidence in any subsequent proceedings.

20. Aloha denies the allegations in this paragraph that it does not allow rooms to be rented on a month-to-month basis or offer cooking privileges. Aloha admits the remaining allegations in this paragraph. Moreover, it is Aloha's position that to the extent that any statements attributed to Aloha were made during the HCRC conciliation process, those statements are confidential and not to be used as evidence in any subsequent proceedings.

21. Aloha admits that the HCRC issued a Notice as alleged in this paragraph, but lacks knowledge sufficient to admit or deny the allegations regarding the work of the HCRC, and on that basis denies the same.

22. Aloha has insufficient knowledge to admit or deny the allegation contained in this paragraph concerning Plaintiffs' receipt of notices, and on that basis denies the same. Aloha denies that this action was filed timely as a matter of law.

#### **CLAIM FOR RELIEF**

29. Aloha reasserts and incorporates by reference all the preceding paragraphs of the answer as if fully set forth herein.<sup>1</sup>

30. The allegations set out in this paragraph are conclusions of law that do not require a response. To the extent they require a response, they are denied.

31. The allegations set out in this paragraph are conclusions of law that do not require a response. To the extent they require a response, they are denied.

32. Aloha denies the classifications and legal conclusions contained in this paragraph but admits the physical description of Ms. Young's residence as set out in this paragraph.

33. Aloha denies the allegation stated in this paragraph.

34. Aloha denies the allegation stated in this paragraph.

35. Aloha denies the allegations stated in this paragraph.

---

<sup>1</sup> The Complaint is missing paragraphs 23 through 28.

36. Aloha denies the allegations stated in this paragraph.

37. The allegations set out in this paragraph are conclusions of law that do not require a response. To the extent they require a response, they are denied.

#### **DECLARATORY AND INJUNCTIVE RELIEF**

38. Aloha denies that Plaintiffs are entitled to any of the relief set forth in this paragraph.

39. Aloha denies that Plaintiffs are entitled to any of the relief set forth in this paragraph.

#### **FIRST AFFIRMATIVE DEFENSE**

Aloha is not a place of “public accommodation” for purposes of Hawai‘i Revised Statutes chapter 489, but instead is the rental of an interest in real estate that is used as a residence in which Ms. Young resides, where three or fewer rooms are made available to others for a fee.

#### **SECOND AFFIRMATIVE DEFENSE**

Application of Hawai‘i Revised Statutes chapter 489 to Aloha violates its owner’s rights under the Free Exercise Clause of the First Amendment of the United States Constitution.

#### **THIRD AFFIRMATIVE DEFENSE**

Application of Hawai‘i Revised Statutes chapter 489 to Aloha violates its owner’s rights under Article I, Section 4 of the Hawai‘i Constitution.

#### **FOURTH AFFIRMATIVE DEFENSE**

Application of Hawai‘i Revised Statutes chapter 489 to Aloha violates its owner’s Free Speech rights under the First Amendment of the United States Constitution.

#### **FIFTH AFFIRMATIVE DEFENSE**

Application of Hawai‘i Revised Statutes chapter 489 to Aloha violates its owner’s Free Speech rights under Article I, Section 4 of the Hawai‘i Constitution.

**SIXTH AFFIRMATIVE DEFENSE**

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's rights of Expressive Association under the First Amendment of the United States Constitution.

**SEVENTH AFFIRMATIVE DEFENSE**

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's rights of Expressive Association under Article I, Section 4 of the Hawai'i Constitution.

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiffs have failed to state a claim upon which relief can be granted.

**NINTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred by the applicable statute of limitations.

**TENTH AFFIRMATIVE DEFENSE**

The court lacks personal jurisdiction over the named Defendant under Hawai'i Revised Statutes chapter 489.

**ELEVENTH AFFIRMATIVE DEFENSE**

Defendant Aloha intends to rely on defenses as contained in Chapter 515 of the Hawaii Revised Statutes (Discrimination in Real Estate Transactions).

**TWELFTH AFFIRMATIVE DEFENSE**

Defendant Aloha gives notice of her intent to rely upon any other applicable affirmative defense or defenses subject to Rule 8(c) of the Hawai'i Rules of Civil Procedure.

**THIRTEENTH AFFIRMATIVE DEFENSE**

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's rights of Intimate Association under the Bill of Rights of the United States Constitution and the Bill of Rights of the Hawai'i Constitution.

**FOURTEENTH AFFIRMATIVE DEFENSE**

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's rights to Privacy under the Bill of Rights of the United States Constitution and under Article I, Section 6 of the Hawai'i Constitution.

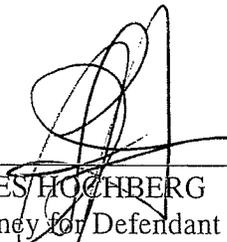
**FIFTEENTH AFFIRMATIVE DEFENSE**

Application of Hawai'i Revised Statutes chapter 489 to Aloha violates its owner's rights under the Takings Clause and Due Process Clause of the Fifth Amendment to the United States Constitution and under Article I, Section 20 and the Due Process Clause of Article I, Section 5 of the Hawai'i Constitution.

WHEREFORE, Defendant Aloha prays for relief as follows:

1. That the Complaint is dismissed with prejudice and that Defendant Aloha is awarded reasonable attorneys' fees and costs.
2. That this Court awards such other and further relief as it deems just and equitable in the premises

Dated: Honolulu, Hawai'i, July 25, 2012.

  
\_\_\_\_\_  
JAMES HOCHBERG  
Attorney for Defendant  
ALOHA BED & BREAKFAST

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAI'I

DIANE CERVELLI and TAEKO BUFFORD, )  
 ) CIVIL NO. 11-1-3103-12 ECN  
 ) (Other Civil Action)  
 )  
 Plaintiffs, )  
 )  
 WILLIAM D. HOSHIJO, as Executive Director )  
 of the Hawai'i Civil Rights Commission, ) **DEMAND FOR JURY TRIAL**  
 )  
 )  
 Plaintiff-Intervenor, )  
 )  
 )  
 v. )  
 )  
 )  
 ALOHA BED & BREAKFAST, a Hawai'i sole )  
 proprietorship, )  
 )  
 )  
 Defendant. )  
 )  
 \_\_\_\_\_ )

**DEMAND FOR JURY TRIAL**

Defendant ALOHA BED & BREAKFAST, above-named, by its undersigned counsel,  
hereby demands trial by jury on all issues so triable herein.

DATED: Honolulu, Hawai'i, July 25, 2012.

  
\_\_\_\_\_  
JAMES HOCHBERG  
Attorney for Defendant  
ALOHA BED & BREAKFAST

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAI'I

DIANE CERVELLI and TAEKO BUFFORD, )  
 )  
 Plaintiffs, ) CIVIL NO. 11-1-3103-12 ECN  
 ) (Other Civil Action)  
 WILLIAM D. HOSHIJO, as Executive Director )  
 of the Hawai'i Civil Rights Commission, ) **CERTIFICATE OF SERVICE**  
 )  
 Plaintiff-Intervenor, )  
 v. )  
 )  
 ALOHA BED & BREAKFAST, a Hawai'i sole )  
 proprietorship, )  
 )  
 Defendant. )

J:\Active Clients\Adf\Young, Phylis\Pleadings\2012 07 25 Cvabb Final Proposed First Amended Answer With Jury Demand.Docx

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the date of filing, a copy of the *First Amended Answer and Affirmative Defenses to Complaint filed December 19, 2011; Demand for Jury Trial; Certificate of Service* was served upon the following parties, in the manner indicated below:

Jay S. Handlin  
Lindsay N. McAneeley  
CARLSMITH BALL LLP  
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1001 Bishop Street  
Honolulu, Hawai'i 96813

*Via Hand-Delivery*

Attorneys for Plaintiffs  
DIANE CERVELLI and TAEKO BUFFORD

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Los Angeles, California 90010

*Via first class mail*

Attorneys for Plaintiffs  
DIANE CERVELLI and TAEKO BUFFORD

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*Via Hand-Delivery*

Attorney for Plaintiff-Intervenor  
WILLIAM D. HOSHIJO, Executive Director

Dated: Honolulu, Hawai'i, July 25, 2012.

  
\_\_\_\_\_  
JAMES HOCHBERG  
Attorney for Defendant  
ALOHA BED & BREAKFAST

Exhibit 3

## Phyllis Young

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**From:** Ty <T\_bufford1@yahoo.com>  
**Sent:** Monday, November 05, 2007 8:00 PM  
**To:** Phyllis & Don Young  
**Subject:** Fair Housing Act (I Found you at <http://www.IBBP.com/obb/hawaii/alohabedbreakfast.html>)

Mrs. Phyllis Young,

I must say that your offensive and discriminatory comments on "homosexuals" has resonated a lot of anger and hurt in me and my partner. You say you are a Christian, but a true Christian does not judge or discriminate. Christians should be open to the Holy Spirit teaching the need for change. So please don't use your Christianity as an excuse to be prejudice. I hope this will be a learning experience for you and open your eyes to the world and to what love is. What my partner and I have is love. We are professionals who live and love like every heterosexual couple. We are monogomous, we will have children, we LOVE. The key is love and not who you love. Please don't judge when you don't know us or know what we do. We could be your doctor, your banker, your vet....we could be the ones saving your daughter's life or husband's, but yet you would never know that because you are too ignorant to see the world.

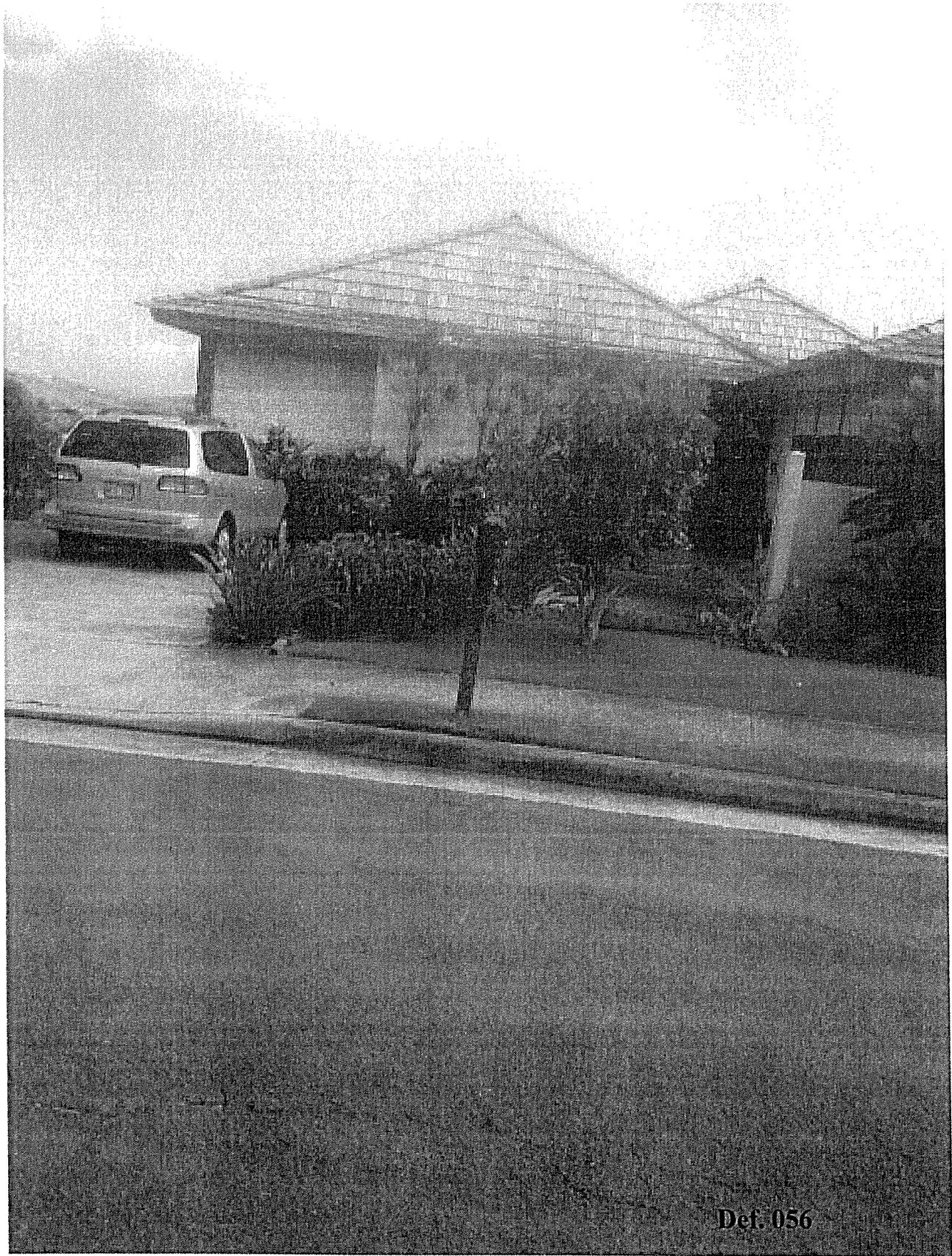
As for the law you spoke about earlier (Mrs. Murphy's Exemption), you forgot to include some things. Yes, you were right-- a housing unit with 4 rooms or less with the owner residing there is exempt...BUT....you left out something very important. And I must remind you that I recorded our conversation earlier. "None of this housing is exempt from section 804(c) of the Act which states that you cannot make, print or publish a discriminatory statement. Any exempt housing that violates 804(c) has lost that exemption and can be held liable under the Act." Looks like you just lost your exemption Mrs. Phyllis.

I will be contacting my lawyer about this matter and figure out where we can go from here. I'm not doing this out of malice, but out of justice and fairness. I'm not asking you to change your values, but I am asking you to open your eyes to the world and to rid yourself of the ignorance that you have acquired.

God Bless,

Ty

Exhibit 4



Def. 056