

Plaintiffs, on behalf of themselves and similarly situated class members, respectfully submit this Memorandum in Support of Plaintiffs' Motion for Class Certification pursuant to Rule 23 of the Federal Rules of Civil Procedure.

INTRODUCTION

Hurricane Katrina was one of the most devastating natural disasters to ever hit United States soil. In its wake, an unprecedented amount of damage and devastation occurred. Most people in the affected areas lost their communities, their jobs, their homes, and nearly all of their belongings. At least 250,000 people were forced into shelters across the country. As of October 24, tens of thousands of people that had evacuated from their homes remained in shelters. Over 1,300 people lost their lives, and more than 3,500 people are officially still unaccounted for nearly five months after Hurricane Katrina hit the Gulf Coast Region. It simply is not possible to capture the scope of this disaster in terms of the damage and suffering it caused, and the full scope of the harm caused to the people of New Orleans and other communities will not be measurable for years, and possibly decades, to come.

What is clear, however, is that in the wake of this disaster, tens of thousands of victims of Hurricane Katrina who looked to their federal government to provide them with statutorily-guaranteed Temporary Housing Assistance were further victimized by governmental bureaucracy, incompetence and wrongheaded priorities. As the federal agency in charge of protecting U.S. citizens in the aftermath of presidentially-declared disasters, the Federal Emergency Management Agency ("FEMA") has the statutory obligation to provide all eligible Katrina evacuees with federal housing benefits, as set forth in the Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, *et seq.* (the "Stafford Act") and the federal regulations promulgated thereunder. This obligation includes providing them with Temporary

Housing Assistance, which may include trailers ("direct assistance") or monetary payments to be used for rent during such evacuee's displacement ("financial assistance"). For tens of thousands of Katrina victims, FEMA has misapplied its rules and illegally denied such benefits. FEMA's dereliction of its mandatory duties necessitated this action; Plaintiffs had no options left but to seek redress by the Court, as they were facing eviction and homelessness due to FEMA's failure to provide assistance and its threatened termination of assistance to those already receiving it.¹

Thus, for example, as of January 12, 2006, Katrina evacuees still inhabited 41,000 hotel rooms in 47 states and the District of Columbia under the FEMA Short-Term Lodging Program. These evacuees were staying in hotels because their applications for Temporary Housing Assistance were still "pending," or were wrongfully denied, or the evacuees were residing in areas where there are no affordable rental units, or there are just no available units to rent. As of January 30, 2006, five months after Katrina made landfall, there were at least 11,284 applications for Temporary Housing Assistance still "pending" despite this Court's admonition that FEMA shall make "extremely substantial progress" in its processing of applications. (Order at 18.)² Furthermore, out of the 43,800 applications that were evaluated between December 19, 2005 and January 30, 2006, over 35,000 were denied. This includes named Plaintiffs Lenora Bartley, Plaintiffs' witness at the hearing before this Court on the December 9, 2005, and Timothy Hood, both victims of the Shared Household Rule. While Plaintiffs' counsel was able to bring Ms. Bartley's situation to the attention of Defendants' counsel, the fact that she was unable to do so herself, as FEMA representatives repeatedly told her in late December and early

¹ In addition to FEMA, the other parties named as defendants in the Second Amended Complaint, dated November 28, 2005 are the Department of Homeland Security ("DHS"), which controls FEMA, and officials of FEMA and DHS who are responsible for setting and/or implementing the policies and procedures challenged in the Complaint, each of whom is sued only in their official capacity.

² Citations in the form "Order" are to this Court's Order and Reasons, dated December 12, 2005.

January that she was ineligible due to the Shared Household Rule,³ goes to the heart of the problem: FEMA has clearly taken a "deny if we can get away with it" approach to resolving the claims of the class. While the words and purported intentions of those with policy-making authority favor granting to all eligible plaintiffs the benefits to which they are entitled, it is apparent that those FEMA workers actually enforcing the decisions are continuing to make this process as difficult as they can. In short, whatever policies may be intended within the Beltway are not being implemented within the Bayou.

In addition, the number of evacuees who were wrongfully denied Temporary Housing Assistance, either due to misapplications of the Shared Household Rule or the illegal requirement that disaster victims apply for a Small Business Administration ("SBA") loan as a pre-condition to obtaining Temporary Housing Assistance, is, to the Plaintiffs' best estimate, potentially in the tens of thousands as well. While Defendants have officially acknowledged that they wrongfully applied the Shared Household Rule and SBA loan requirement in certain circumstances,⁴ anecdotal evidence shows that, even after those admissions, Defendants have failed to apply the correct policies in a uniform manner and have also failed to reconsider the

³ On December 26, 2005, Ms. Bartley received two letters "from FEMA stating that [she] was ineligible for housing assistance because a member of [her] household was already provided with housing assistance." (Bartley Decl., Ex. A ¶ 3.) "On January 6, 2006, [one] FEMA representative explained to [Ms. Bartley] over the phone that [she] had been denied housing assistance" for the same reason. After raising this with Defendants' counsel, Defendants' counsel replied to Plaintiffs' counsel on January 19, 2006 that FEMA has granted Ms. Bartley's request for assistance. (Godnick-Simpson Email, Ex. B)

⁴ In a press release on November 26, 2005, FEMA stated that applicants who evacuated to the same address as another applicant who was a member of a different household and were denied assistance may still be eligible for disaster assistance. Press Release, FEMA, Extended Families Living Together may be Eligible for FEMA Disaster Assistance, Release No. 1606-089 (Nov. 26, 2005), *available at*, http://www.fema.gov/news/newsrelease_print.fema?id=20868; Ex. C. In addition, on December 18, 2005, FEMA issued a press release stating that "Hurricane Katrina victims seeking federal temporary housing assistance do not need to complete a U.S. Small Business Administration (SBA) loan application to be considered for such assistance." Press Release, FEMA, FEMA Housing Assistance Not Contingent On SBA Loan Application, Release No. HQ-05-391 (Dec. 18, 2005), *available at*, http://www.fema.gov/news/newsrelease_print.fema?id=21539; Ex. D. 10038979.7

applications of those evacuees who were wrongfully denied prior to the time when corrective measures were ostensibly taken.⁵

As more fully set forth in the Complaint, twenty-five named Plaintiffs filed this putative class action lawsuit alleging that Defendants have illegally denied the disaster assistance to which Plaintiffs are due under the Stafford Act and which is protected by the Due Process Clause of the Fifth Amendment. “It is well settled that class actions are an appropriate procedure in government benefit cases where statutes and policies are likely to have an impact upon a broad class of recipients.” 5 H. Newberg, *Class Actions*, §23.07 at 23-27 (3rd ed. 1992). For reasons set forth herein, the proposed class consists of all persons who, as of August 29, 2005, (i) resided in either Louisiana, Mississippi or Alabama; (ii) resided in areas declared to be Federal Disaster Areas; (iii) were displaced from their pre-disaster primary residences or whose pre-disaster primary residences have been rendered uninhabitable as a result of damage caused by Hurricane Katrina; and (iv) have applied for or will apply, for Temporary Housing Assistance under the Stafford Act, pursuant to 42 U.S.C. § 5174 and the federal regulations promulgated thereunder, and (v) have applications for Temporary Housing Assistance or Continued Rental Assistance that (a) are still pending; (b) were or will be erroneously denied under the Shared Household Rule; (c) have been or will be delayed due to the SBA loan application requirement; (d) were or will be otherwise erroneously denied; or (e) have been or will be granted, but who have received or will receive Temporary Housing Assistance or Continued Rental Assistance which is not adjusted to reflect the current fair market rental rates for the accommodations (the "Proposed Class"). This class does not include persons who have committed fraud in applying for Temporary Housing Assistance or Continued Rental Assistance. In the Complaint, Plaintiffs allege that Defendants have engaged in multiple practices that have adversely and illegally

⁵ See *supra*, note 3.

affected the members of the class. Those practices (collectively, the "Challenged Practices") are essentially as follows:

- The failure of Defendants to accurately provide consistent information to all potential applicants regarding the scope and conditions of Temporary Housing Assistance available to them, and the criteria they need to meet to qualify for each type of Temporary Housing Assistance, including how they can continue to receive financial assistance beyond the initial three month period ("continued rental assistance");
- The failure to provide Temporary Housing Assistance and Continued Rental Assistance to individuals and families in a timely manner;
- The denial of Temporary Housing Assistance to individuals who lived at the same address, but in a separate household, as another person who also applied for housing assistance under the Shared Household Rule; and
- The requirement that disaster victims apply for an SBA loan as a condition to obtaining Temporary Housing Assistance.

The Challenged Practices, taken as a whole, have served as tools that Defendants have used to unfairly and illegally deny Plaintiffs their benefits.

As set forth herein, this case is ideally suited for adjudication under Rule 23 because (i) the proposed class of plaintiffs consists, at a minimum, of tens of thousands of people; (ii) the issue of FEMA's illegal and unconstitutional denial of housing benefits is common to the claims of each member of this proposed class; (iii) the claims of the representative Plaintiffs are substantially similar and are based on identical legal theories as those of absent class members, and therefore are typical; and (iv) the representative Plaintiffs and their counsel will fairly and adequately represent the interests of all absent class members. Certification under Rule 23(b)(1)(A) and (b)(2) also is warranted because individual actions would create the risk of incompatible standards of conduct for the Defendants and Defendants have acted on grounds generally applicable to the whole class, thereby making injunctive and declaratory relief with respect to the whole class appropriate and necessary.

PROCEDURAL HISTORY

On November 10, 2005 - more than two months after Hurricane Katrina made landfall and left hundreds of thousands of lives destroyed in its wake - Plaintiffs were left with no option other than to bring this putative class action to compel FEMA to perform what was already required under the law. In the Complaint, and in successive motions for Temporary Restraining Orders,⁶ Plaintiffs sought declaratory and injunctive relief to enjoin illegal policies and procedures employed by the Defendants with respect to the processing of applications and distribution of Temporary Housing Assistance. The relief sought was, and is, based upon violations of the Plaintiffs' rights under the Stafford Act and the federal regulations promulgated thereunder, the Due Process Clause of the Fifth Amendment to the United States Constitution, and the Administrative Procedures Act. Plaintiffs asserted seventeen statutory and constitutional causes of action against Defendants.

Specifically, the Complaint seeks, among other things, relief to: (i) prevent Defendants from wrongfully applying the Shared Household Rule to deny Plaintiffs, and similarly situated class members, Temporary Housing Assistance; (ii) prevent Defendants from denying Temporary Housing Assistance to eligible persons who submitted a properly completed application; (iii) prevent Defendants from attempting to recoup from recipients portions of

⁶ On November 18, Plaintiffs' moved for a Temporary Restraining Order and Preliminary Injunction, which sought, *inter alia*, to restrain Defendants from delaying for months the processing of applications for Temporary Housing Assistance and putting disaster victims in a black-hole known as "pending," from denying Temporary Housing Assistance to victims based upon a misapplication of the Shared Household Rule, and from illegally linking SBA loans and applications for Temporary Housing Assistance. (*See* TRO Mem. I.)

On November 28, 2005, in response to FEMA announcing that on December 15, 2005 it would evict evacuees staying in hotels under the Short-Term Housing Program, Plaintiffs filed a second Motion for Temporary Restraining Order and Preliminary Injunction, seeking to prevent Defendants from terminating funding of the Short-Term Lodging Program until eligible applicants staying in the hotels had received the housing assistance to which they were entitled. (*See* TRO Mem. II.)

On December 12, 2005, in response to certain of Defendants' actions regarding the continuation of the Short-Term Lodging Program, Plaintiffs filed a third Motion for a Temporary Restraining Order, whereby Plaintiffs sought a Court Order restraining Defendants from setting arbitrary guidelines and distributing them to hotel owners without simultaneously providing sufficient details for which such owners and evacuees can rely. (*See* TRO Mem. III.)

Temporary Housing Assistance not used for rent and from denying such recipients the ability to receive continued rental assistance on the basis that notice of the restrictions on use of such Temporary Housing Assistance was not provided to such recipients until after the Temporary Housing Assistance itself was received, and, in many cases, already spent on other urgent needs; (iv) prevent Defendants from terminating funding for the Short-Term Lodging Program until the eligible participants have received the housing assistance to which they are entitled; (v) prevent Defendants from requiring applicants to complete an SBA loan application as a prerequisite to applying for or receiving Temporary Housing Assistance; and (vi) require Defendants to provide meaningful notice to all applicants of (a) their right to seek continuation of rental assistance beyond the initial three month installment, (b) the criteria for receiving CRA, (c) any restrictions on the use of Temporary Housing Assistance, (d) the types of assistance available to applicants, including the ability to receive a trailer, and (e) the right to receive additional assistance based upon the size of their families and the process for applying for and obtaining such increased assistance.

On December 12, 2005, the Court issued a temporary restraining order (the "Order") finding that "by *law and mandate*, the federal government *is* responsible" for people in need in the aftermath of a natural disaster. (Order at 22 (emphasis in the original).) The Court further noted that "inaction has been the *leit motif* of [Federal Emergency Management Agency's ("FEMA")] response to the most severe natural disaster in the Nation's history." (Order at 10.) Thus, in light of FEMA's unconscionable delay in the processing of applications, the Court compelled Defendants to fulfill their mandatory obligations to aid disaster victims by providing them with assistance. (Order at 18.) In the Order, the Court ruled: (1) the Short-Term Lodging Program shall not be terminated as to any person in any state earlier than January 7, 2006 even if that person receives Temporary Housing Assistance or a denial of their application prior to such

date; (2) the Short-Term Lodging Program shall terminate no later than February 7, 2006 unless ordered by the Court or upon FEMA's choosing to extend such deadline; (3) applicants shall receive two weeks from the time of receiving a determination of their application for assistance before they can be evicted from their residence provided via the Short-Term Lodging Program; (4) Defendants are temporarily restrained and enjoined from requiring applicants for Temporary Housing Assistance to complete a SBA loan application or apply for a SBA loan as a prerequisite to applying for or receiving Temporary Housing Assistance, or from inquiring into the income of applicants in connection with processing applications for Temporary Housing Assistance, or from mis-communicating the nature of such SBA loan assistance to any applicant; (5) Defendants must notify all applicants who, as a result of any past miscommunication, filled out an unnecessary SBA loan application, or may not have pursued assistance because they were told that applicants must apply for a SBA loan in order to obtain Temporary Housing Assistance; and (6) Defendants must notify applicants and potential applicants that "in no cases will [a SBA]loan [a]pplication be required" in order for applicants to receive Temporary Housing Assistance. (Order at 25-26.)

On January 12, 2006 the Court (1) modified its December 12, 2006 Order to clarify such Order with regard to FEMA's ability to collect applicant data, and (2) granted a new Temporary Restraining Order which extends the termination date set forth in the December 12, 2006 Order until at least February 7, 2006 and potentially until March 1, 2006. The hearing on a permanent injunction is scheduled for February 23-24, 2006.

Now, prior to the hearing and final adjudication of this case, Plaintiffs seek to ensure that the relief ultimately provided will help not just the 25 named Plaintiffs, but also will help the thousands of victims of Hurricane Katrina and FEMA who can and should benefit from this lawsuit. Thus, Plaintiffs seek to certify as a class all persons who, as of August 29, 2005, (i)

resided in either Louisiana, Mississippi, or Alabama; (ii) in areas declared to be Federal Disaster Areas; and (iii) who were displaced from their pre-disaster primary residences or whose pre-disaster primary residences have been rendered uninhabitable as a result of damage caused by Hurricane Katrina; and (iv) have applied for or will apply for Temporary Housing Assistance under the Stafford Act, pursuant to 42 U.S.C. § 5174 and the federal regulations promulgated thereunder, and (v) have applications for Temporary Housing Assistance or Continued Rental Assistance that (a) are still pending; (b) were or will be erroneously denied under the Shared Household Rule; (c) have been or will be delayed due to the SBA loan application requirement; (d) were or will be otherwise erroneously denied; or (e) have been or will be granted, but who have received or will receive Temporary Housing Assistance or Continued Rental Assistance which is not adjusted to reflect the current fair market rental rates for the accommodations.

ARGUMENT

An action may proceed as a class action where the party seeking certification demonstrates that all four requirements of Federal Rule of Civil Procedure ("FRCP") 23(a) are met, and at least one of the three requirements of FRCP 23(b) is met. *Baroni, et. al. v. Bellsouth Telcoms., Inc.*, No. 02-009 Sec. I/4, 2004 U.S. Dist. LEXIS 14403, *13-14 (E.D. La. July 27, 2004) (citing *Vizena v. Union Pac. R.R. Co.*, 360 F.3d 496, 503 (5th Cir. 2004)).

The four requirements for maintaining a class action under Rule 23(a) are that:

- 1) the class is so numerous that joinder of all members is impracticable;
- 2) there are questions of law or fact common to the class;
- 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- 4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). As set forth herein, Plaintiffs can and do meet the prerequisites set forth in Rule 23(a). In fact, this Court, in its December 12, 2005 Order granting a Temporary Restraining Order to Plaintiffs, applied the relief to the putative class based upon the finding that, "plaintiffs will have a substantial likelihood of success in establishing the requisites for certification of numerosity, typicality, commonality, and that the class representatives will fairly and adequately protect the interests of the parties." (Order at 25.)

Although Plaintiffs need only satisfy one requirement of FRCP 23(b), Plaintiffs can in fact meet the requirements of both 23(b)(1)(A) and 23(b)(2). FRCP 23(b)(1)(A) is satisfied when: "the prosecution of separate actions by . . . individual members of the class would . . . create a risk of inconsistent or varying adjudications . . . which would establish incompatible standards of conduct for the [Defendants]." FRCP 23(b)(1)(A). Because the relief requested in this case is injunctive, adjudications in individual actions would most likely result in FEMA having to apply different rules to individuals in similar situations, resulting in incompatible standards of conduct for the Defendants. Thus FRCP 23(b)(1)(A) is satisfied. FRCP 23(b)(2) is also satisfied as Plaintiffs can demonstrate that Defendants have acted and refused to act on grounds generally applicable to the class which has made injunctive relief appropriate.

I. The Proposed Class Satisfies the Prerequisites of a Class Action Required by Rule 23(a) of the Federal Rules of Civil Procedure

Plaintiffs clearly meet the 4-prong test for certification of a class action pursuant to Rule 23(a).

A. The Class is so Numerous that Joinder of all Members Is Impracticable

To determine whether the numerosity requirement is met, courts must take into consideration a reasonable estimate of the number of purported class members, the geographical dispersion of the class, and the ease with which class members may be identified. *Zeidman v. J.*

Ray McDermott & Co., 651 F.2d 1030, 1038 (5th Cir. 1981). Those considerations leave little doubt that the putative class is too numerous for joinder to be practical.

Generally, the putative class consists of all persons residing in Louisiana, Mississippi, and Alabama at the time of Hurricane Katrina who have applied for, or will apply for, federal Temporary Housing Assistance and have not received the assistance to which they are entitled, whose applications for Temporary Housing Assistance or Continued Rental Assistance (a) are still pending; (b) were or will be erroneously denied under the Shared Household Rule; (c) have been or will be delayed due to the SBA loan application requirement; (d) were or will be otherwise erroneously denied; or (e) have been or will be granted, but who have received or will receive Temporary Housing Assistance or Continued Rental Assistance which is not adjusted to reflect the current fair market rental rates for the accommodations. Plaintiffs are unable at this time to provide precise estimates of the number of class members because that information can best be gleaned from records in control of Defendants, who have not yet provided Plaintiffs the Administrative Record or any formal discovery responses.

Nevertheless, the information Defendants have thus far informally provided to Plaintiffs makes it clear that the class is in the tens of thousands. For example, Defendants have informed us that as of January 13, 2006, more than 18,943 applications for Temporary Housing Assistance were still "pending." And that number does not even include the putative class members whose applications have been wrongfully denied. "Although the number of members in a proposed class is not determinative of whether joinder is impracticable, it has been noted that any class consisting of more than forty members 'should raise a presumption that joinder is impracticable.'" *Street v. Diamond Offshore Drilling*, No. 00-1317, 2001 U.S. Dist. LEXIS 7054, *12 (E.D. La. May 25, 2001) (Duval, J.) (quoting *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 624 (5th Cir. 1999)). The size of the class in this case most certainly far exceeds forty

members, and may increase due to applications FEMA continues to take from unregistered Hurricane Katrina victims. Furthermore, because the purported class may include currently unregistered Hurricane Katrina victims, joinder of all plaintiffs is not feasible. *Phillips v. Joint Legislative Comm. on Performance & Expenditure Review*, 637 F.2d 1014, 1022 (5th Cir. 1981) (holding "the alleged class includes future and deterred applicants, necessarily unidentifiable. In such a case the requirement of Rule 23(a)(1) is clearly met, for 'joinder of unknown individuals is certainly impracticable.'" (quoting *Jack v. Am. Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974))).

Geographic dispersion also indicates the suitability of a class action. As an initial matter, the putative class includes residents of three states -- Louisiana, Mississippi, and Alabama. Furthermore, more than 300,000 people were forced to evacuate from Louisiana, Mississippi, and Alabama and are now living in 47 different states and the District of Columbia. Obviously, joinder of all these class members is a practical impossibility, and individual litigation by each would necessarily and substantially burden the operation of the judicial system. Individual litigation would be prohibitive because the individual class members lack the knowledge, sophistication, and financial means to maintain such actions. One key purpose of the class action is to allow individual litigants of modest economic means to have effective access to the judicial process. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). In addition, the prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications establishing incompatible rules of law for the provision of disaster relief.

B. Common Questions of Law and Fact

The second requirement of Rule 23(a) is that "there are questions of law and fact common to the class." The Fifth Circuit "test for commonality is not demanding and is met

'where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.'" *Street v. Diamond Offshore Drilling*, 2001 U.S. Dist. LEXIS 7054, *12-13, No. 00-1317, 2001 WL 568111, at *4 (E.D. La. May 25, 2001) (Duval, J.) quoting *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 625 (5th Cir. 1999).

Where "broad discriminatory policies and practices constitute the gravamen of a class suit, common questions of law or fact are necessarily presented." *Midwest Community Council v. Chicago Park Dist.*, 87 F.R.D. 457, 460 (N.D. Ill. 1980); *see also Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994). Here, there is a well-defined community of interest in the questions of law and fact involving the claims of the members of the class in that FEMA has systemically applied the policies and practices challenged in this action to unlawfully delay or deny Temporary Housing Assistance to them. The present class action seeks declaratory and injunctive relief with respect to the practices of Defendants who acted uniformly against all members of the class. Actions combining challenges to uniform practices with requests for declaratory or injunctive relief by their very nature deal with common questions of law and fact. 7C Wright & Miller, & M. Kane, Federal Practice and Procedure: Civil § 1763.

For example, the first Challenged Practice is the failure of Defendants to provide accurate and consistent information to all applicants regarding the scope and conditions of the Temporary Housing Assistance available to them, the criteria they need to meet to qualify for each type of Temporary Housing Assistance, including how they can continue to receive financial assistance beyond the initial three month period, and other essential information required by applicable statute and regulation. All putative class members share a common legal question regarding whether they are entitled under the Stafford Act, the Due Process Clause, and the APA to receive this information. While different members of the putative class likely

received varying pieces of information and misinformation, Defendants utilized standardized policies and notification that varied little -- if at all -- from person to person. Moreover, there is certainly a common factual issue regarding what information would have been accurate if conveyed. Thus, all members of the putative class share a common factual question in that they have all been subjected to a uniform policy of Defendants that has similarly deprived them of necessary and basic information regarding the Temporary Housing Assistance program.

The second Challenged Practice is Defendants' failure to provide Temporary Housing Assistance and Continued Rental Assistance to individuals and families in a timely manner. All putative class members' claims share a common legal question regarding whether they are entitled under the Stafford Act, the Due Process Clause and the APA to receive this assistance in a timely manner and what constitutes "timely." Moreover, all of the claims of the members of the class share a common factual question in that they have been subjected to procedures applied by Defendants that have led to significant delays in the provision of Temporary Housing Assistance and Continued Rental Assistance.

The third Challenged Practice is Defendants' erroneous use of the Shared Household Rule. Many putative class members share a common legal question regarding the appropriate application of this rule. Although Defendants have changed the application of the rule since the filing of this action, anecdotal evidence suggests that Defendants are still improperly applying the rule and have also failed to revisit applications that had been erroneously denied prior to the rule change. Moreover, many of the claims of the class members share a common factual question in that their applications have been wrongfully denied based on an erroneous application of the Shared Household Rule, which has led to significant delays in the provision of Temporary Housing Assistance and Continued Rental Assistance.

The fourth Challenged Practice is Defendants' erroneous use of the SBA loan applications. Many putative class members' claims share a common legal question regarding the appropriate application of this rule for while Defendants have alleged that the rule has changed since the filing of this action, anecdotal evidence suggests that Defendants are still improperly applying the rule and also have failed to revisit applications that had been delayed prior to the rule change. Moreover, many of the members of the class share a common factual question in that their applications for Temporary Housing Assistance and Continued Rental Assistance have been significantly delayed based on an erroneous use of the SBA loan applications.

C. Typicality of Named Plaintiffs' Claims

The third requirement of Rule 23(a) is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The Fifth Circuit has held:

The test for typicality is not demanding. It focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent. Typicality does not require a complete identity of claims. Rather, the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.

James v. City of Dallas, 254 F.3d 551, 571 (5th Cir. 2001) (internal quotations and citations omitted); *Forbush v. J. C. Penney*, 994 F. 2d 1101, 1106 (5th Cir. 1993) (holding that as is true of the standard for commonality, the standard plaintiffs must meet to satisfy the requirements of typicality is very low). In this case, the named Plaintiffs' legal and remedial theories are directed to FEMA's policies and their implementation, which face the putative class as a whole.

The claims of the named Plaintiffs are typical of all proposed class members in that each named Plaintiff, due to the challenged policies and practices of FEMA, (a) has been displaced by Hurricane Katrina and/or had their primary pre-disaster residence rendered

uninhabitable; (b) is eligible for Temporary Housing Assistance or Continued Rental Assistance; and (c) has applied for Temporary Housing Assistance or Continued Rental Assistance and had it delayed or denied.

The representative Plaintiffs have no interest antagonistic to or in conflict with the interests of the class members they seek to represent. The representative Plaintiffs and the proposed class share a common goal. All want FEMA to provide them notification regarding the full range of benefits available, the criteria applicable to each type of assistance and other essential information required by applicable statute and regulation, and to provide them the benefits for which they are eligible for in a timely manner.

D. The Interests of the Class are Fairly and Adequately Protected

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." In the Fifth Circuit, a determination of adequacy requires "an inquiry into the zeal and competence of the representative's counsel and into the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of absentees." *Horton v. Goose Creek Independent Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982) (citations omitted).

The representative Plaintiffs will adequately and fairly represent and protect the interests of the class because each named Plaintiff has suffered and seek redress from the same or similar harm as all other members of the class. For example, Plaintiffs Bartley and Hood are both familiar with Defendants' improper use of the Shared Housing Rule and FEMA has denied their applications and unfairly delayed their Temporary Housing Assistance as a result of this Rule. Plaintiff Magee has experienced delay in the receipt of Temporary Housing Assistance and his application for Continued Rental Assistance because, according to FEMA representatives, his SBA loan application is still pending. Plaintiff Hayward has experienced

delay in the receipt of Temporary Housing Assistance with no explanation for the delay being. Plaintiff Hayward has also received Continued Rental Assistance with is insufficient given the current fair market rate for accommodations in his area. Representative Plaintiffs in this case have already demonstrated their knowledge of the facts involved and their willingness and ability to take an active role in the litigation in their submission of affidavits supporting this action and in their willingness to testify in this action. Furthermore, there is no likelihood of conflicts or antagonistic interests developing between the named Plaintiffs and the classes they represent since within this action the representative Plaintiffs do not request any different or additional relief for themselves other than the class-wide relief. Thus, their interests overlap and do not conflict.

The attorneys representing Plaintiffs, Schulte Roth & Zabel LLP; the Lawyers Committee For Civil Rights Under Law; John R. Pierre, Esq.; The National Law Center on Homelessness & Poverty; and The Public Interest Law Project are experienced and capable litigators possessed of sufficient resources to adequately protect and represent the interests of the plaintiff class. They are acting on a *pro bono* basis, having already devoted many thousands of hours to the representation of these evacuees in need of an advocate at a time when their lives have been affected so drastically. Furthermore, the Lawyers Committee For Civil Rights Under Law, The National Law Center on Homelessness & Poverty and The Public Interest Law Project intend to use their extensive contacts and relationships with various legal aid, civil rights and other public interest legal organizations to ensure that proper information regarding this action will reach all class members, and that resources exist to respond to inquiries from the class.

Counsel also have extensive experience in litigating class actions. Lead counsel from Schulte Roth, Howard O. Godnick, is a partner who, as lead counsel, has litigated several multi-billion dollar matters on behalf of private clients. These include two several month trials

on behalf of a multibillion dollar hedge fund and Ernst & Young (both cases resulting in judgments in favor of Mr. Godnick's clients), a proxy contest against Kerr-McGee Corporation, resulting in settlement in favor of client's corporate initiatives, and the successful defense of 22 class actions commenced in the United States by various shareholders and note holders arising out of the financial collapse of Livent Inc. Daniel L. Greenberg, Special Counsel for Pro Bono Initiatives at Schulte Roth, was Director of Clinical Programs at Harvard Law School, and President and Attorney-in-Chief at The Legal Aid Society in New York, the country's oldest and largest provider of legal services to the poor, where its case load of nearly 300,000 cases yearly included dozens of class-action lawsuits.

The Lawyers Committee For Civil Rights Under Law is a 43-year old civil rights organization with a history of acting as counsel in numerous and substantial class actions from certification through disposition, addressing issues such as voting rights, housing, education, and employment. In his 36 years of practice, John Brittain, Chief Counsel and Senior Deputy Director of the Lawyers Committee, has acted as counsel in over a dozen class action lawsuits addressing civil rights and consumer issues. He also has taught Civil Procedure, including the requirements of Rule 23, as a Professor for over 25 years.

John K. Pierre has served as co-counsel for plaintiffs in desegregation class action in the Middle District of Louisiana since 1999. *See Davis v. East Baton Rouge*, 251 F.3d 157 (5th Cir. La. 2001). He has been a law professor for 15 years and a licensed attorney for 20 years.

The National Law Center on Homelessness & Poverty has represented homeless plaintiffs in many actions against government entities, including, most recently, in a class action asserting the education rights of homeless children. *See NLCHP v. New York*, 224 F.R.D. 314

(E.D.N.Y. 2004). Legal Director Rebecca Troth was one of plaintiffs' counsel in the first sexual harassment suit certified as a class action, *Jenson v. Eveleth Mines*.

Stephen Ronfeldt specializes in class action advocacy for low-income persons, has litigated over 35 class action or class-wide actions, and has successfully sued FEMA in the aftermath of the Loma Prieta earthquake involving claims similar to those raised in this case, e.g., the shared household rule and failure to inform victims about their benefits. *See Smith v. FEMA*, Civ. No. C-90-0161 EFL (N.D. Cal. 1990), available at <http://www.pilpca.org/docs/Smith.v.FEMA.Settle.Agreement.pdf>.

The adequacy of Plaintiffs and their counsel has been demonstrated already in this case; it is because of what has already been accomplished in this lawsuit that tens of thousands of Katrina victims were spared eviction by FEMA onto the cold streets of the cities, towns and communities to which they had been forced to flee because of the hurricane.

II. The Proposed Class Satisfies the Requirements of Rule 23(b) of the Federal Rules of Civil Procedure

As mentioned above, Plaintiffs need satisfy only one of the three prongs of Rule 23(b). *Baroni, et. al. v. Bellsouth Telcoms., Inc.*, Civ. Action No. 02-009 Sec. I/4, 2004 U.S. Dist. LEXIS 14403, at *13-14 (E.D. La. July 27, 2004) (citing *Vizena v. Union Pac. R.R. Co.*, 360 F.3d 496, 503 (5th Cir. 2004)). In *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), the Fifth Circuit explained the differences between all three types of classifications as follows:

The *(b)(1)* class action encompasses cases in which the defendant is obliged to treat class members alike or where class members are making claims against a fund insufficient to satisfy all of the claims. . . . The *(b)(2)* class action [] was intended to focus on cases where broad, class-wide injunctive or declaratory relief is necessary. . . . The *(b)(3)* class action was intended to dispose of all other cases in which a class action would be "convenient and desirable," including those involving large-scale, complex litigation for money damages.

Choice Inc. v. Graham, 2005 U.S. Dist. LEXIS 11585, at *1-2, *citing Allison*, 151 F.3d at 412.

As demonstrated below, Plaintiffs clearly meet the requirements of FRCP 23(b)(1)(A) and (b)(2).

A. The Proposed Class Satisfies the Requirements of Rule 23(b)(1)(A) of the Federal Rules of Civil Procedure

The FRCP 23(b)(1)(A) "class action encompasses cases in which the defendant is obliged to treat class members alike," such as is the case here. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 412 (5th Cir. 1998). Defendants are required by law to apply a uniform set of rules and procedures in considering individuals' applications for Temporary Housing Assistance. Because separate actions brought by individual members of the class would create a risk inconsistent or varying adjudications which would establish incompatible standards of conduct for the Defendants, class certification under FRCP 23(b)(1)(A) is appropriate. Plaintiffs seek injunctive relief with respect to Defendants' policies and procedures. If similar relief is requested in another proceeding, a risk of incompatible standards of conduct could present itself if the two courts establish conflicting requirements for Defendants. *Id.*, at 421, n16.

B. The Proposed Class Satisfies the Requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure

The claims raised by Plaintiffs in this action are precisely the sorts of claims that Rule 23(b)(2) was designed to facilitate. "As the Advisory Committee Notes explain, 23(b)(2) was adopted in order to permit the prosecution of civil rights actions." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998); *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (civil rights cases against parties charged with unlawful, class-based discrimination are the prime examples of cases appropriate for class certification under Rule 23(b)(2)).

Rule 23(b)(2) requires that the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or declaratory relief with respect to the class as a whole. Here, Defendants have applied the

regulations, practices and procedures to the members of the class as a whole. Defendants have acted or refused to act on grounds generally applicable to the class as a whole with respect to each of the Challenged Practices, by applying uniform policies and procedures to all class members. Plaintiffs seek only injunctive and declaratory relief, rather than monetary damages, and, where such relief is sought, class certification is appropriate under Rule 23(b)(2). *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998) ("The rule is clear that claims seeking injunctive or declaratory relief are appropriate for [Rule 23](b)(2) certification.").

As described above, the common characteristics of the class are precisely that Defendants have common policies and practices that they have applied generally to all members of the affected classes. It is solely to challenge these policies and practices that Plaintiffs have brought this action and are seeking class-wide declaratory and injunctive relief. All members of the class have been subjected to a uniform policy in that all have been similarly deprived of necessary or basic information regarding the assistance available and the changes in FEMA's policies. Because Defendants have used standardized notification practices and policies and forms that varied little, if at all, from person to person, class-wide injunctive relief is appropriate.

CONCLUSION

For the foregoing reasons, a class action is the exclusive method by which the interests of all affected persons can be adequately protected. Accordingly, Plaintiffs respectfully request that the Court find that the proposed class meets the requirements of Rules 23(a) and (b)(1) and (2), and grant their motion for certification of a plaintiff class so that they may pursue the claims alleged in their Complaint.

Dated: New York, New York
January 31, 2006

Respectfully Submitted,

SCHULTE ROTH, & ZABEL LLP

By: 

Howard O. Godnick, Esq. - Admitted Pro Hac Vice
Daniel L. Greenberg, Esq. - Admitted Pro Hac Vice
Sena Kim-Reuter, Esq. - Admitted Pro Hac Vice
919 Third Avenue
New York, New York 10022
(212) 756-2000

THE PUBLIC INTEREST LAW
PROJECT

Steve Ronfeldt, Esq.
449 15th Street, Suite 301
Oakland, California 94612
(510) 891-9794

NATIONAL LAW CENTER ON
HOMELESSNESS & POVERTY

Maria Foscarinis, Esq.
Rebecca K. Troth, Esq.
1411 K Street, NW, Suite 1400
Washington, DC 20005
(202) 638-2535

JOHN K. PIERRE, ATTORNEY AT LAW

John K. Pierre, Esq. - Bar No. 20328
2900 West Fork Drive
Suite 200
Baton Rouge, Louisiana 70816
(225) 295-5638

LAWYERS COMMITTEE FOR
CIVIL RIGHTS UNDER LAW

John C. Brittain, Esq.
1401 New York Avenue, NW
Suite 400
Washington, DC 20005-2124

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing documents was served on all counsel of record by electronic mail on this 31st day of January, 2006.



JONATHAN E. SCHULMAN

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

-----X
BEATRICE B. McWATERS; FLORENCE :
JACKSON; CALVIN DAVIS; REGINALD :
JONES; VAN PATIN; JOHN HUBBARD; :
BILLY SMITH; THURMOND PRICE; KEIVA :
MELISSA COLOMB; RUSSELL HAYWARD; :
MARY PAT VAN TINO; PAMELA JACKSON; :
WILLIAM DAVIS; ELIZABETH SIMPSON; :
CHRIS DAVIS; LYMAN SCOTT; MICHELLE :
DAVIS; JENNIFER SAMPEY; DAVID MAGEE; :
KEISHAN GOODMAN; SHAWN ALLEN; :
TIMOTHY HOOD; MICHAEL MARTINEZ; :
CHARLES HILL, JR.; and LENORA BARTLEY; :
On Behalf Of Themselves And All Those Similarly :
Situating, :

Civ. No.: 05 - 5488 (SRD)

Plaintiffs,

- against -

FEDERAL EMERGENCY MANAGEMENT :
AGENCY; DEPARTMENT OF HOMELAND :
SECURITY; MICHAEL CHERTOFF, Secretary :
of Department of Homeland Security; DAVID :
PAULISON, Interim Director, Federal :
Emergency Management Agency; THAD W. :
ALLEN, Principal Federal Official, Federal :
Emergency Management Agency; KENNETH O. :
BURRIS, JR., Regional Director, Federal :
Emergency Management Agency; RON :
CASTLEMAN, Regional Director, Federal :
Emergency Management Agency; RON :
SHERMAN, Federal Coordinating Officer, :
Federal Emergency Management Agency; :
WILLIAM CARWILE, Federal Coordinating :
Officer, Federal Emergency Management :
Agency; BILL LOCKEY, Federal Coordinating :
Officer, Federal Emergency Management :
Agency; and their successors in office, :

Defendants.

-----X
DECLARATION OF LENORA BARTLEY

10041799.1

I, Lenora Bartley, state as follows:

1. I was a resident of Gretna, Louisiana at the time Hurricane Katrina struck. I evacuated from the storm with my eight-year old son. I registered with FEMA approximately one to two weeks after the storm. After traveling throughout Louisiana and Texas, we eventually ended up living in a motel in San Antonio, Texas. We have been living in the motel for over two months.
2. I have found an apartment complex for myself and my eight-year old son, which will accept us, but cannot move there without housing assistance from FEMA.
3. On December 26, 2005, I received two letters from FEMA stating that I was ineligible for housing assistance because a member of my household was already provided with housing assistance.
4. On January 6, 2006, on a FEMA representative explained to me over the phone that I had been denied housing assistance because my husband had already received housing assistance. I explained that my husband and I were separated and that I was still in need of housing assistance. She told me that I would be receiving a letter in the mail which would explain why I had been denied benefits and that I would have to fill out a form explaining why my husband and I were separated. I have not yet received this letter.
5. On January 10, 2006, I received a call from the motel I am staying in explaining a notice they received from FEMA, stating that I need to register with FEMA or they will stop paying for my hotel room as of February 7, 2006.
6. On information and belief, my brother, who was staying in the same motel as me, has received housing assistance in late December. A DRC worker told him that

10041799 1

because he had received the housing assistance, he had to move out of the motel by January 10, 2006. My brother has secured an apartment, but had been trying to get some basic necessities, such as a bed, prior to leaving the motel and moving into the apartment. However, based on the information provided by the DRC worker, my brother has moved out of the motel prior to obtaining such necessities.

In accordance with 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing statements are true and correct.

Signed 10 day of January 2006.

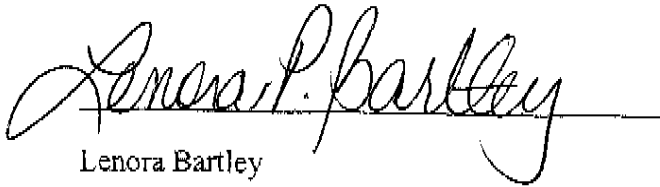

Lenora Bartley

EXHIBIT B

Godnick, Howard

From: Scott.Simpson@usdoj.gov
Sent: Thursday, January 19, 2006 10:01 AM
To: Godnick, Howard
Subject: RE: McWaters v. FEMA

I understand that FEMA has granted Ms. Bartley's request for assistance. Still waiting for a complete response on the other issue.

-----Original Message-----

From: Simpson, Scott (CIV)
Sent: Wednesday, January 18, 2006 3:31 PM
To: 'Howard.Godnick@srz.com'
Subject: RE: McWaters v. FEMA

Howie:

Sorry I haven't responded to these questions yet. On the second issue, FEMA is reviewing all 392 cases in the IAW category. I'm hoping to have something for you before close of business today. We are inquiring about Ms. Bartley.

Scott

-----Original Message-----

From: Howard.Godnick@srz.com [mailto:Howard.Godnick@srz.com]
Sent: Tuesday, January 17, 2006 3:46 PM
To: Simpson, Scott (CIV)
Subject: McWaters v. FEMA

Scott:

Two things.

First, any news on Ms. Bartley?

Second, anything further on the issue I raised the other day regarding applicants whose applications may have been wrongfully denied because of a misapplication (or no application) of, for example, the shared household rule? As I raised the other day, this issue concerns us because evacuees now deemed "denied" may be entitled to "pending" status and, thus, entitled to a longer stay in the hotels.

Thanks for your prompt attention to these matters.

Howard O. Godnick, Esq.
Partner
Schulte Roth & Zabel LLP
919 Third Avenue
New York, New York 10022
212.756.2220

U.S. Treasury Circular 230 Notice: Any U.S. federal tax advice included in this communication was not intended or written to be used, and cannot be used, for the purpose of avoiding U.S. federal tax penalties.

NOTICE

This e-mail message is intended only for the named recipient(s) above. It may contain

confidential information that is privileged or that constitutes attorney work product. If you are not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this e-mail and any attachment(s) is strictly prohibited. If you have received this e-mail in error, please immediately notify the sender by replying to this e-mail and delete the message and any attachment(s) from your system. Thank you.

=====

EXHIBIT C



Extended Families Living Together May Be Eligible For FEMA Disaster Assistance

Release Date: November 26, 2005
Release Number: 1606-089

AUSTIN , Texas -- Some extended families may not be receiving all the aid they are eligible for because they are living together temporarily and have applied from the same address according to the U.S. Department of Homeland Security's Federal Emergency Management Agency (FEMA).

These applications may be considered to be duplicates. In such cases, each head of household or roommate should call the FEMA Help Line and ask for the applications to be unlinked. FEMA may consider separate applications from:

- * Families who lived together before a disaster but who have been displaced in different geographical locations.
- * Extended families who lived in different dwellings on the same property.
- * Extended households who lived in separate homes before the hurricane and are now temporarily sharing quarters.
- * Roommates who lived together before a disaster but who have been displaced in different geographical locations.

Extended families sharing living quarters away from home or those who have been separated in different geographical locations may apply separately for disaster assistance.

Applicants are encouraged to check on the status of their applications if they haven't had a response from FEMA within 25 days. To do so, they may visit a Disaster Recovery Center , log onto www.fema.gov or call **800-621-FEMA (3362)** or TTY **800-462-7585** for the hearing- and speech-impaired.

Individuals can use the toll-free number to access the Automated Status Update and make changes in their application. Using voice-activated prompts, applicants can check on personal registration, eligibility status, financial compensation, the appeal process and other information.

Callers will need to provide their FEMA registration ID number, date of birth and the last four digits of their social security number. In case of an error, applicants will be forwarded to FEMA Help Line staff.

Last Updated: Monday, 28-Nov-2005 11:34:51

[Return to the article](#)

EXHIBIT D



FEMA Housing Assistance Not Contingent On SBA Loan Application

Release Date: December 18, 2005

Release Number: HQ-05-391

WASHINGTON, D.C. -- Hurricane Katrina victims seeking federal temporary housing assistance do not need to complete a U.S. Small Business Administration (SBA) loan application to be considered for such assistance.

Temporary housing assistance from the U.S. Department of Homeland Security's Federal Emergency Management Agency (FEMA) does not require that an applicant file for an SBA loan. FEMA's temporary housing assistance is available to applicants displaced from their pre-disaster primary residence or whose residence has been rendered uninhabitable as a direct result of Hurricane Katrina. Assistance is also contingent on an applicant's insurance coverage and whether it provides for housing needs. But in no case will an SBA loan application be required for temporary housing assistance.

Eligibility determinations for applicants requesting FEMA's temporary housing assistance will not be held up because the applicant has or has not filled out an SBA loan application, or has filled out such an application incorrectly, unnecessarily or superfluously. FEMA will process applications for housing assistance regardless of whether the applicant has applied for an SBA loan.

An applicant must complete an SBA loan application to be eligible for additional assistance under the part of the Other Needs Assistance (ONA) program that covers personal property, vehicle repair or replacement, and moving and storage expenses. Even so, applicants who do not meet a certain income threshold may be excused from this requirement. In addition, there are other ONA grants such as public transportation expenses, medical and dental expenses, and funeral and burial expenses that do not require individuals to apply for an SBA loan to be eligible. The SBA makes low-interest disaster loans to qualified homeowners, renters, landlords, certain private non-profit organizations and businesses of any size that sustained losses due to the disaster. These loans are designed for disaster victims who are either uninsured or not fully covered by insurance.

SBA loans are the primary source of long-term recovery assistance. Actual loan amounts and terms are determined by the SBA and based on each applicant's financial condition.

"Taking on a loan probably isn't the first thing that folks think of when they're recovering from a disaster," FEMA Acting Director R. David Paulison said. "But there are strong advantages to an SBA loan. For example, it is tied to the lowest possible interest rate to make recovery as affordable as possible."

The SBA also makes mitigation funds available to many disaster victims who have already been approved for low-interest disaster loans. SBA funds are intended to help borrowers by offering an increase up to 20 percent of their approved physical loan amount to help pay for mitigation measures.

For more information about how to complete the loan application, or for more information on SBA assistance, call the SBA Helpline at 800-659-2955, or visit www.sba.gov/disaster. For more information on FEMA assistance programs, or to register for FEMA assistance, visit www.fema.gov or call 1-800-621-FEMA (3362) or TTY 1-800-462-7585 for the speech and hearing impaired.

FEMA manages federal response and recovery efforts following any national incident. FEMA also initiates mitigation activities, works with state and local emergency managers, and manages the National Flood Insurance Program. FEMA became part of the U.S. Department of Homeland Security on March 1, 2003.

Last Updated: Monday, 19-Dec-2005 13:34:05

[Return to the article](#)