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ASSOCIATION, INC.

FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

SEP 28 2007  
at 11 o'clock and 10 min. M.  
SUE BEITIA, CLERK

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

MAUI VACATION RENTAL  
ASSOCIATION, INC., a Hawaii  
corporation,

Plaintiff,

vs.

THE COUNTY OF MAUI; JEFF  
HUNT, Director of MAUI COUNTY  
PLANNING DEPARTMENT, as an  
individual, and DOES 1-10, inclusive;

Defendants.

Civil No.:

CV07 00495

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COMPLAINT FOR INJUNCTIVE  
AND DECLARATORY RELIEF;  
DEMAND FOR JURY TRIAL;  
EXHIBIT 1; SUMMONS

KSC

1. Substantive and Procedural Due Process Violations (42 U.S.C. § 1983)
2. Breach of Express and Implied Contract/Specific Performance
3. Breach of Covenant of Good Faith and Fair Dealing
4. Equitable Estoppel
5. Maintenance of Illegal Customs and Policies

COMPLAINT

Plaintiff MAUI VACATION RENTAL ASSOCIATION, INC. hereby alleges  
against defendants, and each of them, as follows:

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## NATURE OF THE SUIT

1. This is an action for injunctive and declaratory relief against defendants, and each of them, for their conduct in dealing with the owners of property being used as Transient Vacation Rentals in the County of Maui. Plaintiff alleges procedural and substantive due process and equal protection violations, equitable estoppel, breach of express and implied contract. Plaintiff also alleges municipal liability for failure to adequately train and supervise entity employees, and for the maintenance of illegal customs and policies, both of which cause and allow constitutional violations of procedural due process, substantive due process, equal protection, and deprivation of honest government services, in violation of the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution.

## JURISDICTION

2. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sections 1331 and 1343(a)(3) and (4), this being an action arising under the Constitution and laws of the United States, for violation of federal laws and rights pursuant to 42 U.S.C. § 1983. Violation of Plaintiff's constitutional and other federal rights is actionable pursuant to 42 U.S.C. § 1983.

3. This Court has pendant and supplemental jurisdiction over all state law claims, if any, under 28 U.S.C. § 1367(a).

4. This Court's jurisdiction is also invoked under the Constitution of the United States, particularly the due process and equal protection clauses of the Fourth

and Fourteenth Amendments, this being an action to secure and enforce rights constitutionally protected which are now being and have been violated by defendants.

5. This Court's jurisdiction is also invoked under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, this being a case of actual controversy where the relief sought by plaintiffs, among other things, includes a declaration of the parties' respective rights and obligations.

6. Venue is proper in the District of Hawaii pursuant to 28 U.S.C. § 1391, in that the subject matter of this action arose in this district, all defendants and plaintiffs are subject to personal jurisdiction in this district, and there is no district in which the action may otherwise be brought.

#### THE PARTIES

7. Plaintiff MAUI VACATION RENTAL ASSOCIATION, INC. (hereinafter referred to as "MVRA") is and at all times herein relevant was a corporation incorporated under the laws of the State of Hawaii. MVRA sues on behalf of itself and its members.

8. Defendant COUNTY OF MAUI ("County") is and at all times herein relevant was a municipality created and existing by virtue of the laws of the State of Hawaii, operating under the Maui County Charter and empowered to act through its governing body, the Maui County Council, and through its officials, employees, agents, agencies, and departments. The County is empowered by the State of Hawaii

to enact, implement and enforce ordinances regulating the use of land and structures within the County's boundaries, and the procedures therefor.

9. Defendant JEFF HUNT ("Hunt") is a competent adult individual and at times herein relevant was the director of the Planning Department for the County of Maui.

10. Plaintiff is presently unaware of the true names and capacities of the DOE Defendants, but will amend its complaint as soon as they are ascertained.

11. Defendants, and each of them, are and at all times herein relevant were the agents, servants and employees of one another in doing the acts and omissions herein complained off, and have been and are acting within the course and scope of said agency and employment. On information and belief, at all times mentioned herein all County officials, agents and employees were acting pursuant to authority delegated or conferred by the County of Maui and, in doing or failing to do the things complained of, were acting within the scope of that authority.

12. In doing all the acts and omissions herein described, the County Defendants, and each of them, and other County officials, agents and employees, separately and in concert, have been and are acting pursuant to the official policy, practice, and/or custom of the County of Maui.

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FIRST CLAIM FOR RELIEF

(Constitutional Violations, 42 U.S.C. § 1983)

13. Plaintiff hereby incorporates by this reference paragraphs 1-12, above, as though fully set forth herein.

14. MVRA is an association formed “to legitimize the existence of Maui vacation rentals on residential, agricultural and rural zoned land, and to promote compliance with County and State regulations, such that local government, visitors, residents and owners of vacation properties benefit mutually.” *MVRA Charter*.

15. “Transient vacation rentals” (“TVR”) is the terminology used to describe the use of property whereby it is rented for periods of less than 180 days per year by a “visitor or person” (including owners) who does not use the property as a primary residence. See *Maui County Code* § 19.04 Definitions. Most every TVR would also fit the definition of “short-term use” which is rental for periods of less than 30 days.

16. As early as 1980, House and Senate journals noted that the County needed to re-write its zoning laws to address TVRs. Starting in or about 1995, Maui County considered legislation to regulate “home occupations”, but determined that it was too large of an issue to tackle in one ordinance, and instead passed the “Bed and Breakfast” (“B&B”) ordinance in 1997. *Maui County Code* § 19.64 et seq. That ordinance is very limited, including only those TVRs in which the operator occupied the same dwelling as the guests, and it does not apply in Rural or Agricultural-zoned areas. The B&B permitting process remains burdensome because the B&B permit

may require approval (or a recommendation of approval) by the Planning Director, one of Maui's three Planning Commissions, the County Council; or all of the foregoing. Agency infrastructure requirements are excessive and inconsistent; and the permit term is only one (1) year.

17. Following the passage of the B&B ordinance in 1997, the Planning Department advised callers not to bother applying for permits for TVR's, because new, less burdensome regulations were being formulated. Thus, many TVR operators believed that they were "in compliance." For this reason, they did not apply for permits. The Planning Department based this advice on the belief that the Council would soon adopt new zoning to encompass all vacation rentals. The Planning Department indicated that this advice was based on their communications with the County Council.

18. For over a decade the Maui Visitor's Bureau in cooperation with the Hawaii Tourism Authority, and from 2002-2006 the Maui Office of Economic Development, actively promoted and encouraged the growth of TVRs. Color travel brochures were produced featuring visitor accommodations in "less familiar, less advertised communities." The brochures invited visitors to "feast on the seclusion of a romantic hideaway in Huelo or Hana," where TVRs and B& B's were not and are not a principal or accessory use permitted by zoning.

19. TVRs provide self-employment for approximately 800 proprietors and create about 600 full-time equivalent jobs for other residents. TVR guests spend \$40

million annually, exclusive of rent, most of which remains in Maui's economy. Spending generates \$4 million in state taxes, of which \$725,000 returns to Maui as Transient Accommodation Tax.

20. In 2001, Maui County inadvertently increased enforcement against TVRs, when Planning Director John Min asked enforcement officers to investigate the TVR situation. Consequently, the County's customary "enforcement-by-complaint" policy was set aside. However, after Council meetings, Director Min agreed to stop initiating enforcement actions when there had been no complaint from the public concerning an actual "nuisance-type" impact. In addition, Director Min enacted the "moratorium" policy, which allowed those with pending permit applications to operate during the permitting process, unless "County enforcement due to a complaint ha[d] already been initiated". *See*, 2001 Agreement.

21. DAVID DANTES, as Vice President of MVRA, met with Director Min, on October 23, 2001. During that meeting, Dr. Dantes and Director Min agreed to the following:

- A. Existing transient accommodations in Agricultural and Rural zoned areas could apply for a County Conditional Permit and State Special Permit (administered by the County Planning Commission for parcels less than 15 acres). A TVR operator could choose to initiate the application process proactively, or wait until they were contacted by the County Zoning

Enforcement Division as part of a general enforcement campaign, before applying.

- B. Any property owner who submitted applications for a Conditional Permit and State Special Permit would be allowed to continue his or her business while the applications were pending. A moratorium would be placed on zoning enforcement until the permit process was concluded, with the exception where County enforcement due to a complaint had already been initiated.
- C. The Planning Department would take certain measures to make the permit process more “user friendly” including:
  - (a) Publish a manual to guide applicants through the application process;
  - (b) Arrange workshops conducted by the Planning Department;
  - (c) Expedite the permit process;
  - (d) When the term of a Conditional Permit was about to expire, the owner would apply for an extension; and
  - (e) MVRA would actively promote compliance and the filing of applications for permits under the new system of regulations.
- D. Planning Director Min also agreed to consider:



- (a) The appointment of two Planners who could focus in processing Conditional Use permit applications;
- (b) Increasing the initial term of the Conditional use Permits from one year, to two or three years.

This agreement, which was effectively a plea bargain for persons otherwise in violation of laws with criminal penalties, was reduced to writing and signed by both Dr. Dantes, as Vice President of the MVRA, and Planning Director John Min. A copy of the executed contract between MVRA and the County of Maui, by Director Min, is attached as EXHIBIT "1".

22. Approximately eighty (80) operators of TVR's submitted transient vacation rental applications. Eight (8) applications were processed and all of them were approved. However, sixty-five (65) or seventy (70) of those submitted were never processed because the then head of the County Council Land Use Committee, Mr. Nishiki, arbitrarily stopped processing the applications, upon information and belief because of the length of time it was taking to complete the processing of each application. It is estimated that at least 800 applications would have been submitted had the cessation of processing not occurred.

23. During the "moratorium" period, additional transient vacation rental owners attempted to submit applications but were told by Planning Department employees that there would be a new law, and they should wait until that time.

24. Dr. David Dantes applied in 2001, and within six (6) or seven (7) months, public hearing was scheduled before Maui Planning Commission, where he received approval of the State Special Permit and a recommendation to the County Council Land Use Committee to approve the County Conditional Permit. However, the Chair and successor-Chairs of the County Council Land Use Committee did not process any such permits for four (4) years. The Maui Planning Commission forwarded Dr. Dantes' Conditional Permit Application (with a recommendation of approval) to the County Council in August, 2002, and there was no further action until August, 2006. Dr. Dantes estimates that he has spent \$15,000 on costs related to the acquisition of his permit to conduct business as Maui Tradewinds Vacation Rental.

25. Of the sixty-five (65) or seventy (70) unprocessed applications, applicants were treated inconsistently: some applicants were contacted and given a choice whether to proceed or delay processing until a new ordinance was passed; others were not given a choice, and their applications were held in abeyance by the Planning Department; some were not given a choice and their applications were processed by the Planning Department; and some went through the Planning Commission and were approved, but never scheduled for hearing by the Council. The County made the agreements with the vacation rental operators for its own benefit, because it could not handle the volume of applications.

26. During the “moratorium period” of the last six (6) years, zoning laws were not enforced because the previous administrations decided not to enforce, and had a written, signed enforcement policy. The current administration has decided to enforce. Jeff Hunt, current Director of the Planning Department, has publicly categorized vacation rentals as a “crisis situation” because of the alleged impact on affordable housing, despite his awareness that a County-sponsored study of vacation rentals found negligible impact on affordable housing due to vacation rentals. Mr. Hunt has also justified strict enforcement based on an “outcry of complaints” about neighborhood impacts allegedly caused by vacation rentals. However, County records show that vacation rentals account for only 2-3% of all complaints received by the Planning Department (an improvement from 7% at the time the Moratorium Agreement was signed in 2001).

27. Commencing in July of 2007 but retroactive to Feb. 12, of 2007, without any public announcement or notification of any kind, the County of Maui ceased the moratorium and determined to issue Notices of Violation to all known TVRs. After meetings and hearing on the matter, Defendants mandated that January 1, 2008, is the cutoff date after which no TVR operations will be allowed. In other words, if a TVR does not have a permit by then (which is of course essentially impossible, given the length of time the application processing takes), then that TVR shall conduct no business after January 1, 2008, effectively putting a TVR out of business.

28. The County has advised that this cutoff will apply even to those who already submitted an application in accordance with the November 1, 2001, contract with the County which specifically states that, “any property owner who submits a Conditional Use Permit Application will be allowed to continue their business while the application is pending”.

29. The permitting process as it existed in 2001, and still exists today, is very burdensome not just for the applicant, but also for the County. At least 15 different and unique agencies review the application, there are three or four public hearings, and then the County Council and the Mayor sign a law authorizing a person to rent to a short-term visitor. Typically, Applications must be circulated to the following agencies for review and comment by:

- A. State of Hawaii Land Use Commission;
- B. Office of State Planning (Department of Business, Economic Development & Tourism);
- C. State of Hawaii Office of Hawaiian Affairs;
- D. State of Hawaii Historic Preservation Division;
- E. State of Hawaii Department of Hawaiian Homelands;
- F. State of Hawaii Department of Land & Natural resources, Land Division Engineering Branch;
- G. State of Hawaii Department of Transportation;
- H. County of Maui Department of Water Supply;

- I. County of Maui Department of Public Works and Waste Management;
- J. County of Maui Department of Parks & Recreation;
- K. County of Maui Police Department;
- L. County of Maui Department of Fire Control;
- M. County of Maui Department of Housing & Human Concerns;
- N. Maui Electric company
- O. Maui District Health Office
- P. County of Maui Department of Planning, for a recommendation
- Q. County of Maui Planning Commission for public meeting
- R. County Council Land Use Committee
- S. County Council Vote
- T. Mayor Signs Ordinance

Professional Planning Consultants routinely estimate that they would charge approximately \$25,000 to prepare and assist in processing TVR applications under current law.

30. Many TVR operators made the decision to delay submitting an application because they were told that the law was going to change, and they didn't want to unnecessarily go through the very lengthy and costly review process. They were explicitly advised by the Planning Department and others to wait until the law changed. However, the County of Maui Planning Department and the County

Council have failed to come to any agreement regarding streamlining the permit process, and the law has not been amended.

31. At or about the time the County stopped processing applications, the County was involved in a lawsuit in which it was ruled by the Ninth Circuit that when the County Council passes an ordinance with respect to just one individual property owner, the Council members do not have legislative immunity for those actions.

32. In breaching their agreement with Plaintiff and failing to have in place or to observe procedurally and substantively sound procedural mechanisms to avoid the violation of constitutional rights, Defendants have violated the procedural and substantive due process and equal protections rights of Plaintiff and Plaintiff's individual members.

33. Violation of one's civil rights by one acting under color of law is actionable pursuant to 42 U.S.C. § 1983.

34. As a direct and proximate result of the foregoing arbitrary and capricious conduct by Defendants, Plaintiff and its members have sustained and will continue to sustain irreparable harm, including damage to their business and reputation, loss of real property, and have no adequate remedy at law to prevent repeated unfounded interference by Defendants with their business and business relationships, and Plaintiff is therefore entitled to an injunction enjoining Defendants and its officers, agents, directors, employees, licensees and all other persons acting by, through, or in

concert with Defendants, from engaging in further acts interfering with Maui Vacation Rental Association, Inc. and its members without due process of law.

35. Furthermore, an actual, present, and substantial controversy exists between the parties and a declaration as to the respective rights and duties of the parties, pursuant to 28 U.S.C. § 2201 and 2202, is necessary and appropriate.

### SECOND CLAIM FOR RELIEF

(Breach of Express and Implied Contract)

36. Plaintiff hereby incorporates by this reference paragraphs 1-35, above, as though fully set forth herein.

37. On or about November 1, 2001, Plaintiff and County Planning Director John Min entered into a written agreement under which the County agreed to allow vacation rental operators to continue their regular business as long as they initiated the process of obtaining the Conditional Permit required under the current law. “[F]iling the application will place a moratorium on zoning enforcement until the permit process has concluded.” *Exhibit 1*.

38. Subsequently, from about 2002-2007 the County actively discouraged TVRs from making permit applications until after a new law was passed. Numerous County officials and employees entered into implied agreements under which the County stopped requiring vacation rental operators to submit Conditional Permits, discouraged applications, and refused to accept applications, because the County

lacked the manpower to process the large volume of applications. The vacation rental operators, however, were allowed to continue to operate as per the prior agreement.

39. Plaintiff fully performed and satisfied all of their obligations and responsibilities under both the express and implied contracts between the parties, and relied upon the express and implied agreements in duly submitting permit applications, or ceasing the submission of permit applications, as the relevant time dictated, and continued to operate their vacation rental units pursuant to said agreements with the County of Maui in reliance upon those agreements.

40. Commencing in or about July of 2007, but retroactive to February of 2007, Defendants, and each of them, breached their agreement with Plaintiff by starting a blanket “crackdown” on all known vacation rental operators, regardless of whether the operator had submitted, or attempted to submit, a permit application, or not. Some operators were told that they would be “okay” until January, however of those, several of the outspoken individuals have been issued Notices of Warning despite the assurances.

41. As a direct and proximate result of the aforesaid breach of express and implied contract, defendants, and each of them, caused pecuniary and non-pecuniary harm to Plaintiff's members, and Plaintiff's members are suffering irreparable harm as a result thereof, including but not limited to loss of business, interference with business and contractual relationship, damage to reputation, and loss of real property



and rights associated therewith, and plaintiff is entitled to specific performance of the agreements with the County of Maui as a remedy.

42. Further, as a condition of specific performance, Plaintiff requests the award of all reasonable and necessary attorneys' fees and costs incurred in the prosecution of this matter, as well as recovery of all expenses attributable to Defendants' breach of contract, in order that Plaintiff be made whole.

### THIRD CLAIM FOR RELIEF

(Breach of Implied Covenant of Good Faith and Fair Dealing)

43. Plaintiff hereby incorporates by this reference paragraphs 1-42 above, as though fully set forth herein.

44. When Plaintiff and Defendants entered into the agreements as set forth above, Plaintiff and its members relied upon Defendant's representations of good faith and fair dealing to accomplish and further the contract.

45. Defendants, and each of them, breached the implied covenant of good faith and fair dealing by failing to inform and cooperate with Plaintiffs in the performance of the agreements as described more fully hereinabove, which breach caused damage to Plaintiff.

46. The conduct of Defendant has proximately and directly caused Plaintiff's members pecuniary and non-pecuniary losses, and Plaintiff's members are suffering irreparable harm as a result thereof, including but not limited to loss of

business, interference with business and contractual relationship, damage to reputation, and loss of real property and rights associated therewith.

#### FOURTH CLAIM FOR RELIEF

(Equitable Estoppel)

47. Plaintiff hereby incorporates by this reference paragraphs 1-46, above, as though fully set forth herein.

48. Over a period of years, the County and its Planning Directors made certain written, verbal and affirmative representations to Plaintiff and all vacation rental operators that constitute a pattern and practice of misleading actions.

49. In submitting or not submitting their applications for Conditional Permits as set forth more fully hereinabove, and in recommending the same, Plaintiff MVRA and its members reasonably and in good faith relied upon the representations and conduct of the County, and the Defendants should be equitably estopped from taking enforcement action against Plaintiff MVRA and its members contrary to the terms of the express and implied agreement between the parties, both to prevent further irreparable harm and to preserve public confidence in government.

#### FIFTH CLAIM FOR RELIEF

(Maintenance of Illegal Customs and Policies)

50. Plaintiff hereby incorporates by this reference paragraphs 1-49, above, as though fully set forth herein.

51. The County of Maui has a custom and policy of using written “enforcement policies” that are handed out to the public and relied upon, including but not limited to the 2001 agreement signed by Plaintiff MVRA and the highest County Planning official, the Planning Director. Another example of a written policy utilized by the County of Maui is the “home based business” policy statement, which has been revised twice since its inception and which is handed out to the public and relied upon by both the County and the public. Upon information and belief, the County has numerous such “enforcement policies” on various matters, many of which are presented to the public as modifying or overriding existing legislation.

52. The use of written enforcement policies that are presented as having the true force of law, and which the County can and does change at its whim and discretion, without notice or hearing to the public, but on which the public is nonetheless encouraged to rely and does in fact rely, is a violation of substantive and procedural due process rights. To the extent the enforcement policies are enforced discriminately and/or against those the County dislikes for speaking out against it, they also violate equal protection and first amendment rights, respectively. For instance, two of the early Notices of Violation were publicly served upon the Board members of MVRA at a forum sponsored by the Maui News and the Better Business Bureau to discuss vacation rentals on Maui.

53. At all times herein relevant, the County of Maui knew or should have known of the existence of Plaintiff’s constitutional rights, specifically procedural and

substantive due process rights, right to honest government services, first amendment rights, and the right to equal protection of the laws, under the First, Fourth, Fifth and Fourteenth Amendments, but nonetheless developed, encouraged, ratified and maintained policies, customs, regulations and/or which caused, encouraged, tolerated and approved the above-described conduct of the individual employees and officials of the County of Maui, causing the deprivation of Plaintiff's well established constitutional rights.

54. Defendant County of Maui was informed and knew or should have known beyond a reasonable doubt that the conduct of its employees and officials as described hereinabove was a violation of Plaintiff's constitutional rights, yet it failed to train and supervise its employees and officials to prevent violation of Plaintiff's rights.

55. Defendant County of Maui also maintained illegal customs and policies in the face of complaints about and knowledge of the illegality of their conduct. Plainly the supervisory mechanism of the County of Maui was not properly engaged to prevent the malicious and continued violation of the federal rights of individuals, establishing a custom and policy of violation of said federal rights.

56. The County of Maui was either intentionally acting or failing to act, illegally acting or failing to act, in a custom or manner pursuant to its policies, and/or was so grossly negligent in its internal training, supervision and discipline of the individual employees and officials that it was deliberately indifferent to and demonstrated a reckless disregard toward the violation of federal constitutional and

other rights which was likely to occur and did occur from their policies and customs, all in violation of 42 U.S.C. §1983.

57. Additionally, Defendant County of Maui has displayed deliberate indifference to the rights of its citizens and, based upon the principles set forth in *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2019 (1978), its progeny and related cases, is thereby liable to Plaintiff.

58. The above-described policies and customs were the driving force behind the actions of the individual employees, supervisors, agents and/or officials of the County of Maui, resulting in irreparable harm and other damage to Plaintiff and its members.

59. Plaintiff is suffering and will continue to suffer irreparable injury by virtue of the violation of its constitutional and federal rights, and is without a plain, speedy and adequate remedy, thereby rendering preliminary and permanent injunctive relief appropriate. Money damages will not adequately compensate Plaintiff for the denial of constitutional and civil liberties and are extremely difficult to calculate for Plaintiff's losses and threatened losses, and, if not enjoined, a multiplicity of lawsuits on the same issues will be required. However, unlike the present case, subsequent lawsuits would seek to recover damages.

60. An actual, present, and substantial controversy exists between the parties. The aforesaid conduct of Defendant, against the Plaintiff, has deprived and continues to deprive Plaintiff of its constitutional and other federal rights, and without

declaratory and injunctive relief the deprivation of those rights will continue.

Defendant denies that its conduct is illegal or unconstitutional or causes injury to Plaintiff.

61. A declaration as to whether said laws and/or conduct is unconstitutional or otherwise unlawful is therefore necessary and appropriate to determine the respective rights and duties of the parties, pursuant to 28 U.S.C. §§ 2201 and 2202.

**PRAYER FOR RELIEF**

WHEREFORE Plaintiff MAUI VACATION RENTAL ASSOCIATION, INC., hereby requests the following relief against Defendants, and each of them, as follows:

1. For preliminary and permanent injunctive and declaratory relief, as necessary to allow the members of Plaintiff MAUI VACATION RENTAL ASSOCIATION, INC. to conduct their business in Maui County;

2. For an order of specific performance of the express and implied agreements between the parties;

3. For attorneys' fees and costs of suit herein pursuant to statute or as otherwise may be allowed by law; and,

4. For such other relief as this Court may deem just and proper.

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**DEMAND FOR JURY TRIAL**

Plaintiff MAUI VACATION RENTAL ASSOCIATION, INC. hereby  
demands trial by jury on all issues triable by right to a jury.

DATED: Wailuku, Maui, Hawaii, 9/27, 2007.

IVEY FOSBINDER FOSBINDER LLC  
A LIMITED LIABILITY LAW COMPANY

By: \_\_\_\_\_  
JAMES H. FOSBINDER,  
*Attorney for Plaintiff, MVR A*