MOLLY A. STEBBINS 8639
Corporation Counsel

LERISA L. HEROLDT 7519
LAUREEN L. MARTIN 5927
Deputies Corporation Counsel
Office of the Corporation Counsel
County of Hawai'i
101 Aupuni Street, Suite 325
Hilo, Hawai'i 96720
Telephone: (808) 961-8251
Facsimile: (808) 961-8622
E-mail: Lerisa.Heroldt@hawaiicounty.gov

Attorneys for Defendant
COUNTY OF HAWAI'I

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

PUNA PONO ALLIANCE, a Hawai'i non-profit association, JON OLSON and HILLARY E. WILT, Plaintiffs, vs. PUNA GEOTHERMAL VENTURE, a Hawai'i Partnership; COUNTY OF HAWAI'I and JOHN DOES 1-10, Defendants.	CIVIL NO. 15-1-0034 (Hilo)(Declaratory Judgment) DEFENDANT COUNTY OF HAWAI'I'S MOTION TO DISMISS *FIRST AMENDED COMPLAINT*, FILED FEBRUARY 17, 2015; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF LERISA L. HEROLDT; EXHIBIT "A"; NOTICE OF MOTION; CERTIFICATE OF SERVICE **Hearing**: Date: April 14, 2015 Time: 8:30 a.m. Judge: Honorable Greg K. Nakamura No Trial Date Set

DEFENDANT COUNTY OF HAWAI'I'S MOTION TO DISMISS *FIRST AMENDED COMPLAINT*, FILED FEBRUARY 17, 2015

Defendant COUNTY OF HAWAI'I ("County"), by and through its undersigned counsel, hereby moves for an order dismissing with prejudice any and all claims raised by Plaintiffs PUNA PONO ALLIANCE, JON OLSON and HILLARY E. WILT (collectively, "Plaintiffs") against the County in their *First Amended Complaint*, filed with this Court on February 17, 2015. Plaintiffs have violated the requirements of Hawai'i Rules of Civil Procedure ("HRCP") 8(a) and, therefore, have failed to state a claim upon which relief can be granted against the County pursuant to HRCP 12(b)(6).

This motion is made pursuant to HRCP 7, 8(a) and 12(b)(6) and Rule 7 of the Rules of the Circuit Courts of the State of Hawai'i, the attached Memorandum in Support of Motion, the attached Declaration of Lerisa L. Heroldt, Exhibit "A", the records and files herein, and on such further and other grounds as may be adduced at a hearing on this motion.

Dated: Hilo, Hawai'i, March 5, 2015.

COUNTY OF HAWAI'I, Defendant

By _____
LERISA L. HEROLDT
Deputy Corporation Counsel
Its Attorney

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

PUNA PONO ALLIANCE, a Hawai'i non-profit association, JON OLSON and HILLARY E. WILT, Plaintiff, vs. PUNA GEOTHERMAL VENTURE, a Hawai'i Partnership; COUNTY OF HAWAI'I and JOHN DOES 1-10, Defendants.	CIVIL NO. 15-1-0034 (Hilo)(Declaratory Judgment) MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

The *First Amended Complaint*, filed by Plaintiffs PUNA PONO ALLIANCE, JON OLSON and HILLARY E. WILT (collectively, "Plaintiffs") on February 17, 2015 ("*First Amended Complaint*") is unartfully pled and fatally flawed and therefore, must be dismissed with prejudice because Plaintiffs have failed to state a claim upon which relief may be granted. Specifically, the *First Amended Complaint* must be dismissed as to Defendant COUNTY OF HAWAI'I ("County") because Plaintiffs have failed to give the County fair notice of their claims or the grounds upon which they are based, in violation of Hawai'i Rules of Civil Procedure ("HRCP") 8(a). Moreover, the *First Amended Complaint* is silent as to what type of relief is demanded by Plaintiffs from the County.

II. BACKGROUND

None of the statements contained in the *First Amended Complaint* referencing the County contain allegations of wrongdoing or seek any relief from the County. Plaintiffs merely

allege that the County "is a political subdivision of the State of Hawai'i", *First Amended Complaint*, ¶5, attached as Exhibit "A", the County's Planning Commission "permits and regulates operations of PGV's facility", *id.*, ¶ 12, the County "has stated it believes County Code § 14-114 does not apply to PGV", *id.*, ¶ 25, and that there is an "absence of enforcement by state or county authorities". *Id.*, ¶ 29. The allegations in paragraphs 12, 25 and 29 of the *First Amended Complaint* are insufficient to state a cause of action against the County and therefore, the *First Amended Complaint* must be dismissed.

III. ARGUMENT

A. PLAINTIFFS' *FIRST AMENDED COMPLAINT* DOES NOT COMPLY WITH HRCP 8 AND MUST BE DISMISSED

HRCP Rule 8(a) requires that "[a] pleading which sets forth a claim for relief shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." This rule is not satisfied if the pleading fails to give defendants fair notice of what plaintiff's claim is or the grounds upon which it rests. *Au v. Au*, 63 Haw. 210, 221, 626 P.2d 173, 181 (Haw. Ct. App. 1981) (affirming dismissal where court was unable to determine nature of claim alleged and claim failed to give defendants fair notice of what plaintiff's claim was or the grounds upon which it rested). Indeed, when a complaint fails to comply with HRCP 8, it is subject to dismissal by a grant of a motion to dismiss for failure to state a claim upon which relief can be granted. *Marsland v. Pang*, 5 Haw. App. 463, 474-75, 489-90, 701 P.2d 175, 186, 194-95 (Haw. Ct. App. 1985) (affirming dismissal of portions of complaint pursuant to HRCP 12(b)(6) where complaint contained no facts upon which a claim for public nuisance could be stated in violation of HRCP 8(a)(1)); *Au*, 63 Haw. at 221, 626 P.2d at 181 (affirming dismissal under HRCP 12(b)(6) where plaintiffs failed to specify what provisions of an agreement of sale were breached in violation of HRCP 8(a)). In order to satisfy Rule 8(a)(1), HRCP:

> the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.

Marsland, 5 Haw. App. at 475, 701 P.2d at 186. *See also McHenry v. Renne*, 84 F.3d 1172, 1178-80 (9th Cir. 2008) (affirming dismissal of complaint under Federal Rule of Civil Procedure ("FRCP") 12(e) where "one cannot determine from the complaint who is being sued, for what relief, and on what theory, with enough detail to guide discovery" in violation of FRCP 8).[1]

"Violations of [Rule 8] warrant dismissal, but there are multiple ways that it can be violated." *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013). "One well-known type of violation is when a pleading says *too little* . . . ." *Knapp*, 738 F.3d at 1109 (referring to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), for baseline threshold of factual allegations required to comply with FRCP 8). In *Iqbal*, the Court provided guidance regarding the then new standard of notice pleading under FRCP 8 and 12(b)(6) established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007),[2] which requires "enough facts to state a claim to relief that is ***plausible*** on its face." *Id.* 550 U.S. at 570 (emphasis added).[3] The *Iqbal* Court provided:

---

[1] HRCP 8(a)(1) is functionally identical to FRCP 8(a)(2). " 'Where a Hawai'i rule of civil procedure is identical to the federal rule, the interpretation of this rule by federal courts is highly persuasive.' " *Wong v. Takeuchi*, 88 Haw. 46, 52 n.4, 961 P.2d 611, 617 n.4 (1998) (*quoting Collins v. South Seas Jeep Eagle*, 87 Haw. 86, 88, 952 P.2d 374, 376 (1997)).

[2] The Intermediate Court of Appeals of Hawai'i adopted the *Twombly* standard in *Pavsek v. Sandvold*, 127 Haw. 390, 403, 279 P.3d 55, 68 (Haw. Ct. App. 2012) (holding lower court properly dismissed counts in complaint that rested on bare and conclusory allegations insufficient to raise right to relief above the speculative level).

[3] Prior to *Twombly*, under the standard the Court set forth in *Conley v. Gibson*, 355 U.S. 41, 47 (1957), a complaint need only state a "conceivable" set of facts to support its legal claims, *Twombly*, 550 U.S. at 570, – that is, that a court could only dismiss a claim if it appeared, beyond a doubt, that the plaintiff would be able to prove no set of facts in support of her claim that would entitle her to relief. *Conley*, 355 U.S. at 46-47. In *Twombly*, the court adopted a stricter, "plausibility" standard for the pleading stage (but not a probability requirement). *Twombly*, 550 U.S. at 556. Ultimately the Court held that the complaint must be dismissed because "plaintiffs have not nudged their claims across the line from conceivable to plausible". *Id.*, 550 U.S. at 570.

> Two working principles underlie our decision in *Twombly*. First, the tenant that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the presumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 556 U.S. at 678-79 (internal citations omitted).

The *Iqbal* Court held that the factual allegations asserted in the complaint -- *i.e.*, that (1) the FBI arrested and detained thousands of Arab Muslim men under the direction of Mueller; and (2) the policy of holding these men under highly restrictive conditions was approved by Ashcroft and Mueller -- did not plausibly suggest an entitlement to relief for unconstitutional discrimination. *Id.*, 556 U.S. at 681-82. The Court held that the complaint was deficient under FRCP 8, *id.*, 556 U.S. at 664-65, and "would need to allege more by way of factual content to nudge his claim of purposeful discrimination across the line from conceivable to plausible." *Id.*, 556 U.S. at 683 (citing *Twombly*, 550 U.S. at 570) (internal quotation marks and brackets omitted).

Rule 8 is also violated when a complaint merely contains a "notice of disaffection" to the opposite party. *Daves et al. v. Haw'n Dredging Co.*, 114 F. Supp. 643, 645 (D. Haw. 1953) (dismissing complaint containing only sketchy generalizations of a conclusory nature unsupported by operative facts). Indeed, "Rule 8 demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Twombly*, 550 U.S. at 555 (citation omitted). Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual

enhancement." *Id.*, 550 U.S. at 557. "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) [a claim for relief] reflects the threshold requirement of [FRCP] Rule 8(a)(2) that the 'plain statement' possess enough heft to 'show that the pleader is entitled to relief.' " *Id.* (internal brackets omitted).

There is substantial practical significance to Rule 8's entitlement requirement necessitating "something beyond the mere possibility of [a claim] must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Id.*, 550 U.S. at 557-58 (internal quotation marks and citations omitted). Thus, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.*, 550 U.S. at 558 (internal quotation marks and citations omitted). *Accord Daves*, 114 F. Supp. at 645 ("if a pleader cannot allege definitely and in good faith the existence of an essential element of his claim, it is difficult to see why this basic deficiency should not be exposed at the point of minimum expenditure of time and money by the parties and the court").

Here, Plaintiffs' *First Amended Complaint* does not meet the baseline threshold of factual allegations required to comply with HRCP 8. The County is unable to determine the nature of the claims alleged against it because it has not received fair notice of what Plaintiffs' claims are or the grounds upon which they are based. As a result, the *First Amended Complaint* should be dismissed because it does not contain allegations plausibly suggesting a claim for relief.

B. PLAINTIFFS' *FIRST AMENDED COMPLAINT* FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO HRCP 12(b)(6)

Rule 12(b)(6) provides for the dismissal of allegations that fail to state a claim upon which relief can be granted. In ruling on a motion to dismiss, the Court should consider the "well-pled" allegations of fact as admitted. *Au*, 63 Haw. at 214, 626 P.2d at 177. However, in weighing the allegations of the complaint as against a motion to dismiss, the court is *not* required to "accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened." *Moore v. Allstate Ins. Co.*, 6 Haw. App. 646, 649, 736 P.2d 73, 77 (Haw. Ct. App. 1987) (affirming dismissal of complaint where plaintiff's claim that a valid insurance binder had been created did not reasonably follow from her description of conversation with insurance salesman).

Where the claims presented are clearly without merit, due to insufficiencies in the alleged facts or the absence of law to support the claim, dismissal of the complaint is warranted. *Rosa v. CWJ Contractors*, 4 Haw. App. 210, 215, 664 P.2d 745, 749 (Haw. Ct. App. 1983). Moreover, "a material fact, if not alleged, is presumed not to exist[]", *McCandless v. Castle*, 25 Haw. 22, 34 (1919) (determining that party not able to raise issue of res judicata due to failure to allege material facts at the pleading stage), and "[i]f material allegations are missing from a pleading, then the pleading fails." *Northway v. Allen*, 728 S.E.2d 624, 229 (Ga. 2012) (holding, pursuant to Georgia's Rule 12(b)(6), which is essentially identical to FRCP 12(b)(6) and HRCP 12(b)(6), that city council's bare allegations that council had asked mayor to resign and mayor had not resigned failed to state claim upon which relief can be granted). Thus, a "[c]omplaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts alleged under a cognizable legal theory." *U.S. ex rel. Hinden v. UNC/Lear Servs., Inc.*, 362 F. Supp. 2d 1203, 1206 (D. Haw. 2005) (citations omitted). With respect to factual allegations:

> [w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true (even if doubtful in fact).

Pavsek, 127 Haw. at 403, 279 P.3d at 68 (quoting *Twombly*, 550 U.S. at 555).

The Court should dismiss the *First Amended Complaint* as to the County pursuant to 12(b)(6) because Plaintiffs' allegations regarding the County fail to provide the County with fair notice of Plaintiffs' claims against it or the grounds upon which they rest and, as a result of this fatal omission, the *First Amended Complaint* cannot possibly state a claim upon which relief can be granted. *Iqbal*, 556 U.S. at 664-651; *Twombly*, 550 U.S. at 570; *Daves et al.* 114 F. Supp. at 646; *Pavsek*, 127 Haw. 403, 279 P.3d at 68; *Moore*, 6 Haw. App. at 648, 736 P.2d at 76; *Marsland*, 5 Haw. App. at 474-75, 701 P.2d at 186; *Au*, 63 Haw. at 221, 626 P.2d at 181.

Although it is incumbent upon Plaintiffs to make clear to the County and this Court what specific conduct entitles them to relief, from the *First Amended Complaint* it is nearly impossible to determine what happened or what the County even did. It is impossible for Plaintiffs' conclusory allegations to "reasonably follow from [their] description of what happened", because Plaintiffs never describe what happened. *Moore*, 6 Haw. App. at 650, 736 P.2d at 77. Other than passing references to the County, Plaintiffs do not provide any discernable description of the events or actions that allegedly resulted in injury. In so doing, Plaintiffs have failed to make a "showing" that they are "entitled to relief" as required by HRCP Rule 8(a)(1) and failed to provide fair notice of the nature of the claim.

With respect to the County, this is not a situation in which a plaintiff has pleaded facts that in themselves may add up to a valid legal claim but has set forth inappropriate legal theories

as the basis for recovery. Here, dismissing the *First Amended Complaint* as to the County is warranted because Plaintiffs have not even met the minimal pleading requirements under HRCP 8(a)(1). The *First Amended Complaint* does not spell out a cause of action or claim against the County as required since no facts are alleged showing that Plaintiffs are entitled to relief. Nor can the facts be rearranged to create a cause of action against the County and as such Plaintiffs fail to articulate a claim for relief. Moreover, it is impossible for the County to determine the relief or remedy it is being sued for. Even assuming all of the facts in Plaintiffs' *First Amended* Complaint are true, Plaintiffs fail to seek any relief against the County. As a result, it is clear Plaintiffs are not entitled to any relief against the County and therefore, the *First Amended Complaint*, as to the County, is plainly nonjusticiable and should be dismissed.

IV. CONCLUSION

For the foregoing reasons, the County respectfully requests that its Motion to Dismiss be granted.

Dated: Hilo, Hawai'i, March 5, 2015.

Respectfully submitted,

By _____
LERISA L. HEROLDT
Deputy Corporation Counsel
Attorney for Defendant County of Hawai'i

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

PUNA PONO ALLIANCE, a Hawai'i non-profit association, JON OLSON and HILLARY E. WILT, Plaintiff, vs. PUNA GEOTHERMAL VENTURE, a Hawai'i Partnership; COUNTY OF HAWAI'I and JOHN DOES 1-10, Defendants.	CIVIL NO. 15-1-0034 (Hilo)(Declaratory Judgment) DECLARATION OF LERISA L. HEROLDT

DECLARATION OF LERISA L. HEROLDT

I, LERISA L. HEROLDT, being first duly sworn, upon oath deposes and says that:

1. I am an attorney duly licensed to practice law before all courts in the State of Hawai'i and the United States District Court for the District of Hawai'i.

2. I am an attorney employed by the Office of the Corporation Counsel for the County of Hawai'i and am one of the attorneys assigned to represent the County of Hawai'i in this matter and have personal knowledge of the matters set forth herein.

3. Exhibit "A" is a true and correct copy of the *First Amended Complaint*, filed herein on February 17, 2015 and is attached for the Court's convenience.

I declare under penalty of law that the forgoing is true and correct.

Dated: Hilo, Hawai'i, March 5, 2015.

LERISA L. HEROLDT

Gary C. Zamber 8446
21 Waianuenue Ave., # 3
Hilo, HI 96720

Phone: (808) 969-3600
E-mail: gzamber@gmail.com

Attorney for Plaintiffs

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

PUNA PONO ALLIANCE, a Hawai'i non-profit association, JON OLSON and HILLARY E. WILT, Plaintiff, vs. PUNA GEOTHERMAL VENTURE, a Hawai'i Partnership; COUNTY OF HAWAI'I and JOHN DOES 1-10; Defendants.	Civil No. 15-1-0034 (Hilo) (Declaratory Judgment) DEFENDANT PUNA GEOTHERMAL VENTURE'S ACCEPTANCE OF SERVICE OF PLAINTIFFS' FIRST AMENDED COMPLAINT

DEFENDANT PUNA GEOTHERMAL VENTURE'S ACCEPTANCE OF SERVICE OF PLAINTIFFS' FIRST AMENDED COMPLAINT

DEFENDANT PUNA GEOTHERMAL VENTURE, through its attorney Thomas L.H. Yeh, acknowledges and accepts service of the First Amended Complaint filed on February 17, 2015.

DATED: Hilo, Hawai'i, February 18, 2015.

Thomas L.H. Yeh
Attorney for Defendant
Puna Geothermal Venture

Gary C. Zamber 8446
21 Waianuenue Ave., # 3
Hilo, HI 96720

Phone: (808) 969-3600
E-mail: gzamber@gmail.com

Attorney for Plaintiffs

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI`I

PUNA PONO ALLIANCE, a Hawai`i non-profit association, JON OLSON and HILLARY E. WILT,  Plaintiff,  vs.  PUNA GEOTHERMAL VENTURE, a Hawai`i Partnership; COUNTY OF HAWAI`I and JOHN DOES 1-10; Defendants.	Civil No. 15-1-0034 (Hilo) (Declaratory Judgment) DEFENDANT COUNTY OF HAWAI`I'S ACCEPTANCE OF SERVICE OF PLAINTIFFS' FIRST AMENDED COMPLAINT

DEFENDANT COUNTY OF HAWAI`I'S ACCEPTANCE OF SERVICE OF PLAINTIFFS' FIRST AMENDED COMPLAINT

Attorney Lerisa L. Heroldt, Office of the Corporation Counsel, hereby acknowledges and accepts service of the Plaintiffs' First Amended Complaint filed on February 17, 2015, on behalf of DEFENDANT COUNTY OF HAWAI`I.

DATED: Hilo, Hawai`i, February 18, 2015.

Office of the Corporation Counsel