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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

JACK WATERS, individually, and MARGARET MARA, individually, and on behalf of all persons similarly situated, Plaintiff, v. STEPHANIE AVEIRO, in her official capacity as the Executive Director of the Housing and Community Development Corporation of Hawai'i; HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I, a duly organized and recognized agency of the State of Hawai'i; HHA WILIKINA APARTMENTS PROJECT, INC.; DOES 1-25	CIVIL NO. 05-1-0815-05 EEH (Contract) **SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; DECLARATION OF GAVIN K. THORNTON; CERTIFICATE OF SERVICE** HEARING DATE: November 28, 2005 TIME: 1:30 p.m. JUDGE: Eden E. Hifo

Defendants.)
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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs filed a motion for partial summary judgment on October 14, 2005 seeking that the Court: (1) declare that Defendants have violated Plaintiffs' rights; (2) enter an injunction requiring Defendants to make appropriate adjustments to the rents for Wilikina Apartments tenants; and (3) enter an order finding Defendants have breached rental agreements for Wilikina Apartments tenants. Plaintiffs submit this Supplemental Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment per the Court's request at the November 2, 2005 hearing on Plaintiffs motion.

II. ARGUMENT

Since Plaintiffs' Motion for Partial Summary Judgment was filed, Plaintiffs withdrew the portion of their motion pertaining to Plaintiffs' claim that Defendants violated federal law and Defendants dismissed their claim against third party Defendants Urban Real Estate. With respect to this motion there are only two remaining issues:

1. Did Defendants breach the rental agreements for Wilikina Apartments tenants?

2. Based on Defendants' breach of the rental agreements, are Plaintiffs entitled to injunctive relief requiring Defendants to adjust the rents for Wilikina Apartments tenants?

A. Did Defendants Breach the Rental Agreements for Wilikina Apartments Tenants?

Section 27 of the Wilikina Rental Agreement incorporates into the terms of the agreement by reference Form HUD-50059, Certification and Recertification of Tenant Eligibility. (*See* Pls.' Mot. for Partial Summ. J., Exhibit "A".) Form HUD-50059 includes a section in which Defendants must certify to the following statement: "I certify that this Tenant's eligibility, rent and assistance payment have been computed in accordance with HUD's regulations and administrative procedures...." (*See* Pls.' Mot. for Partial Summ. J., Exhibit "B".) Defendants do not dispute that since March 1996 they failed to comply with HUD regulations regarding utility allowances provided to tenants (*See* Pls.' Mot. for Partial Summ. J., Exhibit 1 at 1-3), and as a result, the residents of Wilikina Apartments were charged rents in excess of those permitted by the U.S. Housing Act and its supporting HUD regulations. In other words, Defendants do not dispute that they violated HUD regulations regarding the calculation of the tenant rents. Therefore, Defendants' failure to comply with the actions they certified they had taken breached the rental agreements for Wilikina Apartments tenants.

The only issue that Defendants raised in their opposition to Plaintiffs' motion for partial summary judgment is not *whether* Defendants breached the rental agreements with Wilikina Apartments tenants, but *when* the breach occurred. (*See* Defs.' Memo. in Op. to Pls.' Mot. for Partial Summ. J. at 6-7.) Defendants point to provisions in the Wilikina Rental Agreement that: (1) list a specific monetary amount that the tenant is supposed to pay (e.g. $213 per month in the case of the named plaintiff, Jack Waters); and (2) provide that Defendants agree to implement *changes* in

the tenant's rent in accordance with HUD regulations. (*Id* at 6.) Thus, Defendants argue, a breach occurred only after a tenant's rent was adjusted (usually one year after the tenant moves in).[1]

Defendant's argument ignores the portion of the Wilikina Rental Agreement in which they certify that the specific monetary amount of rent listed on the Agreement was calculated in accordance with HUD regulations. Examining the Agreement in its entirety clearly indicates that the specific monetary amounts listed on the Rental Agreement as rent were required to be calculated in accordance with HUD regulations. Because it is undisputed that they were not, the Rental Agreement was breached by Defendants upon execution since Defendants inaccurately calculated the tenants' rents set forth in the Agreement. Plaintiffs are entitled to an order of summary judgment finding that Defendants breached the rental agreements for Wilikina Apartments tenants [the order should clarify that Defendants' breach occurred when the utility allowances became insufficient due to rising utility costs, not when: (1) the allowances became insufficient; *and* (2) the tenant's rent changed since entering into their initial rental agreement].

2. Are Plaintiffs Entitled to Injunctive Relief Requiring Defendants to Adjust Wilikina Apartments Tenants' Rents?

In a letter sent October 13, 2005, Defendants requested that HUD approve an increase in the utility allowances for Wilikina Apartments from $40 to $74 and from $56 to $90 for one and two-bedroom units respectively. (*See* Defs.' Memo.

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[1] Tenants who moved into Wilikina Apartments prior to 1994 or 1995 would remain unaffected by the argument since they would have resided at Wilikina over a year (and thus their rent would have changed) before the utility allowances became insufficient. Defendants' argument would only affect the more recent Wilikina Apartments tenants, such as those tenants that moved in April 2005 (a month before this suit was filed), whose rent has not yet changed or only recently changed.

in Op. to Pls.' Mot. for Partial Summ. J., Exhibit C.) Counsel for Defendants has indicated that since the November 2, 2005 hearing on Plaintiffs' motion, HUD approved the requested increases in the utility allowances.[2] (*See* Declaration of Gavin K. Thornton at ¶ 3.) Thus, it is now undisputed that Wilikina tenants are entitled to a rent reduction of at least $34 per month and that HUD has approved such a reduction.[3]

To determine whether Plaintiffs are entitled to injunctive relief requiring Defendants to implement the HUD-approved changes, the Court must apply a three-part test: "(1) Is the plaintiff likely to prevail on the merits? (2) Does the balance of irreparable damage favor the issuance of [an] injunction? (3) Does the public interest support granting the injunction?" *Life of the Land v. Ariyoshi*, 59 Haw. 1456, 158, 577 P.2d 1116, 1118 (1978). With respect to the first element, it is undisputed that Defendants breached the Plaintiffs' rental agreements by failing to request and obtain adjustments to the utility allowances. With respect to the third, it is clearly in the public interest to enforce the rental agreements for public housing residents and enjoin a practice of charging residents rents in excess of the amount permitted by the rental agreements and the U.S. Housing Act.

With respect to the second element, Defendants argue that an injunction is unnecessary because overcharging the tenants causes them no irreparable harm.

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[2] Plaintiffs believe that an error was made in calculating the utility allowance adjustment approved by HUD, and thus believe that the approved increase is not sufficient. However, Plaintiffs recognize that for the purposes of this motion, an injunction can only pertain to the undisputed amount of the increase.

[3] It should be noted that the federal regulations, which are incorporated by reference into the Wilikina Rental Agreement, require Defendants to implement the new utility allowance now that it has been approved by HUD. "Whenever a Utility Allowance for a unit is adjusted, the owner will promptly notify affected families and make a corresponding adjustment of the tenant rent and the amount of the housing assistance payment for the unit." 24 C.F.R. § 880.610.

However,"the greater the probability the party seeking the injunction is likely to prevail on the merits, the less he has to show that the balance of irreparable damage favors issuance of the injunction." *Penn v. Transportation Lease Hawaii, Ltd.*, 2 Haw. App. 272, 276, 630 P.2d 646, 650 (1981). Since it is abundantly clear that Defendants have breached the Wilikina Rental Agreement, the irreparable damage element needs be afforded little weight.

Furthermore, because Plaintiffs have limited financial resources by definition, the harm to Wilikina tenants caused by rent overcharges is irreparable. (*See* Pls' Reply in Supp. of Mot. for Partial Summ. J. at 6-7.) With respect to Defendants, moreover, there is no harm in being enjoined from collecting rents in excess of those authorized by the U.S. Housing Act. For each month that Plaintiffs are overcharged, Defendants would have to eventually pay damages for the overcharges. It is far less burdensome for Defendants to not collect rents that are not owed, than it is to force the low-income residents of Wilikina Apartments to essentially provide Defendants with loans each month. Plaintiffs should be protected and Defendants conduct enjoined.

III. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court grant their motion.

DATED: Honolulu, Hawai'i, November 16, 2005.

SHELBY ANNE FLOYD
THOMAS E. BUSH
GAVIN K. THORNTON

Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

JACK WATERS, individually, and MARGARET MARA, individually, and on behalf of all persons similarly situated, Plaintiff, v. STEPHANIE AVEIRO, in her official capacity as the Executive Director of the Housing and Community Development Corporation of Hawai'i; HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I, a duly organized and recognized agency of the State of Hawai'i; HHA WILIKINA APARTMENTS PROJECT, INC.; DOES 1-25 Defendants.	CIVIL NO. 05-1-0815-05 EEH (Contract) **DECLARATION OF GAVIN K. THORNTON**

DECLARATION OF GAVIN K. THORNTON

Pursuant to Hawaii Circuit Court Rule 7(g) I declare that:

1. I am an attorney with the law firm of Lawyers for Equal Justice, counsel for Plaintiff herein.

2. I make this declaration based on my personal knowledge and am competent to testify as to the matters set forth herein.

3. Counsel for Defendants has indicated to me that HUD approved Defendants' October 13, 2005 request for an increase in the utility allowances at Wilikina Apartments.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed in Honolulu, Hawai'i on November 16, 2005.

Gavin K. Thornton

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was duly served upon the following party on this date, by hand-delivery as indicated and addressed as set forth below:

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DATED: Honolulu, Hawai'i, November 16, 2005.

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