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Attorneys for Third-Party Defendant
HAWAIIAN PROPERTIES, LTD.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

BEVERLY BLAKE, STEPHANIE
CAMILLERI, ARLENE SUPAPO,
individually, and on behalf of all
persons similarly situated,

Plaintiffs,

vs.

CRAIG NISHIMURA, in his official
capacity as Acting Director of the
Department of Facility Maintenance,
City and County of Honolulu; CITY
AND COUNTY OF HONOLULU, a
municipal corporation,

Defendants.

CIVIL NO. CV 08-00281 LEK
(Contract) (Declaratory Judgment) (Other
Civil Actions)
Class Action

MEMORANDUM IN SUPPORT OF
THIRD-PARTY DEFENDANT
HAWAIIAN PROPERTIES, LTD.'S
MOTION FOR PRELIMINARY
APPROVAL OF SETTLEMENT

Trial Date: December 15, 2009

Judge: Hon. Leslie E. Kobayashi

CITY AND COUNTY OF
HONOLULU,

Third-Party Plaintiff,

vs.

HAWAIIAN PROPERTIES, LTD.,

Third-Party Defendants.

MEMORANDUM IN SUPPORT OF THIRD-PARTY
DEFENDANT HAWAIIAN PROPERTIES, LTD.'S
MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Parties hereby seek the Court's preliminary approval of a settlement of this Class-Action Lawsuit. The Plaintiffs, by and through their counsel, and the Defendant the City and County of Honolulu ("City"), and Third-Party Defendant Hawaiian Properties, Ltd. ("Hawaiian Properties"), with the assistance of the Honorable U.S. Magistrate Leslie E. Kobayashi, have agreed to a settlement of all claims subject to the approval of the Court.

II. BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs filed this lawsuit on June 12, 2008, on behalf of themselves and those similarly situated tenants at the Westlake Apartment project who were injured by the City's failure to correctly calculate the monthly Section 8 utility

allowance in violation of the U.S. Housing Act, 42 U.S.C. 1437a(a)(1) and its supporting regulations (First Claim for Relief), violation of 42 U.S.C. 1983 (Second Claim for Relief), breach of rental agreement (Third Claim for Relief), and violation of Hawaii's Unfair and Deceptive Trade Practices Act and H.R.S. Chapter 480 (Fourth Claim for Relief).

Westlake Apartments, owned and operated by the City, is a 95-unit housing project subsidized by the federal "Section 8 Loan Management program." Among other things, the United States Housing Act generally requires that "rent" for eligible tenants residing in federally-subsidized public housing projects not exceed 30% of tenant income. 42 U.S.C. § 1437a (a)(1); 24 C.F.R. §5.628. Utilities are included in that rent calculation. 24 C.F.R. §§ 5.603(b) and 5.634(a). Because of this, where — as in Westlake — eligible tenants are responsible for their utilities, the project owner must provide tenants with a utility allowance. Id.

Utility allowances must be sufficient to cover "the monthly cost of a reasonable consumption of...utilities...by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment." 24 C.F.R. § 5.603(b). Federal regulations require an adjust their utility allowances whenever a rent adjustment is made and, in between reviews, if there is a change in utility rates greater than 10%. 24 C.F.R.

§ 886.126.

The City denies that the utility allowance for the Westlake Apartments was incorrectly calculated for the years in question and denies that it is liable for the calculation of the utility allowance.

On February 5, 2009, Plaintiffs and the City consented to the appointment of U.S. Magistrate Leslie E. Kobayashi as the trial judge of the above-entitled matter pursuant to Local Rule 73.1.

Subsequently, by Order filed October 30, 2008, the Court granted class certification under Fed. R. Cv. P. 23(a), 23(b)(2), and 23(b)(3) as to:

All persons who are, were, or will be head of household tenants at Westlake Apartments entitled to receive utility allowances from the City and County of Honolulu as part of their section 8 subsidy at any time during which Defendants failed or fails to provide properly-calculated utility allowances for Westlake Apartments (“Westlake Class”).

On June 22, 2009, the Court issued an order granting the Defendant City’s request for leave to file a third-party complaint against Third-Party Defendant Hawaiian Properties, Ltd. Hawaiian Properties was the Property Manager of the Westlake Apartments from the years 2000 to the present.

On June 25, 2009, the City filed its Third-Party Complaint against Hawaiian Properties. The City alleged claims for breach of contract, indemnification and contribution, and declaratory relief against Third-Party Defendant Hawaiian Properties. On July 24, 2009, Hawaiian Properties timely answered the Third-

Party Complaint. Hawaiian Properties denies that the utility allowance for the Westlake Apartments was incorrectly calculated for the years in question.

On July 28, 2009, Plaintiffs, the City, and Hawaiian Properties, consented to the appointment of U.S. Magistrate Leslie E. Kobayashi as the trial judge of the above-entitled matter pursuant to Local Rule 73.1.

III. CLASS CERTIFICATION

By Order filed October 30, 2008, the Court granted class certification under Fed. R. Cv. P. 23(a), 23(b)(2), and 23(b)(3) as to:

All persons who are, were, or will be head of household tenants at Westlake Apartments entitled to receive utility allowances from the City and County of Honolulu as part of their section 8 subsidy at any time during which Defendants failed or fails to provide properly-calculated utility allowances for Westlake Apartments (“Westlake Class”).

III. SETTLEMENT TERMS AND PROPOSED NOTICE

The terms of the settlement are described in detail in the Declaration of Jason Kim, summarized in the attached Notice of Proposed Settlement of Class Action, attached hereto as Exhibit “1,” and memorialized in the attached Settlement and Release Agreement, attached hereto as Exhibit “2.” In summary, the settlement provides for the creation of a settlement fund of \$45,000 to be held by Third-Party Defendant Hawaiian Properties from which eligible class members for the years 2005 through 2008, may receive reimbursement for the alleged overpayment of rental proceeds based on a distribution formula approved by the

Court.

Plaintiffs' counsel will administer the settlement fund.

Hawaiian Properties will open a trust checking account and the funds will be deposited into this account. Hawaiian Properties will assist Plaintiffs' counsel with the identification of the class members. Plaintiffs' counsel will issue notice of the settlement to these class members, and will advise to Hawaiian Properties on when, to whom, and how much, a check should be written. Plaintiffs' counsel will be responsible for delivering the settlement checks.

The three class representatives shall receive as compensation for their services as class representatives \$2,500 each (taken from the \$45,000 fund) if approved by the Court in addition to the amounts they are entitled to receive as class members.

The attorneys for the class, Alston Hunt Floyd & Ing and Lawyers for Equal Justice, shall receive an award of their reasonable attorneys' fees and costs in an amount to be determined by the Court. The award of attorneys' fees and costs shall be in addition to, and shall not reduce, the amount due to the members of the class as set forth above.

All class members shall release any and all claims relating to the City's alleged failure to properly calculate utility allowances through the effective date of the settlement. If the Court gives final approval of the settlement, the Court will

enter a judgment dismissing with prejudice the claims asserted by the Class against the City and forever discharging and releasing the City (and Hawaiian Properties, Inc.) from all claims relating to City's alleged failure to properly calculate utility allowances through the effective date of the settlement, except the claims of those class members who have opted out of this class action.

IV. STANDARD FOR APPROVAL OF SETTLEMENT

Rule 23(e), Fed. R. Civ. P., provides that court approval must be obtained of a voluntary dismissal or compromise. The standard for approval of the settlement is whether it is "fundamentally fair, adequate, and reasonable." *Durkin v. Shea & Gould*, 92 F.3d 1510, 1512 n. 6 (9th Cir. 1996). The Court must consider:

the strengths of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; . . . the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; . . . and the reaction of the class members to the proposed settlement."

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998). Each of these factors strongly support approval of this settlement.

A. Strengths of Plaintiffs' Case

There are many unresolved issues concerning whether the City and Hawaiian Properties given the absence of evidence of a change in the basic utility rate by Hawaiian Electric Company ("HECO") in the years prior to 2008. HUD Guidelines provide for the adjustment in the utility allowance when there is

increase in the local utility rate of 10% or more as compared to the utility rate used for calculating the previous utility allowance. But HECO records confirmed that the utility rate stayed the same from 2000 up until the year 2008. In each year up until the year 2008, at the time of the contract renewal by Hawaiian Properties, HECO reported “no electricity rate increases.”

There is an issue as to whether additional charges assessed by HECO should be added to the utility rate in calculating the utility allowance. Fuel charges are not a part of the utility rate charged to HECO customers. Fuel charges are fluctuating charges that change on a monthly basis. In addition, HECO assesses a customer a flat fee charge for various expenses. If these additional charges are not a part of the utility rate as determined by HUD, then the utility allowance was calculated correctly.

This settlement avoids any concerns about those issues and its mitigating effects on the issues of liability and damages.

B. Risk, Expense, and Complexity of Further Litigation

Absent this settlement, there is a substantial risk that the application and interpretation of HUD Guideline will preclude any recovery by the Westlake Class. The HUD Guidelines requires an adjustment of the utility allowance where there is a 10% or more increase in the utility rates over the rates used in the prior utility allowance calculation. In the years 2000 through 2008, there was no increase in

the utility rate by HECO and the HUD Guideline referenced utility rate and not fluctuating monthly fuel charges or other charges by the local utility company.

Furthermore, in each of the renewal years, despite a request by the Hawaiian Properties, the Westlake tenants allegedly failed to return the authorization form for the release of the tenant's monthly utility bills from HECO. This left Hawaiian Properties with incomplete data in determining the utility consumption rate for the project.

There are also substantial risks to the City (and therefore to Hawaiian Properties) in continued litigation. Plaintiffs have requested treble damages on the basis of HRS § 480-13. Furthermore, if Plaintiffs prevail, they will be entitled to an award of attorneys' fees. The amount of those fees will increase if this matter is litigated to trial and appeal.

To litigate these issues will require the expenditure of a substantial amount of time and resources. Moreover, given the novelty of the issues and its far reaching effect, it is more than likely that an appeal to the Ninth Circuit Court of Appeals and/or the United States Supreme Court would result from any ruling in this case. These factors mitigate in favor of settlement on terms that give the class members certainty.

C. The Amount Offered in Settlement

The amount of \$45,000.00 to fund the settlement to class members is a reasonable settlement amount to satisfy all claims in this case. As detailed in Exhibit 1 to the Declaration of Jason Kim attached, this settlement will satisfy all of the alleged claims for overpayment by the Westlake Class for the time period in the question. The attached settlement agreement and class notice provide the formula for the class distributions and counsel for the parties believe this formula accurately approximates what the utility allowance should have been had they been calculated in the manner claimed by Plaintiffs, such that the settlement fund has been fairly allocated among the class.

The issue of attorney's fees and costs has been reserved for the Court to determine.

D. The Stage of Proceedings

The parties have yet to commence taking depositions and have yet to file any dispositive motions. This factor strongly supports settlement. Settling at a later stage of the proceedings would involve a larger payment of attorneys' fees and costs to Plaintiffs' counsel.

E. Reaction of Class Members

Each of the class representatives have agreed to the settlement terms and will sign a settlement agreement and release of both the City and Hawaiian

Properties, and their agents. Formal notice and disclosure to all class members will be provided upon preliminary approval by the Court.

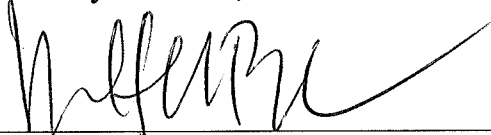
Each of these factors, along with the heavy involvement of the Court in settlement discussions, supports the reasonableness of this settlement.

V. CONCLUSION

The parties respectfully request that preliminary approval be granted for the settlement in the terms set forth in the Declaration attached.

DATED: Honolulu, Hawai`i, December 22, 2009.

LI & TSUKAZAKI,
Attorneys at Law, LLC



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PHILLIP A. LI
Attorneys Third-Party Defendant
HAWAIIAN PROPERTIES, LTD.