

TOM PETRUS & MILLER LLLC

MICHAEL D. TOM 1655-0

mtom@tpm-hawaii.com

BRAD S. PETRUS 4586-0

bpetrus@tpm-hawaii.com

JOSEPH F. KOTOWSKI 7973-0

jkotowski@tpm-hawaii.com

Finance Factors Center, Suite 650

1164 Bishop Street

Honolulu, Hawaii 96813

Tel.: (808) 792-5800

Fax: (808) 792-5809

Attorneys for Third-Party Defendant
URBAN MANAGEMENT CORP. dba
URBAN REAL ESTATE COMPANY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HAZEL MCMILLON; GENE STRICKLAND; TRUDY SABALBORO; KATHERINE VAIOLA; and LEE SOMMERS, each individually, and on behalf of a class of past, present, and future residents of Kuhio Park Terrace and Kuhio Homes who have disabilities affected by architectural barriers and hazardous conditions,

Plaintiffs,

vs.

STATE OF HAWAI'I; HAWAI'I PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a

CIVIL NO. CV 08-00578 JMS LEK
Civil Rights Action
Class Action

THIRD-PARTY DEFENDANT
URBAN MANAGEMENT CORPORATION DBA URBAN REAL ESTATE COMPANY'S
MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, FILED ON NOVEMBER 5, 2010; DECLARATION OF JOSEPH F. KOTOWSKI; EXHIBITS "A" – "E"; CERTIFICATE OF SERVICE

(Caption Continued)

Hawai'i Limited liability company; and Does 1-20, Defendants.	<u>HEARING:</u> DATE: December 13, 2010 TIME: 11:00 a.m. JUDGE: Hon. Leslie E. Kobayashi
STATE OF HAWAI'I; HAWAI'I PUBLIC HOUSING AUTHORITY, Third-Party Plaintiffs, vs. URBAN MANAGEMENT CORP., dba URBAN REAL ESTATE COMPANY, Third-Party Defendant.	TRIAL: June 7, 2011

**THIRD-PARTY DEFENDANT URBAN MANAGEMENT CORPORATION
DBA URBAN REAL ESTATE COMPANY'S MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT,
FILED ON NOVEMBER 5, 2010**

Third-Party Defendant URBAN MANAGEMENT CORPORATION dba URBAN REAL ESTATE COMPANY (hereinafter, "Urban"), by and through its attorneys, Tom Petrus & Miller, LLLC, hereby submits its Memorandum in Opposition to Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, filed on November 5, 2010 ("Motion").

Urban is not opposed to the Plaintiffs' proposed settlement with Defendants/Third-Party Plaintiffs STATE OF HAWAII and HAWAI'I PUBLIC

HOUSING AUTHORITY (“HPHA”) (collectively, the “State”). However, Urban does take issue with certain statements concerning the assigned claims against it made in Plaintiffs’ Memorandum in Support of their Motion. Accordingly, Urban submits this memorandum in response to those statements.

In their Memorandum in Support, Plaintiffs state that Urban and Defendant REALTY LAUA LLC, formerly known as R & L PROPERTY MANAGEMENT LLC (hereinafter “Realty”), are potentially liable for the State’s attorneys’ fees and expenses, as well as the \$610,000 paid by the State to Plaintiffs and their counsel, because their management contracts contained broad indemnity provisions for the benefit of the State. See Memorandum in Support at 8.

The Management Contract between the State and Urban contains, *inter alia*, an indemnification and defense provision that states:

Indemnification and Defense. The CONTRACTOR shall defend, indemnify, and hold harmless the State of Hawaii, the contracting agency, and their officers, employees, and agents from and against all liability, loss, damage cost, and expense, including all attorneys’ fees, and all claims, suits, and demands therefore, **arising out of or resulting from the acts or omissions of the CONTRACTOR or the CONTRACTOR’S employees, officers, agents, or subcontractors under this Contract.** The provisions of this paragraph shall remain in full force and effect notwithstanding the expiration or early termination of this Contract.

The language of the Management Contract expressly and unambiguously states that Urban is only required to defend, indemnify, and hold the State harmless

against claims and suits “arising out of or resulting from the acts or omissions of the CONTRACTOR or the CONTRACTOR’S employees, officers, agents, or subcontractors under this Contract.” Absent from the indemnity provision is any language which purports to obligate Urban to indemnify the State against claims and suits arising out of the *State’s* acts or omissions.

The State has admitted that the indemnification provision above does not obligate Urban to indemnify the State against claims and suits arising out of the State’s acts or omissions. See State’s Response to Urban’s First Request for Admissions, dated June 23, 2010, attached hereto as **Exhibit A**, at ¶¶ 16-18. In addition, the State has admitted that all funds for the settlement will be paid solely for the extinguishment of the State’s liability to the Plaintiffs. See Ex. A at ¶ 23. Finally, the State admits it will not pay as part of the settlement any money to extinguish the liability of Urban. See Ex. A at ¶ 24. These admissions by the State clearly and unequivocally establish that it sustained no damages as a result of Urban’s alleged acts or omissions.

Additionally, in their Memorandum in Support, Plaintiffs argue that “Realty Laua and Urban may also be liable for breach of the management contracts, which required them to among other things, ‘maintain the overall physical appearance and condition of the properties, including maintenance and up-keep to the individual units’ and to comply with applicable laws, such as the ADA and Section

504.” See Memorandum in Support at 9. Based on the earlier admissions of the Plaintiffs and the State, this argument is not valid as to Urban.

On June 2, 2010, Plaintiffs served Urban with their responses to Urban’s First Request for Admissions, dated May 3, 2010. Collectively, the Plaintiffs admitted the following: (1) they have not asserted any claims against Urban in the present action; (2) they are not seeking any relief or damages from Urban in the present action; (3) pursuant to the Court’s Rule 16 Scheduling Orders, the deadline for them to seek leave of Court to amend their Complaint has passed; and (4) the Court’s definition of the class in this action does not include Urban. See Plaintiffs’ collective responses to Urban’s First Request for Admissions, dated June 2, 2010, attached hereto as **Exhibits B, C, D & E**, at ¶¶ 1-3, 6 & 8. Likewise, in its response to Urban’s First Request for Admissions, dated June 23, 2010, the State admitted that it has not asserted a claim for breach of contract against Urban. See Ex. A at ¶¶ 1-2. It follows then, that any assertion by the Plaintiffs and/or the State that Urban may be liable for breach of its Management Contract with the State is baseless.

DATED: Honolulu, Hawaii, November 22, 2010.

/s/ Joseph F. Kotowski

MICHAEL D. TOM

BRAD S. PETRUS

JOSEPH F. KOTOWSKI

Attorneys for Third-Party Defendant
URBAN MANAGEMENT CORP. dba
URBAN REAL ESTATE COMPANY