

VICTOR GEMINIANI 4354
WILLIAM H. DURHAM 8145
LAWYERS FOR EQUAL JUSTICE
P.O. Box 37952
Honolulu, Hawai`i 96837
Telephone: (808) 779-1744
E-mail: victor@lejehawaii.org
william@lejehawaii.org

PAUL ALSTON 1126
JASON H. KIM 7128
ALSTON HUNT FLOYD & ING
1001 Bishop Street, 18th Floor
Honolulu, Hawai`i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
E-mail: palston@ahfi.com
jkim@ahfi.com

JINNY KIM *Pro Hac Vice*
CLAUDIA CENTER *Pro Hac Vice*
LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER
600 Harrison Street, Suite 120
San Francisco, California 94107
Telephone: (415) 864-8848
E-mail: jkim@las-elc.org
ccenter@law-elc.org

Attorneys for Plaintiffs

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 present and future residents of
Kuhio Park Terrace and Kuhio Homes

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

**PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT
OF [249] MOTION FOR**

who have disabilities affected by architectural barriers and hazardous conditions,

Plaintiffs,

vs.

STATE OF HAWAII; HAWAII PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawaii limited liability company,

Defendants.

STATE OF HAWAII; HAWAII PUBLIC HOUSING AUTHORITY,

Third-Party Plaintiffs,

vs.

URBAN MANAGEMENT CORPORATION DBA URBAN REAL ESTATE COMPANY, DOES 1-20,

Third-Party Defendants.

PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, FILED 11/5/10; CERTIFICATE OF SERVICE

DATE: December 13, 2010

TIME: 11:00 a.m.

JUDGE: Leslie E. Kobayashi

TRIAL: June 7, 2011

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF [249] MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, FILED 11/5/10

Plaintiffs HAZEL MCMILLON, TRUDY SABALBORO,

KATHERINE VAIOLA, and LEE SOMMERS, by and through their counsel,

Alston Hunt Floyd & Ing, Lawyers for Equal Justice, and Legal Aid Society – Employment Law Center, submit this Reply Memorandum in further support of their Motion for Preliminary Approval of Class Action Settlement, filed November 5, 2010.

Third-party Defendant Urban Management Corporation (“Urban”) argues at length that it is not liable to Defendants State of Hawai`i and the Hawai`i Public Housing Authority (collectively the “State Defendants). However, the merits of any claims or potential claims against Urban are not directly at issue here. Plaintiffs addressed the claims against Urban assigned by the State Defendants to show that the settlement represents a substantial benefit to the Plaintiff class apart from the direct monetary and non-monetary relief obtained from the State Defendants.

Contrary to Urban’s arguments, the State Defendants’ assigned claims against Urban for defense and indemnity under the Management Contract are meritorious and valuable. The relevant provisions in the Management Contracts require defense and indemnity for claims “arising out of or resulting from the acts or omissions” of Urban and Defendant Realty Laua LLC (“Realty Laua”). Under Hawai`i law, contractual defense and indemnity provisions are interpreted exactly like insurance contracts. *See Pancakes of Hawaii, Inc. v. Pomare Properties Corp.*, 85 Hawai`i 286, 291-92, 944 P.2d 83, 88-89 (1997).

The duty to defend is “fairly broad and separate and distinct from the duty to indemnity.” *Id.* at 291, 944 P.2d at 88. “The duty arises whenever there is a *potential* for indemnification liability to the insured” and where a suit raises such a potential, “the insurer has the duty to accept the defense of the *entire suit* even though other claims of the complaint fall outside the policy coverage.” *Id.* (emphasis added and internal quotations omitted).

As applied to this case, the State Defendants were entitled to a defense from Urban and Realty Laua (and/or their respective insurers) if the Plaintiffs’ Complaint raised even the *potential* that the State Defendants may be held liable to the Plaintiffs based on the acts or omissions of Urban and/or Realty Laua. Urban and Realty Laua accepted complete responsibility under their respective Management Contracts for maintenance of Kuhio Park Terrace (“KPT”) and Kuhio Homes and were responsible for complying with applicable housing laws. Their respective duties to defend were therefore triggered by the Complaint in this matter, which alleged deficiencies in maintenance at KPT and Kuhio Homes and the failure to comply with the Americans With Disabilities Act and other fair housing laws. At the very least, there was the *potential* that the State Defendants would be found to be liable to Plaintiffs based at least in part on acts or omissions of Urban and Realty Laua.

The State Defendants' assigned claims against Urban and Realty Laua for other breaches of the Management Contracts are equally valuable. While Urban is correct that the State Defendants have not yet asserted such claims against Urban or Realty Laua, there is no bar to them doing so in the future. Indeed, once this settlement is finalized, Plaintiffs as assignees of the State Defendants intend to amend the Complaint in the related Circuit Court case to allege additional claims against Urban and Realty Laua for breaches of the Management Contracts in addition to the existing claim for breach of the defense and indemnity provisions in those contracts.

The partial settlement in this matter should be approved for the reasons set for in Plaintiffs' Memorandum in Support. As set forth above, the claims against Urban and Realty Laua assigned by the State Defendants to Plaintiffs as part of that settlement represent a substantial benefit to the class.

DATED: Honolulu, Hawai'i, November 29, 2010.

/s/ Jason H. Kim
PAUL ALSTON
JASON H. KIM
Attorneys for Plaintiffs