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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, Plaintiffs, v. 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 DMP. (Contract) **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF JACK WATERS; EXHIBITS "A"- "B"; DECLARATION OF GAVIN K. THORNTON; EXHIBITS 1-4; DECLARATION OF PETER C. YOUNG; NOTICE OF HEARING MOTION; CERTIFICATE OF SERVICE** Hearing Date: 11/2/05 Time: 10:45 a.m. Judge: Eden E. Hifo

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs JACK WATERS and MARGARET MARA, individually, and on behalf of all persons similarly situated, by and through their counsel Alston Hunt Floyd & Ing and Lawyers for Equal Justice, hereby move this Court pursuant to Rules 7 and 56 of the Hawai'i Rules of Civil Procedure for partial summary judgment in this matter.

Summary judgment is appropriate on the issue of Defendants' liability for violations of the U.S. Housing Act and the rental agreements between Plaintiffs and Defendants with respect to Wilikina Apartments tenants. There is no genuine issue as to a material fact and Plaintiffs are entitled to partial summary judgment as a matter of law

This motion is based upon the attached memorandum, declarations and exhibits filed in support of this Motion, and such other matters as may be brought before the Court and/or presented prior to and at the hearing on this Motion, all of which are incorporated herein.

DATED: Honolulu, Hawai'i, October 14, 2005.

SHELBY ANNE FLOYD
THOMAS E. BUSH
GAVIN THORNTON

Attorneys for Plaintiff

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JACK WATERS individually, and MARGARET MARA, individually, and on behalf of all persons similarly situated, Plaintiffs, v. 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) **MEMORANDUM IN SUPPORT OF MOTION**

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Defendants Housing and Community Development Corporation of Hawaii ("HCDCH") and HHA Wilikina Apartments, Inc. ("HHA") own, operate and/or administer Wilikina Apartments. As a federally subsidized housing project under the Section 8 New Construction program of the U.S. Department of Housing and Urban Development ("HUD"), Wilikina Apartments is subject to certain federal rules regarding, *inter alia*, the calculation of tenant rents.[1]

Section 1437a(a)(1) of the U.S. Housing Act, also known as the Brooke Amendment, imposes a ceiling for rents charged to low-income tenants residing in Section 8 New Construction program units. The Brooke Amendment provides that a low-income

[1] Section 8 of the U.S. Housing Act, 42 U.S.C. § 1437f governs the Section 8 New Construction program under which Wilikina Apartments operates. The maximum rent that can be charged to tenants of Section 8 New Construction program projects is set by 42 U.S.C. § 1437a(a)(1). *See* 42 U.S.C. § 1437f(c)(3). Additionally, 24 C.F.R. §§ 880.101–880.612a and 24 C.F.R. part 5 are applicable to the Section 8 New Construction program projects such as Wilikina Apartments. *See* 24 C.F.R. § 880.101(a) and 24 C.F.R. § 880.104 (d).

family "shall pay as rent" a specific percentage of its income, which in practice is approximately 30%.[2] HUD and the courts have long considered "rent" to include a reasonable amount for the use of utilities. *See* 24 C.F.R. § 5.603(b); *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987); *Dorsey v. Housing Authority of Baltimore City*, 984 F.2d 622, 624 (4th Cir. 1993).

Where tenants are responsible for the payment of utility service (i.e., where tenants must pay a utility provider directly), tenants must be provided with a "utility allowance" so that their rent plus utilities does not exceed the rent ceiling set by the Brooke Amendment.[3] *See* 24 C.F.R. § 5.603(b). HUD regulations require that the utility

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2 The Brooke Amendment in its present form reads as follows:

§ 1437a. Rental payments

(a) Families included; amount.

(1) Dwelling units assisted under this Act shall be rented only to families who are low-income families at the time of their initial occupancy of such units. Reviews of family income shall be made at least annually. Except as provided in paragraph (2) and subject to the requirement under paragraph (3), a family shall pay as rent for a dwelling unit assisted under this Act (other than a family assisted under section 8(o) or (y) [42 USCS § 1437f(o) or (y)] or paying rent under section 8(c)(3)(B) [42 USCS § 1437f(c)(3)(B)]) the highest of the following amounts, rounded to the nearest dollar:

(A) 30 per centum of the family's monthly adjusted income;

(B) 10 per centum of the family's monthly income; or

(C) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

3 The utility allowance takes the form of a rent credit which decreases the amount of rent that a tenant pays to the owner. For example, if a tenant has a monthly adjusted income of $200, the tenant's rent (known as the "total tenant payment") will be $60 (30% of the tenant's income). If the tenant is entitled to a utility allowance of $50 per month, the tenant should only pay $10 to the owner each month for rent ($60 tenant payment - $50 utility allowance).

Where the utility allowance exceeds the total tenant payment, the tenant should receive a "utility reimbursement." 24 C.F.R. §5.603(b). For example, a tenant with an adjusted income of $100 per month, will have a total tenant payment of $30 per month (30% of the tenant's income). If the tenant is entitled to a utility allowance of $50 per month, the tenant should receive a check for $20 each month as a utility reimbursement ($50 utility allowance - $30 total tenant payment).

allowance be sufficient to cover the monthly cost of "a reasonable consumption of such utilities and other services for the unit by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment." *Id.*

After the utility allowances are adopted, the owner must continue to reevaluate the adequacy of the allowances to account for relevant changes, such as an increase in utility rates. 24 C.F.R. § 880.610. When the contract rents received by the owner are adjusted (which generally occurs annually), the owner must complete and submit to HUD an analysis of the adequacy of the utility allowances in light of the relevant changes since the allowances were last adjusted.[4] *Id.* Additionally, where utility rate increases would result in an increase of 10 percent or more in the most recently approved utility allowances, the project owner must request approval of new utility allowances and implement the increased allowances once approved. *Id.*

In spite of Defendants' obligations under federal law, the utility allowance provided to Wilikina Apartments residents has not been reevaluated or updated since 1996. Since the last update, utility rates have increased in excess of 37%. As a result,

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[4] The contract rent is the total amount of rent payable to an owner for a unit as specified in the Housing Assistance Payment Contract ("HAP Contract") between HUD and the owner. 24 C.F.R. § 880.201. For example, if the contract rent for a one bedroom apartment at a Section 8 project is set at $800 by the HAP Contract, and the tenant's share based on the rent maximum according to the Brooke Amendment is $100, HUD will pay a $700 subsidy directly to the owner. *See* 24 C.F.R. § 880.501(d) ("The amount of the housing assistance payment made to the owner of a unit being leased by an eligible family is the difference between the contract rent for the unit and the tenant rent payable by the family.")

The contract rents are adjusted annually upon request from the owner. 24 C.F.R. § 880.609(a). The adjustments are granted automatically based on a schedule of "Automatic Annual Adjustment Factors," which is published at least annually in the Federal Register, and which takes into account increases in the costs of operating comparable housing in the area. *See* 24 C.F.R. §§ 880.201-880.204.

Owner requests for 'special additional adjustments" to contract rents may also be granted where determined necessary by HUD to reflect increases in the actual and necessary expenses of owning and maintaining the assisted units. 24 C.F.R. § 880.609(b).

Defendants have provided residents with utility allowances that are insufficient under federal regulations, thereby violating the Brooke Amendment of the U.S. Housing Act by charging Wilikina Apartments residents rents in excess of 30% of their income for rent. Further, Defendants have breached residents' rental agreements, which require Defendants to calculate residents' rents in accordance with HUD procedures and regulations.

II. UNDISPUTED MATERIAL FACTS

Defendants Housing and Community Development Corporation of Hawaii ("HCDCH") and HHA Wilikina Apartments, Inc., ("HHA") own, operate and/or administer federally subsidized housing projects under the "project-based Section 8 program."[5] (Def.s' First Am. Answer to Compl. Filed May 6, 2005 at ¶ 1.) Defendant HCDCH is a duly organized and recognized agency of the State of Hawaii with the power to sue and be sued. (*Id.* at ¶ 11.) Defendant HHA is a not for profit corporation set up, controlled and run by HCDCH specifically to own and operate the Wilikina Apartments. (Def.s' Mot. to Dismiss Pl.'s Second Claim at 2.)

Wilikina Apartments is an apartment building in Wahiawa with 117 units available for rent to low-income families. (Def.s' Mot. to Dismiss Pl.'s Second Claim at 2.) All of the units are subsidized by the Section 8 New Construction program of the Department of Housing and Urban Development. (*Id.*) At Wilikina Apartments, the tenants pay for electricity directly to Hawaiian Electric Company ("HECO") and are thus entitled to a utility allowance calculated in accordance with HUD rules and regulations.[6]

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[5] Defendant HCDCH owns, operates and/or administers at least one other project-based Section 8 housing project, Banyan Street Manor, which is also a subject of this litigation. However, Defendants have thus far objected to discovery requests concerning Banyan Street Manor and, thus, Plaintiffs do not yet have sufficient information for a summary judgment motion.

[6] Named plaintiff JACK WATERS' Rental Agreement for Wilikina Apartments provides that he must make payment for his utilities directly to the appropriate utility company. *See* Section 7 of Rental Agreement attached as Exhibit "A" to Waters Dec. He is required to pay for heat, lights, electric

(Def.s' Mot. to Dismiss Pl.'s Second Claim at 2; *see also* Declaration of Jack Waters (hereinafter "Waters Dec.") at ¶ 4.) In 1995, to calculate a new utility allowance, HHA's manager obtained and reviewed tenants' actual electrical utility bills. (Def.s' Answer to Pl.s' First Set of Interrogs. to Def. HHA Wilikina Apartments Project, Inc. at 1-2, attached hereto as Exhibit 1 to Declaration of Gavin K. Thornton.) The bills were averaged (separately for one-bedroom and two-bedroom units) and the average amount was submitted to HUD as the requested utility allowance. (*Id.*) Based on HHA's request, effective March 1996 HUD approved a utility allowance of $40 and $56 per month for one and two-bedroom units, respectively. (*Id.* at 1-3.)

Since the March 1996 adjustment, the utility allowance has not been reviewed or adjusted, and tenants continue to receive the same utility allowance implemented in 1996 (although Defendants assert that they have started the review and adjustment process since the filing of this suit). (*Id.*; *see also* Def.s' Mot. to Dismiss Pl.'s Second Claim at 2.) Meanwhile, from April 1996 to May 2005 (the month in which this suit was filed), residential electric utility rates increased by over 37%. (*See* Declaration of Peter C. Young at ¶5.) Additionally, since 1996, Defendants have continued to request and obtain adjustments in the contract rents, (*see* Exhibits 2 thru 4 of Declaration of Gavin K. Thornton), without performing the obligatory analysis of the utility allowances.[7]

Plaintiff JACK WATERS has been a head of household and tenant of Wilikina Apartments since November 24, 1997. (*See* Waters Dec. at ¶ 3.) On November 10, 1997,

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and cooking. *Id.*

[7] Exhibits 2 thru 4 indicate that adjustments to the Wilikina Apartments contract rents were approved at least 2 times between April 1996 and May 2005. Page 2 of Exhibit 2 shows that the contract rents effective on March 29, 2000 were $525 and $660 for one and two-bedroom units, respectively (see Part A, Column 3). Page 2 of Exhibit 3 shows that the contract rents in effect on December 20, 2001 were $537 and $675 for one and two-bedroom units, respectively (see "Step 1", Column C). Page 2 of Exhibit 4 shows that the contract rents effective on April 1, 2000 were $564 and $709 for one and two-bedroom units, respectively (see Part A, Column 3).

WATERS entered into a rental agreement with HHA Wilikina Apartments Project, Inc., a copy of which is attached hereto as Exhibit "A" to the Declaration of Jack Waters . (*See* Waters Dec. at ¶ 5.) WATERS' rental agreement remains in effect and its terms still apply to WATERS tenancy.[8] (*See* Waters Dec. at ¶ 6.)

The rental agreement entered into by WATERS is a form agreement for Wilikina Apartments titled "Lease for HHA Wilikina Apartments" (hereinafter "Wilikina Rental Agreement"). (*See* Exhibit "A" of Waters Dec.) Pursuant to the terms of the Wilikina Rental Agreement, Defendants are required to calculate tenants' rents in accordance with HUD procedures and regulations.[9] (*See* Sections 4 and 27 of Rental Agreement attached hereto as Exhibit "A" to Waters Dec.; *see also* the "Owner Certification" section of Exhibit "B" to Waters Dec.)

On May 6, 2005, Plaintiffs filed this suit seeking declaratory and injunctive relief and damages for Defendants' violations of the U.S. Housing Act stemming from their failure to review and update utility allowances, and seeking relief for breaches of the rental agreements with project-based Section 8 tenants.[10] On October 3, 2005, this Court

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8 Section 2 of the rental agreement provides as follows:

"The initial term of this Agreement shall begin on Nov. 24, 1997 and end on Nov. 30, 1997. After the initial terms ends, the Agreement will continue for successive terms of one year each unless automatically terminated as permitted by paragraph 23 of this Agreement."

The Agreement has not be terminated. *See* (Waters Dec. at ¶ 6).

9 See further discussion infra.

10 Approximately a year before the filing of this action, three related class action suits were filed against Defendant HCDCH seeking redress for HCDCH's failure to update utility allowances for tenants of federally subsidized "public housing" (versus project-based subsidies such as the project-based Section 8 subsidy applicable to Wilikina Apartments). The suits are briefly described below:

Smith, et al. v. Aveiro, et al., Civil No. 04-00309 DAE KSC, was filed in the United States District Court for the District of Hawaii on May 13, 2004. The suit sought equitable relief on behalf of all public housing tenants who pay their own utilities for rent over-charges arising out of HCDCH's failure to adjust utility allowances as utility rates increased. Defendants admitted that they had failed to review and adjust the utility allowances adjust the utility allowances as required by federal law. However, in October 2004, HCDCH adjusted its utility allowances, implementing an adjusted utility allowance that

issued an order granting in part Plaintiffs' motion for class certification and certifying the class as "persons that currently reside, or resided at any point from May 6, 2003 to the present in an HCDCH project-based Section 8 project in which residents receive or should receive utility allowances." (Order Granting in Part Pl.s' Mot. for Class Certification at 2.) Plaintiffs now request an order of partial summary judgment with regards to Defendants' liability for violations of the U.S. Housing Act and the rental agreements between Plaintiffs and Defendants with respect to Wilikina Apartments tenants.

III. STANDARD FOR SUMMARY JUDGMENT

A party is entitled to summary judgment when there are no genuine issues of material fact, and the party is entitled to judgment as a matter of law. Haw. R. Civ. P. 56(c); *Celotex v. Catrett*, 477 U.S. 317, 322 (1986); *Linville v. State*, 674 F. Supp. 1095 (D. Haw. 1994). If the record, including the pleadings, answers to interrogatories, admissions and affidavits show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law, the Court shall enter judgment forthwith. *Joy A. McEclroy, M.D. v. Maryl Group, Inc.*, 107 Haw. 423, 429 (2005); *Querubin v. Thronas*, 107 Haw. 53 (2005). All evidence and inferences must be construed in the light most

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was retroactive to September 2004. In light of HCDCH's adjustment of the utility allowances and its adoption of procedures to annually review the adequacy of the allowances, the suit was dismissed as moot by the Federal District Court on July 12, 2005.

Smith v. Housing and Community Development Corporation of Hawaii, Civil No. 04-10069K, was filed in the Third Circuit Court of the State of Hawaii, seeking reimbursement for the unlawful charges resulting from HCDCH's failure to update utility allowances. A hearing on a motion and cross-motion for summary judgment was held on October 3, 2005 to determine HCDCH's liability under a breach of rental agreement claim and a third-party beneficiary claim based upon HCDCH's breach of the Annual Contributions Contract between HCDCH and HUD. The court's decision on the motion is pending.

Amone v. Aveiro, et al., Civ. No. 04-508ACK, was filed in the United States District Court for the District of Hawaii in August 2004 by disabled public housing tenants who have been denied their rights to receive notice of and request increased utility allowances as a result of their need for medical devices using electricity. On June, 17, 2005, the Court issued an order granting a permanent injunction requiring HCDCH to comply with federal regulations governing the provision of utility allowance adjustments to disabled public housing tenants and declaring that class members were entitled to have their rents adjusted.

favorable to the nonmoving party and disputed facts must be resolved in its favor. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractor's Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

IV. LEGAL ARGUMENT

A. Defendants Breached the Rental Agreement Between Wilikina Apartments Residents and HHA

In Count I of Plaintiffs' Amended Complaint, Plaintiffs seek relief based on a claim for breach of the rental agreements of Section 8 project-based tenants. There are no genuine issues of material fact with respect to Plaintiffs' breach of rental agreement claim for Wilikina Apartments tenants. With respect to Defendants' liability for breaches of the rental agreements for tenants at Wilikina Apartments, Plaintiffs are entitled to judgment as a matter of law.

Section 4 of the Wilikina Rental Agreement, (attached as Exhibit "A" to Waters Dec.), provides, in part, as follows:

> The Landlord agrees to implement changes in the Tenant's rent or assistance payment only in accordance with the time frames and administrative procedures set forth in HUD's handbooks, instructions, and regulations related to administration of multifamily subsidy programs.

Section 27 of the Wilikina Rental Agreement incorporates into the terms of the lease by reference Form HUD-50059, Certification and Recertification of Tenant Eligibility. Form HUD-50059 includes an "Owner's Certification" section in which HHA 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* Exhibit "B" of Waters Dec.)

In spite of these provisions of the Wilikina Rental Agreement, Defendants failed to comply with HUD procedures and regulations in calculating tenants' rents by neglecting to review and request adjustments to the utility allowance. HUD regulations require that: (1) the Section 8 New Construction project owner complete and submit to

HUD an analysis of the adequacy of utility allowances in connection with adjustments of the contract rents; and (2) the owner request approval of, and implement new utility allowances where utility rate increases would result in an increase of 10 percent or more in the most recently approved allowances. 24 C.F.R. § 880.610. The undisputed facts are that Defendants failed to fulfill either of these requirements. As a direct result of Defendants' failures, Plaintiffs were provided with an insufficient utility allowance and were thereby charged rents in excess of the maximum rents permitted by the Brooke Amendment of the U.S. Housing Act and its supporting regulations.[11] Because the U.S. Housing Act and HUD procedures and regulations are expressly and implicitly part of the Wilikina Rental Agreement for Wilikina Apartments residents,[12] Defendants violations of federal law amount to a material breach of the Agreement for which Plaintiffs are entitled to recover.

B. Defendants Have Violated Plaintiffs' Federal Rights Under the U.S. Housing Act.

In Count II, Plaintiffs seek relief based on an implied private right of action under the Brooke Amendment for Defendants' admitted violations of the U.S. Housing Act. Specifically, Plaintiffs allege that Defendants' have over-charged Plaintiffs in rent in direct violation of the rent ceiling imposed by the Brooke Amendment. Case law has recognized that Plaintiffs have the right bring such a claim.

An implied private right of action is available to public housing residents to enforce their rights under the Brooke Amendment. In *Castleman v. United States Dep't of HUD*, 1988 U.S. Dist. LEXIS 10242 (W.D.Mo. 1988), public housing tenants filed suit to

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11 24 C.F.R. § 5.628 sets out the rent ceiling for Section 8 New Construction project tenants in almost identical fashion to the Brooke Amendment.

12 Existing law is part of a contract where there is no stipulation to the contrary. *Quedding v. Arisumi Brothers, Inc.*, 66 Haw. 335, 337, 661 P.2d 706, 709 (1983) (holding that it was implied in the contract that a contractor would comply with the requirements of the Uniform Building Code even though the Code was not expressly referred to in the contract).