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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI'I

TIMOTHY SHEA, MARY)	CIVIL NO. 09-00480 LEK
JACQUELINE LEE, DON E.)	[Contract]
MURDOCK, individually, and on behalf)	[Declaratory Judgment]
of all persons similarly situated,)	Class Action
)	
Plaintiffs,)	FIRST AMENDED COMPLAINT;
)	CERTIFICATE OF SERVICE
)	
)	Class Action
)	

vs.)
)
KAHUKU HOUSING FOUNDATION,)
INC., and HAWAIIAN PROPERTIES,)
LTD.)
)
Defendants.)
_____)

FIRST AMENDED COMPLAINT

BACKGROUND

1. Defendants KAHUKU HOUSING FOUNDATION, INC and HAWAIIAN PROPERTIES, LTD. (collectively “Defendants”) own, operate, and manage Kahuku Elderly Housing Project (“Kahuku Elderly Housing”), a housing project subsidized by the federal “project-based Section 8 New Construction program.” Under the program, tenants’ rents, including utilities, generally cannot exceed 30% of tenant income.

2. Plaintiffs TIMOTHY SHEA, recently deceased, MARY JACQUELINE LEE, and DON E. MURDOCK, and the persons whose interests they represent, are Kahuku Elderly Housing Project tenants who pay their own utilities.

3. Where tenants pay their own utilities, owners of housing projects must provide the tenants with utility allowances to cover the costs of the

tenants' utility consumption. To ensure that the allowances remain adequate to cover the tenants' utility costs, the allowances must be regularly reviewed and adjusted where utility rates have increased by 10% or more since the last allowance adjustment.

4. Though rates rose, Defendants historically failed to adjust the tenants' utility allowance for over seven years, in violation of federal law and in breach of the rental agreements for Plaintiffs TIMOTHY SHEA, MARY JACQUELINE LEE, and DON E. MURDOCK, and the persons whose interests they represent. As a result, Kahuku Elderly Housing tenants have been significantly overcharged for rent.

5. Further, Defendants falsely certified that the rents for tenants at Kahuku Elderly were properly calculated.

6. The Plaintiff class seeks reimbursement for rent overcharges resulting from Defendants' violations of law and breaches of tenants' rental agreements and treble damages for Defendants' unfair or deceptive actions in repeatedly overcharging residents for rent and falsely certifying that their rents were properly calculated. Additionally, the Plaintiff class seeks declaratory and injunctive relief barring any eviction proceedings based on rent delinquencies until tenants are credited with rent overcharges resulting from Defendants' failure to

adjust the utilities allowances.

JURISDICTION AND VENUE

7. This Court has jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. § 1343 (a) (3).

8. This Court has supplemental jurisdiction under 28 U.S.C. § 1367 over Plaintiffs' state law claims.

PARTIES AND CLASS ACTION ALLEGATIONS

9. Plaintiff TIMOTHY SHEA was, and MARY JACQUELINE LEE, and DON E. MURDOCK are tenants of Kahuku Elderly Housing Project and are citizens and residents of the State of Hawai'i. Plaintiffs TIMOTHY SHEA, MARY JACQUELINE LEE, and DON E. MURDOCK bring this action on their own behalf and, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of all others who are similarly situated.

10. Defendants KAHUKU HOUSING FOUNDATION, INC., a nonprofit corporation, and HAWAIIAN PROPERTIES, LTD., a domestic for-profit corporation, own, operate, and/or manage Kahuku Elderly Housing Project 56-154 Pu'uluana Place Kahuku, HI 96731, or hold themselves out as doing so.

11. Plaintiffs represent present and past Kahuku Elderly Housing tenants for whom Defendants pay or should have paid utility allowances and

whose rights have been violated by Defendants as set forth herein.

12. The class is so numerous that joinder of all members is impracticable.

13. There are questions of law and/or fact common to the class, as set forth below.

14. Plaintiffs' claims are typical of the claims of the class as a whole.

15. Plaintiffs will fairly and adequately represent the interest of the class. Plaintiff knows of no conflicts of interest among members of the class.

16. Plaintiffs are represented by attorneys who are experienced class action litigators and will adequately represent the interest of the entire class.

17. A class action is appropriate in this case because questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

18. Questions of law and fact common to the Plaintiff class include:

- a. Whether the Defendants failed to increase or request an increase of the utility allowances where a utility rate change would have resulted in a cumulative increase of 10 percent or more in the

- most recently approved utility allowance;
- b. The amounts of the adjustments that should have been made to correspond with utility rate increases; and
 - c. Whether the Defendants' false certifications constitute an unfair and deceptive trade practice.

LEGAL FRAMEWORK

19. Pursuant to the United States Housing Act, 42 U.S.C. § 1437a(a)(1) (known as the "Brooke Amendment"), rent, including utilities, for tenants residing in project-based Section 8 New Construction developments cannot exceed a certain percentage of tenant income. 42 U.S.C. § 1437a(a)(1); *see also* 24 C.F.R. § 5.603(b).

20. The owner of a project-based Section 8 development receives a certain amount of rent to operate each unit (called the "contract rent"), which is set by a "Housing Assistance Payment Contract" between the owner and the U.S. Department of Housing and Urban Development ("HUD"). 24 C.F.R. § 880.201. To ensure that the owner receives the full contract rent for operation of a subsidized unit, HUD pays the owner the difference between the tenant's portion of the rent and the contract rent. 24 C.F.R. § 880.501(d).

21. To ensure that tenants' rents plus utilities do not exceed the

Brooke Amendment's rent ceiling when tenants are directly responsible for the payment of utility service (*i.e.*, where tenants must pay a utility provider directly), HUD regulations require that tenants are provided with a "utility allowance." *See* 24 C.F.R. § 5.603(b).

22. The utility allowance provided to tenants takes the form of a rent credit that must be equal to an amount that tenants are estimated to pay for a reasonable consumption of utilities. *Id.*

23. Each time the contract rents for a project-based Section 8 development are to be adjusted, the owner must complete and submit an analysis of the adequacy of utility allowances in light of the relevant changes since the allowances were last adjusted (e.g., changes in utility rates). *See, e.g.*, 24 C.F.R. § 880.610.

24. Where utility rates increase by 10 percent or more since the most recently approved utility allowance, the utility allowances must be increased to account for the utility rate increase to ensure that tenants are not charged more than 30 percent of their income for rent. *See, e.g.*, 24 C.F.R. § 880.610.

FACTUAL ALLEGATIONS

25. Plaintiff TIMOTHY SHEA 69 years old has been a head of household and tenant of Kahuku Elderly Housing for over 4 years.

26. Plaintiff TIMOTHY SHEA resided in a one-bedroom rental unit in the Kahuku Elderly Housing pursuant to a rental agreement executed between Plaintiff TIMOTHY SHEA and Defendant KAHUKU HOUSING FOUNDATION, INC. by its agent Defendant HAWAIIAN PROPERTIES, LTD., most recently on May 1, 2009.

27. As a resident of Kahuku Elderly Housing, Plaintiff TIMOTHY SHEA paid his own electric and gas utilities. Defendants provided a monthly utility allowance to TIMOTHY SHEA in the amount of \$35.00, which is deducted from his \$260.00 rent balance.

28. Plaintiff TIMOTHY SHEA passed away on July 16, 2010.

29. Plaintiff MARY JACQUELINE LEE is 77 years old and has been a head of household and tenant of Kahuku Elderly Housing for over 9 years.

30. Plaintiff MARY JACQUELINE LEE resides in a one-bedroom rental unit in the Kahuku Elderly Housing pursuant to a rental agreement executed between Plaintiff MARY JACQUELINE LEE and Defendant KAHUKU HOUSING FOUNDATION, INC. by its agent, Defendant HAWAIIAN PROPERTIES LTD., most recently on November 1, 2008.

31. As a resident of Kahuku Elderly Housing, Plaintiff MARY JACQUELINE LEE pays her own electric and gas utilities. Defendants provide a

monthly utility allowance to MARY JACQUELINE LEE in the amount of \$64.00, which is deducted from her \$168.00 rent balance.

32. Plaintiff DON MURDOCK is 78 years old has been a head of household and tenant of Kahuku Elderly Housing for over 4 years.

33. Plaintiff DON MURDOCK resides in a one-bedroom rental unit in Kahuku Elderly Housing pursuant to a rental agreement executed between Plaintiff DON MURDOCK and Defendant KAHUKU HOUSING FOUNDATION, INC. by its agent HAWAIIAN PROPERTIES, LTD., most recently on September 8, 2008.

34. As a resident of Kahuku Elderly Housing, Plaintiff DON MURDOCK pays his own electric and gas utilities. Defendants provide a monthly utility allowance to DON MURDOCK in the amount of \$64.00, which is deducted from his \$379.00 rent balance.

35. Though utility rates have increased in excess of 10 percent since the utility allowances were last updated, Defendants failed to revise or request revisions to the utility allowances for Kahuku Elderly Housing for several years.

36. On information and belief, Defendants failed to complete and submit an analysis of the adequacy of utility allowances in connection with

adjustments of the contract rents for Kahuku Elderly Housing.

37. As a result, Plaintiffs TIMOTHY SHEA, MARY JACQUELINE LEE, and DON E. MURDOCK, and the persons whose interests they represent were required to pay amounts for utility bills in excess of the utility allowance provided and thereby were forced to pay an amount for rent in excess of 30% of their income.

38. With knowledge of the falsity of their statements, or in reckless disregard of whether the statements were true or false, Defendants repeatedly certified that the rents for the members of the Plaintiff class were calculated in accordance with HUD regulations and procedures when in fact they were not.

39. In reliance on Defendants' statements, Plaintiffs and the Plaintiff class have not taken action earlier to enforce their rights.

40. Additionally, Defendants have revoked permission for the Kahuku Public Library's Bookmobile to come to Kahuku Housing to provide access to books and other reading materials for Kahuku's elderly residents, including TIMOTHY SHEA, MARY JACQUELINE LEE and DON E. MURDOCK.

41. Defendants have also denied Kahuku's elderly residents, including TIMOTHY SHEA, MARY JACQUELINE LEE and DON E.

MURDOCK, access to the Community Center, which is a common facility generally open to residents 6 days a week.

42. Defendants have passed policies and decisions to deny, hinder or interfere with Kahuku's elderly residents use and enjoyment of the Bookmobile and Community Center.

43. The acts and conduct of Defendants continues a pattern and practice of harassing and threatening the residents of Kahuku Elderly Housing with the intent to punish them for enforcing their legal rights. Plaintiffs fear further harassment and retaliation should they continue to enforce their legally recognized rights to fair housing.

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF Breach of Rental Agreement

44. Plaintiffs reallege and incorporate by reference each and every allegation contained in the paragraphs 1 through 43.

45. The rental agreement for Kahuku Elderly Housing tenants requires Defendants to calculate tenant rents in accordance with the HUD requirements.

46. Section 4 of the rental agreement for Kahuku Elderly Housing tenants provides, in part, that "[t]he 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."

47. The section of the rental agreement for Kahuku Elderly Housing tenants titled "Owner's Certification" 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 the owner must certify, in part, to the following: "I certify that this Tenant's eligibility, rent and assistance payment have been computed in accordance with HUD's regulations and administrative procedures...."

48. Additionally, since existing law is part of a contract where there is no stipulation to the contrary, the U.S. Housing Act and the supporting HUD procedures and regulations are implied into the terms of the rental agreements between the Plaintiff class and Defendants.

49. Defendants' actions with regard to the calculation of tenant rents and their failures to revise, or request revisions to the utility allowances were not in accordance with the U.S. Housing Act and the supporting HUD regulations and procedures, thereby breaching the Plaintiffs' rental agreements.

50. As a direct result of Defendants' breaches, Plaintiffs

TIMOTHY SHEA, MARY JACQUELINE LEE, and DON E. MURDOCK, and the persons whose interests they represent were damaged in an amount to be determined at trial.

51. Additionally, on information and belief, Defendants have taken action to evict members of the Plaintiff class from their apartments for alleged rent delinquencies. Plaintiffs, and the persons whose interests they represent, are entitled to declaratory and injunctive relief to enforce the terms of the rental agreement and Defendants' corresponding obligations pursuant to the U.S. Housing Act and HUD requirements, and to prevent irreparable harm resulting from their evictions or other adverse actions.

SECOND CLAIM FOR RELIEF
Unfair Trade Practices Prohibited by H.R.S CHAPTER 480

52. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1-51.

53. Plaintiffs TIMOTHY SHEA, MARY JACQUELINE LEE, and DON E. MURDOCK, and the persons whose interests they represent, are "consumers" and "persons" as those terms are defined in H.R.S. Chapter 480-1, and the described acts and practices involved "trade or commerce," as that term is defined in H. R. S. § 480-2 (a).

54. An unfair or deceptive act or practice in the conduct of any trade or commerce is unlawful pursuant to H.R.S. § 480-2(a).

55. Defendants engaged in unfair and deceptive acts or practices that violate H.R.S. § 480-2 (a), including but not limited to:

- a. Repeatedly certifying that Defendants had properly calculated the rents for each member of the Plaintiff class when in fact Defendants had not;
- b. Charging rents in excess of those permitted by the rental agreements between Defendants and the members of the Plaintiff class; and
- c. Charging rents in excess of those permitted by federal law.
- d. Prohibiting access to the Bookmobile and the Community Center for the sole purpose of discouraging the Plaintiff's from enforcing their legal rights.

56. Defendants' unfair and deceptive acts or practices caused Plaintiffs TIMOTHY SHEA, MARY JACQUELINE LEE, and DON E. MURDOCK, and the persons whose interests they represent, to suffer injury to their property in an amount to be determined at trial.

57. TIMOTHY SHEA, MARY JACQUELINE LEE, and DON E.

MURDOCK and many members of the class whose interests they represents are “elders” within the meaning of H.R.S. § 480-13.5. Defendants conduct was in willful disregard of the rights of such elders and Defendants knew or should have known that their conduct was directed towards or targeted such elders.

58. Pursuant to H.R.S. § 480-13, Plaintiffs, and the persons whose interests they represent, are entitled to declaratory relief, injunctive relief, treble damages, and attorneys’ fees as a result of Defendants’ unfair trade practices.

59. Plaintiffs TIMOTHY SHEA, MARY JACQUELINE LEE, and DON E. MURDOCK and other elder class members whose interests she represents are also entitled to minimum damages of \$5,000 under H.R.S § 480-13(b)(1).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and behalf of all persons similarly situated, pray that this Court:

1. Assume jurisdiction of this case.
2. Certify the Plaintiff class.
3. Declare that Defendants have violated Plaintiffs’ rights as set forth herein.
4. Enter preliminary and permanent injunctions requiring Defendants to comply with the terms of the rental agreements of the plaintiff class,

the U.S. Housing Act and HUD requirements, and barring Defendants from initiating or proceeding with eviction actions against members of the Plaintiff class based on rent delinquencies until rent overcharges resulting from Defendants' unlawful actions are credited to the tenants' rent payments.

5. Award damages and pre-judgment interest to each member of the Plaintiff class for amounts charged for rent by Defendants in excess of 30% of tenant income resulting from inadequacies in the utility allowances.

6. Award treble damages.

7. Award Plaintiffs costs and attorneys' fees.

8. Grant Plaintiffs such other relief as may be just and proper.

DATED: Honolulu, Hawai'i, November 2, 2010.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the dates and methods of service noted below, as true and correct copy of the foregoing was served on the following at their last known address:

Served Electronically through CM/ECF:

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November 2, 2010

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November 2, 2010

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DATED: Honolulu, Hawai'i, November 2, 2010.

/s/ Jason H. Kim
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