Of Counsel:

LAWYERS FOR EQUAL JUSTICE

GAVIN K. THORNTON 7922-0
PO Box 37952
Honolulu, HI 96837
Telephone: (808) 542-5203
Facsimile: (808) 262-4727
Email: gavinthornton@verizon.net

ALSTON HUNT FLOYD & ING
Attorneys At Law
A Law Corporation

SHELBY ANNE FLOYD 1724-0
THOMAS E. BUSH 4737-0
Carter Professional Center, Suite C21
65-1230 Mamalahoa Hwy,
Kamuela, Hawai'i 96743
Telephone: (808) 885-6762
Facsimile: (808) 885-8065
E-Mail: sfloyd@ahfi.com

Attorneys for Plaintiffs

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, Plaintiff, vs. 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.; STEPHANIE AVEIRO, in her official capacity as the Executive Director of the Housing and Community Development Corporation of Hawaii; DOES 1-25 Defendants.	CIVIL NO. 05-1-0815-05 EEH (Contract) Class Action **SUPPLEMENTAL REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; DECLARATION OF GAVIN K. THORNTON; DECLARATION OF JACK WATERS; EXHIBITS "C"- "D"; CERTIFICATE OF SERVICE** HEARING DATE: November 28, 2005 TIME: 1:30 P.M. JUDGE: Eden E. Hifo

SUPPLEMENTAL REPLY MEMORANDUM IN SUPPORT OF 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, submit this Supplemental Reply Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment filed October 14, 2005 against Defendants Housing and Community Development Corporation of Hawaii ("HCDCH") and HHA Wilikina Apartments Project, Inc. ("HHA").

I. INTRODUCTION

There is no dispute that Defendants violated federal law by failing to analyze and request adjustments to the utility allowances at Wilikina Apartments. Nor is there any dispute that Plaintiffs are currently being overcharged for their rent as a result of Defendants' failures. Knowing of the overcharges, Defendants continue to charge and collect excessive rents from the low-income residents of Wilikina.

A hearing on this motion was held on November 2, 2005. The hearing was continued until November 28, 2005 based on Defendants' request pursuant to Haw. R. Civ. P. 56(f) to allow Defendant time to discover "information concerning changes to tenants' rent" (referring to Defendants' argument that a breach of the rental agreement only occurred once the rent for a tenant changed after residing at Wilikina for approximately one year). Defendants' Supplemental Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment contains no reference to such facts. Yet Defendants continue to seek to delay judgment on whether or not the contract was breached, and seek to delay adjusting the rents to the proper amount.

II. ARGUMENT

A. PLAINTIFFS' CONTRACT CLAIM

The clear intent of the Wilikina Apartments Rental Agreement is to ensure that Wilikina tenants pay a rent that is in accordance with the U.S. Housing Act and HUD rules. Contrary to Defendants' assertions, the fact that Defendants listed an exact dollar amount on the rental agreements that was not in accordance with HUD regulations does not make the contract ambiguous; Defendants listed the wrong amount.

Defendants' argument ultimately forces the question, "Did Defendants intend to charge rents in accordance with federal law, or rents that violated federal law?" Even if Defendants wanted to argue the latter, they have presented no evidence whatsoever to support that interpretation. They admit that they failed to perform their duties with respect to analyzing and requesting adjustments to utility allowances in accordance with HUD regulations. They certainly imply that their failure was not intentional. Furthermore, the intent to charge rents in accordance with federal law is clear from: (1) Section 27 of the Rental Agreement which incorporates into the Agreement a certification by Defendants that tenants' rents are computed in accordance with HUD regulations;[1] and (2) Section 4 of the Rental

---

[1] In a footnote, Defendants suggest that the Form HUD 50059 may have changed from 1997 to 2004. (Def.s' Supp. Memo. in Opp. to Pl.s' Mot. for Partial Summ. J. at 4, fn.2.) Defendant did not previously dispute the validity of the HUD 50059 form attached to Plaintiffs' summary judgment motion in Defendants' original opposition filed on October 25, 2005, or at the hearing on November 2, 2005. Only now, when summary judgment is imminent, do Defendants seek to further delay judgment in this case by suggesting that the form may have changed.

There is no reason to believe that the form has substantively changed. The purpose fo the form is clear from its face: It is intended to require tenants to certify that they provided accurate information regarding their income, and to require owners to certify that, using the information supplied by the tenant, the owner properly calculated the tenant's rent. Indeed, Defendants offer no evidence to support the assertion that the form attached to Plaintiffs' motion is invalid or may have changed. The mere suggestion in Defendants' legal memorandum that the form may have changed at some point, unsupported by actual evidence, is not sufficient to defeat a summary judgment motion. *See* Waimea Falls Park v. Brown, 6 Haw. App. 83, 97 (Haw. Ct. App. 1985). (note continued on next page)

Agreement which requires Defendants to make changes to tenants' rents in accordance with HUD regulations.[2] Even absent these express provisions that incorporate federal law by reference into the Agreement, existing law is part of a contract where there is no stipulation to the contrary. (*See* Pl.s' Reply in Supp. of Mot. for Partial Summ. J. at 5.)

Defendants have also argued that at the very least, they only breached the Wilikina Rental Agreements once a tenant's rent changed, usually after a year of residing at Wilikina. (Def.s' Supp. Memo. in Opp. to Pl.s' Mot. for Partial Summ. J. at 8.) However, Defendants have yet to offer any argument whatsoever to support their suggestion that Defendants may have somehow avoided eventually breaching the rental agreements for Wilikina tenants. It is thus absolutely clear that Defendants breached the agreements at some point, and at the very least, Plaintiffs are entitled to an order of summary judgment to that effect.

B. PLAINTIFFS' RIGHT TO INJUNCTIVE RELIEF

Defendants argue that they are currently in compliance with federal law and the terms of the Wilikina Rental Agreement because they have submitted an analysis of the Wilikina utility allowances to HUD. However, the basis of Plaintiffs' claim is that Defendants' are charging them in excess of the amount of rent permitted by the Brooke Amendment. Certainly, Defendants' rent overcharges are a result of

---

To remove any possible doubt that there has been a substantive change to the form, attached hereto as Exhibit "C" is the Form - HUD 50059 signed by Jack Waters on November 10, 1997, the date on which Mr. Waters entered into his rental agreement with Defendants. Attached hereto as Exhibit "D" is the statement to which Defendant's certified by signing the 1997 Form-HUD 50059, which says, "I certify that the Tenant's eligibility, rent and assistance payment have been computed in accordance with HUD's regulations and administrative procedures...."

2 Section 4 alone provides sufficient indication of the intent to charge rents in accordance with federal law at the beginning of the lease term. It would be ludicrous to interpret the lease as allowing one "free" year of charging tenants any rent Defendants wish, after which Defendants would become obligated to comply with the federal rules by which they are governed.

their failures to comply with the regulations regarding utility allowances, but complying with the regulations and merely requesting a utility allowance adjustment after a lapse in compliance of almost 10 years does not address the root of the problem; that Defendants' have overcharged, and continue to overcharge, Wilikina residents for rent in violation of the Brooke Amendment.[3]

Defendants couch their arguments in terms of "paying" residents a higher utility allowances, suggesting that Plaintiffs are requesting Defendants to pay them more. However, Plaintiffs are simply asking that Defendants stop overcharging them for rent. Each month Plaintiffs are sent a bill indicating the amount of rent they are required to pay (Waters Decl. at ¶ 7), and each month Defendants continue to charge an amount in excess of what they are authorized to collect knowing that the amount they are charging is excessive.

Defendants argue that Plaintiffs are asking the court to ignore Hawaii law regarding when an injunction will be issued. (Def.s' Supp. Memo. in Opp. to Pl.s' Mot. for Partial Summ. J. at 5.) However, Plaintiffs do not dispute that injury must be irreparable for an injunction to issue. Instead, Plaintiffs have pointed to precedent that demonstrates that monetary damages are irreparable for low-income subsidized housing residents. Defendants attempt to distinguish these cases by arguing that they pertain to rent increases, whereas the current case involves a requested decrease. This is not the case.

Utilities are supposed to be included in tenants' rents. By failing to supply tenants with an adequate utility allowance as utility rates increased,

---

[3] Defendants assert that "[t]he only alleged violation mentioned in [Plaintiffs'] motion or anywhere else in [sic] pleadings relates to potential adjustment to the utility allowance required by 24 C.F.R. § 880.610." This assertion is wrong. Plaintiffs clearly set forth in both their complaint and this motion that Defendants violated federal law and the Plaintiffs' rental agreements by charging rents in excess of those authorized by the Brooke Amendment. (*See e.g.*, Pl.s' Mot. for Partial Summ. J. at 1-4, 9.)

Defendants have slowly but surely increased tenants' rents. Take for example, a tenant in a one-bedroom at Wilikina who was paying Defendants $100 per month in 1996 when the utility allowances were last adjusted. The tenant's total rent under the Brooke Amendment (which includes utilities) was $140–the $100 paid to Defendants plus $40 for utilities (assuming that the tenant paid the same amount for utilities as estimated by Defendants in the $40 utility allowance he or she was provided). The same tenant today, still paying Defendants $100 per month, is being charged a rent of $174 (according to Defendants' estimate that utility costs for one-bedroom tenants have increased by $34). As utility rates go up, tenants' rents will continue to go up.

Furthermore, Defendants ignore the rule that "the greater the probability the party seeking [an] injunction is likely to prevail on the merits, the less he has to show that the balance of irreparable damage favors issuance of the injunction." Penn v. Transportation Lease Hawaii, Ltd., 2 Haw. App. 272, 276, 630 P.2d 646, 650 (1981). Defendants cite to cases in which the injunction sought is preliminary and the outcome of the case undetermined. Here however, Plaintiffs only request the court issue an injunction preventing Defendants from charging rents in excess of those they are permitted to charge under the Wilikina Rental Agreement if the court determines that Defendants have in fact breached the Rental Agreement.

In light of HUD's approval of a utility allowance increase of $34, Defendants now know with a certainty that they are overcharging Wilikina residents by at least $34 per month.[4] In spite of this knowledge, Defendants continue to affirmatively act to collect excess rents from tenants by sending them a bill each

---

[4] Plaintiffs believe that Defendants used the wrong utility rates when they completed the analysis of the utility allowances submitted to HUD, leading to the approval of an insufficient allowance. If necessary, Plaintiffs would need to retain an expert to dispute the accuracy of the utility rates used by Defendants.

month for the excess amounts. Each month, Defendants engage in a new act to collect rents in excess of those they are authorized to charge. Plaintiffs request an injunction preventing Defendants from doing so.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for partial summary judgment against Defendants HCDCH and HHA with respect to Plaintiffs' contract claim.

DATED: Honolulu, Hawai'i, November 25, 2005.

SHELBY ANNE FLOYD
THOMAS E. BUSH
GAVIN THORNTON
Attorneys for Plaintiff

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, Plaintiff, vs. 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.; STEPHANIE AVEIRO, in her official capacity as the Executive Director of the Housing and Community Development Corporation of Hawaii; DOES 1-25 Defendants.	CIVIL NO. 05-1-0815-05 EEH (Contract) Class Action **DECLARATION OF GAVIN K. THORNTON**

DECLARATION OF GAVIN K. THORNTON

GAVIN K. THORNTON, under penalty of perjury, declares and states the following to be true and correct:

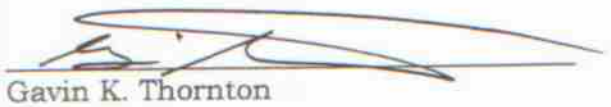
1. I am an attorney for the law firm of Lawyers for Equal Justice, counsel for Plaintiffs herein.

2. I am familiar with and have personal knowledge of the facts stated in this Declaration.

3. Attached to this memorandum is a true and correct copy of the Declaration of Jack Waters with facsimile signature. An original signature will be filed when it is received by mail.

I declare under the penalty of perjury the forgoing is true and correct.

Dated: Honolulu, Hawaii, November 25, 2005.



Gavin K. Thornton

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, Plaintiff, vs. 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.; STEPHANIE AVEIRO, in her official capacity as the Executive Director of the Housing and Community Development Corporation of Hawaii; DOES 1-25 Defendants.	CIVIL NO. 05-1-0815-05 EEH (Contract) Class Action **DECLARATION OF JACK WATERS**

DECLARATION OF JACK WATERS

Jack Waters, under penalty of perjury, declares and states the following to be true and correct:

1. I am familiar with and have personal knowledge of the facts stated in this Declaration.

2. I am a resident of Wilikina Apartments, were I have resided since November 24, 1997.

3. On November 10, 1997, I entered into a rental agreement with HHA Wilikina Apartments Project, Inc.

4. On the same day that I entered into my rental agreement, the agent from Wilikina Apartment Project, Inc. that went through my rental

agreement with me requested that I sign the form attached hereto as Exhibit "C" titled "Owner's Certification of Compliance with HUD's Tenant Eligibility and Tenant Procedures" (hereinafter "Owner's Certification Form").

5. Exhibit "C" is a true and correct copy of the Owner's Certification Form that I signed on November 10, 1997.

6. Prior to signing the Owner's Certification Form, I was provided with a statement to read. To the best of my recollection, Exhibit "D" is a true and correct copy of the statement.

7. Each month I receive a rent statement indicating how much rent I am supposed to pay.

I declare under the penalty of perjury that the foregoing is true and correct.

DATED: Wahiawa, Hawaii, November 24, 2005.

Jack Waters

JACK WATERS

EXHIBIT C

U.S. Department of Housing and Urban Development
Office of Housing, Federal Housing Commissioner

OWNER'S CERTIFICATION OF COMPLIANCE WITH
HUD'S TENANT ELIGIBILITY AND TENANT PROCEDURES

Apartment Number : 812
Tenant Name : WATERS JACK
Tenant Number : 10150

Voucher Month : 12/1997

PART I - GENERAL INFORMATION

1. Date this Form will be effective : 11/24/1997
2. Date Tenant Moved into this Project: 11/24/1997

3. Project Name : WILIKINA APARTMENTS - HHA PROJ
4. FHA/EH/Non-Insured Project No.: 14035071
5. Section 8 Project Contract No.: HI100001002

6a. Certification Type : 1 Move-In
6b. Action Processed : Not Indicated

7a. Type of Subsidy : 1 Section 8
7b. Is this type of subsidy the Family is NOW receiving?

Housing Assistance Code : E All members citizens/eligible noncitizens
Secondary Subsidy Code :

8a. Date Code:
8b. Was Head or Spouse 62 or Older at Time of Conversion? :
8c. Has Family Received Sec 8 Continuously since Converted? :

9a. Race of Head of Household : 4 Asian or Pacific I
9b. Ethnicity of Head of Household: 2 Non-Hispanic

10. Previous Housing Code : 3
11. Displacement Code : 4
12. Preference Code :

PART II - HOUSEHOLD COMPOSITION

13. MBR. NO.	14A. LAST NAME OF FAMILY MEMBER	14B. FIRST NAME OF FAMILY MEMBER	14C M. I.	15. RELATION CODE	16. SEX	17. BIRTH DATE	18. AGE	19. SPEC. STATUS CODE	20. SSN	21. ELIG CODE	ALIEN REG. NUM	23. OCCUPATION	28A.
H	WATERS	JACK		H	M	09/02/73	24		575969889	EC			
02	SOLOMON	ALVINA		A	F	05/17/77	20		575788975	EC			
03	WATERS	LEILANI		C	F	07/14/96	1		555555555	EC			

24a. Number of Family Members : 3
24b. Number of Foster/Live-In : 0
25. Number of Dependents : 1

NON-CITIZEN RULE: Number Eligible : 3
Number Ineligible : 0
Pending Verification : 0

PART III - NET FAMILY ASSETS AND INCOME

26A. Type of Asset	26B. C or I	26C. Cash Value	26D. Yearly Income
TOTALS		0	0

27. Inputed Income from Assets:
HUD Approved Passbook Rate(2.00)% $ 0

28. Mbr. No.	28A. Care Code	28B. Employment or Business	28C. Soc. Sec. Pensions	28D. Public Assistance	28E. Other Income
H		5051	0	0	0
02		0	0	6192	0
28F. TOTAL		5051	0	6192	0

29. Income from all sources except Assets $11243
30. Income from Assets $ 0
31. ANNUAL INCOME $11243
32. INCOME LIMITS: Lower...$40800
Very Low..$29050
33. Eligibility Universe [PRE-1981]
34. Tenants Income Status [VERY LOW]
35A. Did tenant begin receiving Section 8 assistance on or after Aug 1, 1984? [ ]
35B. If "YES" Exception Code: [ ]

WNER CERTIFICATION OF COMPLIANCE WITH
HUD'S TENANT ELIGIBILITY AND TENANT PROCEDURES

U.S. Department of Housing and Urban Development
Office of Housing, Federal Housing Commissioner

Apartment Number : 812
Tenant Name : WATERS JACK
Tenant Number : 10150

Voucher Month : 12/1997

PART IV - ALLOWANCES AND ADJUSTED INCOME

36.	Allowances for Dependents	$ 480
37.	Child Care Allowance	$ 0
	A: Allow member to work : 0	
	B: Seek work/go to school: 0	
38.	3% of Annual Income	$ 337
39A.	Total Handicap Assistance Expense	$ 0
39B.	Allowance for Handicap Assistance	$ 0
40A.	Total Medical Expenses	$ 0
40B.	Allowances for Medical Expenses	$ 0
41.	Elderly Household Allowance	$ 0
42.	Total Allowances	$ 480
43.	Adjusted Income	$10763

PART V - PROJECT RENT INFORMATION

44.	Contract Rent	$ 931
45.	Utility Allowance	$ 56
46.	Gross Rent	$ 987

PART VI - FAMILY RENT & SUBSIDY INFORMATION

47.	Welfare Rent	$ 0
48.	HCDA Percentage	30 %
49.	HUD 50059 Worksheet Used	E
50.	TOTAL TENANT PAYMENT (TTP)	$ 269
51.	Tenant Rent	$ 213
52.	Utility Reimbursement	$ 0
53.	Assistance Payment	$ 718
54.	Percentage of Adjusted Income Charged	30.00%
55.	Did the 1983 HUNRA Rent Limitations affect the Tenant's Rent	[NO]

PART VII - UNIT ASSIGNMENT AND RECERTIFICATION INFORMATION

56.	Date next Annual Recertification will be Effective	[11/01/98]
57.	Number of Bedrooms	[2]
58.	Building Identification Code	[ ]
59.	Unit Number	[812]

PART VIII - CERTIFICATIONS

SIGN ONLY AFTER READING THE STATEMENT THAT APPLIES TO YOU

Tenant Signed Date : 11/22/97

Head of Household: Jack D. Waters III — Date: 11-10-97

Spouse/Co-Head: Wilma M. Johnson — Date: 11-10-97

Owner Signed Date : 11/22/97

Owner/Agent: Angie Ingram — Date: 11/10/97

EXHIBIT D

PLEASE INITIAL

READ BEFORE COMPLETING AND SIGNING THE HUD-50059 FORM

PRIVACY ACT STATEMENT - The information on this form is being collected by the Department of Housing and Urban Development (HUD) to determine an applicant's eligibility; the recommended unit size; and the amount the tenant(s) will pay toward rent and utilities. It will be used to manage the programs covered by this form; to protect the Government's financial interest; and to verify the accuracy of the information furnished. It may be released to appropriate Federal, State and local agencies when relevant to civil, criminal or regulatory investigators and prosecutors. Failure to provide any requested information may result in a delay or rejection of your eligibility approval. The Department is authorized to ask for this information by the U.S. Housing Act of 1937, as amended (42 U.S.C., 1437 et seq.); the Housing and Community Development Amendments of 1981 (P.L. 97-35); the Housing and Urban-Rural Recovery Act of 1983 (P.L. 98-181); and the Housing and Community Development Technical Amendments of 1984 (P.L. 98-479).

TENANT(S) STATEMENT - I/We certify that the information in Parts II, III and IV of this Form are true and complete to the best of my/our knowledge and belief. I/We understand that we can be fined up to $10,000, or imprisoned for up to five years, or lose the subsidy HUD pays and have my/our rent increased, if I/we furnish false or incomplete information.

OWNERS STATEMENT - I certify that the Tenant's eligibility, rent and assistance payment have been computed in accordance with HUD's regulations and administrative procedures and that all required verifications were obtained.

WARNING TO OWNERS AND TENANTS - By signing in Part VIII of this Form, you are indicating that you have read the above Privacy Act Notice and are agreeing with the applicable Certification.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was duly served by hand-delivery at the address shown below:

WILLIAM J. WYNHOFF, ESQ.
Deputy Attorney General
Office of the Attorney General
465 South King St., Ste. 300
Honolulu, Hawai'i 96743

Attorney for Defendants

DATED: Honolulu, Hawai'i, November 25, 2005.

SHELBY ANNE FLOYD
THOMAS E. BUSH
GAVIN K. THORNTON
Attorneys for Plaintiffs