

Of Counsel:  
LAWYERS FOR EQUAL JUSTICE

VICTOR GEMINIANI 4354  
WILLIAM H. DURHAM 8145  
GAVIN K. THORNTON 7922  
P.O. Box 37952  
Honolulu, HI 96837  
Telephone: (808) 779-1744  
Email: [victor@lejehawaii.org](mailto:victor@lejehawaii.org)  
[william@lejehawaii.org](mailto:william@lejehawaii.org)  
[gavin@lejehawaii.org](mailto:gavin@lejehawaii.org)

ALSTON HUNT FLOYD & ING

PAUL ALSTON 1126  
JASON H. KIM 7128  
American Savings Bank Tower  
1001 Bishop St., 18th Floor  
Honolulu, HI 96813  
Telephone: (808) 524-1800  
Fax: (808) 524-4591  
Email: [palston@ahfi.com](mailto:palston@ahfi.com)  
[jkim@ahfi.com](mailto:jkim@ahfi.com)

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

BEVERLY BLAKE, STEPHANIE	)	CIVIL NO. CV08 00281 LEK
CAMILLERI, ARLENE SUPAPO,	)	(Contract) (Declaratory Judgment)
individually, and on behalf of all persons	)	(Other Civil Action)
similarly situated,	)	Class Action
	)	
Plaintiffs,	)	<b>PLAINTIFFS' MEMORANDUM</b>
	)	<b>IN OPPOSITION TO</b>
vs.	)	<b>DEFENDANT CITY AND</b>
	)	<b>COUNTY OF HONOLULU'S</b>

CRAIG NISHIMURA, in his official capacity as Acting Director of the Department of Facility Maintenance, City and County of Honolulu; CITY AND COUNTY OF HONOLULU, a municipal corporation,

Defendants.

) **MOTION FOR LEAVE TO FILE**  
) **THIRD-PARTY COMPLAINT**  
) **AGAINST HAWAIIAN**  
) **PROPERTIES, LTD., FILED**  
) **MAY 15, 2009; DECLARATION**  
) **OF JASON H. KIM; EXHIBITS**  
) **“A” AND “B”; CERTIFICATE OF**  
) **SERVICE**

DATE: June 22, 2009  
TIME: 9:30 a.m.  
JUDGE: Leslie E. Kobayashi

**PLAINTIFFS’ MEMORANDUM IN OPPOSITION TO DEFENDANT CITY AND COUNTY OF HONOLULU’S MOTION FOR LEAVE TO FILE THIRD-PARTY COMPLAINT AGAINST HAWAIIAN PROPERTIES, LTD., FILED MAY 15, 2009**

**I. INTRODUCTION**

Plaintiffs Beverly Blake, Stephanie Camilleri, and Arlene Supapo oppose Defendant City and County of Honolulu’s Motion for Leave to File Third-Party Complaint Against Hawaiian Properties, Ltd. (“Motion for Leave”) because needlessly bringing in a new party into this action six months before trial will likely delay resolution of this matter and prejudice the Plaintiff class. Furthermore, the City and County could have and should have brought this motion at least six months ago. Therefore, this Court should deny the Motion for Leave and require the City and County to pursue its indemnity claim against Hawaiian Properties in a separate action.

## II. PROCEDURAL HISTORY

Plaintiffs filed their class action complaint almost one year ago, on June 12, 2008. The complaint seeks damages and declaratory and injunctive relief against the City and County for overcharging rent to tenants at Westlake Apartment Complex (“Westlake”) in violation of the U.S. Housing Act and its supporting regulations and contrary to the terms of its contracts with Westlake tenants by failing to update utility allowances. As alleged in the Complaint, it is the City and County as the owner of Westlake that is responsible for compliance with the U.S. Housing Act and is a party to rental agreements with Westlake tenants that require the City and County to calculate rent in accordance with the U.S. Housing Act and its implementing regulations. Compl. at ¶¶ 25, 27, 40.

Trial is set for December 15, 2009. The dispositive motions deadline is July 15, 2009 and the discovery deadline is October 16, 2009. *See* Amended Rule 16 Scheduling Order entered February 18, 2009. Neither Plaintiffs nor Defendant have conducted much discovery, in the expectation that this case would settle before trial.

According to the Motion for Leave, Hawaiian Properties has managed Westlake since 2003 pursuant to a contract with the City and County that contains an indemnity provision that may apply here. Memo. in Supp. of Motion for Leave at p. 2. The City and County first raised the possibility of tendering defense and

indemnity to Hawaiian Properties almost eight months ago, on October 13, 2008. *See* Exhibit “A” to attached Declaration of Jason H. Kim (“Kim Dec.”). The City and County tendered defense and indemnity of this action to Hawaiian Properties on October 22, 2008. Memo. in Supp. of Motion for Leave at p. 7. A week later, the City and County acknowledged that it may need to file a third-party action against Hawaiian Properties. *See* Exhibit “B” to Kim Dec. Nonetheless, the City and County did not move to assert a claim against Hawaiian Properties in this action until May 18, 2009.

### III. ARGUMENT

#### A. ALLOWING A NEW THIRD-PARTY CLAIM WILL DELAY RESOLUTION OF THIS ACTION AND PREJUDICE PLAINTIFFS.

Whether to allow amendment of a pleading is within this Court’s discretion. *See Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9<sup>th</sup> Cir. 1990). Although F.R.C.P. Rule 15(a) should be interpreted liberally, “leave to amend is not to be granted automatically.” *Id.* “A trial court may deny such a motion if permitting an amendment would prejudice the opposing party” or “produce an undue delay in the litigation.” *Id.* (affirming denial of motion for leave to amend where opposing party would be prejudiced by the amendment and moving party unduly delayed in filing motion).

Leave to amend may be denied where “[t]he new allegations would *totally alter the basis of the action*, in that they covered additional acts, employees

and time periods necessitating additional discovery.” *M/V American Queen v. San Diego Marine Construction Corp.*, 708 F.2d 1483, 1492 (9<sup>th</sup> Cir. 1983) (emphasis added). *See also Western Shoshone National Council v. Molini*, 951 F.2d 200, 204 (9<sup>th</sup> Cir. 1991) (party opposing amendment would suffer prejudice from “the time and expense of continued litigation on a new theory”).

Here, the proposed third-party complaint would “totally alter the basis of the action” because the focus would shift from the City and County’s liability to the Plaintiff class to Hawaiian Properties’ liability to the City and County. And although it is unclear to what extent the City and County and Hawaiian Properties will need to engage in discovery, it is likely that Hawaiian Properties will claim that it cannot prepare its dispositive motions, complete discovery, and be ready for trial by the existing deadlines. This action should not be hijacked to serve as a vehicle for litigation of a collateral dispute as to which Plaintiffs have no interest, especially when it is so close to settlement or trial. *See M/V American Queen*, 708 F.2d at 1492 (where a dispositive summary judgment motion was pending, the fact that “possible disposition of the case would be unduly delayed” by an amendment supported denial of leave to amend).

This is especially true because there is no need for the City and County and Hawaiian Properties to resolve their dispute in this action. A third-party claim under F.R.C.P. Rule 14 is not compulsory: an indemnity claim may be

brought as a free-standing action after the City and County has settled this action or paid a judgment. *See Barron v. U.S.*, 654 F.2d 644, 650 (9<sup>th</sup> Cir. 1981) (because “a cause of action for indemnity does not accrue until the indemnitee has suffered a loss,” indemnitor and indemnitee are not required to litigate their claims among themselves in the action in which the indemnitee’s liability is established).

Delaying resolution of the Plaintiff class’s claims to allow the City and County to litigate its indemnity claim in this action would needlessly prejudice the Plaintiff class. Thus, the Motion for Leave should be denied.

**B. THE CITY AND COUNTY UNDULY DELAYED IN ASSERTING A THIRD-PARTY CLAIM AGAINST HAWAIIAN PROPERTIES.**

Leave to amend may also be denied where the moving party “unduly delayed in filing their motion.” *Jackson*, 902 F.2d at 1388. A party may be charged with undue delay where “the moving party knew or should have known the facts and theories raised by the amendment in the original pleading.” *Id.*

Here, the City and County knew or should have known about its indemnity claim against Hawaiian Properties at the time of its Answer, filed July 24, 2008. At that time, it had been a party to a contract with Hawaiian Properties for five years relating to Westlake that contained an indemnity provision. At the very latest, the City and County knew of its claim when it anticipated tendering defense and indemnity to Hawaiian Properties almost eight months ago. Ex. “A” to Kim Dec. Indeed, the City and County specifically

acknowledged that it may file a third-party claim on October 29, 2008. Ex. “B” to Kim Dec.

The City and County has provided no explanation for why it did not assert an indemnity claim against Hawaiian Properties months ago. Because the City and County acted with undue and unexplained delay in bringing the Motion for Leave, it should be denied. *See Jackson*, 902 F.2d at 1388 (where delay of eight months between when plaintiff had sufficient facts to support amended complaint and when plaintiff moved for leave to amend was “inexplicable and unjustified,” district court properly denied motion).

#### **IV. CONCLUSION**

For the foregoing reasons, the City and County of Honolulu’s Motion for Leave to File Third-Party Complaint Against Hawaiian Properties, Ltd. should be denied.

DATED: Honolulu, Hawai`i, June 4, 2009.

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

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAI'I

BEVERLY BLAKE, STEPHANIE	)	CIVIL NO. CV08 00281 LEK
CAMILLERI, ARLENE SUPAPO,	)	(Contract) (Declaratory Judgment)
individually, and on behalf of all persons	)	(Other Civil Action)
similarly situated,	)	Class Action
	)	
Plaintiffs,	)	<b>DECLARATION OF JASON H.</b>
	)	<b>KIM</b>
vs.	)	
	)	
CRAIG NISHIMURA, etc., et al., ,	)	
	)	
Defendants.	)	
_____	)	

**DECLARATION OF JASON H. KIM**

I, JASON H. KIM, declare that:

1. I am an attorney at law licensed to practice before this Court and am one of the attorneys for Plaintiffs Beverly Blake, Stephanie Camilleri, and Arlene Supapo in this matter.

2. I make this Declaration based on my personal knowledge and am competent to testify about the matters contained in this Declaration.

3. Attached as Exhibit "A" to this Declaration is a true and correct copy of an October 13, 2008 email from D. Scott Dodd, attorney for the City and County of Honolulu, to me.

4. Attached as Exhibit "B" to this Declaration is a true and correct copy of an October 29, 2008 email from Mr. Dodd to me.



5. As reflected in Mr. Dodd's declaration filed in support of the City and County's Motion for Leave to File Third-Party Complaint Against Hawaiian Properties, Ltd., Plaintiffs do not object to filing the third-party complaint so long as such filing does not delay settlement or trial of this action. It appears likely, however, that Hawaiian Properties will seek to move the current pretrial deadlines and trial date and that the possibility of Hawaiian Properties becoming a party to this action is delaying settlement.

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

Executed in Honolulu, Hawai'i on June 4, 2009.

/s/ Jason H. Kim

JASON H. KIM

**Jason Kim - Blake v. City, et al**

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**From:** "Dodd, D Scott" <dsdodd@honolulu.gov>  
**To:** <jkim@ahfi.com>  
**Date:** 10/13/2008 4:20 PM  
**Subject:** Blake v. City, et al  
**CC:** "Gavigan, Marie Manuele" <mgavigan@honolulu.gov>

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Hello Jason,

As Marie informed you, she has assigned this matter to me for further handling. She informed me that you requested that I e-mail you dates for discovery and motions.

I am set for trial on October 28<sup>th</sup> with Judge Mollway, so I will be busy preparing for that. If that case gets bounced by a criminal trial set the same week, this would open up my schedule significantly.

Briefly looking at the file, it appears the City owes Plaintiffs discovery. I would like to request an extension as we have not received information from the City departments necessary to respond to these requests.

I would hope that Plaintiffs would provide the City a reasonable time to respond to the discovery and pending motions. Additionally, the City needs to tender the defense of this case to the management company and its insurance company.

Anyway, please contact me at your convenience so we can discuss dates and other issues.

Thank you,

*D. Scott Dodd, Esq.*  
*Deputy Corporation Counsel*  
*City and County of Honolulu*  
*530 S. King Street, Room 110*  
*Honolulu, Hawaii 96813*  
*Tel: (808) 768-5129*  
*Fax: (808) 768-5105*  
*[dsdodd@honolulu.gov](mailto:dsdodd@honolulu.gov)*

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**EXHIBIT A**

**Jason Kim - RE: Blake - discovery issues**

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**From:** "Dodd, D Scott" <dsdodd@honolulu.gov>  
**To:** "Jason Kim" <JKim@ahfi.com>  
**Date:** 10/29/2008 5:26 PM  
**Subject:** RE: Blake - discovery issues  
**CC:** "Waihee, Jennifer D" <jwaihee@honolulu.gov>

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Jason,

As to the 30(b)(6) deposition, Christopher Terry informed me that he would be the appropriate person to testify as to all of the categories listed in your 30(b)(6) notice. However, he wanted me to convey to you that much of his knowledge is academic since he has only been with the City since 2007 and has had the position overseeing the Westlake project since the beginning of this year. He will tell you that the person who used to be in the position prior to him, who is no longer with the City, would have more first hand knowledge over much of the material contained in your depo notice. Additionally, Mr. Terry stated that Francine Martinez, the property manager for Hawaiian Properties, Ltd., ("HPL"), would also have information as to prior dealings between the City and HPL and the requests for increased utilities allowances.

Also, we would strongly prefer not having Mr. Terry deposed multiple times, so I ask you to consider reviewing the tenant files over at HPL prior to deposing Mr. Terry. I will be serving the City's initial disclosures (including the documents provided to me) this week.

Another issue I want to bring up is that we have tendered to HPL since the contract provides that HPL owes the City indemnity and are awaiting a response from their insurance carrier. It appears that HPL began managing the Westlake Project in 2003. Prior to 2003, we believe Hawaii Affordable Properties, Inc. ("HAPI") was the management company. We are searching for the management contract for HAPI and intend to tender to HAPI as well. We would appreciate a little time to pursue these tenders in case they are denied and we need to file a third-party action to bring those entities into this lawsuit.

Additionally, on September 12, 2008, tenants of the Westlake Apartments were informed that the Contract Management Office/HUD approved an increase in the project's utility allowance. We understand that as of October 1, 2008, the utility allowances for tenants at the Westlake project were increased from \$40.00 to \$84.00 per month. Because the reason for an immediacy of harm has been removed, we believe that injunctive relief is not appropriate. We continue to believe that Plaintiffs get no additional relief by having Mr. Nishimura named personally in this lawsuit than by only suing the City, and question the need to have him as a party.

I look forward to receiving the protective order regarding the tenant files.

Thank you,  
Scott

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**From:** Jason Kim [mailto:JKim@ahfi.com]  
**Sent:** Monday, October 27, 2008 7:32 PM  
**To:** Dodd, D Scott  
**Cc:** PAUL Alston; Delia L'Heureux; gavin@lejehawaii.org; William Durham  
**Subject:** Blake — discovery issues

**EXHIBIT B**

Scott:

Since the City & County will likely be paying our fees eventually, the timing of the payment of this relatively small amount is not a significant issue. We will not press for immediate payment but will reserve the right to do so in the future if the order is not complied with or we have future discovery disputes.

We will enter into a stipulated protective order regarding personal information of tenants found in their files. Once that is done, we will discuss the logistics of the inspection. We will likely inspect the files at Hawaiian Properties offices but I need to think about that more and perhaps ask additional questions at the deposition

about this. We will prepare a form of protective order for your review.

On scheduling the 30b6 deposition, please let me know which of the two dates you proposed is best for you and your designee so I can send an amended notice. Also please let me know if your designee can testify as to all the topics in the notice. I need to have the documents responsive to our document request (other than the voluminous ones you described) very soon to prepare for the deposition.

Finally, with respect to Mr. Nishimura, it is common practice in Section 1983 actions to name the responsible official as a party. This has been the case since at least Ex Parte Young and in every case for injunctive relief against a governmental entity I have ever been involved in.

Jason H. Kim  
ALSTON HUNT FLOYD & ING  
1001 Bishop Street, 18th floor  
Honolulu, HI 96813  
(808) 524-1800

This email may contain confidential and attorney-client privileged information.

>>> "Dodd, D Scott" <dsdodd@honolulu.gov> 10/24/2008 5:39 PM >>>  
Jason,

My concern as to the sanctions is that I was willing to stipulate to an order compelling the discovery and agreeing to your suggested dates, but now I've got to explain that, regardless of my attempts to resolve the discovery issue, the City is still ordered to pay sanctions. Marie asked me to inquire whether you intend to push for the money or just hold onto the order in case the City fails to comply.

Next, I am informed that to respond to Plaintiffs' request for production of documents, specifically for categories #4 through #11, this will require the copying of ALL tenant files (especially in light of the fact this case is now a class action), for present and former tenants. As part of the property management contract, Hawaiian Properties, Ltd. possesses and manages these files, and these are contained in five or more four-door filing cabinets in Hawaiian Properties' office. In other words, we are talking about a lot of documents.

As you can imagine, these tenant files contain all kinds of personal information to which the present and former tenants of the Westlake project have a right to privacy. I suggest that we enter into a stipulated protective order with respect to the tenant files so that the privacy interests of the tenants are protected, especially now that the matter is a class action suit.

After the parties enter into a protective order, we have to decide about how to handle the document production since we are talking about a very large number of documents; too large for us to simply copy and provide to you. Please let me know if you would like to go to Hawaiian Properties' office to review the files.

Last issue I wanted to bring up was to ask you to dismiss Craig Nishimura as a defendant from this lawsuit. Mr. Nishimura has only been sued in his official capacity, so Plaintiffs will get no additional relief against him that they cannot get from the City. Further, Mr. Nishimura has no specific knowledge of this case and the oversight of the project was delegated to person under him. Having Mr. Nishimura named as a defendant adds nothing to Plaintiffs' case, so we ask that you agree to stipulate to dismiss him.

Thank you,  
Scott

---

**From:** Jason Kim [mailto:JKim@ahfi.com]  
**Sent:** Friday, October 24, 2008 2:45 PM  
**To:** Dodd, D Scott  
**Subject:** RE: Blake; 30(b)(6) deposition

Sorry Scott. I got tied up and did not get a chance to write the letter. Given the order it is probably moot. The fees awarded are quite reasonable so there should not be a concern.

Jason H. Kim  
ALSTON HUNT FLOYD & ING  
1001 Bishop Street, 18th floor  
Honolulu, HI 96813  
(808) 524-1800

This email may contain confidential and attorney-client privileged information.

>>> "Dodd, D Scott" <dsdodd@honolulu.gov> 10/22/2008 10:14 AM >>>

## CERTIFICATE OF SERVICE

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

Served electronically through CM/ECF:

D. Scott Dodd, Esq. <a href="mailto:dsdodd@honolulu.gov">dsdodd@honolulu.gov</a>	June 4, 2009
David M. Louie, Esq. <a href="mailto:dlouie@rhlaw.com">dlouie@rhlaw.com</a>	June 4, 2009
James Shin, Esq. <a href="mailto:jshin@rhlaw.com">jshin@rhlaw.com</a>	June 4, 2009

Attorneys for Defendant  
CITY AND COUNTY OF HONOLULU

DATED: Honolulu, Hawai'i, June 4, 2009.

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