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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LEWERS FALETOGO; HAZEL MCMILLON; GENE STRICKLAND; TRUDY SABALBORO; and LEE SOMMERS, individually and on behalf of a class of present and future residents of Kuhio Park Terrace, Plaintiffs, v. STATE OF HAWAII; HAWAII PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawaii limited liability company, and Does 1-20, Defendants.	) CIVIL NO. 08-1-2608-12 SSM) (Other Civil Action))) **DEFENDANTS MOTION TO DISMISS**) **COMPLAINT FOR FAILURE TO**) **STATE CLAIMS UPON WHICH**) **RELIEF CAN BE GRANTED OR, IN**) **THE ALTERNATIVE, MOTION FOR**) **SUMMARY JUDGMENT;**) **MEMORANDUM IN SUPPORT OF**) **MOTION; DECLARATION OF CHAD**) **TANIGUCHI; EXHIBITS "1", "2", "3";;**) **DECLARATION OF ROBERT**) **FALEAFINE; EXHIBITS "1";**) **DECLARATION OF STEPHANIE L.**) **FO; EXHIBITS "1", "2"; NOTICE OF**) **HEARING ; CERTIFICATE OF**) **SERVICE**)

DEFENDANTS MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Defendants, the STATE OF HAWAII and the HAWAII PUBLIC HOUSING AUTHORITY (collectively "HPHA") moves this Court to dismiss this case because: the Complaint filed on December 18, 2008, fails to state claims upon which any relief can be granted. Alternatively, HPHA moves this Court for summary judgment because: the material facts are not in dispute, and Defendants are entitled to judgment as a matter of law.

This Motion is brought pursuant to Rule 12(b)(6), *Hawaii Rules of Civil Procedure* ("H.R.Civ. P."), and alternatively, under Rule 56(b), H.R.Civ. P., and is supported by the Memorandum in Support and the documents and exhibits attached.

DATED: Honolulu, Hawaii; MAR 3 1 2009, 2009.

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LEWERS FALETOGO; HAZEL MCMILLON; GENE STRICKLAND; TRUDY SABALBORO; and LEE SOMMERS, individually and on behalf of a class of present and future residents of Kuhio Park Terrace, Plaintiffs, v. STATE OF HAWAII; HAWAII PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawaii limited liability company, and Does 1-20, Defendants.	) CIVIL NO. 08-1-2608-12) (Other Civil Action))) **MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF CHAD TANIGUCHI; EXHIBITS "1", "2"; DECLARATION OF ROBERT FALEAFINE; EXHIBIT "1"; DECLARATION OF STEPHANIE L. FO; EXHIBITS "1", "2"**

MEMORANDUM IN SUPPORT OF MOTION

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I. INTRODUCTION

Defendants STATE OF HAWAII and the HAWAII PUBLIC HOUSING AUTHORITY (collectively referred herein as "HPHA") submit this Motion to Dismiss the Complaint under Rule 12(b)(6), Hawaii Rules of Civil Procedure ("Haw. R. Civ. P."), for failure to state claims upon which relief can be granted. Alternatively, this Motion is submitted pursuant to Rule 56(b), Haw. R. Civ. P., because the material facts are undisputed and Plaintiffs are not entitled to judgment as a matter of law.

Plaintiffs have no right to relief against HPHA under any set of facts or circumstances for 1) Breach of Implied Warranty of Habitability; 2) Breach of Lease; 3) Breach of the Management Agreement – Third Party Beneficiary; and 4) Unfair Trade Practices Prohibited by HRS §480-2. Moreover, because HPHA and the issues in this case are so closely regulated by Federal law, federal law has preempted the field and primary jurisdiction is with the Department of Housing and Urban Development (HUD) . To the extent that this court has any remaining jurisdiction of the issues raised in Plaintiff's Complaint, HUD is a necessary party.

II. STATEMENT OF FACTS

HPHA is created under Chapter 356D, H.R.S. and administers federally subsidized housing projects on behalf of HUD and for the State. Section 356D-16 authorizes HPHA to enter into contracts with other governmental agencies, such as the Annual Contributions Contract ("ACC") with HUD, by which HPHA receives federal subsidies to operate and manage federal public housing projects under HUD's programs. Part II of Chapter 356D (Sections 356D-31, et seq.) establishes HPHA's authority for the Federal Low-Income Housing Program under which Kuhio Park Terrace ("KPT") is included. The provisions of HPHA's Rental Agreement are dictated by HUD regulations, 24 C.F.R. §966, et seq.

Built in 1965, KPT and Kuhio Homes are two separate low income public housing projects. [1] Both are operated by the State of Hawaii, and managed by HPHA with extensive financing, oversight, regulation and enforcement by the United States Department of Housing and Urban Development (HUD).

KPT is one of 12 Asset Management Projects ("AMPS"), or public housing projects on the Island of Oahu. HPHA has contracted the daily management of the projects to Defendant REALTY LAUA, LLC ("Realty"). *Declaration of Robert Faleafine ("Decl. Faleafine"), Exh. 1.* KPT, itself, consists of two twin 16 story buildings containing a total of 614 dwelling units, ranging from one to four bedrooms. *Declaration of Chad Taniguchi ("Decl. Taniguchi"), par. 2, 5.* Both KTP buildings are constructed of reinforced cement and cinderblocks with two elevator shafts running down the middle.

Unfortunately because of KPT's age, structural inflexiblity and overwhelming size, HPHA spends $120,000 annually (approximately $10,000/month) on repairs and maintenance. *Declaration of Stephanie L. Fo ("Decl. Fo"), par. 3.* Comparable public housing structures in other states have been razed and replaced with more modern, low rise buildings. HUD has twice denied Hawaii's request to raze and replace KPT. Recently, a private developer has approached HPHA with a proposal to "privatize" KPT: that is, the company would buy the building, totally refurbish it and rent it out as mixed use, retaining a high number of low income housing units. The developer would make its money primarily through tax incentives. HUD has approved such

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[1] The average rent paid by KPT residents is about $300 per month. The rent is based on the unit size; however, no family can be charged more than 30% of their qualified income in rent. *42 U.S.C. §1437.* Therefore, if a resident has no income, for example, due to unemployment, the rent monthly rent is $0. Comparable rents on the commercial market, in the area start at about $800 per month for a one-bedroom unit, so it is clear that the rent at KPT is highly subsidized. It is noteworthy that there are over 4,000 families on the waiting list for public housing in central Oahu.

privatizations in other states. That proposal is currently under consideration by Defendants and may go forward. A preliminary decision is expected within the next 90 days.

Unlike KPT, Kuhio Homes is a series of low-rise, two-story buildings containing 134 units constructed primarily of wood and are more self-contained, for example, each unit has its own hot water system.

Like many public housing projects across the country, both KPT and Kuhio Homes suffer from malcontents and vandals who constantly damage the physical facilities. While there are many KPT and Kuhio Homes residents who take pride in their homes, many of the structural concerns outlined in the Plaintiffs' Complaint have been repeatedly repaired and redamaged because of vandals. These include but are not limited to elevators, emergency fire hoses, fire alarms, light bulbs, signage and garbage/trash chutes and receptacles. Surveillance equipment is scheduled to be installed to try to mitigate the vandalism.

It is estimated that there are up to 40% more people living on the premises than the project was designed for. Many of those people are "unregistered long-term guests" or extended family. Because of the KPT and Kuhio Homes buildings age and over-crowding, there are several maintenance projects are currently taking place, including:

(1) Replacement of hot-water boilers in both buildings and solar panels in Building A. HPHA contemplates a reasonable completion date of year end.

(2) HPHA is presently installing new state of the art fire alarms in KPT. *Decl. Fo, Exhibit "1"*. Individual fire hoses will not be replaced because, on December 2008 , HFD issued an exemption to HPHA stating that fire hoses are not required at KPT. *Decl. Fo, Exhibit "2"*.

(3) A contract has been awarded to Kone, Inc., for the complete replacement and modernization of all six (6) elevators at KPT with estimated completion by 2010. Kone, Inc.

also presently has the maintenance contract with HPHA for the continued maintenance and service of the elevators.

(3) HPHA is currently reviewing options for a new pest control exterminating contract to cover all of KPT .

(4) HPHA has received an appropriation of approximately $884,000 for the modernization and replacement of the KPT garbage chutes. HPHA contemplates a reasonable completion date of early 2010. *Id.*

(5) Approximately 14 units at KPT are out of service due to occasional sewage back ups. An engineering study has been funded and is underway to develop an appropriate and economical fix to the sewage problems. *Decl. Taniguchi, par. 10; Decl. Faleafine, par. 5.*

(6) Several other projects are also in the early stages of consideration.

Contrary to the Plaintiffs' assertions that these repairs are evidence of HPHA's neglect, they are in fact but part of an appropriate ongoing repair and maintenance plan.

HPHA and each of its projects are under the authority of the Department of Housing and Urban Development (HUD). Historically, there are two major pieces of legislation that provide for the federal housing programs by which all public housing authorities, including HPHA, administer for HUD: the National Housing Act of 1934 ("NHA") and the United States Housing Act of 1937 ("USHA"). *12 U.S.C. §§1701 – 1730(W) , as amended, 42 U.S.C. §1437.* These two laws have the same policy goal of establishing a national program for the development of low-income housing.

The NHA provides accessibility of mortgage credit and mortgage loan guarantees to developers of low income housing projects. Congress enacted the USHA in 1937 to correct "the acute shortage of decent, safe and sanitary housing for lower income families" caused by the

Depression. *42 U.S.C. §1437 (1982).* The USHA's main function is to subsidize the operation of local public housing authorities ("PHAs") through the Department of Housing and Urban Development ("HUD"). *Id.*

In 1978, Congress determined that the goal of providing decent housing was not being met because a number of housing projects had defaulted on their mortgage loans, resulting in HUD foreclosing on and taking over the properties. *S. REP. NO. 871, 89TH Cong. 2d Sess. 23, reprinted in 1978 U.S. CODE CONG. & ADMIN NEWS 4773, 4796.* Congress found that while under HUD ownership, a number of these properties had deteriorated due to the agency's failure to properly maintain them. *Id.* In response to this, Congress enacted the Housing and Community Development Act of 1978 which required HUD to take "affirmative steps" to maintain its properties in a manner consistent with the statutory purpose of the USHA. *12 U.S.C. § 1701z-11(a).*[2]

This obligation to properly maintain the public housing units is also delegated to housing projects operated by local PHAs. Under the USHA, HUD and the local PHA, in this case HPHA, enter into an ACC by which HPHA receives HUD subsidies for the operation of the housing projects in exchange for properly maintaining the housing units and following all HUD rules and regulations. *24 C.F.R. §941.302, et seq.*

Pursuant to the above statutes, the national, mandated standard for federally subsidized public housing is "decent, safe and sanitary." HUD has more fully defined that standard at 24 CFR § 5.703. HUD not only fleshes out the definition of the standard but is also charged with administering it, overseeing compliance and has broad powers to enforce it. See e.g. *24 CFR §*

[2] The broad policy goals of the USHA are set out as follows: "It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit...to assist the several states and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income and...to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." *Id.*

901.150 and § 901.200 et seq. Enforcement powers range from simply giving notice of a deficiency to requiring repairs within 24 hours, to placing the entire public housing authority into receivership. As substantially correctly stated in Plaintiffs' Complaint Paragraphs 29 to 32, earlier in this decade, HUD did find significant deficiencies in HPHA's performance, ordered corrective action and designated HPHA a "troubled agency." HPHA did make the corrective actions as prescribed by HUD and did enter into a Memorandum of Understanding which resulted in the removal of the troubled agency designation.

HUD has available to it several assessment and investigating tools, one of the major ones being the **Real Estate Assessment Center** ("REAC")[3]. REAC involves a thorough inspection and rating assessment of one or more housing projects by independent contractors retained by HUD.

In February 2008, HUD conducted a REAC inspection of KPT with a follow up inspection later that year. KPT received a score of 40 out 100. Although admittedly low, that score standing alone is virtually meaningless. The purpose of the REAC inspection is to determine what issues and work need to be done. Several of the current problems listed in this lawsuit contributed to the low REAC score; however they are currently being addressed. Several other matters such as potholes in the parking lot and conditions in individual units, which were solely the responsibility of the tenant, also contributed to the low score. Tellingly, with all of this past and present knowledge available, HUD did not issue any order or a finding against HPHA or KPT, nor determine that the conditions there are not "decent, safe or sanitary."[4]

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[3] REAC's "mission" is simply to investigate and report on the conditions of public housing projects in HUD's portfolio. It provides an assessment, not an enforcement function, and the scores and detail are intended to provide objective criteria to HUD as well as HPHA as to what items, systems or conditions need to be improved

[4] Only HUD has the authority to extend any enforcement sanction against HPHA because of the REAC score. In addition, Section 504 does not provide a private right of action to enforce HUD regulations *Three Rivers Center for Independent Living v. Housing Authority of the City of Pittsburgh*, 382 F. 3d 412 (3rd Cir. 2004).

Similarly, no governmental or regulatory agency, including HUD, has ever determined or made a finding that either KPT or Kuhio Homes are uninhabitable and/or are in violation of any code or regulation where the health or safety of persons is imminently threatened. *Decl. Taniguchi, par. 11; Decl. Faleafine, par. 6.*

III. SUMMARY OF ARGUMENTS

A. Under the federal statutes which established low-income public housing (NHA, USHA) there is no evidence that Congress intended to create private causes of action for breach of an implied warranty of habitability. (Complaint, First Cause of Action)

B. HPHA has not breached its obligations under the Rental Agreement because there is no finding, notice or order from any governmental or regulatory agency that HPHA has violated any heath, safety or building code, any finding, notice or order that the housing conditions at KPT are not "decent, safe and sanitary." (Complaint, Second Cause of Action)

C. Plaintiffs are not third-party beneficiaries of the management contract between HPHA and Defendant Realty. (Complaint, Third Cause of Action)

D. Chapter 480-2 HRS is simply inapplicable to HPHA. (Complaint, Fourth Cause of Action)

E. Plaintiffs bare allegations concerning Medical Monitoring are simply not ripe for adjudication. *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawaii* , 117 Haw. 174, 207 (Haw. 2008)(Complaint, Fifth Cause of Action).

F. Federal law and regulations have preempted the field of regulating HUD subsidized public housing. The applicable standard is safe, decent and sanitary housing , the definition, oversight and enforcement of which is exclusively in the province of HUD.

IV. STANDARD OF REVIEW

1. Failure to state a claim is ground for dismissal of the Complaint pursuant to Rule 12(b)(6), Hawai`i Rules of Civil Procedure ("HRCP"). "The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993).

2. Dismissal is warranted under HRCP Rule 12(b)(6), if the claims are clearly without merit due to "an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or of disclosure of some fact which will necessarily defeat the claim." *Rosa v. CWJ Contractors*, 4 Haw. App. 210, 215, 664 P.2d 745 (1983) (internal quotes and citation omitted). While the factual allegations in the complaint are deemed true, the court is not required to accept conclusory allegations on the legal effect of the events alleged. *Marsland v. Pang*, 5 Haw. App. 463, 474, 701 P.2d 175 (1985).

3. Where facts outside of the pleadings and record are presented, the motion shall be treated as one for summary judgment under Rule 56. *Rule 12(c), Haw. R. Civ. P.*

V. ARGUMENTS

A. AN IMPLIED WARRANTY OF HABITABILITY DOES NOT APPLY TO FEDERAL PUBLIC HOUSING PROJECTS

Plaintiffs' First Cause of Action against HPHA is for "Breach of the Implied Warranty of Habitability". *Complaint, at p. 13.* Hawaii case law recognizes such a cause of action, but only with respect to private residential leases. *Lemle v. Breeden*, 51 Haw. 426, 436 (Haw. 1969); *Cho v. State*, 115 Haw. 373 (Haw. 2007); But, see *Doe v. Grosvenor Center Associates*, 104 Haw. 500, 514 (Haw. 2004) (Implied warranty does not apply to commercial leases). No implied warranty of habitability applies to federally subsidized public housing projects.

In *Alexander v. U.S. Department of Housing and Urban Development*, 555 F. 2d 166 (7th Cir. 1977), plaintiffs were former public housing tenants who sued HUD for relocation payments

when they were forced to relocate from a housing project taken over by HUD and had deteriorated. The plaintiffs also argued that their security deposits should have been returned rather than used to offset their rent delinquencies, because their obligation to pay rent was relieved by HUD's "breach of the warranty of habitability, which is to be implied from their leases." *Id.*, 555 F. 2d at 170. The Court of Appeals held (*Id.*):

> "We decline plaintiffs' invitation to follow these state court decisions implying a warranty of habitability in urban residential leases in the private sector. We decline to do so because we are not persuaded that such warranties should be implied in leases of dwelling units constructed and operated as public housing projects. In contrast to housing projects in the private sector, the construction of public housing are projects established to effectuate a stated national policy 'to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income.' 42 U.S.C. §1401. ...
>
> The stated Congressional purpose of providing a 'decent home and a suitable living environment for every American family,' 42 U.S.C. 1441, expresses general Congressional objectives in instituting public housing programs. **We fail to see how these objectives can be interpreted to impose upon HUD or its agents an absolute, fixed obligation to maintain suitable dwellings."**
>
> (Emphasis added.)

See also, *Conille v. Pierce*, 649 F. Supp 1133 (D. Mass. 1986); *Chase v. Theodore Mayer Bros.*, 592 F. Supp. 90 (S.D. Ohio 1983).

Simply put, and as the courts have so clearly stated: an implied warranty of habitability is simply inapplicable to public housing leases.

Lastly, it stands to reason that an alleged breach of an implied warranty of "habitability" must be based, at least, on a finding that the premises are indeed, "uninhabitable". *Lemle v. Breeden, supra.* Mere allegations or anecdotal statements as are contained in the Complaint are insufficient to establish a prima facie case that the premises at KPT are "uninhabitable."

"Uninhabitable" means "[U]nfit for habitation." *The American Heritage Dictionary of the English Language, Fourth Edition, 2000.*

No governmental or regulatory agency has declared that KPT is "uninhabitable." The statements in the Declarations of Chad Taniguchi, HPHA executive director, and Robert Faleafine, Realty Laua manager for KPT, are compelling on this point. The obligation of HPHA to maintain the units and premises at KPT in a "decent, safe and sanitary" condition is required by the NHA and USHA as well as the HUD regulations. HUD has primary jurisdiction to determine compliance with the decent, safe and sanitary standard and, where appropriate, enforce it with appropriate tools provided by HUD regulations.

It is significant that the Complaint contains absolutely no allegations, or reference to any objective finding, that KPT is, or has been found, to be uninhabitable. It is clear to HPHA that the reason for this is that they cannot overcome the fundamental fact that KPT, although indeed old and needing more frequent repair and maintenance to its decades-old systems, has never been found to be "unfit for habitation." Accordingly, Plaintiffs Cause of Action has no basis in law or in fact, and therefore, must be dismissed.

B. HPHA HAS NOT BREACHED THE RENTAL AGREEMENT

The terms and provisions of HPHA's Rental Agreement are mandated by HUD: 24 C.F.R. §966, et seq. There is no difference between public housing leases for HUD-owned properties, or housing projects operated and managed by PHAs, such as HPHA, for HUD. In *Alexander,* the housing project was directly owned and managed by HUD following foreclosure of the mortgagor. The residents were in privity of contract with HUD when it took over the property. However, the *Alexander* court's holding was followed in *Ford, by Pringle v.*

Philadelphia Housing Authority, 848 A. 2d 1038 (Penn. 2004) where the plaintiff's lease was directly with the Philadelphia housing authority.

The Court followed the holding in *Alexander* and found that there was no implied warranty of habitability even in leases between a housing authority and the plaintiff-resident. (*Id., at 1061).* However, what is significant are the Court's remarks regarding the lease-relationship between the housing authority and the resident (*Id.):*

> "Unlike a private lease agreement, this lease agreement indicates that the Authority manages the property while HUD controls what may or may not happen at the property, and neither the Authority nor the tenant has the right to negotiate the terms of the agreement. Additionally, unlike a private lease agreement, the price of rent is pre-determined by HUD to the extent that Pringle was only required to pay rent based on a certain percentage of her income as determined by a calculation devised by the federal government. ...
> Moreover, the federal government funds the Authority and provides it with detailed regulations on how it operates. What is involved here is not a marketplace lease entered into by two bargaining parties as envisioned by (citation omitted), but a public government program in which the Authority, under federal law, is required to provide safe and habitable housing. Because the concept of 'warranty of habitability' was adopted to address the inequities in the marketplace and public housing is anything but marketplace housing, the reasoning set forth in **Alexander** is equally applicable, and we hold that the contract action for warranty of habitability does not apply to public housing. "

The obligation in the Rental Agreement for HPHA to "maintain the Project in a **decent, safe and sanitary** condition" *(Complaint, par. 52)* is required language mandated by the NHA, the USHA and the regulations in 24 C.F.R. §966, et seq. But, as argued above, that obligation does not create a right of action in Plaintiffs to sue for every occasional breakdown of one of KPT's systems. None of the allegations in the Complaint relating to the conditions at KPT, even if true, resulted in any finding or order against HPHA that KPT was not in a "decent, safe or sanitary" condition. At a minimum, there has to be an objective and probative standard by which HPHA is deemed to have breached its obligation to provide "decent, safe and sanitary" housing

at KPT. If at all, the conditions at KPT would need to be determined as "unfit for habitation" in order to find that HPHA breached the Rental Agreement in this regard.

Absent such evidence or facts, Plaintiffs claim for breaching the Rental Agreement fails to state a claim upon which relief can be granted.

C. PLAINTIFFS ARE NOT THIRD-PARTY BENEFICIARIES OF THE MANAGEMENT CONTRACT BETWEEN HPHA AND REALTY LAUA

Plaintiffs Third Cause of Action alleges that they are "third party beneficiaries" of the management contract between HPHA and Realty Laua. *Complaint, par. 58; Decl. Faleafine, Exhibit "1".* As a general proposition, benefits conferred on third parties by government contracts are presumed to be "incidental", as the government usually acts in the general public interest. *Lemon v. Harvey*, 448 F. Supp. 2d 97, 102 (D.D.C. 2006).

In *Blair v. Ing*, 95 Haw. 247, 255 (Haw. 2001), the Hawaii Supreme Court articulated the essentials for a third-party beneficiary claim, and providing that such a claim focuses on whether the plaintiff was a "person intended to be benefitted by the [promise] and does not extend to those incidentally deriving an indirect benefit. In other words, [plaintiff] must have been an **intended** beneficiary, not merely an incidental beneficiary. " *Id.*

Plaintiffs here can only be considered "incidental" and not "intended" beneficiaries of the management contract between HPHA and Realty Laua. In *Kingston Square Tenants Association v. Tuskegee Gardens, Ltd.*, 792 F. Supp. 1566 (S.D.Fla. 1992) the Court held that public housing residents are not third-party beneficiaries for the purpose of enforcing contracts between HUD, the housing authority or its operators. *Id., at 1573.* In *Kingston,* plaintiffs were public housing residents of the Kingston Square Apartments who filed a class action suit against the owners, the private management company and government officials of the project, alleging that they had

allowed the physical condition of Kingston Square to deteriorate. The lawsuit sought declaratory, injunctive and monetary relief. In dismissing the plaintiffs claim that they were third-party beneficiaries of the contracts related to the project, the Court said: "The plaintiffs are, at best, incidental, rather than intended, beneficiaries of the contracts in question." *Id.*

This conclusion is also overwhelmingly supported by the fact that the ACC, the agreement by which HPHA receives federal subsidies from HUD in exchange for following all statutes, rules and regulations for the operation and management of its housing projects, states explicitly in Section 21:

> **"Rights of Third Parties**
>
> Except as to bondholders, as stated in Part B (Attachment VI) of this ACC, nothing in this ACC shall be construed as creating any right of any third party to enforce any provision of the ACC or to assert any claim against HUD or the HA (i.e. "housing authority")." (Parentheses added)

See, Perry v. Housing Authority of the City of Charleston, 664 F. 2d 1210 (4th Cir. 1981); *Falzarano v.Uunited States,* 607 F.2d 506 (1st Cir. 1979).

Nothing in the management contract with Realty Laua can be remotely construed to mean that Plaintiffs themselves were specifically "intended" beneficiaries, which is what the rule of law requires. First and foremost, Realty's management services and work under the contract are provided for HPHA to meet its obligation to properly maintain and operate KPT. *Id.* HPHA's management contract with Realty is for the management of KPT's entire operations and covers a wide range of services, and not only those maintenance items alleged in the Complaint. *Complaint, par. 60.* Among other things, Realty is also responsible for rent collection, enforcement of rules, and eviction of residents who fail to pay their rent, and not only for maintenance issues.

Clearly, Plaintiffs can only be considered incidental beneficiaries to the management contract and, accordingly, this Cause of Action must likewise be dismissed.

D. CHAPTER 480-2, HRS, IS SIMPLY INAPPLICABLE TO HPHA

In their Fourth Cause of Action, Plaintiffs alleged that HPHA has violated the provisions of section 480-2, HRS. Simply put, this claim has no basis in law or fact and was long ago decided that the provisions of the section do not apply to the State in *Big Island Small Ranchers Association v. State*, 60 Haw. 228, 236 (1978); *cited in*, *Pele Defense Fund v. Paty*, 73 Haw. 574, 608 (1992):

> "It is a general principle of law that statutory laws of general application are not applicable to the State unless the legislature in the enactment of such laws made them explicitly applicable to the State...Since the legislature has not made Chapter 480 explicitly applicable to the State, and since none of the allegations in the complaint claim that the State has consented to be sued upon this chapter, appellants can claim no right to relief under this theory."

HPHA has not consented to be sued under section 480-2, HRS, and therefore, this Fourth Cause of Action must be dismissed in its entirety as not only having no basis in law or in fact. In that regard, HPHA submits that not only must this Court dismiss this Cause of Action in its entirety, but it should also consider finding it frivolous. The case precedence under *Big Island Small Ranchers* is long standing and it would have taken only the smallest of efforts for Plaintiffs Counsel to have discovered that the claim was meritless against the State.

E. PLAINTIFFS ARE NOT ENTITLED TO FUTURE MEDICAL MONITORING MERELY BASED ON THE COMPLAINT ALLEGATIONS

Simply put, this is not a "cause of action" but is in the nature of a remedy. Further, this "Cause of Action" is not ripe for adjudication at this time. The mere allegations of "hazardous substances" and "toxic air" are all unsubstantiated and reference no fundamental facts or

objective criteria as to how, who, or when these conditions might have been determined, if at all. Although pled as a cause of action, to establish some need for medical monitoring it must first be determined that Plaintiffs 1) suffered an injury 2) which was caused by the Defendants, and 3) which requires such future monitoring. Without some minimal factual allegations of how these "hazardous" conditions were determined at KPT, and what injuries have resulted from them this Cause of Action is at best speculative and not ripe for review or adjudication by this Court.

"Ripeness is peculiarly a question of timing, and a ruling that an issue is not ripe only means the court has concluded a later decision may be more apt or that the matter is not yet appropriate for adjudication." *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawaii*, 117 Haw. 174, 207 (Haw. 2008).

F. FEDERAL PREEMPTION

It should be palpably clear from the preceding arguments that HPHA and its various housing projects are so closely regulated by federal law and regulations that state law has been preempted in that field. *See, Young v. Coloma-Agaran,* 340 F.3d 1053 (9th Cir. 2003). HUD specifically has the oversight and enforcement authority to determine the validity of each of plaintiffs' claims, each of which clearly invokes the basic standard of safe decent and sanitary housing. Moreover, it is HUD who tells us what safe decent and sanitary housing means.

Plaintiffs have simultaneously filed lawsuits in both state and federal court[5]. Although the instant suit appears to be an attempt to state only claims under state law, those state laws are preempted by federal law. These issues should be determined in the first instance by HUD, which we submit has already been done. With full knowledge of the conditions at KPT, HUD has determined to take no enforcement action whatsoever. The expertise and specialized

[5] On December 18, 2008, several of the named Plaintiffs here also filed a class action Complaint in U.S. District Court, Hawaii, seeking declaratory, injunctive relief and monetary damages, also based on conditions at KPT and KH, in *McMillon, et al., v. State of Hawaii, et al.,* Civ. No. 08-00578 JMS/LEK.

knowledge of the designated regulatory agency is entitled to great deference, indeed if not primary jurisdiction. *Tamashiro v. Dept. of Human Resources*, 112 Haw. 388 (2006); *Pono v. Molokai Ranch*, 119 Haw. App. 164 (Haw. App. 2008). If these matters are found to warrant further judicial action, it should be in a forum where HUD appears as a party.

VIII. CONCLUSION

HPHA acknowledges that at any of its federal housing project and at any given time, continuous review, repair and maintenance of its building systems are required. The age of the projects, the limited government funding to upgrade systems, as well as damage to the systems by the residents themselves, all contribute to this continuous endeavor. KPT is no different. However, the fact that "public housing is not marketplace housing", *Ford, by Pringle v. Philadelphia Housing Authority*, 848 A.2d at 1061 (Penn. 2004), does not and has not obviated or diminished HPHA's commitment to providing the KPT residents with the fundamental requirement of decent, safe and sanitary housing overall.

The facts and the law support HPHA's contention that it has met and continues to meet this duty at KPT, and that the allegations of the Complaint are simply that: mere allegations. Upon stricter examination and analysis, Plaintiffs allegations are not borne out by either the facts, nor are they supported by the law. Therefore, HPHA respectfully submits that based on its

foregoing arguments, the Complaint fails to state any claim upon which relief can be granted, and urges this Court to grant the present Motion.

DATED: Honolulu, Hawaii; MAR 3 1 2009.

RESPECTFULLY SUBMITTED,

MARK J. BENNETT
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEWERS FALETOGO; HAZEL MCMILLON; GENE STRICKLAND; TRUDY SABALBORO; and LEE SOMMERS, individually and on behalf of a class of present and future residents of Kuhio Park Terrace, Plaintiffs, v. STATE OF HAWAI'I; HAWAI'I PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawaii limited liability company, and Does 1-20, Defendants.	CIVIL NO. 08-1-2608-12 (Other Civil Action) **DECLARATION OF CHAD TANIGUCHI; EXHIBITS "1", "2"**

DECLARATION OF CHAD TANIGUCHI

I, CHAD TANIGUCHI, Declarant, do hereby declare under penalty of perjury, that the foregoing statements are true and correct:

1. I am and have been the Executive Director for the Hawaii Public Housing Authority ("HPHA") since 2007, I have direct and personal knowledge of the facts stated in this Declaration and I am competent to testify as to the facts in this case.

2. HPHA administers and manages approximately 5,363 federally subsidized public housing dwelling units in 67 housing projects, including Kuhio Park Terrace ("KPT").

3. KPT was constructed around 1965 and is approximately 44 years old.

4. Because of the age of KPT, repairs to various equipment and systems are continuously planned and scheduled.

5. KPT is a federally subsidized public housing project under the jurisdiction of the U.S. Department of Housing and Urban Development (HUD) and under the ownership and operation of HPHA which receives federal housing subsidies from HUD.

6. Realty Laua, LLC, ("Realty Laua") is the current managing agent at KPT by virtue of a management contract between HPHA and Realty Laua, and which requires Realty Laua, among other things, to provide maintenance and repair services and collection of rent .

7. HPHA and HUD, pursuant to 24 C.F.R. §941.302, et seq., have entered into an Annual Contributions Contract ("ACC") by which HPHA receives subsidies for the operation of the housing projects in exchange for properly maintaining the housing units and following all HUD rules and regulations.

8. Paragraph 21 of the ACC states that there are no third party rights created by the ACC under any of the terms and conditions contained in that document. Attached hereto as Exhibit "1" is a true and correct copy of paragraph 21 of the ACC.

9. HPHA's Rental Agreement with its public housing tenants is required by HUD regulations 24 C.F.R. 966. Attached hereto as Exhibit "2" is a true and correct copy of HPHA's Rental Agreement.

10. When necessary, HPHA and Realty Laua have closed units because of conditions that could affect the health and welfare of residents. For example, there are approximately 14 units at KPT that have been closed for resident occupation, pending repairs to the plumbing system.

11. Since I have been Executive Director for HPHA, no governmental or regulatory agency has ever ordered KPT to be closed entirely and the residents relocated because of any health, building or safety code violation.

DATED: Honolulu, Hawaii; March 23, 2009

CHAD TANIGUCHI

Declarant