

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HAZEL MCMILLON; et al.,

Plaintiffs,

vs.

STATE OF HAWAII; et al.,

Defendants.

STATE OF HAWAII; et al.,

Third-Party Plaintiffs,

vs.

URBAN MANAGEMENT
CORPORATION DBA URBAN
REAL ESTATE COMPANY, et al.,

Third-Party
Defendants.

CIVIL NO. CV 08-00578 LEK

Civil Rights Action

Class Action

**MEMORANDUM IN SUPPORT
OF MOTION**

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I. INTRODUCTION

This action brought by HAZEL MCMILLON, TRUDY SABALBORO; KATHERINE VAIOLA; and LEE SOMMERS (“Named Plaintiffs”) alleges violations of the Americans with Disabilities Act (“ADA”), Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and the Fair Housing Act Amendments regarding physical access for persons with disabilities

at Kuhio Park Terrace (KPT) and Kuhio Homes and the failure to provide reasonable accommodations. It is a companion case with *McMillon v. State of Hawaii*, Civil No. 08-1-2608-12, in the Circuit Court of the First Circuit for the State of Hawai`i (“State Lawsuit”). The class was certified in this action on October 29, 2009.

After over a year of settlement discussions facilitated by Magistrate Judge Leslie E. Kobayashi and mediator Keith Hunter, Defendants STATE OF HAWAII (“State”) and HAWAII PUBLIC HOUSING AUTHORITY (“HPHA”) (collectively, “State Defendants”) and Named Plaintiffs entered into a settlement agreement subject to (1) appropriations of settlement funds by the 2009 Hawaii Legislature; (2) approval by the courts; and (3) approval by the United States Department of Housing and Urban Development (“HUD”). The funds for settlement have been appropriated and HUD approval is pending. The State Defendants and Named Plaintiffs now seek preliminary approval of the settlement agreement by this Court. The Named Plaintiffs are simultaneously filing a motion for preliminary approval of the settlement with the Circuit Court.

II. BACKGROUND AND PROCEDURAL HISTORY

On December 18, 2008, Named Plaintiffs commenced a class action against the State Defendants and REALTY LAUA LLC (“Realty Laua”), alleging discrimination in violation of the ADA, Section 504, and the Fair Housing Act

Amendments regarding physical access for persons with disabilities at Kuhio Park Terrace (KPT) and Kuhio Homes and the failure to provide reasonable accommodations.

On March 31, 2009, the State Defendants filed a Motion to Dismiss Plaintiffs' Complaint and/or for Summary Judgment (Motion to Dismiss, Doc. 23). On April 1, 2009, Realty Laua filed its Answer and Crossclaim against State Defendants, (Defendant Realty Laua LLC's Answer and Crossclaim, Doc. 25), and on April 15, 2009, joined State Defendants' Motion to Dismiss (Motion for Joinder re Motion to Dismiss, Doc. 38). In an Order dated June 19, 2009, the Court denied State Defendants' Motion for Summary Judgment and dismissed Plaintiffs' Fair Housing Act Amendments claims against the State Defendants, but Plaintiffs' claims pursuant to Title II and Section 504 against the State Defendants and all claims against Realty Laua remained. (Order Re State of Hawaii's and HPHA's Motion to Dismiss, Doc. 87 at 31-32).

On July 17, 2009, the State Defendants filed their Answer and Third-Party Complaint against Urban Management Corporation dba Urban Real Estate Company ("Urban") and Crossclaim against Realty Laua LLC. (State of Hawaii and HPHA Answer, Third Party Complaint and Cross Claim, Doc. 96). On August 13, 2009, Urban filed its Answer to Complaint, Third Party Complaint and

Cross Claim and Counterclaim against State Defendants. (Third-Party Defendant Urban Answer and Counterclaim, Doc. 106).

On December 16, 2009, Plaintiffs filed their Motion for Preliminary Injunction (MPI) (Plaintiffs' Motion for Preliminary Injunction and supporting documents, Doc. 126-136); however, due to the progression of settlement discussions, Plaintiffs withdrew their MPI on February 17, 2010 (Plaintiffs' Withdrawal of MPI, Doc. 174).

From late 2009 through early 2010, the parties continued met several times with Mr. Hunter and Judge Kobayashi to discuss settlement. The parties have come to an agreement, as set forth in the Settlement, Release, Indemnification, and Assignment Agreement attached as Exhibit "1" to the Declaration of Jason Kim ("Kim Decl.").

The material terms of the settlement are as follows:

- The State Defendants have implemented and will comply with improved policies and forms for requests for reasonable accommodations and transfers to accessible housing units;
- The State Defendants have committed to deadlines for responding to and implementing requests for reasonable accommodations and transferring disabled tenants to accessible units;
- The State Defendants have, and will, make certain improvements and modifications to the KPT and Kuhio Homes premises and grounds to improve access for individuals with disabilities;
- The State Defendants shall contract with a nationally-recognized organization with experience in accessible housing to monitor

compliance with the ADA and Section 504, review policies and procedures, perform a physical site assessment of KPT and Kuhio Homes, and provide training to the State Defendants' employees and contractors;

- The State Defendants shall pay to Plaintiffs a total of \$610,000, to be disbursed as follows: (1) \$45,000 to the Named Plaintiffs; (2) \$200,000 for the beginning of a fund to distribute among class members; and (3) \$365,000 in attorneys' fees and costs;
- The State Defendants shall assign all claims against Realty Laua and Urban relating to the class actions to the Named Plaintiffs, who shall prosecute these claims for the benefit of the Class; and
- The Named Plaintiffs and the Class shall release and dismiss all claims against the State Defendants alleged in this action and the Circuit Court action.

III. CLASS CERTIFICATION AND NOTICE

On October 29, 2009, the District Court entered an Order certifying the following class in this action:

All present and future residents of KPT and Kuhio Homes who are eligible for public housing, who have mobility impairments or other disabling medical conditions that constitute "disabilities" or "handicaps" under federal disability nondiscrimination laws, and who are being denied access to the facilities, programs, services, and/or activities of the Defendants, and/or discriminated against, because of the architectural barriers and/or hazardous conditions described in the Complaint.

(Order Re Class Certification, Doc. 120 at 30-31.)

IV. STANDARD FOR APPROVAL OF SETTLEMENT

Rule 23(e), Fed. R. Civ. P., provides that court approval must be obtained for a voluntary dismissal or compromise of a class action. The standard for approval of the settlement is whether it is “fundamentally fair, adequate, and reasonable.” *Durkin v. Shea & Gould*, 92 F.3d 1510, 1512 n. 6 (9th Cir. 1996). The court must consider the strengths of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; . . . the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; . . . and the reaction of the class members to the proposed settlement.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Each of these factors strongly supports approval of this settlement.

A. Strengths of Plaintiffs' Case

Plaintiffs withstood the State Defendants’ and Realty Laua’s Motion to Dismiss, and the Court denied the State Defendants’ Motion for Summary Judgment. Plaintiffs also presented significant evidence in support of their Motion for Preliminary Injunction. As the litigation has progressed, however, the State Defendants have taken actions to remedy the conditions at KPT and Kuhio Homes and to improve their policies and procedures with respect to individuals with disabilities, making some of Plaintiffs’ complaints arguably moot.

B. Risk, Expense, and Complexity of Further Litigation

Given the State Defendants' actions to improve conditions at KPT and Kuhio Homes and their policies and procedures relating to disabled tenants, there appears to be little to be gained by continued litigation. Avoiding the risk, expense, and complexity of further litigation therefore favors settlement.

C. The Amount Offered in Settlement

Here, the combination of the equitable relief, settlement amount, and other terms to which the State Defendants agree weigh in favor of settlement. This action was brought primarily to obtain injunctive relief. The State Defendants have agreed to substantial relief that will benefit the class, including: (1) improved policies and forms for requests for reasonable accommodations and disability-related transfers; (2) deadlines for responding to and implementing such requests; (3) modifications to the KPT and Kuhio Homes premises and grounds to make them more accessible for individuals with disabilities; and (4) retention of a consultant to monitor compliance and suggest further improvements to the State Defendants' policies and procedures.

Although Plaintiffs sought even greater injunctive relief, Michaels Development Company ("MDC") has submitted plans for a ten year comprehensive modernization and redevelopment of KPT and Kuhio Homes. In light of this proposal, expending substantial funds to improve KPT and Kuhio

Homes may be wasteful since any such improvements would benefit the class for only a short period of time before MDC's proposal is implemented.

The State Defendants have also agreed to pay \$610,000 to Plaintiffs and their counsel. This settlement will: (1) pay reasonable compensation to the Named Plaintiffs for their service to the class; (2) reimburse Plaintiffs' counsel for a portion of their attorneys' fees and expenses;¹ and (3) create the beginning of a fund to compensate class members.

Of even greater value to the class, the State Defendants have assigned their contractual indemnity and other claims against Realty Laua and Urban to the Named Plaintiffs. The value of these claims is substantial: according to time records provided by the State Defendants, they have incurred approximately \$837,500 in attorneys' fees and expenses defending these actions. Kim Decl. at ¶ 7. Realty Laua and Urban are potentially liable for these attorneys' fees and expenses (as well as the \$610,000 paid by the State Defendants to Plaintiffs and their counsel) because their management contracts contained broad indemnity provisions for the benefit of the State Defendants. The management agreements provide that Realty Laua and Urban shall "defend, indemnify, and hold harmless

¹ The attorneys' fees and expenses incurred by Plaintiffs' counsel are detailed in the attached Declarations of Jason H. Kim, Victor Geminiani, and Claudia Center. Plaintiffs' counsel will provide the information required by Local Rule 54.3 in a separate Motion for Award of Attorneys' Fees and Costs that will be filed to be heard in conjunction with the final fairness hearing in this matter.

the State of Hawaii [and] the contracting agency ... from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefore, arising out of or resulting from the acts or omissions of the CONTRACTOR ... under this Contract.”

Realty Laua and Urban may also be liable for breach of the management contracts, which required them to among other things, “maintain the overall physical appearance and condition of the properties, including maintenance and up-keep to the individual units” and to comply with applicable laws, such as the ADA and Section 504.

D. The Stage of Proceedings

To date, the parties have conducted extensive settlement discussions facilitated by Mr. Hunter and Magistrate Judge Kobayashi. Although discovery was suspended during part of the period of settlement discussions, Plaintiffs performed extensive research and investigation prior to filing their Complaints and have refined that research and investigation in defending against motions to dismiss and for summary judgment and in supporting their motion for preliminary injunction. At this point in the proceedings, Plaintiffs are in a position to make an informed decision about settlement.

E. Views of Class Counsel and Reaction of Class Members

The Named Plaintiffs and all class counsel have agreed to the settlement agreement. Class counsel have vast experience in class actions and believe that this settlement is fair and reasonable to the class, for the reasons set forth above. Although class notice is not required for settlement of a Rule 26(b)(2) class action, Plaintiffs request that the Court issue a notice of settlement to class members as set forth in Exhibit “2” to the Kim Declaration to ascertain whether any class member has any objection to this settlement and allow class members to opt-out if they wish.

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court: (1) preliminarily approve the Settlement, Release, Indemnification, and Assignment Agreement attached as Exhibit “1”; (2) schedule a final fairness hearing at the earliest practicable time; and (3) issue the notice of settlement of class action attached as Exhibit “2.”

DATED: Honolulu, Hawai`i, November 5, 2010.

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