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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

KUKUI GARDENS ASSOCIATION,) Civil No. CV06 00534 SOM LEK
FAITH ACTION FOR COMMUNITY)
EQUITY) PLAINTIFFS' MEMORANDUM
) IN OPPOSITION TO
Plaintiffs,)
) (Continued on next page)

Standing

1. Because the standing of the Association is not questioned, a case or controversy will continue to exist, so FACE's standing is not an issue.
2. FACE's allegations regarding the injury it has suffered (and will suffer) as a result of the proposed prepayment of Kukui Gardens are sufficient to survive a motion to dismiss.
3. FACE's has standing to sue as a representative of its members.
4. Even if FACE's allegations regarding its injury and standing are not sufficient, the proper remedy is to provide Plaintiffs with an opportunity to amend their complaint; dismissal of FACE is not appropriate.

The Fair Housing Claim

1. There is an express statutory right of action against HUD for violation of several provisions of the Fair Housing Act, including 42 U.S.C. § 3604.
2. Section 3604 actions are explicitly permitted to prevent a discriminatory housing practice that is about to occur.

II. Background

Kukui Gardens is an 857-unit housing project located in Honolulu, Hawaii.

The project is subsidized by a mortgage insured by HUD under the Section 221(d)(3) program. To participate in the 221(d)(3) program, the owner of Kukui Gardens, KGC, was required to enter into a Regulatory Agreement that governs the operation of the project including, among other things, the setting of tenants' rents. Prepayment of the mortgage on a 221(d)(3) project releases the project owner from the Regulatory Agreement and its restrictions on the setting of rents. In light of that fact, Section 250 of the National Housing Act prohibits HUD from approving

the prepayment of mortgages on 221(d)(3) properties where such properties continue to meet the need for affordable housing.

HUD has adopted a policy that directly violates Section 250 and permits prepayment of the Kukui Gardens housing project, though the project continues to meet a critical need for affordable housing. KGC is seeking to prepay the mortgage on Kukui Gardens in a continued effort to sell the project to Carmel Partners, a for-profit real estate company. Prepayment will subject Kukui Gardens tenants to unwarranted rent increases and will allow KGC to circumvent rules governing the sale of Kukui Gardens that require KGC to: (1) first try to sell the property to a non-profit buyer that will maintain the project's affordability; and (2) place the proceeds of the sale into a third-party trust where it will be used to promote the expansion of the supply of low and moderate income housing.

Plaintiff Kukui Gardens Association, comprised solely of Kukui Gardens residents, exists to: (1) serve to improve the living environment and quality of life for residents of Kukui Gardens; (2) ensure that Kukui Gardens is a safe, healthy, and well-kept place for its residents to live; (3) seek to preserve the affordability of Kukui Gardens for its current and future residents and applicants; (4) provide social and recreational activities for Kukui Gardens residents; and (5) educate Kukui Gardens residents regarding their tenant rights and advocating on their behalf.

Plaintiff FACE is 501(c)(3) corporation, whose membership is comprised of over 25 institutions located in the State of Hawaii which primarily consist of religious organizations, but also includes a local union and the Association. FACE's mission is to allow its members to advocate for change in systems that perpetuate poverty and injustice to improve the quality of life for local communities in Hawaii. One of FACE's primary purposes is to preserve and increase the availability of affordable rentals in the State of Hawaii and to house the homeless.

Plaintiffs filed this suit to prevent HUD approval of the Kukui Gardens prepayment and to enjoin further application of HUD's prepayment policy. Plaintiffs asserted six claims arising out of the APA, the National Housing Act, and the Fair Housing Act. Plaintiffs have alleged that prepayment of Kukui Gardens will frustrate the missions of both FACE and the Association. Further Plaintiffs have alleged that FACE has been forced to divert a significant portion of its resources to preventing the sale and prepayment of Kukui Gardens since it began advocating on behalf of the residents there in early 2006.

III. Argument

A. The Standing of FACE

- 1. Because the standing of the Association is not questioned, a case or controversy will continue to exist, so FACE's standing is not an issue.*

KGC's motion to dismiss asserts that FACE does not have Article III standing and does not meet the three-part test set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). But the application of the *Lujan* test below is merely an academic exercise since the root of the Article III standing requirement is whether a case or controversy exists. A case or controversy will continue to exist because the Association's standing has not been challenged. As long as one plaintiff has standing, courts will not question the standing of the remaining plaintiffs in an action.¹

2. *FACE's allegations regarding the injury it has suffered (and will suffer) as a result of the proposed prepayment of Kukui Gardens are sufficient to survive a motion to dismiss.*

The three-part *Lujan* test KGC relies on requires:

1. That plaintiff has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent;
2. The injury has to be fairly traceable to the challenged action of the defendant; and
3. It must be likely that the injury will be redressed by a favorable decision.²

KGC argues that FACE does not meet the first part of the *Lujan* test because it failed to provide factual support for its claims that it would be harmed by the

¹ *Babitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299 n. 11 (1979) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)); *Village of Arlington Hts. Kv. Metro. Housing Dev.*, 429 U.S. 252, 264 n. 9 (1977).

² *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

prepayment. KGC's motion does not raise the issues regarding FACE's fulfillment of parts two and three of the *Lujan* test, so this memorandum does not address those issues.

KGC's argument that FACE lacks standing because it has not provided "factual support" is misplaced, since such factual support is not necessary at this stage of litigation.³ In ruling on a motion to dismiss based on standing, the Court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."⁴ So the issue is whether the complaint contains sufficient allegations of harm suffered by FACE as a result of the challenged prepayment.

At the pleading stage, only "general factual allegations of injury resulting from the defendant's conduct" are necessary to establish standing.⁵ On a motion to dismiss, the court presumes "that general allegations embrace those specific facts that are necessary to support the claim."⁶ The US Supreme Court case *Havens Realty Corp v. Coleman* set forth the rule that to satisfy the Article III injury in fact requirement, the plaintiff need merely "allege that as a result of the defendant's actions he has suffered 'a distinct and palpable injury.'"⁷ The *Havens* court held

³ *Lujan*, 504 U.S. at 561.

⁴ *Warth v. Seldin*, 422 U.S. 490,501 (1975).

⁵ *Lujan*, 504 U.S. at 561.

⁶ *Id.*

⁷ *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

that the organizational plaintiff had standing based on the allegations in its complaint that defendants actions had frustrated its activities and required a drain on its resources.⁸ Although greater proof of standing may be required at a later stage in the litigation, the complaint will pass muster at the motion to dismiss stage if its allegations of injury track the language in *Havens*.⁹

Plaintiffs' complaint makes the following allegations relevant to the harm FACE has and will suffer as a result of the proposed prepayment of Kukui Gardens and the application of HUD's unlawful prepayment policy:

- FACE is a 501(c)(3) organization whose mission is "to allow its members to advocate for change in systems that perpetuate poverty and injustice to improve the quality of life for local communities in Hawaii."¹⁰
- "One of FACE's primary purposes is to preserve and increase the availability of affordable rentals in the State of Hawaii and to house the homeless."¹¹
- "FACE began advocating on behalf of the Association and Kukui Gardens residents for the preservation of Kukui Gardens in early 2006 and has had to divert a significant portion of its resources towards preventing the sale and prepayment of Kukui Gardens."¹²
- "Approval of the prepayment and the resulting increases in Kukui Gardens' rents and the loss of sale proceeds that will be diverted from the production of affordable housing will interfere with FACE's mission and

⁸ *Havens*, 455 U.S. at 379.

⁹ *The Fair Housing Council of Suburban Philadelphia v Montgomery Newspapers*, 141 F. 3d 71, 76 (3rd Cir. 1998), *aff'd* 205 F.3d 1328 (3rd Cir. 1999).

¹⁰ Pls.' Compl. ¶ 3.

¹¹ *Id.*

¹² *Id.*

efforts to promote more affordable housing by reducing the available supply from what it otherwise would be.”¹³

At later stages of this litigation, FACE may be required to produce evidence showing that it has in fact diverted its resources towards preventing the sale and prepayment of Kukui Gardens, and that the prepayment will frustrate FACE’s mission to promote more affordable housing by reducing the available supply from what it otherwise would be. However, at this stage, these general allegations are sufficient to survive a motion to dismiss.

Additionally, the attached declaration of Alan Mark, president of FACE’s board of directors, sets out in greater detail the harm that FACE has suffered, and will suffer should the prepayment be allowed. The Court may consider the declaration to help determine whether a plaintiff has standing, and to do so will not convert KGC’s motion to dismiss into a summary judgment motion.¹⁴ KGC makes a final assertion regarding standing that “even if FACE were to have ‘diversion of resources’ standing to bring the two fair housing claims alleged in the complaint, such standing would not be proper for the other four claims.”¹⁵ The assertion is unsupported by any authority, and is somewhat cryptic. For the purposes of Article III standing, a diversion of resources is sufficient injury regardless of

¹³ Pls.’ Compl. ¶ 39.

¹⁴ *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990).

¹⁵ KGC’s Mem. in Support of Mot. to Dismiss, 8-9.

whether the claims asserted relate to fair housing or not. If KGC means that FACE's other claims are subject to some non-Article III (i.e. prudential) standing rule that FACE cannot meet, KGC has not raised any such standing issues for FACE to respond to.

3. *FACE has standing to sue as a representative of its members.*

As KGC points out in its motion, even if FACE could not itself satisfy the Lujan test, it may also gain standing as a representative of its members.¹⁶ To establish representational standing, FACE must demonstrate that: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to vindicate must be germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested must require the participation of individual members in the lawsuit.¹⁷

FACE meets these requirements because: (a) the Kukui Gardens Association, whose standing has not been challenged by KGC, is a member of FACE; (b) the interest of preventing the prepayment of Kukui Gardens and preserving its affordability are germane to FACE's purpose of increasing and preserving the supply of affordable housing; and (c) this suit does not require the participation of individual members of FACE or the Association. The fact that one of FACE's

¹⁶ *Id.* at 7.

¹⁷ *Smith v. Pacific Properties and Development Corp.*, 358 F.3d 1097, 1101-1102 (9th Cir. 2004).

members chooses to participate in the suit does not affect FACE's standing; FACE would only lack representative standing if participation of its members were *required*.

4. *Even if FACE's allegations regarding its injury and standing are not sufficient, the proper remedy is to provide Plaintiffs with an opportunity to amend their complaint; dismissal of FACE is not appropriate.*

If the Court finds that FACE has not sufficiently pled the injury that it has and will suffer, the appropriate recourse is not dismissal of FACE. Instead FACE should be allowed an opportunity to amend its complaint to further elaborate regarding the injuries that it has suffered because of the proposed prepayment (and will suffer should the prepayment be allowed) as set forth in Alan Mark's declaration.¹⁸

B. Plaintiffs have a direct cause of action against HUD under the Fair Housing Act.

Plaintiffs have asserted two claims arising out of the Fair Housing Act—Title VIII of the Civil Rights Act of 1968. The first is a claim that HUD violated its duty under 42 U.S.C. § 3608 to affirmatively further the purposes of the Fair

¹⁸ *See, Warth v. Seldin*, 422 U.S. 490, 501 (U.S. 1975) (stating that in the context of considering a motion to dismiss, it is appropriate for the trial court to allow a plaintiff to supply by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing). *See also, NAACP v. Town of Harrison*, 907 F.2d 1408, 1417 (3d Cir.1990) (holding that district court abused its discretion in refusing to permit plaintiff to amend its complaint after dismissal for lack of standing).

Housing Act.¹⁹ Plaintiffs have sought relief for this claim through the APA because 42 U.S.C. § 3613, creating a specific right of action for some Fair Housing Act violations, does not cover Section 3608 and courts have generally declined to recognize an implied right of action under that section. Plaintiffs' second fair housing claim is that HUD approval of the Kukui Gardens prepayment will violate 42 U.S.C. § 3604, which prohibits, among other things, making a dwelling unavailable for a person because of race, color, national origin, etcetera.²⁰ Plaintiffs have sought relief under the Fair Housing Act itself because 42 U.S.C. § 3613 of the Act provides an express private right of action against the United States and its agencies for violations of Section 3604.

¹⁹ 42 U.S.C. § 3608(d) provides as follows:

All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this title.

²⁰ 42 U.S.C. § 3604 provides in relevant part as follows:

As made applicable by section 803 [42 USCS § 3603] and except as exempted by sections 803(b) and 807 [42 USCS §§ 3603(b), 3607], it shall be unlawful--

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

1. There is an express statutory right of action against HUD for violation of several provisions of the Fair Housing Act, including 42 U.S.C. § 3604.

KGC's argues that there is no private right of action against HUD for violations of the Fair Housing Act. But 42 U.S.C. § 3613 provides an express right of action for enforcement of portions of the Act, including Section 3604. There is no limitation in Section 3613 regarding which perpetrators of discriminatory housing practices can be sued. Indeed, the right of action must include suits against the United States and its agencies because the attorney's fees award provision of Section 3613(c)(2) explicitly provides that "[t]he United States shall be liable for such fees and costs to the same extent as a private person."²¹

The Fair Housing Act is structured in a way that provides a private right of action for Section 3604 claims, but not for violations of Section 3608 and other sections of the Act. Section 3613 authorizes private actions for victims of

²¹ 42 U.S.C. § 3613 provides in relevant part:

(a) Civil action.

(1) (A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this title, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach...

(c) Relief which may be granted...

(2) In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

“discriminatory housing practices.” The definition of “discriminatory housing practice,” found in Section 3602(f), includes acts that are unlawful under Section 3604. But the definition does not include acts that violate Section 3608. So while there is an express right of action under the Fair Housing Act for discriminatory housing practices under Section 3604, there is no such enforcement mechanism for violations of Section 3608.

The cases cited by KGC—*Puerto Rico Public Housing Administration v. HUD*²² and *NAACP v. Secretary*²³— both hold that there is no *implied* private right of action for direct enforcement of a Section 3608 claim. But the holdings in both *Puerto Rico* and *NAACP* are limited only to violations of Section 3608, and perhaps other violations of the Fair Housing Act for which no express right of action exists. *Puerto Rico* and *NAACP* do not extend to Section 3604 where there is an express right of action and conjuring up an implied right of action is unnecessary.²⁴ Indeed, the *Puerto Rico* case held that there was a right of action under a different title of the Civil Rights Act of 1964—Title VI—because a section of the Act (20 U.S.C. § 1617) allowed recovery of reasonable attorney’s fees

²² *Puerto Rico Housing Administration v. HUD*, 59 F.Supp. 2d 310, 323 (1st Cir 1987).

²³ *NAACP v. Secretary*, 817 F.2d 149, 153 (1st Cir. 1987).

²⁴ *See Puerto Rico*, 59 F. Supp. 2d at 324 and *NAACP*, 817 F.2d at 151. *See also Hanson v. Veterans Admin.*, 800 F.2d 1381, 1384 n. 5 (5th Cir. 1988) (in which the V.A. admits it is subject to suit for injunctive relief under 3604).

against the United States for discrimination in violation of Title VI.²⁵ The same analysis applies for Section 3604 claims brought under the Fair Housing Act.

The third case cited by KGC, *Givens v. U.S. Dept. of Housing & Urban Devel.*, 1984 U.S. Dist. LEXIS 20,195 (D. Tex. 1984), was decided by the United States District Court for the Northern District of Texas, Dallas Division. The court in *Givens* dismissed the plaintiff's Section 3604 claim, holding that the Fair Housing Act did not create an implied right of action against HUD. But *Givens* was decided prior to the addition of the language adding waiver of sovereign immunity for fee and cost awards against the government to Section 3613.²⁶ Even if the *Givens* holding was correct at the time it was made (why an implied right of action would be necessary where an express right exists is unclear), it no longer has any validity in light of the amendment. Indeed *Givens* has not been cited in any other reported case.

2. *Section 3604 actions are explicitly permitted to prevent a discriminatory housing practice that is about to occur.*

KGC asserts that there is no such thing as a cause of action for a “threatened” fair housing violation. But Section 3613(c)(1) explicitly states that “if the court finds that a discriminatory housing practice...*is about to occur*, the court...may grant as relief...any permanent or temporary injunction” (emphasis added). The

²⁵ *Puerto Rico*, 59 F. Supp. at 323.

²⁶ The waiver was added in 1988 by Pub. L. 100-430, § 8(2), 102 Stat. 1634.

term “discriminatory housing practice” is defined to include any violation of Section 3604.²⁷

Plaintiffs’ complaint adequately alleges that that prepayment will have a discriminatory impact, in violation of Section 3604, because all of the adverse affects of the prepayment set forth in the complaint will disproportionately affect non-white renter households.²⁸ The complaint also adequately alleges that the prepayment is imminent since it has been proposed by KGC and it is not prohibited by HUD’s prepayment policy.²⁹ These allegations are all that is necessary to support Plaintiffs’ Section 3604 claim at this stage of the litigation.

IV. Conclusion

For the foregoing reasons, KGC’s motion to dismiss should be denied.

DATED: Honolulu, Hawaii, December 21, 2006

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²⁷ 42 U.S.C. § 3602(f).

²⁸ Pls.’ Compl. ¶ 37-38, 64.

²⁹ Pls.’ Compl. ¶ 35, 41.