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KUKUI GARDENS CORPORATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KUKUI GARDENS ASSOCIATION, FAITH ACTION FOR COMMUNITY EQUITY, Plaintiffs, vs. ALPHONSO JACKSON, in his capacity as SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, KUKUI GARDENS CORPORATION, CARMEL PARTNERS, INC. Defendants.	CIVIL NO. CV06-00534 SOM LEK MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

II. INTRODUCTION

Defendant Kukui Gardens Corporation ("KGC") by and through its counsel, Kobayashi, Sugita & Goda, hereby moves this Honorable Court for an order granting summary judgment as to certain legal issues raised in the complaint filed by Plaintiff Faith Action For Community Equity's ("FACE") and Kukui Gardens Association ("KGA") on October 2, 2006 ("Complaint") amended on December 19, 2007 ("Amended Complaint") against KGC, Carmel Partners, Inc. ("Carmel"), and Alphonso Jackson ("Jackson"), in his capacity as the Secretary of the United States Department of Housing and Urban Development ("HUD"). Specifically, KGC seeks this Court's legal ruling as to the following issues:

1. That all of the causes of action claimed by the Plaintiffs are unripe and therefore subject to immediate dismissal;

2. That the Plaintiff FACE lacks standing both on its own right and in its representative capacity to bring this lawsuit;

3. No damages have been sustained by the Plaintiffs; and

4. That the Plaintiff KGA lacks standing both on its own right and in its representative capacity to bring this lawsuit.

In this case, summary judgment is applicable as to these issues as there are no questions of material fact and thus a ruling of this Court based upon the law is appropriate.

III. RELEVANT FACTS

A. THE PARTIES

1. KGC is a non-profit corporation incorporated in Hawaii on August 25, 1967 as a tax exempt organization pursuant to Section 501(c)(4) of the IRC .

2. KGC was formed by the Trustees of the Clarence T.C. Ching Foundation ("Foundation") for among other purposes, constructing a housing development for low and moderate income tenants by obtaining a loan with a below market interest rate secured by a United States Department of Housing and Urban Development ("HUD") insured mortgage pursuant to section 221(d)(3) of the National Housing Act ("NHA"). Relevant sections of the Charter of Incorporation and bylaws of KGC attached as Exhibits "A" and "B".

3. KGC's other purpose was to implement and carry out the purposes of the Foundation and accordingly, "all net income, if any, earned or realized by…[KGC] shall be paid and delivered to the Trustees of said Foundation...." Id.

4. KGA is an unincorporated association.

5. FACE is domestic non-profit corporation whose purpose is to "allow its members to live out common, faith-based values by engaging in actions that challenge the systems that perpetuate poverty and injustice. We balance social, economic and community activity with a deep spiritual commitment. Our spiritual

centeredness empowers us to return hope and love to the public arena." (see Website, Exhibit "C").

B. CONSTRUCTION OF THE KUKUI GARDENS COMPLEX AND HUD CONDITIONS

1. In 1937, the Congress of the United States enacted the National Housing Act ("NHA").

2. As part of the NHA, Congress authorized HUD to insure mortgages which were used for the construction of multifamily rental projects in order to assist private industry in providing housing for low and moderate income families and displaced families. See 12 U.S.C. §1715l.

3. In 1970, KGC built Kukui Gardens, an 857-unit apartment development located in Honolulu, Hawaii ("the Property"), with a $16 million loan ("Loan") insured by HUD under Section 221(d)(3) of the NHA. See Secured Note, attached as Exhibit "D".

4. The Loan is a type of loan commonly referred to as a "221(d)(3) BMIR" loan, with the "BMIR" standing for "Below Market Interest Rate." The 221(d)(3) BMIR program and the Property are for low and moderate income tenants, which means those at or below 80% of the Area Median Income ("AMI"), and those or below 95% of AMI, respectively.

5. As part of obtaining the Loan, KGC executed and recorded against the Property what is known as a regulatory agreement ("Regulatory Agreement"). A copy of the Regulatory Agreement is attached hereto as Exhibit "E".

6. The Regulatory Agreement applies to the Property as long as the Loan remains in place and the Regulatory Agreement controls such matters as HUD requirements for the physical condition of the Property and the setting of rents. Id.

7. The rights of the tenants, who are the members of the KGA are established in this Regulatory Agreement.

8. The Loan matures on May 1, 2011 and contains the following prepayment restriction: "The debt evidenced by this note may not be prepaid in whole or in part prior to the final maturity date hereof without the prior written approval of the Federal Housing Commissioner...." See Secured Note, p.1., a copy of which is attached hereto as Exhibit "D".

C. KGC INABILITY TO FUND MAINTENANCE AND REPAIR OF THE PROPERTY

1. Further, the allowing of prepayment in order to allow owners to perform such necessary repairs is consistent with HUD's Congressional mandate to

provide for adequate, safe, and sanitary housing for low income families. See e.g. 42 U.S.C. §1441 and 12 U.S.C. §1701.

2. KGC was facing a similar problem in that KGC was forced to seek prepayment of the Loan in order to rehabilitate and repair the dangerous conditions existing at the Project. See Declaration of Allen Lau filed on December 22, 2006 ("Lau Declaration"), a copy of which attached hereto as Exhibit "F".

3. The major reason driving KGC's efforts to prepay the Loan and sell the Property at this time is because the Property, due to its age and needed repairs, is a safety risk to its tenants. Substantial work is needed now, including the repair of substantial concrete spalling that is occurring at the Property. Id.

4. In 2003, HUD approved a Management Improvement and Operating Plan ("Plan") for the Project, which documented the extensive amount of capital repair and improvements needed at the Project. A true and correct copy of the Plan is attached hereto as Exhibit "G".

5. For as long as the Property is subject to the Loan, KGC has been completely unable to get a second mortgage as banks or other financial institutions will not give such a loan unless it can secure such a loan through the normally-available remedies such as foreclosure as demonstrated by the April 27, 2004 letter from HUD to KGC's counsel describing the then-ongoing issues

between HUD and First Hawaiian Bank's counsel over HUD's ability to approve of or consent to the financing documentation required by commercial lenders, such as First Hawaiian Bank, to support a subordinate loan to KGC. A true and correct copy of the April 27, 2004 letter is attached hereto as Exhibit "H".

6. KGC was unable to fund the rehabilitation and repair identified by the Plan out of available funds (residual receipts), so KGC tried to secure secondary financing for the rehabilitation and repair work but was unable to obtain such financing because the subordinate lender could not agree to the conditions imposed by HUD (i.e., repayment of the loan only from surplus cash; no ability to foreclose to protect second mortgage; and no assignment of rents). A copy of the letter dated April 28, 2004 from Cheryl A. Fukunaga of HUD to counsel for KGC is attached hereto as Exhibit "I". (See also Affidavit of Allen Lau dated December 22, 2006)

7. Even HUD has noted that its "programs are really not designed to allow commercial secondary financing.…[T]o make all of this work, [i.e. to get the needed funding for rehabilitation and repairs,] I believe that KGC must seriously consider prepaying the HUD insured loan." A true and correct copy of a memorandum sent from Cheryl A. Fukunaga of HUD to counsel for KGC dated April 27, 2004 attached hereto as Exhibit "H".

D. DECISION TO SELL THE PROPERTY

1. On July 29, 2004 at a meeting of the KGC board, Wallace Ching proposed that KGC consider the sale of the KGC complex ("Project") and the board thereafter appointed a long range planning committee. (See Affidavit of Allen Lau dated February 27, 2007, which is attached hereto as Exhibit "J". See also Minutes of the KGC board dated July 29, 2004, which is attached hereto as Exhibit "K".)

2. In furtherance of exploring the sale of the Project, Lawrence Ching, Wallace Ching, Paul Loo, Peter Ng, Raymond Tam, Eugene Tiwanak and John K. Tsui were appointed to such a committee and proceeded to work on the sale of the Project. (See Exhibit "L", Minutes of a meeting of a committee to examine the long range strategy dated November 18, 2004); Exhibit "M", the unanimous Written Consent of the Trustees in Lieu of a Meeting; Exhibit "N", Minutes of the Long Range Planning Committee dated October 10, 2005; the Affidavit of Paul C.T. Loo).

3. Thereafter in mid-2005, the KGC board voted to sell the Project as a result of the need to fund significant repairs and the insufficient cash reserves generated by rents to timely repair the identified needs of the project.

4. On March 31, 2006, KGC entered into a purchase and sale agreement with Carmel to sell the Project (the "Carmel Agreement"). This

document is subject has been produced subject to a protective order and stipulation to seal.

5. On April 3, 2006 it was resolved by the board of directors of KGC that the Property be sold for a sum of not less than $131,236,000; this resolution was passed by a majority of nine directors of the ten present that made up the quorum. Attached as Exhibit "O" are the minutes of that meeting.

6. At the April 27, 2006 Special Meeting of the Board of Directors of KGC, a resolution was passed to sell the Project and to have the President of KGC take the necessary steps to effectuate the sale. The Meeting Minutes are attached hereto as Exhibit "P".

7. Problems with maintenance and tenant safety continued after the decision to sell the project and the actual costs of spalling repair work on building 7 were more than double the initial estimate for such work. See Lau Declaration.

8. On January 16, 2006 Schiff Hardin, a firm that specialized in non-profit corporations rendered its opinion that the assumption of the expenses of KGC incurred in the sale of the Property was consistent within the applicable IRS regulations. That report is attached hereto as Exhibit "Q".

9. On February 20, 2007, the board of directors of KGC passed three resolutions: (a) Exhibit "R" attached and incorporated herein which ratifies the actions of the President of KGC in connection with the Project subsequent to the ratification of the sale of the Project; (b) Exhibit "S" attached and incorporated herein ratifying the execution of the exclusive listing agreement and (c) Exhibit "T" attached and incorporated herein ratifying and confirming that consistent with the KGC articles and by-laws that the proceeds of the sale of the Project will be distributed to the Clarence Ching Foundation. The vote on these resolution were unanimous with thirteen of the thirteen directors voting in favor. The fourteenth director was unable to attend but also was in favor. (See affidavit of Mary C. Wesselkamper)

E. THE NATIONAL HOUSING ACT AND HUD COMPLIANCE

1. The NHA ("NHA"), Section 250(a), provides that HUD shall not accept an offer to prepay a loan of this type unless: (1) HUD has determined that "such project is no longer meeting a need for rental housing for lower income families in the area"; (2) HUD has determined that the tenants have been provided notice of and an opportunity to comment on the request to prepay; and (3) HUD has assured that there is a relocation plan for anyone who would be displaced as a result of the prepayment and withdrawal of the project from the program. 12 U.S.C. §1715z-15(a).

2. In 2004, HUD issued notice H-04-17, which provided some guidance on how it would go about making the determinations that it was required to make pursuant to Section 250(a).

3. On August 8, 2006, HUD issued Notice H-06-11, entitled "Prepayments Subject to Section 250(a) of the NHA" ("the Notice"), which contained substantially the same terms as Notice H-04-17. A copy of the Notice is attached as Exhibit "U".

4. The purpose of the Notice is to "provide **background** and up-to-date guidance on HUD's **policy and procedure** regarding the prepayment of HUD-insured/held mortgages pursuant to the National Housing Act." See Exhibit "U" at p.1.

5. The Notice provides for three scenarios under which subsection (a)(1) of Section 250 may be satisfied, including a scenario in which the applicant for prepayment may execute a use agreement ("Use Agreement") with HUD which provides that the project will maintain the same affordability and rental restrictions in place under the regulatory agreement. Id.

6. Specifically, the Notice provides in relevant part:

> **3. Scenario #3.** Section 250(a)(1) can be satisfied if the owner of a subsidized project can show that the regulatory agreement executed by the owner as part of the mortgage insurance transaction is no longer **needed by assuring that the building will continue to**

> **provide low-income housing in the absence of any regulatory agreement**. In these cases, HUD will permit a prepayment in order to recapitalize the project only if **the owner agrees to execute a Use Agreement that ensures that the project will continue to be maintained as rental housing for lower income families in the area until at least the date the original mortgage would have terminated had it not been prepaid**. The Use Agreement provides the mechanism for ensuring that the building will continue to operate as low-income housing after the prepayment. **It requires the project to maintain the same affordability and rental restrictions as those that were in place before the prepayment and minimize the threat of a negative impact on current and future low-income tenants.** The owner must have the Use Agreement recorded against the property, and provide copies of that Use Agreement, when signed, to applicable State and local governments, and to the local public housing authority.

Id. (emphasis added).

7. Thus, in order to comply with this provision of the Notice, the applicant for prepayment must execute a Use Agreement which restricts the use of the project prior to the approval of the application for prepayment. Id.

8. Therefore, in passing the Notice, HUD has executed a rule that interprets Section 250(a) which provides that, so long as the applicant executes a Use Agreement ensuring use for low income housing, HUD is making the required determination that the property is no longer needed under the current regulatory agreement scheme as required by Section 250(a).

9. Further, the Notice provides that the requirement for a relocation plan is satisfied by the execution of such a Use Agreement as the Use Agreement itself requires that no tenants be displaced as a result of the relocation. Id.

10. HUD has specifically noted that the prepayment procedure is often necessary to allow the rehabilitation and repair of many of the older buildings which are substandard and in need of such repair. As stated by HUD in the Notice:

> [I]n many cases when HUD receives a request from an owner of a subsidized project for permission to prepay the project's subsidized mortgage, the owner wants to prepay the existing subsidized insured mortgage as part of a refinancing and recapitalization of the project to effectuate much needed rehabilitation of the project through the sale of tax credits, and lower than market interest rate financing through the sale of tax exempt bonds, and grants.

Id.

11. On July 24, 2006, KGC provided notice to its tenants, the 150-day notice ("KGC Notice"), that it was seeking to prepay the Loan as required by Section 250(a) of the NHA. A copy of the KGC Notice is attached hereto as Exhibit "V".

12. The KGC Notice states in relevant part:

Dear Resident:

* * *

> **Please note that upon prepayment of the mortgage HUD will require the owner to enter into an affordable housing Use Agreement until May 1, 2011 (the maturity date of the mortgage), the form of which is in the manager's office for your review. Any future rent increase will be restricted in accordance with the terms of the HUD required Use Agreement or as otherwise approved by HUD.**
>
> * * *

See Exhibit "V".

13. In addition to the required form of the KGC Notice, tenants received a letter from Lawrence Ching of KGC, which provides in relevant part:

> Rents will not be increased as a result of this prepayment. Future rent increases will be strictly governed by the terms of the Use Agreement or as otherwise approved by HUD.

A copy of this letter is attached hereto as Exhibit "W".

14. The KGC Notice was hand delivered to each unit of the Project on July 24, 2006, and copies were posted in four prominent locations in the apartment project in compliance with HUD procedures as follows:

> 1) On the bulletin boards located inside the project's 13 laundry rooms
> 2) Outside of the project operation office
> 3) In the project's recreation hall
> 4) In the project's community center

See Declaration of Lawrence Ching.

15. Furthermore, the Notice specifies that "HUD will not issue a release of the regulatory agreement until all Use Agreement recording requirements have been satisfied." See Exhibit "U".

16. On September 29, 2006, KGC submitted its Notice of Request for Prepayment to its lender ("Notice to Lender"). The Notice to Lender was sent at this time because normal HUD processing time for prepayment request is 45 to 60 days. Further, upon approval, the borrower has 60 days in which to prepay (or the approval is good for 60 days). Therefore KGC wanted the approval to be received in early December 2006 so that it could prepay immediately after the expiration of the 150 days notice period which was December 21, 2006.

17. On October 2, 2006 KGC's Notice of Request for Prepayment was received by the lender as confirmed through Federal Express manifest. We understand from Lender that the Lender submitted the request to HUD (the HUD 9807 application) on October 3, 2006. See Declaration of Counsel.

18. On October 2, 2006, Plaintiffs KGA and FACE filed the present Complaint against HUD, KGC, and Carmel.

19. On January 22, 2007, Plaintiffs filed a First Amended Complaint that added additional allegations that KGC had violated the Regulatory Agreement.

20. Plaintiffs' First Amended Complaint contains seven causes of action against HUD. Four of those seven (Counts I, III, IV, and V) relate to HUD's adoption or promulgation of the Notice. All four of these counts ask for relief under the Administrative Procedures Act ("APA"), 5 U.S.C. §706, and the "agency action" of which the plaintiffs complain is HUD's promulgation of the Notice. In Count I, plaintiffs allege that the Notice violates Section 250(a) of the NHA in that it allows prepayment of HUD-insured loans for projects that continue to meet a need for lower income housing, and such prepayments are not consistent with national housing goals. In Count III, plaintiffs allege that the notice violates Section 250(a) in that it does not require adequate notice to the residents. In Count IV, plaintiffs allege that the Notice is a "rule" that was adopted without following the proper rulemaking requirements. In Count V, plaintiffs allege that the promulgation violated the fair housing laws by failing to affirmatively further fair housing. The other two counts in the lawsuit relate to HUD's "processing" and "review" of KGC's prepayment request under the Notice. Count II claims that such processing threatens to violate the NHA, and they seek relief under the Declaratory Judgment Act. Count VI claims that such review threatens to violate fair housing laws, in that approval will have a disproportionate effect on non-whites. Lastly, in Count VII Plaintiffs allege that KGC has violated the Regulatory Agreement by paying funds seeking the prepayment and sale.

IV. LEGAL AUTHORITY

A. RIGHT TO SUMMARY JUDGMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate where it is demonstrated that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Avila v. Travelers Insurance Co., 651 F.2d 658, 660 (9th Cir.1981); Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir.1980). Once a summary judgment motion is made and properly supported, the adverse party must set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); Celotex Corp v. Myrtle Nell Catrett, 477 U.S. 317 (1986).

B. WHEN FILING MOTION FOR SUMMARY JUDGMENT BASED ON STANDING THE BURDEN OF PROOF SHIFTS

This motion seeks to dismiss the Plaintiff's Complaint on grounds that the Plaintiffs lack standing. In Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the United States Supreme Court made it clear that when standing is challenged by way of a motion for summary judgment the burden of establishing the requisite elements of standing rests with the party seeking jurisdiction, who cannot rely upon its mere allegations pled but must provide the court with sufficient specific facts supported by sworn testimony.

> **The party invoking federal jurisdiction bears the burden of establishing these elements**. See FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990); Warth, supra,

> 422 U.S., at 508, 95 S.Ct., at 2210. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation. See Lujan v. National Wildlife Federation, 497 U.S. 871, 883-889, 110 S.Ct. 3177, 3185-3189, 111 L.Ed.2d 695 (1990); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 114-115, and n. 31, 99 S.Ct. 1601, 1614-1615, and n. 31, 60 L.Ed.2d 66 (1979); Simon, supra, 426 U.S., at 45, n. 25, 96 S.Ct., at 1927, and n. 25; Warth, supra, 422 U.S., at 527, and n. 6, 95 S.Ct., at 2219, and n. 6 (Brennan, J., dissenting). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." National Wildlife Federation, supra, 497 U.S., at 889, 110 S.Ct., at 3189. **In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts,"** Fed.Rule Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." Gladstone, supra, 441 U.S., at 115, n. 31, 99 S.Ct., at 1616, n. 31. (Emphasis added).

Lujan, 504 U.S. at 560-561 (internal citations omitted and emphasis added).

C. STANDING/BASED UPON PARTY'S OWN RIGHT TO SUE

In examining whether an organization has standing to sue on its own behalf, courts conduct the same inquiry as in the case of the individual. See Havens, 455 U.S. at 379. Accordingly, to have standing to maintain their claims FACE and KGA must establish: (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood, not mere speculation, that the injury will be redressed by a favorable decision. Lujan, 455 U.S. at 560-561.

In considering this issue, we will address the claims mainly of KGA and its tenant members as FACE's "claims" are even more remote.

As previously recognized by this court:

> Plaintiffs have the burden of proving that jurisdiction does in fact exist. Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir.1979). Standing pertains to this court's subject matter jurisdiction. This court therefore analyzes FACE's standing to assert its claims under Rule 12(b)(1) of the Federal Rules of Civil Procedure. See White v. Lee, 227 F.3d 1214, 1242 (9th Cir.2000).
>
> Under Rule 12(b)(1), this court may dismiss a complaint when its allegations are insufficient to confer subject matter jurisdiction. Alternatively, this court may dismiss a complaint under Rule 12(b) (1) when disputed facts that would give rise to this court's subject matter jurisdiction are insufficient. See Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir.1979).

Kukui Gardens Ass'n. v. Jackson, 2007 WL 128857, *2.

1. **WHAT CONSTITUTES A CLAIM THAT IS UNRIPE**

"Whether a claim is ripe for adjudication goes to a court's subject matter jurisdiction under the case or controversy clause of Article III of the federal Constitution and is a question of law that must be determined by the court." Kukui Gardens Ass'n. v. Jackson, 2007 WL 128857, *8 (internal citations omitted). In Clinton v. Acequia, Inc., 94 F.3d 568, 572 (9th Cir.1996), the Ninth Circuit Court of Appeals set forth the "basic rationale" of the Article III ripeness doctrine.

> The "basic rationale" of Article III ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Abbott Labs. v. Gardner, 387

> U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). Accordingly, "ripeness is peculiarly a question of timing," Regional Rail Reorganization Act Cases, 419 U.S. 102, 140, 95 S.Ct. 335, 357, 42 L.Ed.2d 320 (1974), and a federal court normally ought not resolve issues "involv[ing] 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580-81, 105 S.Ct. 3325, 3333, 87 L.Ed.2d 409 (1985) (quoting 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532 (1984)). In the absence of an immediate and certain injury to a party, a dispute has not "matured sufficiently to warrant judicial intervention." See Warth v. Seldin, 422 U.S. 490, 499 n. 10, 95 S.Ct. 2197, 2205 n. 10, 45 L.Ed.2d 343 (1975).

a. **INJURY IN FACT**

(i) **INJURY IN FACT/WHAT CONSTITUTES A LEGALLY PROTECTED INTEREST**

The Lujan opinion expressly set forth the three elements necessary to establish standing under Article III as follows:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. **First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical**[.]' " **Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly … trace[able] to the challenged action of the defendant**, and not … the[e] result [of] the independent action of some third party not before the court." **Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision.**"

Lujan, 504 U.S. at 560-561 (internal citations omitted and emphasis added). Per the discussion in the section above, there is no legally protected right which has

been violated, the facts do not elevate the question to the level of causal connection or beyond mere speculation, there is no violation of any legally protected interest.

(ii) DAMAGES MUST BE LIKELY/NOT SPECULATIVE

This court has already found that any claims alleging injury caused by an anticipated HUD approval of KGC's prepayment request is unripe and subject to dismissal. In part, this court has stated:

> Ripeness is determined by a two-pronged analysis. A plaintiff must show both that the issues are appropriate for judicial decision and that the plaintiff will suffer hardship if judicial consideration is withheld. United States v. Lazarenko, 469 F.3d 815, 825 (9th Cir.2006) ("We determine if a case is ripe for review by evaluating whether (1) the issues are fit for judicial decision, and (2) the parties will suffer hardship if we withhold decision."). The Ninth Circuit has cautioned that "a federal court normally ought not resolve issues involving contingent future events that may not occur as anticipated, or indeed may not occur at all." Clinton v. Acequia, Inc., 94 F.3d 568, 572 (9th Cir.1996) (citations and quotations omitted).
>
> Considering only the allegations in the Complaint and the documents attached thereto, the court finds no allegation that HUD has approved the prepayment of the mortgage or the sale of Kukui Gardens from KGC to Carmel. At most, Plaintiffs allege in paragraph 35 of the Complaint that HUD will approve the prepayment. However, Plaintiffs do not explain the basis for that allegation. A letter dated September 26, 2006, attached to the Complaint as Exhibit F, indicates that, as of that date, HUD had not even received a formal request from KGC to prepay the mortgage. Indeed, the Complaint alleges that HUD exercises discretion in approving such a prepayment. Count Six of the Complaint is therefore not ripe, as there can be no "disparate impact" on nonwhite renters under the facts asserted in the Complaint and the attachments to the Complaint.

Kukui Gardens Ass'n. v. Jackson, 2007 WL 128857. Clearly we believe that the

allegations not only lack a violation of the Plaintiff's rights but as stated would rely upon a contingency upon a contingency and that is just as to the tenant members of KGA.

(iii) **NOT SELF INFLICTED**

The law clearly distinguishes injuries suffered as a result of a defendant's alleged actions, and injuries that are self-inflicted. See Abigail v. Alliance for Better Access to Developmental Drugs v. Eschenbach, 469 F3d 129, 133 (D.C. Cir.2006) ("an organization is not injured by expending resources to challenge the regulation itself; we do not recognize such self-inflicted harm"); Nat'l Family Planning and Reproductive Health Ass'n v. Gonzales, 468 F.3d 826, 831 (D.C. Cir. 2006) ("[T]he Association's asserted injury appears to be largely of its own making. We have consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing. Such harm does not amount to an 'injury' cognizable under Article III. Further, even if self-inflicted harm qualified as an injury it would not be fairly traceable to the defendant's challenged conduct." (citations omitted)); Ass'n of Community Organizations for Reform Now v. Fowler, 178 F.3d 350, 358 (5th Cir. 1999) ("An organization cannot obtain standing to sue in its own right as a result of self-inflicted injuries, i.e., those that are not fairly traceable to the actions of the defendant." (quotations omitted)); John and Vincent Arduini, Inc. v. NYNEX, 129 F.Supp. 162, 168 (N.D.N.Y. 2001) ("To the extent that an

injury is self-inflicted or due to the plaintiff's own fault, the causal chain is broken and standing will not be established."); Spann v. Colonial Village, Inc., 899 F.2d 24, 27 (DC Cir. 1990). Therefore, any claims of the cost of filing or proceeding with this litigation would fall within the definition of self inflicted.

b. LIKELIHOOD OF A FAVORABLE DECISION TO REDRESS THE INJURY

The choice here is: (i) to either allow the prepayment and substitute the Use Agreement (which provides for the same protection as the Regulatory Agreement until 2011) for the Regulatory Agreement; or (ii) to allow the loan to run its course which ends in 2011. There is no favorable decision which could change the fact that the rights of the tenants will not, under the law or existing facts, extend beyond 2011.

c. FINAL AGENCY ACTION

When a complaint involves claims filed under the APA, 5 USC § 702, as is the case at bar, the Ninth Circuit has required that the Plaintiff must show, among other things, that there has been a final agency action that adversely affects the plaintiff.

> To establish standing to use under the APA, appellants must first meet the "irreducible constitutional minimum of standing [which] contains three elements: (1) injury in fact; (2) causation; and (3) likelihood that a favorable decision will redress the injury. (citations omitted). **A party suing under the APA must also show '(1) that there has**

> **been final agency action adversely affecting the [party], and (2) that, as a result, it suffers legal wrong or that its injury falls within the zone of interests of the statutory provisions the [party] claims was violated**. (Citations omitted). (Emphasis added).

DBSI/TRI IV Ltd. Partnership, 465 F.3d at 1038; see also Citizens for Better Forestry v. U.S. Dept. of Agric., 341 F.3d 961, 976 (9th Cir.2003).

As defined by the APA, the term "agency action" includes agency inaction. As such, "courts can compel an official to exercise his discretion when he fails or refuses to do so." Vaughn v. Consumer Home Mortg., Inc., 293 F.Supp.2d 206, 213 (E.D.N.Y. 2003). For an agency action to be considered "final", satisfaction of the following conditions is required:

> First, the action must mark the "consummation" of the agency's decision-making process . . . it must be not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow[.]"

Bennett v. Spear, 520 U.S. 154, 177-78 (1997). Stated another way, "the core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties." Indus. Customers of NW Utils. v. Bonneville Power Admin., 408 F.3d 638, 646 (9th Cir.2005) (quoting Franklin v. Massachusetts, 505 U.S. 788, 797 (1992). Clearly there has been no final agency action.

2. ACTIONS BROUGHT UNDER APA, 5USC§702

While all of the law cited herein is applicable to all counts of the Plaintiffs' First Amended Complaint, there is additional authority as to four of the seven counts. When a complaint involves claims filed under the APA, 5 USC § 702, as is the case at bar, the burden to establish standing is heavier. DBSI/TRI IV Ltd. Partnership v U.S., 465 F.3d 1031 (9th Cir., 2006); see also Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38-39, 96 S.Ct. 1917, 48 L.Ed2d 450 (1976). In the DBSI/TRI IV Ltd. Partnership case, the Ninth Circuit wrote:

> To establish standing to use under the APA, appellants must first meet the "irreducible constitutional minimum of standing [which] contains three elements: (1) injury in fact; (2) causation; and (3) likelihood that a favorable decision will redress the injury. (citations omitted). **A party suing under the APA must also show '(1) that there has been final agency action adversely affecting the [party], and (2) that, as a result, it suffers legal wrong or that its injury falls within the zone of interests of the statutory provisions the [party] claims was violated**. (Citations omitted). (Emphasis added).

DBSI/TRI IV Ltd. Partnership, 465 F.3d at 1038. In this case four of the seven (Counts I, III, IV, and V) relate to HUD's adoption or promulgation of the Notice and all ask for relief under the Administrative Procedures Act ("APA"),

In DBSI/TRI IV Ltd. Partnership the defendant appellee owned six low-income housing properties, all financed by through the Rural Housing Service ("RHS") of the United States Department of Agriculture. The RHS loans, like the HUD-insured loan at issue here, required that the financed-properties be subject to

certain operational requirements, to ensure affordability, among other things, for as long as the loans were outstanding. Id. 465 F.3d at 1034-35. There were five individual plaintiffs at the trial court level, four were residents of a property known as Seacrest, and the last one from a property known as Meadowbrook. Id. 465 P.3d at 1035. Prior to the termination date of the underlying loans, the defendant owner sought prepayment approval from RHS on all six of the properties. RHS accepted prepayment on the Seacrest loan but not the Meadowbrook loan. Plaintiffs the filed their lawsuit under the APA, 5 U.S.C. § 702, alleging that any RHS approval would be contrary to law as it would violate the Emergency Low Income Housing Protection Act ("ELIHPA"). On the issues of standing and ripeness, the Ninth Circuit Court of Appeals found that the plaintiff living in Meadowbrook lacked standing on grounds that there was no final agency action. In relevant part, the court stated:

> However, because Meadowbrook appellant Rhodes has not yet suffered concrete injury, nor is injury sufficiently imminent, we hold that she lacks standing and that her APA claim is not ripe for review. Where, as here, "injunctive relief and a declaratory judgment are sought with regard to an administrative determination, the courts traditionally have been reluctant to grant such relief unless there is a controversy ripe for judicial resolution." Mt. Adams Veneer Co. v. United States, 896 F.2d 339, 343 (9th Cir.1990) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)) (internal punctuation omitted).
>
> " '[A] case is not ripe where the existence of the dispute itself hangs on future contingencies that may or may not occur.' " Porter v. Jones, 319 F.3d 483, 490 (9th Cir.2003) (quoting Clinton v. Acequia,

> Inc., 94 F.3d 568, 572 (9th Cir.1996)). It is undisputed that DBSI has not tendered prepayment on the Meadowbrook I loan, nor has it indicated an intention to do so. Moreover, Rhodes has not shown that she has been "adversely affected" by "final agency action"-specifically, RHS's acceptance of prepayment-as required for standing under the APA. See Citizens for Better Forestry, 341 F.3d at 976.

DBSI/TRI IV Ltd. Partnership, 465 F.3d at 1038-1039.

Similarly, in the present case, the Defendant HUD has not made its decision on KGC's prepayment application. Indeed, HUD still has not released the form use agreement that will be required for prepayment and therefore KGC does not (as it is impossible at this time) have an acceptable request for prepayment pending with HUD. Therefore, like in DBSI/TRI IV Ltd. Partnership the Plaintiffs here lack standing on account of the fact that they have suffered no "concrete injury" as the claim appears to be based upon a contingency upon the contingency that: (a) first that if the prepayment takes place; then (b) the parties buying subject to the Use Agreement will breach the Use Agreement. That is the only way that the rights to which the tenants who we assume to be members of KGA would have their rights violated. Secondly, FACE has no damages under any circumstances. Moreover, at this time there has been no "final agency action" taken by the defendants. As such, all of the Plaintiffs' claims brought under the APA are unripe and should properly be dismissed.

B. STANDING/BASED UPON PARTY'S RIGHT TO SUE ON A REPRESENTATIVE BASIS

This court has stated that "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Kukui Gardens Ass'n. v. Jackson, 2007 WL 128857, *7 (quoting Hunt v. Wash. Stte Apple Adver. Comm'n, 432 U.S. 333, 343 (1977); Fleck & Assoc., Inc. v. Phoenix, City f, an Arizona Mun. Corp., 2006 WL 3755201, *4 (9th Cir. Dec. 22, 2006).

1. FACE HAS NO AUTHORITY TO SUE ON BEHALF OF TENANT MEMBERS OF KGA

In its Order granting in part and denying in part KGC Motion to Dismiss, this Court noted the following:

> FACE conceded at the hearing that it had no authority for the proposition that an organization could sue as a representative of a representative. In other words, FACE had no authority indicating that FACE could sue as a representative of KGA, which was itself a representative of individual residents of Kukui Gardens. FACE lacks standing to assert claims in a representational capacity.

Kukui Gardens Ass'n. v. Jackson, 2007 WL 128857, *7.

V. CONCLUSION

Based upon the facts and legal authority cited herein, there are clearly no issues of material fact and the Defendant KGC isentitled to have the Plaintiffs' First Amended Complaint dismissed with prejudice.

DATED: Honolulu, Hawaii, March 13, 2006.

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