

**Case No. 04-73913  
and Case No. 04-74260**

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN**

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Bankruptcy Court Case No. 03-46502

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NEW BALTIMORE TOWERS  
*Appellant-Cross-Appellee,*

v.

THOMAS VINCENT OKSENTOWICZ  
*Appellee-Cross-Appellant.*

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BRIEF *AMICUS CURIAE* OF AARP  
IN SUPPORT OF APPELLEE-CROSS-APPELLANT

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

AARP is a nonpartisan, nonprofit membership organization of more than 35 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. Of AARP's over 35 million members, 1.5 million reside in Michigan, representing over 70% of Michigan's fifty and over population.

Livable Communities is one of the key social impact goals for AARP. AARP is deeply concerned about the ability of the oldest and most vulnerable portion of the population to have appropriate and affordable housing options. AARP has a strong interest in preserving access to low income senior housing. Senior housing programs created, supervised, and subsidized by the United States Department of Housing and Urban Development (HUD) are extremely important to low income older persons. Government subsidized housing will become more important as more and more older people are targeted by predatory lending and consumer scams, and as the costs of medical care increases. The numbers of older people that have availed themselves of bankruptcy have increased in recent years. Older persons are targets of predatory lending, live on fixed incomes, and have higher medical expenses. Thus, older people will more than ever need to rely on federally assisted housing.

AARP's Michigan members and other residents of Michigan have a significant interest in the outcome of this appeal, which addresses the broad

question of whether a government subsidized low income housing provider can discriminate against applicants based solely on a prior bankruptcy. AARP submits this brief in support of Debtor-Appellee. For the reasons discussed below, the Court should affirm the decision of the United States Bankruptcy Court of the Eastern District of Michigan.

## **ARGUMENT**

### **I. GOVERNMENTAL HOUSING UNITS ARE A KEY RESOURCE FOR OLDER AMERICANS**

#### **A. Older Americans Overwhelmingly Prefer to Live in Their Own Homes In the Community as the Age.**

Overwhelmingly, people 50 and over strongly prefer independent living in their own homes to other alternatives.<sup>1/</sup> Not only is aging in one's home the vast preference of older people,<sup>2/</sup> it is also more cost effective for both the individual and the state,<sup>3/</sup> which pays for nursing home care for low income people through its

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<sup>1/</sup> AARP, Public Policy Institute, *Beyond 50.03: A Report to the Nation on Independent Living and Disability*, (AARP *Beyond 50.03*) at 8, 177-78 (April 2003) available at [http://research.aarp.org/il/beyond\\_50\\_il.html](http://research.aarp.org/il/beyond_50_il.html).

<sup>2/</sup> See, e.g., Housing Assistance Council, *Federal Programs and Local Organizations: Meeting the Housing Needs of Rural Seniors* (2001) available at <http://www.ruralhome.org/pubs/hsganalysis/elderly/intro.htm>.

<sup>3/</sup> Nationally, in 2001, the average annual cost of nursing home care was \$55,000. *AARP Beyond 50:03*, *supra* note 1, at 80 (citing GE Long Term Care Insurance Nursing Home Survey, March 2002). In 2000, the national average cost of assisted living was \$26,904. *Id.* at 76 (citing National Investment Center/American Seniors

Medicaid program.<sup>4/</sup> Safe, decent and affordable housing is extremely important to the goal of enabling people to age in their homes.

**B. Large Numbers of Older Americans Nationally and Especially in Michigan Cannot Afford Decent Housing.**

Yet, many older people do not live in safe, decent and affordable housing.

One-third of older Americans are estimated to have unmet housing needs.

Commission on Affordable Housing and Health Facility Needs for Seniors in the 21st Century, *A Report to Congress: Quiet Crisis in America*, (*Seniors Commission Report*) at 14 (June 30, 2002).<sup>5/</sup> Almost half of older persons today are low-income, having incomes less than 50% of the area median income,<sup>6/</sup> and one third of those pay more than 50% of their income for housing costs. *Id.* Although 80% of older persons may be homeowners,<sup>7/</sup> many are forced to move from their own

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Housing Association, *The State of Seniors Housing 2000*).

<sup>4/</sup> MICH. COMP. LAWS § 400.1 *et seq.*

<sup>5/</sup> The Commission submitted the Report to the House Comm. on Fin. Serv. and House Comm. on Approps. and the Senate Comm. On Banking, Housing and Urban Affairs and Senate Comm. on Urban Affairs pursuant to Section 525(f) of Pub. L. 106-74 as amended. The report is available at [www.seniorscommission.gov](http://www.seniorscommission.gov).

<sup>6/</sup> This represents the lowest income quartile of the population. *Seniors Commission Report* at 24 (citing Current Population Survey 2001).

<sup>7/</sup> *Id.* at 22.

homes to a rental unit either because the cost of upkeep is no longer affordable or their income is reduced or because they are no longer physically able to maintain their home.

The situation for older residents in Michigan mirrors that of the nation as a whole. In Michigan, 61% of all elderly households are low income. U.S. Census Bureau, State of Cities Data System (SOCDS): Comprehensive Housing Affordability Strategy Data 2000 (CHAS Data) at III-29 available at <http://www.huduser.org/datasets/cp.html>. Among elderly renters, 82% are low-income with 58% considered extremely low income (below 30% of area median income). *Id.* Among homeowners, 55.8% are low income. *Id.*

Not only are most elderly households in Michigan low income, elderly people comprise a disproportionate share of low income households. Of households with income of less than 50% of the median family income, 40% are elderly. CHAS Data at III-12. Of these 316,127 households, about two-thirds are designated as having “housing problems” and more than a third have housing costs that exceed 50% of their household income. *Id.*

The State of Michigan has identified the continuing need and high demand for affordable housing for the elderly population. *Id.* Twenty-five percent of all

elderly households were identified as having housing needs; of those, “a staggering 98% had affordability as one of their housing problems.” *Id.* at V-25. Michigan also identified the prevalence of housing problems that can lead homeowners to seek to move to rental housing, including the inability to make repairs and trouble shoveling snow. *Id.*

Indeed, many older persons choose to move from their current housing to federally subsidized housing for accessibility features as well as affordability. Among people over 50, more than one third of them would like to make physical modifications to their home to make it easier to live there. *See AARP Beyond 50.03, supra* note 1 at 144. In addition to the federally subsidized housing that is specifically designed to meet the physical and social needs of older persons,<sup>8/</sup> all federally subsidized rental housing must meet one or more of a variety of accessibility standards.<sup>9/</sup> In addition, all private providers of subsidized housing must comply with Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, that require that their program as a whole to be accessible.<sup>10/</sup> Thus, these private

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<sup>8/</sup> 12 U.S.C. § 170q (West 2004).

<sup>9/</sup> The accessibility standards that private providers of subsidized housing must meet include accessible routes to and from dwelling units, apartments that can be adapted to wheelchair use and a percentage of units that are fully wheelchair accessible. *See* 24 C.F.R. § 8.32; 24 C.F.R. § 205.

<sup>10/</sup> 29 U.S.C. § 794.

providers must make physical modifications to units and reasonable accommodations in their rules and policies in order to meet the needs of individual residents who are frail or disabled.<sup>11/</sup> Older people thus look to privately owned governmental housing units to meet their housing needs so that they can start a new phase of their lives and age with dignity.

**C. Privately Owned Governmental Housing Units Are an Integral Part of Congress’s National Goal of Providing Housing that is Safe, Decent and Affordable.**

Over 50 years ago, Congress enshrined as the cornerstone of national housing policy, the “realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family.”<sup>12/</sup> In order to achieve this critical national goal Congress from the outset has relied upon the private sector to provide subsidized housing.<sup>13/</sup> Indeed, the very first program that established private development and ownership of subsidized housing was the elderly housing program authorized by Section 202 of the 1959 Housing Act,

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<sup>11/</sup> 24 C.F.R. Subpart C.

<sup>12/</sup> 42 U.S.C. § 1441 (2004).

<sup>13/</sup> For instance, the conventional public housing program relied on private contractors and the bonds which provided long-term financing were sold by private firms.

although private involvement was limited to non-profits entities.<sup>14/</sup> In 1961 Congress took the next step by establishing a below-market interest rate insured loan program under which private landlords could develop housing for low and moderate income residents.<sup>15/</sup> In 1965 Congress expanded the capacity of private landlords to develop housing that was affordable to poor people by establishing the Rent Supplement program.<sup>16/</sup> In 1968 Congress created what it intended to be the most important expansion of the subsidized rental housing program; adding six million units to the subsidized housing market by relying exclusively on private landlords.<sup>17/</sup> The government's reliance on the private sector to provide subsidized housing expanded further with the adoption of the Housing and Community Development Act of 1974 which created, among other programs, the Section 8 New Construction Program.<sup>18/</sup>

In order to make the provision of affordable housing possible, Congress

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<sup>14/</sup> 12 U.S.C. § 1701q.

<sup>15/</sup> *Id.* § 17151 (d)(3).

<sup>16/</sup> *Id.* § 1701s.

<sup>17/</sup> *Id.* § 1715z-1.

<sup>18/</sup> 42 U.S.C. § 1437f (2004).

created through these various programs a system of financial incentives, supports and subsidies by which private developers could continue to make a reasonable profit (thus maintaining their character as private enterprises).<sup>19/</sup> Private subsidized housing developers and owners are able to market housing to the low income market precisely because they receive these governmental benefits. These benefits take the form of subsidized mortgage insurance, federally insured mortgages, below-market interest rates, rent subsidy payments, direct loans, capital advances and rehabilitation funds.<sup>20/</sup> In addition, since 1986 private developers have been eligible for tax credits through the Low Income Housing Tax Credit Program.<sup>21/</sup>

In placing its reliance on private parties to carry out its national affordable housing policy, Congress required substantial governmental oversight. Indeed, Congress itself set many parameters of the landlord-tenant relationship in its statutory enactments of its programs, including setting a limit on the amount of rent tenants can be charged, how resident income is defined, financial and household eligibility for each program, the form and terms of the lease and even whether pets

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<sup>19/</sup> [CITE]????

<sup>20/</sup> String cite to all programs.

<sup>21/</sup> 26 U.S.C. § 42. Of course not all private housing developers and owners receive all of the forms of subsidy and support. The lower the income range of the target resident population, the more these programs are used concurrently and “layered” by housing providers.

are allowed.<sup>22/</sup> HUD through its regulations and handbooks carries out these statutory requirements through providing rules and guidance that govern virtually every decision of and action by private owners of subsidized housing. For instance, the guidebook that covers the most typical private provider of subsidized housing includes requirements and guidance concerning civil rights obligations, financial eligibility, marketing, tenant selection and rent.<sup>23/</sup>

Residents of privately owned federally subsidized housing may not be evicted without receiving the procedural due process protections of the U.S. constitution, which include notice and an opportunity to be heard and the right to remain unless the private housing provider can demonstrate good cause for eviction. *McQueen v. Druker*, 317 F. Supp. 1122 (D. Mass. 1970), *aff'd on other grounds*, 438 F.D. 1971.<sup>24/</sup> The court concluded the private landlords in *McQueen* were subject to Fourteenth Amendment due process requirements because they were “intertwined” (heavily funded and controlled) with the government so that

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<sup>22/</sup> 42 U.S.C. §§ 1437 a(a), a(b)(4), d(1); 12 U.S.C. § 1701r-1. Each program has its own eligibility requirements. *See, e.g.*, 42 U.S.C. §§ 1437 n(a)(2), f(a); 12 U.S.C. § 1715z-1(I)(2).

<sup>23/</sup> 4350.3 Rev-1.

<sup>24/</sup> *See, e.g. Lopez v. Henry Phipps Plaza S. Inc.*, 498 F.2d. 937 (2d Cir. 1974); *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973); *Short v. Fulton Redev. Co.*, 390 F. Supp. 517, *on reconsideration*, 398 F. Supp. 1234 (S.D.NY. 1975).

their actions were the equivalent of state action. *McQueen v. Druker*, 317 F.Supp at 1133.<sup>25/</sup>

**D. Criteria for Admission to Governmental Units is Designed to Be Fair and to Protect the Interests of Both Low Income Applicants and the Financial Integrity of Housing Providers.**

The admissions policy that determines admission to “privately owned” “federally subsidized” housing must meet statutory and regulatory requirements<sup>26/</sup> and must be set forth in the owner’s “Tenant Selection Policy” and in its “Affirmative Fair Housing Marketing Plan,” both of which are reviewed by HUD and must be made available to the public.<sup>27/</sup>

Owners not only have the right to screen applicants to determine if they can meet the obligations of tenancy, they have a duty to do so in order to ensure that the project is fiscally sound and that the rights of other tenants are not unduly

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<sup>25/</sup> HUD regulations prescribe the form of process due before residents of privately owned governmentally subsidized housing may be evicted and requires that such a provision be included in each lease. 24 C.F.R. Part 247; HUD Occupancy Requirements of Subsidized Multifamily Housing Programs 4350.3 Rev-1 (June 12, 2003).

<sup>26/</sup> [Cites]?????.

<sup>27/</sup> 24 C.F.R. §§ 108.1-108-50 and 5.655©)(1)(2003); HUD, Occupancy Requirements of Subsidized Multifamily Programs, 4350.3 Rev-1, ¶ 4-4D (June 12, 2003).

burdened.<sup>28/</sup> The purpose of the applicant screening process is to enable owners “to make informed and objective decisions to admit applicants who are most likely to comply with the lease.”<sup>29/</sup> Applicants may be required to demonstrate, through objective evidence that includes references and housing history, that they are able to meet the obligations of tenancy as expressed in the terms of the lease.

In particular, the applicant may be required to demonstrate a current ability and willingness to pay the rent at the amount set by federal regulations and in a timely manner.<sup>30/</sup> Although a landlord cannot use discharged debts and resulting credit history adversely against an applicant who filed for bankruptcy, the landlord is free to consider a variety of other factors in determining an applicant’s ability to pay the rent. For example, the landlord can examine the applicant’s current sources of income, bill paying history, including rent and mortgage obligations, subsequent to the bankruptcy.<sup>31/</sup> The housing provider may also take into account

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<sup>28/</sup> See, e.g., 4350.3 Rev-1 Chapter 4-4, Tenant Selection.

<sup>29/</sup> 4350.3 Rev-1 4-14.

<sup>30/</sup> Even for applicants who have *not* had their debts discharged in bankruptcy, the housing provider may only consider poor past credit history to the extent that it can justify that is a sound basis for rejection and related to the ability to pay rent in the future. 4350.3 Rev.-1 4-20.

<sup>31/</sup> The housing provider may not reject an applicant for having *no* credit history. 4340.3 Rev.-1 4-20.

details of the applicant's prior landlord references that might be useful in predicting whether the applicant will unduly interfere with other residents' right to quiet enjoyment. Thus, the prohibition against discrimination on the basis of bankruptcy will not result in the admission of residents who cannot fulfill their financial obligations or other legitimate requirements of the lease.

## **II. REJECTION OF APPLICANTS TO GOVERNMENTAL HOUSING UNITS FOR OLDER PERSONS ON THE BASIS OF THEIR BANKRUPTCY OR DEBTS DISCHARGED IN BANKRUPTCY VIOLATES THE BANKRUPTCY ACT'S NON-DISCRIMINATION PROVISION AND THE PUBLIC POLICIES OF PROVIDING A FRESH START AND ENSURING THAT OLDER PERSONS CAN AGE WITH DIGNITY.**

### **A. Rising Numbers of Older Persons are Filing for Bankruptcy.**

Americans 65 years of age and older are filing for bankruptcy at increasing rates. From 1991 to 2001, the number of people in this age group who filed for bankruptcy rose an astounding 213%,<sup>32/</sup> causing bankruptcy filers age 65 and older to be the fastest growing age group in bankruptcy. The growth rate of Americans age 65 and older in bankruptcy increased more than 200 times the growth rate for the 65 age and older segment of the population, which grew only 10%.<sup>33/</sup> The next

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<sup>32/</sup> Teresa Sullivan et al., *Young, Old, And in Between: Who Files for Bankruptcy*, NORTON BANKR. LAW ADVISOR, Sept. 2001, at 2.

<sup>33/</sup> *Id.*

largest increase in bankruptcy filings occurred in the 55-64 age group and while significant, was a comparatively smaller 60.5%.

The reasons for this increase in bankruptcy filings among older people are numerous. Research and anecdotal evidence show that the increase can be attributed to rising medical costs, income volatility and aggressive credit card marketing.<sup>34/</sup> Other factors may include caring for an aging relative, the high costs of college tuition, continuing mortgage payments after retirement and the simple fact of the high cost of basic necessities such as medication, food and heat, when income is fixed or dramatically reduced (for instance upon the death of a spouse).<sup>35/</sup> Debtors age 70 and older have incomes one third less than the average for other debtors and rely on Social Security as their primary source of income.<sup>36/</sup> Older homeowners have spent a lifetime paying off their mortgages. As they become disabled and live on fixed incomes, they often need to convert their equity to pay medical bills, pay off debt or to make urgently needed home repairs. The

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<sup>34/</sup> Susan Hwang, *Another Chapter: New Group Swells Bankruptcy Court: The Middle-Aged— Job Losses, Illnesses Can Push White Collar Over Edge; Delay Can Make it Worse— Mr. Hester Takes a Mall Job*, WALL ST. J., Aug. 6, 2004, at A-1.

<sup>35/</sup> Id and Jennifer Baylot, *As Bills Mount, Debts on Homes Rise for Elderly*, N.Y. TIMES, July 3, 2004.

<sup>36/</sup> Ed Flynn et. al, *Bankruptcy by the Numbers— A closer look at Elderly Chapter 7 Debtors*, AM. BANKR. INST. J., Vol. XXI, No. 3, Apr. 2002 available at <http://www.usdoj.gov/ust/press/articles/articles.htm#top>.

combination of these factors makes older homeowners attractive targets for predatory lenders. Predatory lenders use aggressive and sophisticated marketing tactics to target older homeowners. Predatory loans are characterized by onerous and abusive loan terms that often lead to bankruptcy. *See* Joint U.S. Department of Housing and Urban Development and U.S. Department of Treasury Report: *Recommendations to Curb Predatory Home Mortgage Lending* (“HUD/Treasury Report”) (June 2000) pp. 2, 17 *available at*: <http://www.huduser.org/publications/hsgfin/curbing.html>. Predatory loans are often made based on home equity as opposed to the borrower’s true income or ability to repay the loan. Aggressive predatory mortgage lending to older persons is one of the reasons for the rising rate of bankruptcy among older persons and may be one of the precipitating causes in their application for private subsidized housing.

**B. Purpose of Bankruptcy Act is to Provide a Fresh Start.**

The longstanding purpose of the Bankruptcy Code is to give debtors like Mr. Oksentowicz a fresh start and a bright future untainted by prior debts. *See, e.g., Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554-555 (1915) (the intent of the Code is to “relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh . . . ); *Perez v. Campbell*,

402 U.S. 637 (1971) (“one of the primary purposes of the act is to give debtors a new opportunity in life”); *In re Bogdanovich*, 292 F.3d 104, 107 (2d Cir. 2002) (“a central purpose of the bankruptcy code [is] to give debtors a fresh start in life and a clear field for future effort unburdened by the existence of old debts.”). Low-income older persons, like Mr. Okenstowicz, not only deserve a fresh start and a future unencumbered by prior financial difficulties, many of them will only be able to do so successfully if they can move to privately subsidized rental housing.

The anti-discrimination provision of the Code, Section 525(a) ensures the debtor’s opportunity for a fresh start by protecting them from government-based discrimination. *In re Marcano*, 288 Bankr. 324 at 331 (E.D. Pa 2003). The government cannot deprive debtors essential services solely because they have filed for bankruptcy. Section 525(a) reads:

[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against . . . a person that is or has been a debtor under the Bankruptcy Act. . . , solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. 525(a).

“Governmental unit” is defined in the “broadest sense” in order to effectuate the debtor’s fresh start.<sup>37/</sup> S. Rep. No. 95-989 at 24 (1978) and H. Rep. No. 95-595 at 311 (1977); *TI Federal Credit Union v. Delbonis*, 72 F.3d 921, 930-31 (1st Cir. 1995); *Stoltz v. Brattleboro Housing Auth. (In re Stoltz)*, 315 F.3d 80 at 94 (Bankr. E.D. Pa. 2002). The term encompasses governmental agencies or instrumentalities carrying out public functions as well as quasi-governmental agencies or other organizations (state bar associations, medical societies, and credit unions) that seriously affect a debtor’s livelihood or fresh start. H. Rep. S. No. 95-595 at 367. *In re Stoltz*, 315 F.3d 80.<sup>38/</sup>

A private entity can also fall within the scope of Section 525(a). *Brentwood*

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<sup>37/</sup> In fact, the original version of Section 525 went as far as protecting the debtor from discrimination in purely private contexts. The proposed language stated: “A person shall not be subjected to discriminatory treatment because, he or any person with whom he is or has been associated, is or has been a debtor or has failed to pay a debt discharged in a case under the Act.” Report of the Commission of the Bankruptcy Laws of the United States, H. Rep. No. 137, 93rd Cong., 1st Session, pt. I at 143-44 (1973). In the current version, private discrimination is forbidden only in the employment context. *See* 11 U.S.C. 525(b).

<sup>38/</sup> It is well-recognized that there is nothing more essential to a debtor’s fresh start than securing a place to live. *See e.g., Stoltz*, 315 F.3d at 90 (public housing leases are essential to a debtor’s fresh start) *In re Whitsett*, 163 B.R. 752, 755 (B.R. E.D. Pa.) (a public lease is a debtor’s “single most significant material possession”); *In re Day*, 208 B.R. 358, 367 (Bankr. E.D. Pa. 1997) (a debtors entire economic status rests on his or her public housing lease).

*v. Tennessee*, 531 U.S. 288 (2001) outlined three scenarios for determining whether a private entity is a state actor. First, when the actor is under the “coercive power” of the state; second, when the actor has been delegated a “public function;” and third, when the actor is “entwined” with governmental policies...management or control... that it can be fairly treated as an instrumentality of the State itself.” *Id* at 296.

**C. Bankruptcy Act’s Anti-Discrimination Provisions Apply.**

NBPA meets the governmental unit standards for purposes of Section 525(a). Through explicit Congressional intent, NBPA carries out the traditional government function of providing subsidized low-income housing. *See supra*, Section 2. In addition, NBPA’s relationship with the government is substantial and pervasive. It is entwined with HUD’s “policies, management or control.”<sup>39/</sup> HUD’s heavily regulated framework dictates NBPA’s prospective tenants’ eligibility, the application process, rent, and the grounds and procedures for eviction. *See Debtor’s Brief*, pp. 2-3. NBPA must participate in the HUD-mandated Affirmative Fair Housing Marketing Plan and Tenant Selection Plan. *See id.* The minimal aspects of control left to NBPA cannot conflict with HUD’s

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<sup>39/</sup> *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 531 U.S. 288, 296.

statutory requirements. Moreover, the 29-year contract NBPA entered into with HUD gives HUD the right to take over and continue NBPA's business if NBPA defaults on its obligations. *See id.* at 3.

As a governmental unit NBPA is subject to Section 525(a) and prohibited from discriminating against prospective tenants on the basis of their having filed for bankruptcy.

### **CONCLUSION**

The decision of the U.S. Bankruptcy Court for the Eastern District of Michigan should be affirmed as to NBPA being subject to and having violated 11 U.S.C. § 525(a).

December 22, 2004

Respectfully Submitted,

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