No. 2007-09706

THE CITY OF HOUSTON	§	IN THE DISTRICT COURT OF
	§	
VS.	§	HARRIS COUNTY, TEXAS
	§	
APTDF LTD., ET AL.	§	189TH JUDICIAL DISTRICT

DEFENDANT APTDF LTD.'S THIRD AMENDED ORIGINAL COUNTERCLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, APTDF, Ltd., a Defendant herein and hereinafter referred to as "APTDF" and files this its Third Amended Original Counterclaim against The City of Houston and hereinafter referred to as "COH" or "City" and in support hereof would respectfully show as follows:

1. COH may be served with this pleading by serving its attorney of record by certified mail, return receipt requested and/or by facsimile.

2. Discovery is intended to be conducted under a Level 2 discovery control plan.

FACTS

COH caused Increase in Crime

3. Following the devastation of Hurricane Katrina in August 2005, the City invited tens of thousands of Katrina evacuees to make their home in Houston. It is well documented that the City's crime rate increased markedly after the arrival of the Katrina evacuees and that many of evacuees made their homes in and around the property made the subject of this lawsuit. APTDF did not have any input or voice in the decision to invite the Katrina evacuees to Houston.

4. It is also well documented that prior to September 2006, the City had encountered unprecedented budget and police pension shortfalls resulting in the reduction of its police force.

COH's Policy, Custom and Routine

5. COH maintains a multiple-departmental team housed within its police headquarters known as the Forfeiture Abatement Support Team ("F.A.S.T."). At all relevant times, F.A.S.T. was made up collectively of code enforcement personnel, firemen, police officers and several city attorneys, including the original attorneys of record for COH in this cause, Ms. Nirja S. Aiyer and Ms. Veena Krishnan. Ms. Aiyer is no longer listed as an attorney of record on the City's pleadings and Ms. Krishnan has since left her employment with the City.

6. F.A.S.T. has a policy, custom, routine and protocol of arbitrarily and capriciously singling-out commercial properties, including apartment complexes, and, in making arbitrary and capricious determinations that they constitute common nuisances under TEX.CIV.PRAC.&REM.CODE Chapter 125 (Vernon 2006) ("Chapter 125"). F.A.S.T., by policy, custom and routine, singles-out property owners and unilaterally labels them as common nuisances without any definitive or objective formula, standard or parameter; F.A.S.T. is unable to definitively advise any given property owner of the threshold number of Chapter 125 criminal incidences which constitutes a common nuisance over any given time-period. In determining whether a common nuisance exists, F.A.S.T. customarily and routinely relies solely upon the opinions of a few police officers who are not trained in premises security. Additionally, F.A.S.T., as a matter of policy, custom and routine, does not perform any comparative criminal analysis of similarly situated properties in making its nuisance determinations. Pursuant to its policy, custom and routine, once F.A.S.T. singles-out and subjectively targets an alleged property as a nuisance, it then uses its in-house attorneys to intimidate the singled-out property owner into signing a burdensome and costly Nuisance Abatement Plan ("NAP") without any consideration of the cost burden the NAP places upon the property owner or even whether forcing of the property owner to sign the NAP passes constitutional muster.

7. A NAP, by design, has a two-fold purpose—(1) to subject the property owner to COH's sole discretionary control for a period of at least six (6) months and perhaps even longer and (2) to force the targeted property owner to subsidize the City's police force by mandating that the property owner hire and pay for its own security. Based upon information and belief, it has been F.A.S.T.'s policy, custom and routine to create NAPs without any input from the targeted property owner or any premises security expert and without any consideration as to whether the NAP might place the property owner in default on its loan obligations. Typically and as a matter of policy, custom and protocol a targeted property owner is not permitted to disagree with F.A.S.T.'s arbitrary and capricious assessment that the targeted property constitutes a common nuisance or to refuse to sign a NAP even though signing a NAP may potentially place the property owner in default of its loan obligations. If a targeted property owner refuses to sign a NAP, F.A.S.T., as a matter of policy, custom and routine, files suit against the property owner, manager, and the property *in rem* under Chapter 125. Additionally, F.A.S.T. indiscriminately, arbitrarily and capriciously targets properties for harassment and litigation without complying with TEX.CIV.PRAC.&REM.CODE § 125.002.(h)(Vernon 2006), without conducting any comparative criminal analysis of any similarly situated properties and without treating similarly situated properties in a same or similar fashion.

8. Upon information and belief, COH, by policy, custom and routine, uses F.A.S.T. as a vehicle to force private property owners to subsidize its police force. To achieve this result, COH routinely uses the threat of litigation, via Chapter 125, to coerce targeted property owners into signing NAPs. COH, under duress of threat of suit, forces property owners to sign NAPs for purposes of shifting the burden of paying for the police protection into the pocket books of private property owners. As such, the forced NAPs are a form of unlawful taxation.

9. Pursuant to its protocol, policy, custom and routine, one of several F.A.S.T. police officers, with no substantial premises security training, is assigned to review criminal incident data over an arbitrary two-year period on a specific property without any regard to the frequency of criminal incidents on similarly situated properties. The officer's review is not predicated on any proven objective formula, standard or parameter for determining what threshold number of Chapter 125 criminal incidences constitutes a nuisance, but merely upon the officer's "feelings". Upon completion of the review of criminal incidents, the officer renders an opinion that a property is or is not a common nuisance. A decision by the officer that a property constitutes a common nuisance is forwarded to a superior officer for "rubberstamping". Upon information and belief, a superior officer has never overturned the opinion of a reviewing officer. After "rubberstamping" the officer's opinion, the matter is then forwarded on to the F.A.S.T. attorneys for handling.

10. Once placed in the F.A.S.T. attorneys' hands, the policy, custom and protocol is for an initial form letter to be generated by the attorneys and sent to the targeted property owner advising that its property may be declared a common nuisance and requesting a meeting with the owner at the headquarters of the Houston Police Department; this initial form letter, as a matter of policy, always contains a veiled threat of litigation. If an owner attends the meeting, that owner will routinely be presented with a NAP prepared by F.A.S.T.'s lawyers without any input or advice from the owner or any premises security expert. The owner is invariably told by the F.A.S.T. attorneys, in no uncertain terms, to either sign the NAP or be subject to the expense of having to defend a lawsuit. If an owner refuses to sign a NAP because (1) it disagrees with the inexpert opinion of the police officer; (2) it cannot afford the cost of implementing the NAP; or (3) because the NAP will potentially place it in default of its loan obligations, then as a matter of policy, custom and routine, both a lawsuit and a notice of *lis pendens* are subsequently filed by the F.A.S.T. attorneys. The filing of such suit and notice of *lis*

pendens, places the property owner in the daunting position of having to defend an expensive nuisance abatement suit against a stable of salaried city attorneys as well as potentially facing lender and title issues resulting from the lawsuit and the corresponding *lis pendens*. Routinely and customarily, every NAP requires the owner to provide and pay for its own police protection and security. This policy, custom and routine amounts to nothing more than a "shakedown"—an attempt by F.A.S.T. to force private property owners to provide for their own police protection, a duty which is historically vested in the City. NAPs are notoriously one-sided; formulated by the City and decidedly in the City's favor. APTDF is unaware of any NAP which places any burden upon the City to increase its police presence on any given targeted property.

F.A.S.T. vs. APTDF

11. In July 2006, the City, in keeping with its policy, custom and routine made an arbitrary and capricious decision to target APTDF's property. In furtherance of the City's protocol, APTDF received the initial form letter from F.A.S.T. attorney Veena Krishnan dated July 17, 2006. In her letter, Ms. Krishnan advised APTDF that COH's "records indicate[d] that criminal activity has occurred at [APTDF's] property [and that] [i]f this illegal activity continues unabated, [APTDF's] property could be declared a common and/or public nuisance under Chapter 125 of the Texas Civil Practices and Remedies Code." Ms. Krishnan further advised that COH was giving "official notice" that APTDF was, in no uncertain terms, required to attend a meeting scheduled for August 16, 2006, at Houston Police headquarters to "discuss . . . the criminal activity that has occurred on [APTDF's] property." Ms. Krishnan further stated that "[w]e hope to work with you to resolve this problem **without litigation**." (emphasis added). Based upon information and belief, the meeting "requested" by Ms. Krishnan and to be held at police headquarters, per COH's policy, custom and routine, would be for the purpose of intimidating APTDF into signing its NAP.

12. APTDF responded to Ms. Krishnan's letter by way of correspondence from its attorney Steven Poock dated August 7, 2006, wherein, Mr. Poock requested that COH supply all the names of APTDF's tenants who had been accused, arrested and convicted of a crime so that they could be evicted forthwith. COH summarily denied Mr. Poock's request. The facts that this request was made and that COH's subsequently refused to supply this information are crucial. After COH filed its lawsuit, APTDF discovered that COH had been inflating the number of alleged criminal incidences recorded by COH on APTDF's property. APTDF found out during the discovery process that a number of the alleged criminal incidences and/or arrests which formed the basis of COH's lawsuit were generated by a number of undercover operations conducted by COH. APTDF has always maintained a policy of evicting tenants who commit crimes. Although requested by Mr. Poock on August 7, 2006, and on subsequent occasions, COH has steadfastly refused and continues to refuse to disclose the identities of the known criminals. This refusal has thwarted APTDF's criminal eviction policy and has skewed and continues to skew the number of alleged incidents of crime. Had the identity of these individuals been disclosed so as to allow APTDF to evict them, the number of the criminal incidences alleged by COH would have been reduced.

13. Ms. Krishnan responded to Mr. Poock by way of letter dated August 10, 2006. It was obvious by the tone of Ms. Krishnan's letter that F.A.S.T., in keeping with its policy, custom and routine, was not willing to work in a conciliatory fashion with APTDF in resolving the alleged nuisance issue. In her letter Ms. Krishnan responded emphatically that the requested information would not be produced; however, she did recommend, albeit a hollow recommendation, that APTDF "obtain such information through an open records request to the Houston Police Department."

14. By way of correspondence of August 11, 2006, Mr. Poock again simply re-urged his request that COH provide APTDF with the records indicating that criminal activity had occurred at APTDF's property, together with the names of any person

residing on the property who has been charged with a crime. Mr. Poock additionally noted efforts undertaken by APTDF to abate the alleged crime, which included but were not limited to completing background criminal checks on residents, evicting residents who had committed a crime, the installation of additional lighting, training of staff and continuing the "rehab" of the entire apartment complex.

15. Ms. Krishnan, by way of letter of August 15, 2006, responded to Mr. Poock by advising that he did not need any information since the meeting was to be "informal . . . and one that will not require exhaustive preparation on [APTDF's] part". Ms. Krishnan's letter wholly failed to disclose the reason the meeting would not require exhaustive preparation is because APTDF would virtually have no say or input into the terms of the NAP and would be required, no questions asked, to sign it "as is".

16. Mr. Poock responded by way of letter dated August 16, 2006, and again made a request for information in COH's possession "regarding criminal activity at Deerfield Apartments."

17. Ms. Krishnan responded by sending a letter dated August 21, 2006, which was identical to her initial form letter of July 17, 2006, with the only exception being that the date of the "requested" meeting was changed. In addition to coming full-circle, Ms. Krishnan's transmittal of the correspondence clearly indicated that F.A.S.T. wanted to be in total control and was neither pleased with nor would comply with APTDF's simple request for documentation. In keeping with its policy, custom and routine, F.A.S.T. was simply hell-bent on forcing APTDF to attend the meeting for the sole purpose of signing its NAP with no questions asked and without first giving APTDF the opportunity to review the requested documentation prior to the meeting.

18. Frustrated at COH's feigned sincerity to discuss and work with APTDF on the alleged property's security issues, Mr. Poock responded by way of letter dated September 7, 2006, as follows:

Dear Ms. Krishnan:

Despite my many requests, you have refused to share with us any information you have regarding Deerfield Apartments or any alleged criminal conduct occurring there. I have tried through the Open Records Act to obtain information, but the City has thwarted my attempts by claiming exceptions to the Act. The City has requested the Attorney General to respond to its claim of exceptions to the Open Records Act, and as a result we have decided to wait for the Attorney General's decision prior to meeting with the F.A.S.T. Team.

In the mean time, please forward to me a copy of the Nuisance Abatement Plan. Also, please let me know whether there is any information or any document you are willing to share with me regarding the Deerfield Apartments and any criminal conduct occurring there.

Thank you.

Sincerely,

Steven D. Poock.

19. Additional correspondence from Mr. Poock to Ms. Krishnan requesting documentation relevant to her requested meeting, including a request for a copy of the NAP, were ignored by Ms. Krishnan as the requested documents, including a copy of the NAP, were never tendered to Mr. Poock.

20. As represented by Mr. Poock's letter of September 7th, not only were all of APTDF's efforts to obtain records from COH completely ignored, but Mr. Poock's attempts to obtain relevant records through the Open Records Act, per Ms. Krishnan's recommendation, were vigorously resisted by COH as well.

21. During the relevant time-period in which the foregoing described correspondences were exchanged, APTDF began negotiating with COH for the renewal, modification, and extension of a loan agreement entered into, by and between APTDF and COH in 1998 and which was secured by a lien on the property. As a material part of these negotiations, APTDF and COH agreed that if APTDF could obtain a third-party loan and would grant COH certain covenants and land use restrictions, COH would

subordinate its lien position to the third-party lender's lien. It was further agreed that the primary purpose of the third-party loan would be for the rehabilitation and improvement of the property, including extensively improving the property's security. In furtherance of this understanding and agreement, APTDF specifically outlined for COH how the third-party funds would be spent for rehabilitation of the property, including the enhancement of its security such as the construction and installation of fencing, gates, and lighting. COH agreed to the renewal, modification, and extension of the loan agreement in part upon these representations by APTDF. COH's legal department, including its most-senior attorney, Arturo Michel, was fully apprised of the ongoing negotiations. A renewal, modification and extension agreement was ultimately approved by COH's legal department and subsequently signed by COH on September 27, 2006.

22. Per the renewal, modification and extension agreement, APTDF successfully obtained a third-party loan and on October 5, 2006, COH signed an agreement subordinating its lien position to that of the third-party lender. The renewal, modification, and extension agreement, the loan agreement and the underlying loan documentation dictate that the third-party loan proceeds were to be used in the rehabilitation of the property, and set forth the time-frame required for APTDF to commence and complete the rehabilitation as well as the various actions and/or inactions which constitute defaults.

23. In furtherance of the renewal, modification, and extension agreement, in October 2006, APTDF commenced to rehabilitate the property. APTDF never materially defaulted in the performance of its duties and obligations under the renewal, modification, and extension agreement and never received any notice from COH of any

default of its duties and obligations under the renewal, modification, and extension agreement prior to the filing of this lawsuit by COH.

24. Unbeknownst to APTDF and in total disregard for and in breach of the renewal, modification and extension agreement, on or about February 16, 2007, COH filed this lawsuit and its notice of *lis pendens* in the Official Public Records of Harris County. APTDF was never notified by COH of any breach of the renewal, modification and extension agreement prior to the filing of this lawsuit. APTDF first learned that this lawsuit was filed when it was served on or about February 23, 2007.

25. In its lawsuit COH alleged that APTDF's property constituted a common nuisance based upon Chapter 125 criminal incidences allegedly occurring on APTDF's property between February 5, 2005 to April 24, 2007 ("time-period"). COH further alleged that the crime committed during the time-period was habitual, knowingly tolerated and that APTDF made no reasonable attempts to abate such crime. Ironically, the reinstatement, modification, and extension agreement was negotiated and signed and the rehabilitation process actually commenced during the time-period alleged by COH in its suit.

26. Incongruously, the alleged crimes listed by COH as set forth in its lawsuit and in response to discovery would appear to be the same information requested by Mr. Poock and which COH refused to provide prior to the COH's "requested" meeting. Many of the crimes which COH alleges occurred on the property occurred after the Katrina evacuees were invited by the City to make their home in Houston and during a time after which the City had reduced its police force. Many of the Katrina evacuees ultimately located in and around APTDF's property. The City, in making its

determination that APTDF's property constituted a nuisance, failed to take into account the sharp increase in the City's overall crime rate associated with the Katrina evacuees, the corresponding reduction in the City's police force and the fact that similar situated properties had higher rates of Chapter 125 criminal incidences. Additionally, the very F.A.S.T. police officer who rendered the opinion that the property is a common nuisance, has admitted that the alleged crime committed on the property during the time in which APTDF was rehabilitating the property markedly decreased.

27. Although COH's lawsuit was premised upon outdated criminal data and on the opinion of only one of its F.A.S.T. police officers, who admittedly is not an expert on premises security issues, more than one of its very own beat officers subsequently commended APTDF on the security and safety measures which have been implemented on the property through the rehabilitation process.

28. COH, after being advised that APTDF's intended to pursue a motion for sanctions for the filing of a frivolous lawsuit, nonsuited its claims in entirety on or about September 12, 2007.

WAIVER OF IMMUNITY

No Immunity under 42 U.S.C. 1983 and 42 U.S.C. 1988

29. Local governing bodies may be sued in federal court under 42 U.S.C. 1983 for monetary, declaratory and injunctive relief where the action that is alleged to be unconstitutional implements a policy, statement, ordinance, regulation, or a decision officially adopted and promulgated or through custom, without formal approval, by the local bodies' officers. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 690-91 (1978); *Texas Education Agency v. Leeper*, 843 S.W.2d 41, 49 (Tex.1994). State courts share

concurrent jurisdiction over cases brought under 42 U.S.C. 1983. *See Martinez v. California*, 444 U.S. 277, 283 (1980); *Leeper*, at 48. The district courts of this State are required to entertain direct suits against local bodies under 42 U.S.C. 1983 and to provide legal, equitable or declaratory relief thereunder. *Leeper*, at 49. APTDF's suit places into issue COH's unconstitutional implementation of a nuisance abatement policy promulgated through custom and routine and/or as approved by a local body's officers.[1] Accordingly, COH is not immune to APTDF's claims for legal, equitable and declaratory relief under the U.S. Constitution. Additionally, COH does not enjoy immunity against a claim for attorney's fees under 42 U.S.C. 1988.

Statutory waiver of Immunity

30. APTDF is seeking declarations and an award of attorney's fees under the *Uniform Declaratory Judgments Act,* TEX.CIV.PRAC.&REM.CODE Chapter 37 (Vernon 2006) ("UDJA"). A government body is not immune from declaratory action, including a recovery of attorney's fees under the UDJA. *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 404 (Tex.1997); *Texas Education Agency v. Leeper*, 843 S.W.2d 41 (Tex.1994).

31. COH brought its cause of action under Chapter 125. Pursuant to TEX.CIV.PRAC.&REM.CODE § 125.068 (Vernon 2006), the legislature has specifically waived immunity as to the recovery of attorney's fees and costs, to wit: "[i]n an action brought under this subchapter, the court may award a prevailing party reasonable attorney's fees and costs." Accordingly, the legislature has statutorily waived COH's immunity as to the recovery of attorney's fees and costs.

[1] COH has thwarted and continues to thwart APTDF's attempts to discover how and when this policy was originated and implemented.

No Immunity against Injunctive Relief

32. APTDF has pled for and is seeking prospective injunctive relief. "[S]uits for equitable remedies for violation of constitutional rights are not prohibited", *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex.1995), and suits for injunctive relief are not barred by immunity. *See Bell v. City of Grand Prairie*, 221 S.W.3d 137, 325 (Tex.App.—Dallas 2007, no pet.); *Lowell v. City of Baytown*, ____ S.W.3d ____, WL 2264703 (Tex.App.—Hou.[1st Dist.] 2007).

Claim for Affirmative Relief waives Immunity

33. A political subdivision of a state, such as a city is entitled to sovereign immunity unless it has been waived. *See Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex.2006). When a city seeks affirmative relief it waives immunity as to any claims which are germane to, connected to, and are properly defensive to claims asserted by the city. *Id.*, at 378. Affirmative relief, constituting a waiver, includes a simple prayer asking for the recovery of attorney's fees. *See Dequire v. City of Dallas*, 192 S.W.3d 663 (Tex.2006). COH's cause of action affirmatively sought injunctive relief, the posting of a bond in $10,000.00, the appointment of a receiver and the recovery of attorney's fees. APTDF's claims arise directly out of the same operative facts and claims alleged by COH and are, accordingly, all germane to, connected to, and are properly defensive to the claims asserted by COH. *Reata*, at 378. The fact that COH's has non-suited its alleged causes of action should have no adverse affect on APTDF's claims, especially in light of the fact that COH initiated this lawsuit and its claims were not asserted by way of counterclaim. Therefore, COH, by the mere filing of its suit, waived sovereign immunity as to APTDF's alleged causes of action.

CAUSES OF ACTION

Violations of U.S. Constitution

Equal Protection Clause—Selective Enforcement (Class-of-One)

34. APTDF hereby sues COH under 42 U.S.C. § 1983 for violation of its constitutional right to equal protection. The Equal Protection Clause of the Fourteenth Amendment requires that all persons similarly situated should be treated alike. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). COH violated APTDF's constitutional right to equal protection when COH treated APTDF differently from other similarly-situated parties without a reasonable basis. *City of Lubbock v. Corbin*, 942 S.W.2d 14, 22 (Tex.App.—Amarillo 1996, writ denied).

35. A law that is fair on its face, but which is applied and administered by public authority arbitrarily and capriciously, with an evil eye and an unequal hand violates the Fourteenth Amendment. *See Yick Wo v. Hopkins*, 118 U.W. 356 (1886); *City of Houston v. Glenshannon Townhouse Assoc., Inc.*, 607 S.W.2d 930 (Tex.App.—Houston [1st Dist.] 1980, no writ).

36. COH violated APTDF's right to equal protection when it irrationally and arbitrarily singled-out APTDF, as a class-of-one, for harassment under the color of Texas statutory law. The targeting and singling-out of a class-of-one is a violation of and is actionable under the Equal Protection Clause of the U.S. Constitution. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). APTDF was unconstitutionally singled-out as a public nuisance under Chapter 125. More specifically, COH acted irrationally, arbitrarily and capriciously and in bad faith in: (a) making the decision to single-out APTDF as a potential nuisance without treating similarly situated properties and property

owners in the same or similar fashion; (b) making a determination that APTDF's property constitutes a nuisance without making the same determination as to any similarly situated properties; (c) making a determination that APTDF's property constitutes a nuisance without making any comparative analysis of the incidences of crime occurring on similarly situated properties; (d) labeling APTDF as a common nuisance without giving the same label to any similarly situated properties; (e) demanding that APTDF, under threat of suit, sign a NAP without making the same demand and threat on similarly situated properties; (f) filing its lawsuit without filing the same or similar lawsuit against similarly situated properties; and (e) filing its notice of *lis pendens* without filing the same or similar notices of *lis pendens* against similarly situated properties.

37. COH's invidious targeting and singling-out of APTDF, in an irrational, arbitrary and capricious manner, was in bad faith and in retaliation for APTDF's refusal (a) to acknowledge and/or to agree with COH's arbitrary and capricious nuisance determination, (b) to acknowledge and/or to agree with COH's arbitrary and capricious labeling of APTDF as a common nuisance, and (c) to comply with COH's arbitrary and capricious demand to sign a NAP without question and under the threat of litigation.

38. As a result of COH's singling-out of APTDF for selective enforcement of Texas law, APTDF has suffered damages in excess of this Court's minimum jurisdictional requirements for which it hereby sues, and is entitled to the equitable relief as hereinafter described and to recover attorney's fees.

39. APTDF seeks declaratory and injunctive relief, as well as all damages afforded by 42 U.S.C. § 1983 and 42 U.S.C. 1988.

40. APTDF seeks the following 42 U.S.C. § 1983 declarations:

a. COH's decision to single-out APTDF without treating similarly situated properties in the same manner and fashion was irrational, arbitrary and capricious and in bad faith and in violation of APTDF's right to equal protection;

b. COH's determination that APTDF is a common nuisance without making the same determination to similarly situated properties in the same manner and fashion was arbitrary and capricious and in bad faith and in violation of APTDF's right to equal protection;

c. COH's labeling of APTDF as a common nuisance without attaching the same label to similarly situated properties in the same manner and fashion was arbitrary and capricious and in bad faith and in violation of APTDF's right to equal protection;

d. COH's filing of suit against APTDF without filing the same or similar suit against similarly situated properties in the same manner and fashion was arbitrary and capricious and in bad faith and in violation of APTDF's right to equal protection; and,

e. COH's filing of a notice of *lis pendens* on APTDF's property without filing similar notices of *lis pendens* against similarly situated properties in the same manner and fashion was arbitrary and capricious and in bad faith and in violation of APTDF's right to equal protection.

41. APTDF seeks to enjoin COH from committing future violations of 42 U.S.C. § 1983 as follows:

a. from irrationally, arbitrarily and capriciously singling-out APTDF under color of law without treating other similarly situated properties in the same or similar fashion;

b. from making irrational, arbitrary and capricious determinations under color of law that APTDF is a nuisance without making the same determinations on other similarly situated properties in the same or similar fashion;

c. from irrationally, arbitrarily and capriciously labeling APTDF as a common nuisance without attaching the same label to other similarly situated properties in the same or similar fashion;

d. in determining whether a common nuisance exists, COH must announce and implement an objective and definitive standard, formula or parameter for determining the existence of a nuisance and COH must apply that same objective and definitive standard, formula or parameter equally to all similarly situated properties;

e. from arbitrarily and capriciously filing of suit against APTDF under Chapter 125 without first applying an across-the-board objective and definitive standard, formula or parameter for determining the existence of a common nuisance on similarly situated properties;

f. from filing a suit against APTDF under Chapter 125 without filing the same or similar suit against all other similarly situated properties; and,

g. from filing notice of *lis pendens* against APTDF under Chapter 125 without filing similar notices *of lis pendens* against all other similarly situated properties.

42. APTDF seeks to recover all lawful damages, including the loss of interest savings, punitive damages and attorney's fees, as well as all other damages to which it may be justly entitled pursuant to 42 U.S.C. 1983 and 42 U.S.C. 1988.

Violations of Texas Constitution

Equal Protection

43. APTDF herein incorporates the foregoing Paragraphs 34-42 as if fully set forth herein and seeks the same equitable relief as requested therein as it applies to Article 1 § 3 (Equal Protection) of the Texas Constitution.

Unconstitutional Tax

44. A municipality cannot lawfully charge a fee or fine which is not specifically authorized by statute and ordinance. TEX. CONST. art. 11 § 5. The charging of an unauthorized fee by a municipality amounts to an unconstitutional tax. TEX. CONST. art. 1.

45. In an effort to reduce its work load and to skirt its duty to protect its residents, COH, by way of its policy, custom and routine, contrived a scheme to indirectly charge and collect unconstitutional taxes against targeted property owners. Under its scheme, COH indirectly extracts fines and fees, i.e., taxes, from targeted property owners by forcing and coercing them, under threat of Chapter 125 litigation, to hire security personnel and to make security improvements. In furtherance of this scheme, COH, without any statutory authority and without taking into account any

known and tested formula or any quantified security or financial data, unilaterally creates self-contrived NAPs and then forces targeted property owners to appear at its police headquarters to sign them. Each NAP requires the targeted property owner to pay for security guards. COH's scheme gives the targeted property owners only two choices—to either sign a NAP without question or face expensive and protracted litigation and unwarranted title issues and encumbrances. Either way, the owner pays—either for the cost of hiring security guards or for the costs associated with the defense of a Chapter 125 lawsuit. If a targeted property owner capitulates under the coercive pressure and signs a NAP, then COH in effect has extracted an unconstitutional tax from the targeted owner by forcing it to pay for security in lieu of the police protection which COH is otherwise required to provide. COH's scheme is a strong-armed ploy to indirectly levy and charge unconstitutional taxes against singled-out property owners and is not uniformly applied across-the-board. The desired result achieved by COH from its operation of this scheme is the unlawful shifting of its traditional duty of providing police protection onto the backs and into the pocketbooks of singled-out property owners, requiring them to incur and pay fees, i.e., taxes, not otherwise authorized by statute and ordinance.

46. APTDF seeks a declaration that COH's scheme, based upon its policy, custom and routine, of forcing property owners to hire and pay for security guards and to make security improvements, under duress of suit, amounts to the charging and collection of an unconstitutional tax.

47. APTDF seeks to permanently enjoin COH from forcing it or any other property owners, under threat of duress, to pay unconstitutional taxes, i.e., forcing the

hiring of and paying for security guards and/or the implementation of security improvements.

Declaratory Relief

48. APTDF petitions the Court, pursuant to the *Uniform Declaratory Judgments Act,* TEX.CIV.PRAC.&REM.CODE Chapter 37 (Vernon 2006), for declarations that:

a. COH filed its suit without first considering whether APTDF or its authorized representative promptly notified the City of the occurrence of criminal acts on the property;

b. COH filed its suit without first considering whether APTDF or its authorized representative have historically cooperated with the City's law enforcement investigation of criminal acts occurring at the property;

c. the apartment complex located at 10001 Club Creek Drive, Houston, Texas, and more commonly known as the "Deerfield Apartments" is not a place to which persons habitually go to commit acts listed in subsection (a) of Chapter 125;

d. APTDF has not knowingly tolerated Chapter 125 criminal acts at Deerfield;

e. APTDF has made reasonable attempts to abate Chapter 125 criminal acts at Deerfield;

f. COH acted irrationally, arbitrarily and capriciously and in bad faith in refusing to provide APTDF with requested information which

only COH had and which would have assisted APTDF in reducing the alleged incidences of crime on its property;

g. COH's determination and labeling of APTDF as a public nuisance on out-dated criminal data skewed by the influx of Katrina evacuees; during a time in which COH had reduced its police force; and based upon secret undercover operations conducted by COH was irrational, arbitrary and capricious and in bad faith;

h. COH acted in irrationally, arbitrarily and capriciously and bad faith by including in its nuisance analysis inflated crime statistics which were in fact created by COH's undercover operations;

i. the signing of the NAP would have placed APTDF in default of its renewal, modification and extension loan agreement;

j. the signing of the NAP would have placed APTDF in default of its loan agreement with its third-party lender;

k. the signing of the NAP would have placed APTDF in an untenable financial situation;

l. demanding that APTDF unconditionally sign the NAP under threat of lawsuit, and without conducting any cost analysis was irrational, arbitrary and capricious and in bad faith;

m. demanding that APTDF unconditionally sign the NAP under threat of lawsuit, without considering whether the NAP would have placed APTDF in default under its loan agreement with COH and its third-party lender was irrational, arbitrary and capricious and in bad faith;

n. requiring APTDF to hire security guards or to make security improvements is the levying and charging of an unconstitutional tax;

o. COH's actions in filing its lawsuit and the corresponding *lis pendens* is/was in conflict with and constituted breaches of its covenants set forth in the loan documentation by and between APTDF and its third-party lender;

p. COH's policy, custom, routine and protocol of determining the existence of a common nuisance without any definitive and objective formula, standard or parameter is irrational, arbitrary and capricious and in bad faith;

q. the determination that APTDF constituted a nuisance based solely upon the opinion of a police office untrained in premises security issues was irrational, arbitrary and capricious and in bad faith;

r. COH's policy, custom and routine of determining the existence of a common nuisance without undertaking any comparative criminal analysis of similarly situated properties is irrational, arbitrary and capricious and in bad faith;

s. Before making an internal determination that APTDF constitutes a nuisance, COH must first articulate a threshold number, as well as the type and frequency of crimes which rise to the level of a common nuisance and which must be applied across-the-board to similarly situated properties; and,

t. COH's determination that APTDF's property constitutes a common nuisance was irrational, arbitrary and capricious and in bad faith.

49. APTDF has been required to retain the undersigned counsel to represent it in this action. APTDF has agreed to pay the undersigned reasonable and necessary attorney's fees. An award of reasonable and necessary attorney's fees to APTDF would be equitable and just and therefore authorized by TEX.CIV.PRAC.&REM.CODE § 37.009, (Vernon 2006); *Leeper*, at 48-49.

Permanent Injunction

50. The threat by COH's protocol, policy, custom and routine in using F.A.S.T. to intimidate and coerce APTDF into signing a NAP based solely upon inexpert willy-nilly nuisance determinations without any definitive and objective threshold formula, standard or parameter or comparative criminal analysis of similarly situated properties will in all likelihood continue into the future and will result in potential irreparable damages to APTDF. APTDF will not have an adequate remedy at law or otherwise for the harm or damage which may be incurred as a result of COH's future conduct. Monetary damages in an action at law would be an inadequate remedy for APTDF because of the nature of the threatened action, and because of the difficulty of precise computation of the amount by which the APTDF will be damaged by COH's unlawful conduct. For this reason APTDF requests that, after trial, this Court permanently enjoin COH and specifically F.A.S.T. from (1) making inexpert willy-nilly determinations that APTDF's property constitutes a common nuisance without the application or use of a known, tested and proven objective and definitive scientific formula, standard or parameter; (2) from singling-out APTDF for determination and

labeling under Chapter 125 without treating other similarly situated properties in the same fashion; and (3) intimidating and coercing APTDF into signing a NAP.

COH is entitled to recover Attorney Fees under Chapter 125

51. APTDF retained the undersigned counsel to represent it in defense of COH's lawsuit. APTDF agreed to pay the undersigned reasonable and necessary attorney's fees. APTDF is entitled to recover an award of reasonable attorney's fees and costs as authorized by TEX.CIV.PRAC.&REM.CODE § 125.068 (Vernon 2006), and which were incurred in the defense of COH's lawsuit.

Notice of Intent to use Documents Produced by Plaintiff

52. Notice is hereby given, pursuant to TEX.R.CIV.P 193.7, that APTDF may use any or all documents produced by COH in any pretrial hearing and/or trial of this cause.

WHEREFORE, PREMISES CONSIDERED, APTDF requests that upon final hearing hereof, that the Court make and grant all declarations and injunctive relief as pled for herein by APTDF and that APTDF recover all damages, both actual and exemplary, including reasonable attorney's fees and costs and for such other and further relief to which APTDF may show itself justly entitled.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been forwarded to all counsel of record, by certified mail, return receipt requested, by hand delivery and/or by facsimile, on this the 26th day of February, 2008.

Robert G. Gibson, Jr.