

<p>COUNTY COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Room 135 Denver, CO 80202</p> <hr/> <p>Plaintiff: HOUSING AUTHORITY OF THE CITY AND COUNTY OF DENVER</p> <p>v.</p> <p>Defendant: TUBMAN HILLIARD GLOBAL ACADEMY, a Colorado nonprofit corporation, AND ALL OTHER OCCUPANTS</p> <hr/> <p>Attorney for Defendant: Reed Andrew Melnick #50218 Address: 150 W. 9th Ave. Unit 1101 Denver, CO 80204 Phone Number: 214-546-9013</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2018C70006</p>
<p style="text-align: center;">AMENDED COUNTERCLAIM WITH JURY DEMAND</p>	

COUNTERCLAIMS

Defendant, Tubman, for its counterclaim states as follows:

The Parties

Defendant

1. DHA is a Housing Authority formed pursuant to C.R.S. Section 29-4-201, et. Seq., with a principal place of business located at 777 Grant Street, Denver, CO 80203
2. DHA is not an infant, incompetent person, or in the military. DHA is a quasi-municipal corporation enabled by state statute and is a government entity.
3. Defendant serves the residents of Denver by developing, owning, and operating safe, decent and affordable housing in a manner that promotes thriving communities.

Plaintiff

4. Tubman Hilliard Global Academy (“Tubman”) is a Colorado nonprofit corporation with its principal office located at 2980 Curtis Street, Denver, Colorado 80202.

5. Tubman is a private school that serves underprivileged students from elementary to adults by teaching through Arts and Music.
6. Tubman is not an infant, incompetent person, officer or agency of the State of Colorado, or in the military service.

Jurisdiction and Venue

7. Defendant has sent Notice of Claim Pursuant to C.R.S. Section 24-10-109. **See Exhibit 1.**
8. This action arises under the Constitution and laws of the United States and the State of Colorado and is brought pursuant to 42 U.S.C. Section 1983, Title VI of the Civil Rights Act of 1964, Section 109 of the Housing and Community Development Act of 1974, Breach of Contract, and Breach of Covenant of Quiet Enjoyment.
9. This District Court has jurisdiction over the subject matter at issue because this is a civil action for damages and/or equitable relief. Colo. Const. Art. VI, § 9(1).
10. Further, the Agreement states that Venue lies in the State District Court. See the Agreement paragraph 29.
11. Jurisdiction supporting Tubman's claims for attorney fees and costs is conferred upon this Court pursuant to C.R.S. § 13-40-123.
12. Venue is proper in the District of Colorado pursuant to C.R.C.P. 98(a), (c). All of the events alleged herein occurred within the State of Colorado and the County of Denver, and all of the parties have a principal place of business within Denver County. Further, all of the events giving rise to this litigation happened within Denver County. *See* C.R.C.P. 98(a), (c).
13. County Court does not have jurisdiction on this claim because the damages exceed the jurisdictional limits.

14. This Counterclaim includes a federal question pursuant to 28 U.S.C. § 1331. Defendant reserves the right to remove this case to Federal Court.

General Allegations

15. On November 30, 2018, Plaintiff commenced this action alleging unlawful detainer of the real property located at 2980 Curtis Street, Denver, Colorado 80202 (the “Premises”).

The following sequence of events happened before this lawsuit.

16. On December 17, 2017, Tubman gave notice to the Plaintiff that the school was reorganizing.

17. Shortly after, DHA acknowledged that Tubman was reorganizing and allowed Tubman to continue its ongoing efforts to reopen in the Fall of 2018. **See Exhibit 2.**

18. On April 11, 2018, the Defendant was served a demand alleging violations of the Agreement. **See Plaintiff’s Exhibit D.**

19. On April 12, 2018, the Defendant replied to the demand **See Exhibit 3.**

20. Between April 12, 2018 and August 31, 2018, there were no communications with DHA that would give notice that Tubman was in violation of the Agreement. Defendant made all payments to DHA and, under reasonable belief, all payments were accepted by DHA.

21. On or around May 29th, 2018 to October 26th, 2018, a camera was erected pointing directly at Tubman’s southeast entrance of the building. This camera photographed the staff, students, and guests at the school 24 hours a day during this time period.

22. DHA hired a company to film Tubman’s elementary school children entering and exiting the building. **See Exhibit 4.**

23. On August 31, 2018, another Demand letter was sent to the Defendant essentially stating the same violations. **See Plaintiff’s Exhibit E.**

24. Defendant once again responded.

25. After the 30 day compliance demand letter sent to the Defendant on August 31, 2018, Defendant, once again, sent a money order for rent. Under reasonable belief, the Plaintiff accepted that check, and thus waived any breach of the Agreement. **See Exhibit 5.**
26. On October 23, 2018 the Plaintiff enforced the contractual right to enter the premise scheduled an inspection pursuant to clause 13 of the lease agreement. Defendant, under the belief that DHA's contractual authority was still in place, allowed DHA to inspect the building and program on a non-school day. **See Exhibit 6.**
27. During this meeting, there was no mention of violations of the lease, no notice that the lease was terminated prior to this contractually enforced "Inspection" pursuant to clause 13 of the agreement, and no notice for Tubman to know of the intentions of DHA . **See Plaintiff's Exhibit A paragraph 13.**
28. On November 9th, Tubman sent the rent money order to DHA and once again, DHA accepted that payment. **See Exhibit 7.**
29. On November 26th, Defendant received a notice to quit, notifying the Defendant that the Defendant had 3 days to move out. **See Plaintiff's Exhibit F.**
30. On November 30th, 2018, Plaintiff filed this lawsuit.
31. Defendant never sent a three day demand for payment as is required by C.R.S. 13-40-104(1)(d). Further, this demand cannot be waived according to the statute.
32. After the Notice to Quit was sent out, a December invoice was sent on November 20th, 2018. **See Exhibit 8.**
33. As of today, all rent is paid through December. **See Exhibit 9.**
34. As of today, there are 27 students currently enrolled at Tubman.

First Claim For Relief – Breach of Contract

35. Defendant incorporates the foregoing allegations by this reference.

36. On November 30th, 2012 Plaintiff and Defendant entered into a lease agreement (the “Agreement”), see Plaintiff’s Exhibit A, and incorporated by reference.

37. As part of the Agreement, Defendant agreed to the following terms:

- a. **TERM:** The term of this Lease (the “Lease Term”) shall begin at 12:01 a.m. on December 1, 2012, (the “Commencement Date”) and terminate at 12:00 a.m. on November 30, 2022, (the “Termination Date”), unless sooner terminated pursuant to the terms of this Lease.
- b. **QUIET ENJOYMENT:** Subject to the provisions of this Lease, Landlord covenants that Tenant, upon paying the rent and performing the covenants of this Lease on its part to be performed, shall and may peacefully and quietly have, hold and enjoy the Premises for the term of this Lease. In the event of a transfer of Landlord’s interest in the Premises, other than a transfer for security purposes only, the Landlord shall be relieved of any and all obligations and liabilities accruing after the date of such transfer.
- c. **NO DISCRIMINATION IN EMPLOYMENT:** This Lease is subject to the requirements of Title VI of the Civil Rights Act of 1964 (P.L. 88-352) as amended, and the implementing regulations at 24 CFR Part 1, prohibiting discrimination on the basis of race color, religion, national origin, sex, handicap or familial status in the sale, lease, rental, or in the use or occupancy of such land, or any improvements erected or to be erected thereon. Landlord and the United States are the beneficiaries of and entitled to enforce such covenant. These requirements are a covenant running with the land.

38. Plaintiff intentionally and materially breached its Agreement with Defendant by the following actions:

- d. The Plaintiff violated the Term provision of the Agreement by initiating an unlawful detainer action 6 years into a 10 year contract term without following the procedural requirements of notice. Further, the Plaintiff never represented any holdover status or termination of lease prior to the three day notice to quit.
- e. The Plaintiff violated the Quiet Enjoyment provision of the Agreement by setting up a video camera on an adjacent building. This video camera taped elementary students, parents, and staff 24 hours a day while the camera was setup.
- f. The Plaintiff violated the No Discrimination in Employment provision by consistently harassing minority and marginalized student school. This discrimination was in the form of videotaping minority students and employees, sending demand letters for compliance enforcing the Plaintiff's beliefs on how a school curriculum should be run, and by the commencement of an eviction action when the beliefs of an minority and marginalized student school were different than those of DHA.

39. Plaintiff fully performed its obligations under the Agreement.

40. The Agreement provides that the following remedies are available in the event of a breach of its terms:

- g. **ATTORNEY'S FEES:** In the event of any dispute hereunder, or any default in the performance of any term or condition of this Lease, the substantially prevailing party in any proceeding shall be entitled to recover all costs and expenses associated therewith, including reasonable attorney's fees.

41. The Defendant requests general damages, special damages, and punitive damages.

Second Claim For Relief- 42 U.S.C. Section 1983- Violation of First Amendment to United States Constitution

42. For purposes of this claim, Tubman hereby incorporates by reference all other paragraphs of this Complaint as though fully set forth herein.

43. Tubman engaged in constitutionally-protected free speech, including, but not necessarily limited to, educating minority and marginalized students in academia, art, and community service.

44. Tubman engaged in constitutionally-protected speech.

45. DHA, under its own impression of how education programs should run, sent multiple harassing letters alleging breach of contract for not running the facility according to DHA's educational beliefs.

46. Under reasonable belief, DHA did not consult with any educational professional or board before making the determination that Tubman's education programs were an unauthorized use of the school.

47. DHA is attempting to terminate Tubman's lease for failing to conform to DHA's ideology.

48. DHA has filed an unlawful detainer action against Tubman in an attempt to violate Tubman's freedom of expression.

49. The Supreme Court requires the government to provide substantial justification for the interference with the right of free speech where it attempts to regulate the content of the speech.

50. DHA is attempting to regulate Tubman's freedom of expression by bringing an improper claim of eviction for failure to pay. Further, DHA is attempting to circumvent the court

process by concluding that there was a termination of the lease rather than bringing the action immediately for eviction for breach of lease. DHA took advantage of the FED time constraints and brought a claim for eviction without notifying Tubman of DHA's position that the Agreement was terminated.

51. DHA failed to properly justify why Tubman's education program did not meet the requirements of the Use clause in the Agreement.
52. DHA engaged in an escalating campaign of threatening and harassing behaviors, which was the moving force behind and proximate cause of DHA's violation of Tubman's constitutionally-protected right to free speech.
53. Tubman has been and continues to be damaged by DHA's unreasonable violation of his right to free speech.
54. Each of DHA's acts or omissions, including, but not limited to, the unconstitutional policies, procedures, customs and/or practices described herein, were the legal and proximate cause of Tubman's damages.
55. At all relevant times, DHA was acting under color of state law in both their actions and inactions.
56. DHA's conduct legally and proximately caused significant injuries, damages and losses to Tubman.

Third Claim for Relief – Violation of Title VI of the Civil Rights Act of 1964 and Section 109 of the Housing and Community Development Act of 1974

57. Defendant incorporates the foregoing allegations by this reference.

58. Title VI of the Civil Rights Act of 1964 and Section 109 of the Housing and Community Development Act of 1974 prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.
59. While discriminatory intent need not be the only motive, a violation occurs when the evidence shows that the entity adopted a policy at issue “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.” *Pers. Adm’r of Mass v. Feeney*, 442 U.S. 256, 279 (1979).
60. Tubman is a school serving underprivileged African American and Hispanic students in the community through education.
61. DHA is a recipient of federal funds from the Housing and Urban Development Program.
62. DHA is denying Tubman the right to use an agreed upon facility because of the protected class that Tubman serves.
63. DHA is trying to prevent access of a protected class to an educational facility by means of bringing an eviction action against Tubman.
64. DHA has treated Tubman differently because of the protected class that Tubman serves. For direct evidence, DHA has videotaped, specifically, African American and Hispanic students solely based on their race.
65. Under reasonable belief, DHA has not videotaped any other schools except Tubman.
66. DHA received public funds and treated Tubman differently than others and knowingly caused harm because of the protected class that Tubman serves in the community.
67. Each of DHA’s acts or omissions, including, but not limited to, the unconstitutional policies, procedures, customs and/or practices described herein, were the legal and proximate cause of Tubman’s damages.

68. At all relevant times, DHA was acting under color of state law in both their actions and inactions.

69. DHA's conduct legally and proximately caused significant injuries, damages and losses to Tubman.

Fourth Claim For Relief – Breach of Covenant of Quiet Enjoyment

70. Defendant incorporates the foregoing allegations by this reference.

71. Any disturbance of a lessee's possession by his lessor which renders the premises unfit for occupancy for the purposes for which they were leased, or which deprives the lessee of the beneficial enjoyment of the premises, causing him to abandon them." *Id.* at 220

72. On or around May 29th, 2018 to October 26th, 2018, a camera was erected pointing directly at Tubman's southeast entrance of the building. This camera photographed the staff, students and guests at the school 24 hours a day during this time period.

73. Under reasonable belief, DHA hired a company to film Tubman's elementary school children entering and exiting the building.

74. Tubman entered the Agreement with the purpose of running a school for underprivileged children.

75. Tubman expected to run this school without being filmed.

76. The actions of DHA created a hostile and policing climate.

77. Tubman is entitled to damages in the form of an abatement of rent measured by the decrease in the fair rental value of the premises caused by DHA's breach.

JURY DEMAND

78. Tubman requests a jury trial on the issues.

79. Defendant reserves the right to assert counterclaims within any time allowed for the amendment of pleadings.

WHEREFORE, Plaintiff requests that this court enter judgment in Plaintiff's favor and against Defendant, and award to Plaintiff:

- A. Such actual damages as this court may deem just and proper;
- B. Costs of this action;
- C. Reasonable attorney fees;
- D. Expert witness fees;
- E. Pre-judgment and post-judgment interest on any award of damages to the extent permitted by law; and
- F. Such other and further relief as this court may deem appropriate.

WHEREFORE, Defendant Tubman request for judgment upon all claims, and request for all damages claimed, and such other relief as the Court deems just and proper.

DATED: December 7, 2018

BY: /s/ Reed Andrew Melnick
Reed Andrew Melnick, #50218
Attorney for the Defendant
Melnick Law LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of December 2018, a true and correct copy of the foregoing AMENDED COUNTERCLAIM WITH JURY DEMAND, was filed and served via the Integrated Colorado Courts E-filing System to all counsel of record.

/s/ Reed Andrew Melnick
Attorney for the Defendant