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Attorneys for Defendants

ELIZABETH STRANCE  
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Circuit Court  
3/1  
Oahu

2005 SEP 12 AM 11:49

FILED

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

RODELLE SMITH, et al.,

Plaintiffs,

vs.

HOUSING AND COMMUNITY  
DEVELOPMENT CORPORATION OF  
HAWAII, a duly organized and recognized  
agency of the State of Hawai'i;

Defendants.

) CIVIL NO. 04-1-0069K  
) (Contract)  
) Class Action

) **DEFENDANT'S MEMORANDUM IN**  
) **OPPOSITON TO MOTION FOR CLASS**  
) **CERTIFICATION, FILED ON AUGUST**  
) **10, 2005; DECLARATION OF JOHN C.**  
) **WONG; EXHIBITS "A", "B", "C", "D",**  
) **"E", "F"; CERTIFICATE OF SERVICE**

) **HEARING: September 21, 2005**  
) **TIME: 8:00 a.m.**  
) **JUDGE: Hon. Elizabeth Strance**

**DEFENDANT'S MEMORANDUM  
IN OPPOSITION TO MOTION FOR CLASS CERTIFICATION**

**I. INTRODUCTION**

Defendant HCDCH submits this Memorandum in Opposition to the Plaintiff's Motion for Class Certification, filed on August 10, 2005, pursuant to Rules 23 and 7 of the Hawaii Rules of Civil Procedure ("H.R.Civ.P.") and Rule 7 of the Rules of the Circuit Courts, State of Hawaii.

Concurrent with the filing of this Memorandum, HCDCH is filing a "Motion for Summary Judgment" based on the fact that Plaintiffs claims for relief in the Amended Complaint are totally without merit. (A true and correct copy of the "Motion for Summary Judgment" is attached to the "Declaration of John C. Wong" ("Wong"), hereto, as **Exhibit "A"**).

In summary, HCDCH asserts in the Motion that Plaintiffs First Claim for Relief, that is, violation of the Annual Contributions Contract ("ACC") executed between the U.S. Department of Housing and Urban Development ("HUD") and HCDCH, is barred by Section 21 of the ACC itself. Plaintiffs Second Claim for Relief, that is, breach of the Rental Agreement, is likewise without merit because residents were provided utility allowances in accordance with the express provisions of the Rental Agreement.

Thus, HCDCH's opposition to the Motion for Class Certification is based on the fact that Plaintiffs entire lawsuit should be dismissed, making class certification a moot issue.

**II. STATEMENT OF FACTS AND BACKGROUND**

Plaintiffs filed their Complaint on May 17, 2004 and an Amended Complaint on August 10, 2004. Defendant answered on November 3, 2004. In this lawsuit, Plaintiffs are essentially seeking monetary damages based on Defendant's alleged failure to provide federal public housing residents with an appropriate utility allowance as purportedly required by federal law and HUD regulations in the ACC and the Rental Agreement.

Plaintiffs filed a related lawsuit on May 13, 2004 in federal District Court, *Smith, et al. v. Aveiro, HCDCH*, Civ. No. 04-00309DAE/KSC, seeking declaratory and injunctive relief based on violation of the same federal laws and regulations, including 42 U.S.C. §1983, et seq.<sup>1</sup> (Stephanie Aveiro is the executive director of HCDCH). In that case, Plaintiffs filed a Motion for Partial Summary Judgment on March 16, 2005; Defendants filed a Counter-Motion for Summary Judgment on June 21, 2005. On July 12, 2005, Judge Ezra ruled that Defendant's corrective actions since the filing of the lawsuit had rendered the case moot and granted Defendant's Motion for Summary Judgment. *Wong, Exhibit "B" and "C"*.

The ACC establishes the relationship between HUD and HCDCH as the "Housing Authority" ("HA") and also imposes the obligations upon HCDCH and its residents. Plaintiffs First Claim for Relief is based on HCDCH's alleged violation of the terms of the ACC. However, Section 21 of the "Terms and Conditions" of the ACC states:

**"Section 21- Rights of Third Parties.**

Except as to bondholders, as stated in Part B (Attachment VI) of this ACC, nothing in this ACC shall be construed as creating any right of any third party to enforce any provision of the ACC or to assert any claim against HUD or the HA." (emphasis added.)

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<sup>1</sup> Plaintiffs counsel also filed a third lawsuit on August 18, 2004 in U.S. District Court, *Amone, et al., v. Aveiro, HCDCH*, Civ. No. 04-00508ACK/BMK, based on a separate HUD regulation relating to supplemental utility allowances for disabled residents.

*Wong, Exhibit "D"* hereto.

As to Plaintiffs Second Claim for Relief, paragraph 5 of the Rental Agreement

"For Management-furnished utilities, Management shall pay for and furnish to Tenant water, gas and electricity in accordance with the applicable schedule of utility allowances. For Tenant-purchased utilities, Management shall provide an allowance in dollars for water, gas and electricity in accordance with the applicable schedules. Said schedules shall be posted in the Project Office." (emphasis added)

*Wong, Exhibit "E"*.

Under the allegations of the Amended Complaint, it is undisputed that Plaintiffs, and any putative class member, were provided utility allowances in accordance with the posted schedules.

### **III. STANDARD OF REVIEW**

In order for the Court to grant class certification, it must be convinced that an actual controversy presently exists, not only at the time of the filing of the complaint but at all stages of the litigation. *Arizonans for Official English v. Arizona*, 520 U. S. 43, 67, (1997), citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Where a controversy no longer exists as to the relief sought, the case is considered moot. *Biodiversity Legal Foundation v. Badgley*, 284 F.3d 1046, 1054 (9<sup>th</sup> Cir. 2002); *Santillian v. Ashcroft*, --F. 2d--, 2004 WL 2297990, at 2 (N.D.Cal. decided October 12, 2004).

Plaintiffs Motion for Class Certification must be denied because they, as well as the putative members of the class, are not entitled to the relief they seek.

### **IV. ARGUMENTS**

#### **A. AN ACTUAL AND VIABLE CASE MUST EXIST AS A PREREQUISITE TO GRANTING CLASS CERTIFICATION**

It is a fundamental principle that in order to certify a class action, there must exist an actual, live controversy by which Plaintiffs are entitled to the relief they seek. In *Life of the Land v. Land Use Commission of Hawaii*, 63 Haw. 166, 180 (1981), the Hawaii Supreme Court stated that “party who seeks to utilize a class action must establish his right to do so.” *Also, Sheehan v. Grove Farm, Inc.*, --P.3d --, 2005 WL 2082743, at p. 10 (Haw.App.2005).

Stated another way, in order to justify the ability to assert claims on behalf of a class, the named Plaintiffs must clearly demonstrate that their lawsuit is a viable one, and that they have personally sustained some direct injury as a result of the challenged conduct and are entitled to the relief they seek. *Armstrong v. Davis*, 275 F.3d 849, 860 (9<sup>th</sup> Cir. 2001); *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974). In *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 160, 180-181 (2000), the U.S. Supreme Court stated that one aspect of justiciability, that is, whether an actual case or controversy existed, was whether “it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”

Here, HCDCH submits that its Motion for Summary Judgment will clearly establish that Plaintiffs’ claims for relief are totally negated and that the entire case should be dismissed.

**B. NEITHER PLAINTIFFS OR ANY PUTATIVE CLASS MEMBER IS ENTITLED TO THE RELIEF THEY SEE, AND THEREFORE THIS ENTIRE LAWSUIT SHOULD BE DISMISSED**

Simply put, HCDCH’s opposition to class certification is based on the fact that Plaintiffs are not entitled to the relief they seek in the Amended Complaint. As HCDCH’s Motion for Summary Judgment will clearly show, neither Plaintiffs, nor any

putative class member, are entitled to the relief plead in the Amended Complaint.

Because their entire lawsuit should be dismissed, class certification is in fact a “moot” issue and definitely should not be granted. Without totally replicating the arguments in the Motion for Summary Judgment here, a summary of HCDCH’s arguments is provided for the purposes of arguing against class certification.

First, as to Plaintiffs First Claim for Relief based on breach of the ACC, the ACC creates the unique relationship between HUD and its HAs. Section 5 of the ACC, entitled “Covenant to Develop and Operate”, states in applicable part that the HA (HCDCH in this case) shall “operate” all of its projects “in compliance with all the provisions of this ACC, and all applicable statutes, executive orders, and regulations issued by HUD including but not limited to those regulations promulgated by HUD at Title 24 of the Code of Federal Regulations...”. *Wong*, **Exhibit “F”**.

Because the ACC then is the governing document which establishes the rights and obligations of all the parties, including the residents, any claim or cause of action based on a breach of those rights and obligations must be grounded under the authority of the ACC. As stated above, the very provisions of section 21 specifically negate “creating **any right of any third party** to enforce any provision of this ACC or to assert **any claim against HUD or the HA**” (emphasis added). Clearly, this provision is compelling and absolutely affirms that there is no legal basis for a claim based on a breach of the ACC.

In the context of this Memorandum, because Section 21 of the ACC negates the Plaintiffs First Claim for Relief, to Plaintiffs as well as to any putative class member, there is no justification for class certification.

Next, as to Plaintiffs Second Claim for Relief based on breach of the Rental Agreement, it is undisputed based on the express language of the Rental Agreement itself, that Plaintiffs, and any putative class member, were provided utility allowances in accordance with the posted schedules, notwithstanding the argument that the schedules needed to be updated<sup>2</sup>. As will be argued in the Motion for Summary Judgment, under well established principles of contract law, HCDCH did not breach its obligations under the very wording of the Rental Agreement itself. Accordingly, Plaintiffs claim for relief on this count must also fail as to them and any putative class member.

#### V. CONCLUSION

Whether Plaintiffs can meet the requirements of Rule 23, e.g. numerosity, commonality, typicality and adequacy, is, quite frankly, irrelevant to HCDCH's opposition to class certification. The fundamental principle of law is that in order for a class to be certified, there must be extant a viable case or an actual controversy by which the Plaintiffs are entitled to the relief they seek. Simply put, if Plaintiffs are not entitled to the relief they seek, there is no case. And, if there is no case, it is meaningless to certify a class.

Even if the Court were inclined to grant the Motion for Class Certification, it would be a tremendous waste of time and resources to do so now while HCDCH has a pending Motion for Summary Judgment. Whether there is jurisdiction for this case to even continue should be the primary consideration, and considering class certification should be relegated to a subordinate objective when the entire case could be dismissed.

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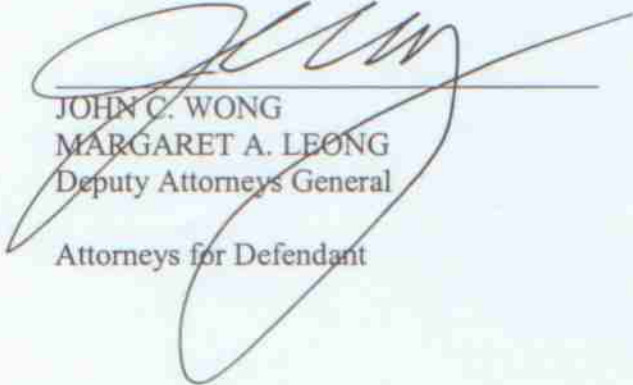
<sup>2</sup> As HCDCH notes in its Memorandum in Support of the Motion for Summary Judgment, query whether Plaintiffs have even alleged sufficient "facts" in the Amended Complaint that they even executed a Rental Agreement with HCDCH. The Amended Complaint is devoid of any allegations or foundational statements as to this critical "fact" which, at minimum, must be pled in a "contract" action if one is going to allege breach of that contract.

Therefore, HCDCH requests that if the Court is going to rule other than denying the Motion, that it then defer ruling on the Motion for Class Certification until the outcome of HCDCH's Motion for Summary Judgment is resolved.

DATED: Honolulu, Hawai'i, September 12, 2005.

Respectfully Submitted

MARK J. BENNETT  
ATTORNEY GENERAL



JOHN C. WONG  
MARGARET A. LEONG  
Deputy Attorneys General

Attorneys for Defendant



IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

RODELLE SMITH, et al.,

Plaintiffs,

vs.

HOUSING AND COMMUNITY  
DEVELOPMENT CORPORATION OF  
HAWAII, a duly organized and recognized  
agency of the State of Hawai'i;

Defendants.

) CIVIL NO. 04-1-0069K  
) (Contract)  
) Class Action

) **DECLARATION OF JOHN C. WONG;**  
) **EXHIBITS "A", "B", "C", "D", "E", "F"**

DECLARATION OF JOHN C. WONG

I, JOHN C. WONG, under penalty of perjury, declare the following to be true:

1. I am a Deputy Attorney General and one of the attorneys for Defendant Housing and Community Development Corporation of Hawaii ("HCDCH").
2. I am familiar with and have personal knowledge of the facts and circumstances of the matters contained in this Declaration.
3. Attached hereto as **Exhibit "A"** is a true and correct copy of HCDCH's "Motion for Summary Judgment" which is being filed concurrently with this Memorandum in Opposition.

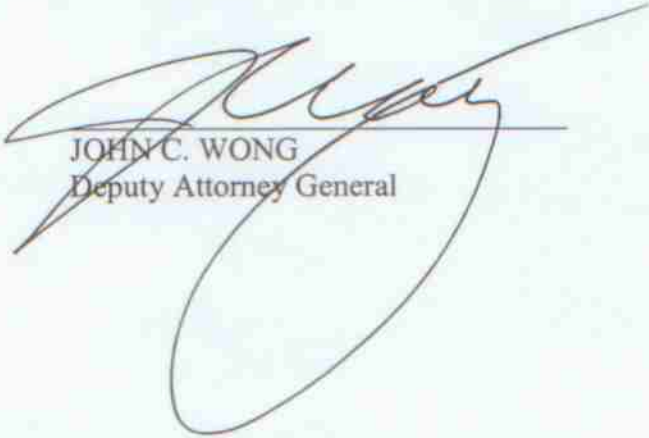
4. Attached hereto as **Exhibit "B"** is a true and correct copy of the decision and Order issued by the Honorable David A. Ezra, on July 13, 2005 in Smith, et al. v. Aveiro, HCDCH, Civ. No. 04-00309, and attached hereto as **Exhibit "C"** is a true and correct copy of the Judgment.

5. Attached hereto as **Exhibit "D"** is a true and correct copy of Section 21 of the Annual Contributions Contract.

6. Attached hereto as **Exhibit "E"** is a true and correct copy of Paragraph 5 of the Rental Agreement.

7. Attached hereto as **Exhibit "F"** is a true and correct copy of Section 5 of the Annual Contributions Contract.

I declare under penalty of perjury that the foregoing statements are true and correct.



JOHN C. WONG  
Deputy Attorney General

FILED

MARK J. BENNETT  
Attorney General  
State of Hawaii

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5737

FILED  
CLERK OF DISTRICT COURTS  
STATE OF HAWAII

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Attorneys for Defendants

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

RODELLE SMITH, SHEILA TOBIAS,  
BARBARA BARAWIS, and LEWIS  
GLASER individually, and on behalf of all  
persons similarly situated,

Plaintiffs,

vs.

HOUSING AND COMMUNITY  
DEVELOPMENT CORPORATION OF  
HAWAII, a duly organized and recognized  
agency of the State of Hawai'i;

Defendants.

) CIVIL NO. 04-1-0069K  
) (Contract)  
) Class Action  
)  
)

) DEFENDANT'S MOTION FOR  
) SUMMARY JUDGMENT;  
) MEMORANDUM IN SUPPORT OF  
) MOTION FOR SUMMARY  
) JUDGMENT; AFFIDAVIT OF JOHN C.  
) WONG; EXHIBITS "A", "B", "C", "D";  
) NOTICE OF HEARING MOTION;  
) CERTIFICATE OF SERVICE

) Hearing: October 3, 2006 Y  
) Time: 9:30 a.m.  
) Judge: Hon. Elizabeth Strance

EXHIBIT "A"<sup>15</sup>

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**


Defendant HCDCH submits this Motion for Summary Judgment pursuant to Rule 56(b), *Hawaii Rules of Civil Procedure* ("H.R.Civ.P."). There are no material facts in dispute and Defendant is entitled to summary judgment as a matter of law because Plaintiffs claims are wholly without merit.

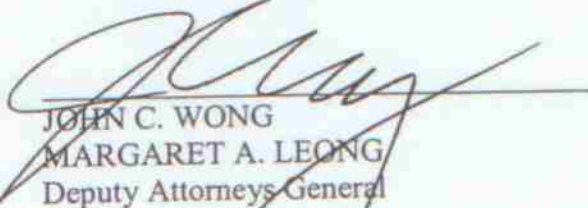
Plaintiffs claim based on violation of the Annual Contributions Contract ("ACC") is barred by the ACC itself. Plaintiffs claim based on the purported breach of the Rental Agreement is likewise without merit because residents were provided a utility allowance in accordance with the express provisions of the Rental Agreement itself.

This Motion is supported by the pleadings and record on file, the Memorandum in Support of the Motion, and the Affidavit of John C. Wong and accompanying exhibits.

DATED: HONOLULU, HAWAII, September 12, 2005.

MARK J. BENNETT  
Attorney General

  
BRYAN C. YEE  
Deputy Attorney General

  
JOHN C. WONG  
MARGARET A. LEONG  
Deputy Attorneys General

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

JUL 13 2005

FOR THE DISTRICT OF HAWAII

at 2 o'clock and 57 min. PM  
SUE BEITIA, CLERK 

CV NO 04-00309 DAE KSC

RODELLE SMITH, SHEILA )  
TOBIAS, BARBARA BARAWIS, )  
and LEWIS GLASSER individually, )  
and on behalf of all persons similarly )  
situated, )

Plaintiffs, )

vs. )

STEPHANIE AVEIRO, in her )  
official capacity as the Executive )  
Director of the Housing and )  
Community Development )  
Corporation of Hawaii; HOUSING )  
AND COMMUNITY )  
DEVELOPMENT CORPORATION )  
OF HAWAII, a duly organized and )  
recognized agency of the State of )  
Hawaii, )

Defendants. )

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY  
JUDGMENT; GRANTING DEFENDANTS' COUNTER-MOTION FOR  
SUMMARY JUDGMENT AND DISMISSING THE CASE WITHOUT  
PREJUDICE

The court heard Plaintiffs' Motion and Defendants' Counter-Motion  
on July 12, 2005. Gavin Thornton, Esq., and Shelby Anne Floyd, Esq., appeared  
at the hearing on behalf of Plaintiffs; John C. Wong, Esq., and Margaret A. Leong,

EXHIBIT "B"

Esq., appeared at the hearing on behalf of Defendants. After reviewing the motions and the supporting and opposing memoranda, the Court DENIES Plaintiffs' Motion for Partial Summary Judgment; GRANTS Defendants' Counter-Motion for Summary Judgment; and DISMISSES the case WITHOUT PREJUDICE.

### BACKGROUND

#### A. Factual background

On May 13, 2004, Plaintiffs Rodelle Smith, Sheila Tobias, Barbara Barawis, Lewis Glaser, individually and on behalf of all persons similarly situated (collectively "Plaintiffs") filed a complaint against Defendants Stephanie Aveiro and the Housing and Community Development Corporation of Hawaii (collectively "Defendants"). The complaint alleged utility allowance violations under the United States Housing Act ("Housing Act") and sought declaratory and injunctive relief.

Defendant Housing and Community Development Corporation of Hawaii ("HCDCH") is a public housing authority and Defendant Stephanie Aveiro is HCDCH's Executive Director. Plaintiffs are tenants of HCDCH.

The Housing Act requires shelter costs (including utilities) for tenants of federally subsidized public housing projects to be less than thirty percent of the

tenant's income. If tenants pay for utilities directly, public housing authorities must provide utility allowances.

Prior to May 17, 1998, Defendants established a utility allowance schedule applicable to all relevant HCDCH housing projects. This allowance schedule required tenants who exceeded their consumption allowance to pay for the excess consumption out of pocket. The allowance schedule measured electric and gas consumption. Defendants failed to review and revise these allowances annually, as required by 24 C.F.R. § 965.507(a).

Sometime prior to May 17, 1998, Defendants converted from an electric and gas consumption allowance to a monetary allowance. Defendants credited this monetary allowance to Plaintiffs' monthly rent. Defendants failed to adjust monetary allowances between May 17, 1998 and September 30, 2004, as required by 24 C.F.R. § 965.507(b).

After Plaintiffs filed their complaint, Defendants retained a consultant to update the allowance schedule and initiate a system to prevent future incidents of noncompliance. On October 1, 2004, HCDCH implemented amended utility allowances. HCDCH now requires annual review of utility rates and allowances. Finally, HCDCH promulgated amendments incorporating the federal statute into Hawaii's statutory scheme, which were recently approved by Governor Lingle.

B. Procedural background

On March 16, 2005, Plaintiffs filed a Motion for Partial Summary Judgment. On June 21, 2005, Defendants filed a Counter-Motion for Summary Judgment and an Opposition to Plaintiffs' Motion for Summary Judgment. On June 30, 2005, Plaintiffs filed a Reply in support of their Motion for Summary Judgment and an Opposition to Defendants' Counter-Motion for Summary Judgment. On July 7, 2005, Defendants filed a Reply in support of their Counter-Motion for Summary Judgment.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be entered when:

[T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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.

Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating for the court that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)). However, the moving party need not produce evidence negating the



existence of an element for which the opposing party will bear the burden of proof at trial. Id. at 323.

Once the movant has met its burden, the opposing party has the affirmative burden of coming forward with specific facts evidencing a need for trial. Fed. R. Civ. P. 56(e). The opposing party cannot stand on its pleadings, nor simply assert that it will be able to discredit the movant's evidence at trial. See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9<sup>th</sup> Cir. 1987); Fed. R. Civ. P. 56(e). There is no genuine issue of fact "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted).

A material fact is one that may affect the decision, so that the finding of that fact is relevant and necessary to the proceedings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue is shown to exist if sufficient evidence is presented such that a reasonable fact finder could decide the question in favor of the nonmoving party. Id. The evidence submitted by the nonmovant, in opposition to a motion for summary judgment, "is to be believed, and all justifiable inferences are to be drawn in [its] favor." Id. at 255. In ruling on a motion for summary judgment, the court must bear in mind the actual

quantum and quality of proof necessary to support liability under the applicable law. Id. at 254. The court must assess the adequacy of the nonmovant's response and must determine whether the showing the nonmovant asserts it will make at trial would be sufficient to carry its burden of proof. See Celotex, 477 U.S. at 322.

At the summary judgment stage, this court may not make credibility determinations or weigh conflicting evidence. Musick v. Burke, 913 F.2d 1390, 1394 (9<sup>th</sup> Cir. 1990). The standard for determining a motion for summary judgment is the same standard used to determine a motion for directed verdict: whether the evidence presents a sufficient disagreement to require submission to a jury, or it is so one-sided that one party must prevail as a matter of law. Id. (internal citation omitted).

### DISCUSSION

Here, there is no genuine issue of material fact. Plaintiffs and Defendants agree federal law requires: (1) an annual review of utility allowances and (2) an adjustment when there is a change in utility costs of more than ten percent from the most recent adjustment. Furthermore, Plaintiffs and Defendants agree Defendants failed to comply with these two requirements of federal law in the past. Plaintiffs request declaratory and injunctive relief be granted under 42 U.S.C. § 1983 and under the Housing Act. The Court finds, however, that

Plaintiffs' claims are moot as Defendants have already promulgated the requested changes and are in the process of implementing them.

"A claim is moot if it has lost its character as a present, live controversy." American Rivers v. National Marine Fisheries Serv., 126 F.3d 1118, 1123 (9<sup>th</sup> Cir. 1997). "If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed." Id. "In the context of injunctive relief, the plaintiff must demonstrate a real or immediate threat of an irreparable injury." Clark v. City of Lakewood, 253 F.3d 996, 1007 (9<sup>th</sup> Cir. 2001).

Here, subsequent to this suit's filing Defendants retained a consultant to update the allowance schedule and initiate a system to prevent future incidents of noncompliance. Defendants reviewed utility allowances and on October 1, 2004 adjusted them in accordance with 24 C.F.R. §956.507, implementing an adjusted utility allowance that was retroactive to September 2004. This adjustment addressed Plaintiffs' immediate concerns regarding violations. HCDCH now also requires annual review of utility rates and allowances, which is currently scheduled to take place in January of 2006.

Plaintiffs also expressed concern that the most recent adjustment was only a temporary solution and that statutory violations would likely resume in the

future. However, HCDCH drafted amendments to its administrative rules addressing these concerns. The new state administrative rules are substantially identical to the federal standard, thereby eliminating the likelihood of future violations. The Court finds, that given the newly-devised administrative scheme, future violations are unlikely to occur and any concern regarding potential future violations would be purely speculative at this point. These new administrative rules have just been signed by Governor Lingle and will take effect 10 days from the date of her signature.

The Court finds that the relief sought by Plaintiffs has been effectuated by Defendants, therefore rendering moot Plaintiffs' requested injunctive or declaratory relief. Therefore, the court DENIES Plaintiffs' Motion for Partial Summary Judgment; GRANTS Defendants' Counter-Motion for Summary Judgment; and DISMISSES the case WITHOUT PREJUDICE. Should Defendants fail in any way to adequately implement the recently promulgated regulatory scheme and comply with the applicable federal regulations, the Court will permit Plaintiffs to refile their Complaint and proceed with their case at that point.

CONCLUSION

For the reasons stated above, the Court DENIES Plaintiffs' Motion for Partial Summary Judgment; GRANTS Defendants' Counter-Motion for Summary Judgment; and DISMISSES the case WITHOUT PREJUDICE.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUL 13 2005.



DAVID ALAN EZRA  
CHIEF UNITED STATES DISTRICT JUDGE

Rodelle Smith, et al. vs. Stephanie Aveiro, et al., CV NO. 04-00309 DAE-KSC;  
ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY  
JUDGMENT; GRANTING DEFENDANTS' COUNTER-MOTION FOR  
SUMMARY JUDGMENT; AND DISMISSING THE CASE WITHOUT  
PREJUDICE.

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII  
OFFICE OF THE CLERK  
300 ALA MOANA BLVD., RM C-338  
HONOLULU, HAWAII 96850

OFFICE OF  
ATTORNEY GENERAL

SUE BEITIA  
CLERK

2005 JUL 15 A 11: 20

TEL (808) 541-1300  
FAX (808) 541-1303

July 14, 2005

TO ALL COUNSEL

Re: CIVIL 04-00309DAE-KSC  
Rodelle Smith, et al. vs. Stephanie Aveiro, etc., et al.

Dear Sir or Madam:

Please be advised that pursuant to Rule 77, FRCP, notice is hereby given that judgment was entered on July 14, 2005.

Sincerely Yours,

SUE BEITIA, CLERK

*Anna F. Chang*  
by: Anna F. Chang  
Deputy Clerk

encl.  
cc: all counsel

EXHIBIT "C"

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

RODELLE SMITH, SHEILA TOBIAS,  
BARBARA BARAWIS, and LEWIS  
GLASSER, individually, and on behalf of  
all persons similarly situated,

JUDGMENT IN A CIVIL CASE

Case: CIVIL 04-00309DAE-KSC

Plaintiffs,

V.

FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

July 14, 2005

At 4 o'clock and 00 min p.m.  
SUE BEITIA, CLERK

STEPHANIE AVEIRO, in her official  
capacity as the Executive Director of the  
Housing and Community Development  
Corporation of Hawaii; HOUSING AND  
COMMUNITY DEVELOPMENT  
CORPORATION OF HAWAII, a duly  
organized and recognized agency of the  
State of Hawaii,

Defendants.

- Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court.** This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiffs' Motion for Partial Summary Judgment is Denied, Defendants' Counter-Motion for Summary Judgment is Granted, and the Case is Dismissed without Prejudice. Judgment is thus entered and is entered as pursuant to the "*Order Denying Plaintiffs' Motion for Partial Summary Judgment; Granting Defendants' Counter-Motion for Summary Judgment and Dismissing the Case without Prejudice*" filed on July 13, 2005.

cc: all counsel

July 14, 2005

Date

SUE BEITIA

Clerk



(By) Deputy Clerk

Case: 1:04-cv-00309

John C. Wong, Esq.  
Office of the Attorney General-State of Hawaii  
Kekuanao'a Building  
465 S King St Room B-2  
Honolulu, HI 96813

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## Terms and Conditions

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Constituting Part A of a  
Consolidated Annual Contributions Contract  
Between Housing Authority and  
the United States of America

Forms HUD-53010 and  
HUD-53011 are obsolete

Form HUD-53012A  
(7/95)

EXHIBIT "D"

#### **Section 5 - Covenant to Develop and Operate.**

The HA shall develop and operate all projects covered by this ACC in compliance with all the provisions of this ACC and all applicable statutes, executive orders, and regulations issued by HUD, as they shall be amended from time to time, including but not limited to those regulations promulgated by HUD at Title 24 of the Code of Federal Regulations, which are hereby incorporated into this ACC by reference as if fully set forth herein, and as such regulations shall be amended from time to time. The HA shall also ensure compliance with such requirements by any contractor or subcontractor engaged in the development or operation of a project covered under this ACC.

#### **Section 6 - Cooperation Agreement(s).**

During the development and operation of the project(s), the HA shall perform and comply with all applicable provisions of the Cooperation Agreement(s), in the form prescribed by HUD, including the making of payments in lieu of taxes provided therein (or such lesser amount as may be prescribed by State law or agreed to by the local governing body), shall at all times preserve and enforce its rights thereunder, and shall not terminate or amend the Cooperation Agreement(s) without the written approval of HUD.

#### **Section 7 - Covenant Against Disposition and Encumbrances.**

The HA shall not demolish or dispose of any project, or portion thereof, other than in accordance with the terms of this ACC and applicable HUD requirements. With the exception of entering into dwelling leases with eligible families for dwelling units in the projects covered by this ACC, and normal uses associated with the operation of the project(s), the HA shall not in any way encumber any such project, or portion thereof, without the prior approval of HUD. In addition, the HA shall not pledge as collateral for a loan the assets of any project covered under this ACC.

#### **Section 8 - Declaration of Trust.**

Promptly upon the acquisition of the site of any project, the HA shall execute and deliver an instrument (which may be in the form of a declaration of trust, a trust indenture, or such other document as may be approved by HUD), confirming and further evidencing, among other things, the covenant of the HA not to convey or encumber the project except as expressly authorized in this ACC. Such instrument and all amendments shall be duly recorded or filed for record wherever necessary to give public notice of their contents and to protect the rights and interests of HUD and of any bondholders. The HA shall furnish HUD with appropriate evidence of such recording or filing. From time to time, as additional real property is acquired by the HA in connection with the projects, the HA shall promptly amend such instrument to incorporate all such real property and shall record the instrument, as amended.

# RENTAL AGREEMENT

THIS RENTAL AGREEMENT, made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, by and between Housing and Community Development Corporation of Hawaii, a public body and a body corporate and politic of the State of Hawaii, hereinafter referred to as "Management," and \_\_\_\_\_ hereinafter referred to as, "Tenant," WITNESSETH THAT: Management hereby rents to Tenant, the dwelling unit described below for the term, at the rental, and under the covenants and conditions stated herein.

## 1. DESCRIPTION OF THE DWELLING UNIT:

Address: \_\_\_\_\_  
being a \_\_\_\_\_ bedroom unit in Building No. \_\_\_\_\_

## 2. TERM AND RENTAL:

Term to commence on \_\_\_\_\_ (occupancy date) to \_\_\_\_\_ at a rent of \$ \_\_\_\_\_.

This Rental Agreement shall be renewed thereafter on payment of a monthly rent of \$ \_\_\_\_\_ which shall be due and payable in advance on the first day of each calendar month beginning \_\_\_\_\_. This rent will remain in effect unless it is changed as provided in Paragraph 6 below or this Agreement is terminated. If the tenancy ends on date other than the last day of a month, the rental payment shall be prorated to the last day of the tenancy. In addition to the monthly rent as specified, payment shall include amount of utility charges based on the current rate charged Management for gas and/or electricity for utility consumption in excess of the allowances provided. There shall be allowed a grace period of seven working days for rental payments.

**3. SECURITY DEPOSIT:** Security Deposit to be paid by Tenant shall be \$150.00 or one month's rent, whichever is lower. The Security Deposit has not been paid or received as rental and shall not be treated by Tenant as a payment of or offset against rental. The Security Deposit shall be returned if Tenant performs in accordance with his Rental Agreement and surrenders the dwelling unit and all keys thereto and pays for all damages at the expiration of this Rental Agreement. If Tenant shall default in the performance of Tenant's covenants including the payment of rent, then and without waiving any other remedies available to Management, the Security Deposit shall be applied toward satisfaction of the damages, including loss or removal of property, cleaning of the premises and the restoration of the premises due to damage caused by the Tenant. Any refund under this Paragraph should be made to Tenant within fourteen (14) days after the termination of this Rental Agreement.

**4. USE AND OCCUPANCY:** Tenant shall have the right to exclusive use and occupancy of the dwelling unit subject to the following:

- (a) Limited Occupancy: Occupancy shall be restricted to the Tenant and the members of the Tenant's household who are listed on the Tenant's most current Application for Establishing Eligibility (HCDCH-4057), as updated to show changes in the Tenant's household.
- (b) Guests and Visitors:
  - (1) Tenant may accommodate Tenant's guests and visitors without prior Management consent on a limited basis not to exceed one (1) night. For periods exceeding one (1) night, prior Management consent is required.
  - (2) Tenant shall be fully responsible for the conduct of Tenant's guests and visitors while they are on the Project premises.
- (c) Tenant's failure to obtain prior consent of Management as required by this Section for use and occupancy of dwelling unit may result in termination of this Agreement.

**5. ELECTRICITY, GAS AND WATER:** For Management-furnished utilities, Management shall pay for and furnish to Tenant water, gas and electricity in accordance with the applicable schedule of utility allowances. For Tenant-purchased utilities, Management shall provide an allowance in dollars for water, gas and electricity in accordance with the applicable schedules. Said schedules shall be posted in the Project Office (See Paragraph 10 (h)).

## 6. ELIGIBILITY REEXAMINATIONS AND RENTAL ADJUSTMENTS:

- (a) Eligibility Reexaminations. In accordance with Rules and Regulations available in the Project Office, Management will notify Tenant when a reexamination of the family income and composition is required to verify eligibility, dwelling size and rent to be paid. Reexaminations initiated by Management will normally occur annually but they may be scheduled earlier or later depending upon special circumstances described in the Rules. Immediately following completion of the reexamination, Tenant will be given written notification concerning his eligibility status and any change to be made in the rent or size of the unit occupied.

- (b) Interim Redetermination of Rent.

- (1) At any time between required reexaminations, Tenant may initiate a redetermination of rent when there is a change in his family circumstances (such as a decrease in income) which will decrease his annual income for rent as described in the schedule of rents available in the Project Office. In the event rent is decreased in accordance with this provision, Tenant agrees to report any change in his family circumstances which occurs prior to the next regular

EXHIBIT "E"

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## Terms and Conditions

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Constituting Part A of a  
Consolidated Annual Contributions Contract  
Between Housing Authority and  
the United States of America

Forms HUD-53010 and  
HUD-53011 are obsolete

Form HUD-53012A  
(7/95)

EXHIBIT "F"

remain subject to other applicable conflict of interest requirements.

(D) For purposes of this section, the term "immediate family member" means the spouse, mother, father, brother, sister, or child of a covered class member (whether related as a full blood relative, or as a "half" or "step" relative, e.g., a half-brother or stepchild).

#### Section 20 - Interest of a Member or Delegate to Congress.

No member of or delegate to the Congress of the United States of America or resident commissioner shall be admitted to any share or part of this ACC or to any benefits which may arise from it. (As used in this section, the term "resident commissioner" refers to an individual appointed to oversee a territory or possession of the United States of America, e.g., Guam.)

#### Section 21 - Rights of Third Parties.

Except as to bondholders, as stated in Part B (Attachment VI) of this ACC, nothing in this ACC shall be construed as creating any right of any third party to enforce any provision of the ACC or to assert any claim against HUD or the HA.

#### Section 22 - Performance of Conditions Precedent to the Validity of this ACC.

The HA certifies that all conditions precedent to the valid execution and delivery of this ACC on its part have been complied with, that all things necessary to constitute this ACC its valid, binding, and legal agreement on the terms and conditions and for the purposes herein set forth have been done and have occurred and that the execution and delivery of the ACC on its part have been and are in all respects duly authorized in accordance with law. HUD similarly certifies with reference to its execution and delivery of this ACC.

#### Section 23 - Waiver or Amendment.

Any right or remedy that HUD may have under this ACC may be waived in writing by HUD without the execution of a new or supplemental agreement; or by mutual agreement of the parties to this ACC, this contract may be amended in writing: Provided, That none of the provisions of this ACC may be modified or amended so as to impair in any way HUD's obligation to pay any annual contributions that have been pledged as security for any obligations of the HA.