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Onsite

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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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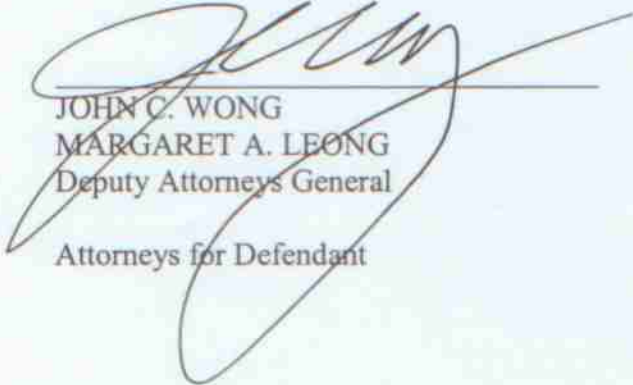
<sup>2</sup> As HCDCH notes in its Memorandum in Support of the Motion for Summary Judgment, query whether Plaintiffs have even alleged sufficient "facts" in the Amended Complaint that they even executed a Rental Agreement with HCDCH. The Amended Complaint is devoid of any allegations or foundational 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.

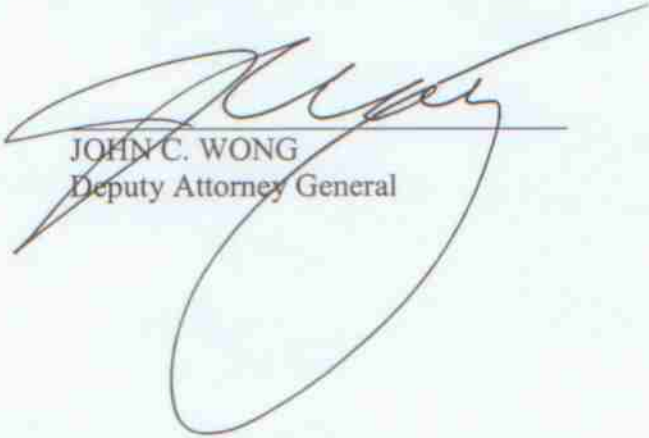
4. Attached hereto as **Exhibit "B"** is a true and correct copy of the decision and Order issued by the Honorable David A. Ezra, on July 13, 2005 in Smith, et al. v. Aveiro, HCDCH, Civ. No. 04-00309, and attached hereto as **Exhibit "C"** is a true and correct copy of the Judgment.

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

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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.

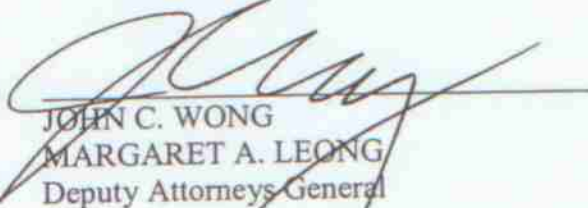
Plaintiffs claim based on violation of the Annual Contributions Contract ("ACC") is barred by the ACC itself. Plaintiffs claim based on the purported breach of the Rental Agreement is likewise without merit because residents were provided a utility allowance in accordance with the express provisions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



