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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

RODELLE SMITH, SHEILA TOBIAS, BARBARA BARAWIS, and LEWIS GLASER individually, and on behalf of all persons similarly situated, Plaintiffs, v. HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I, a duly organized and recognized agency of the State of Hawai'i. Defendant.	CIVIL NO. 04-1 0069K (Contract) Class Action **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; DECLARATION OF RODELLE SMITH; EXHIBIT "A"; DECLARATION OF GAVIN THORNTON; EXHIBITS 1-7 ; CERTIFICATE OF SERVICE** **Date: October 3, 2005** **Time: 9:30 a.m.** **Judge: Hon. Elizabeth Strance**

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs submit this memorandum of law pursuant to Rules 7 and 56 of the Hawaii Rules of Civil Procedure. As set forth below, Plaintiffs claims are supported by the law and the undisputed facts in this case. Defendant's Motion should be denied

II. STATEMENT OF FACTS

Plaintiffs filed this suit seeking declaratory relief and damages against Defendant Housing and Community Development Corporation of Hawai'i ("HCDCH") for failing to adjust utility allowances in public housing as utility rates increased, in violation of Plaintiffs' rights under the Annual Contributions Contract ("ACC") between HCDCH and the U.S. Department of Housing and Urban Development ("HUD"), and in violation of Plaintiffs' rights under the Rental Agreement between public housing residents and HCDCH.

To fully understand issues pertaining to the utility allowance in public housing, background regarding the statutory and regulatory framework that created the requirement for an allowance is necessary. The United States Housing Act requires that shelter costs for tenants residing in federally subsidized public housing projects do not exceed 30% of tenant income. 42 U.S.C. §1437a(a), 24 C.F.R. §§ 965.501-965.508. *See also* Dorsey v. Housing Authority of Baltimore City, 984 F.2d 622, 624 (4th Cir. 1993). "Rent" under the statute includes necessary utilities paid directly by tenants. Therefore, where tenants are directly responsible for the payment of utility service, the supporting federal regulations require public housing authorities (PHAs) like HCDCH to provide the tenants with a utility allowance. 24 C.F.R. §§ 965.501-965.508.

In establishing the utility allowances, the PHA must approximate a reasonable consumption of utilities by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment. 24 C.F.R. §965.505(a). Sometime prior to 1997,

HCDCH determined the amounts of utility consumption by public housing residents that were reasonable and in accordance with 24 C.F.R. §965.505(a). Based on its determination, HCDCH established a utility allowance schedule set in terms of consumption per kilowatt hour of electricity or cubic foot of gas (hereinafter "consumption allowances"). A copy of the consumption allowance schedule is attached as Exhibit "A" to the Declaration of Rodelle Smith (hereinafter "*Smith Dec.*").

The consumption allowance schedule is applicable to all HCDCH housing projects where utility allowances are provided . *See* Admission No. 11 of Defendant Housing and Community Development Corporation of Hawaii's Answers to Plaintiff's First Request for Admissions (hereinafter "*Admissions*") attached hereto as Exhibit 1 to the Declaration of Gavin Thornton (hereinafter "*Thornton Dec.*"). Because tenants at different projects pay for different utilities (e.g. some tenants pay for only lighting and refrigeration, while others pay for electric lighting and refrigeration plus gas for cooking and a hot water heater, etc.), the consumption allowances set forth the consumption amounts in different categories (e.g. the amount of gas required for one month's use of a hot water heater) according to the number of bedrooms in a unit. For example, a family residing in a three-bedroom unit at a project where tenants pay electricity bills for lighting, refrigeration, and cooking would have a consumption allowance of 480 kilowatt hours of electricity per month. *See* Exhibit "A" to *Smith Dec.*

To allow tenants to purchase the quantity of utilities provided for in the consumption allowances, at some point in the past HCDCH applied the utility rates at the time to the consumption allowances to convert them into terms of dollar amounts (hereinafter "dollar allowances"). Thereafter, when the rents for public housing tenants were calculated, HCDCH factored in a rent credit in the amount of the dollar allowances in an attempt to ensure that the tenant's total rent, including the cost of utilities, did not exceed 30% of tenant

income.

While the consumption allowances are applicable to all public housing tenants who pay their own utilities, because of differences in the cost of utilities, the dollar allowances differ depending on the location of the housing project. For example, a tenant on Maui who resides in a one-bedroom unit and pays for utilities to cover lighting and refrigeration would be provided the same consumption allowance as a tenant on Oahu living in a one-bedroom unit and paying for lighting and refrigeration. However, the dollar allowances provided to the Oahu resident and the Maui resident would be different because of differences in the cost of electricity on each island.

Because the cost of utilities fluctuate over time, the federal regulations require regular revisions to the dollar allowances to ensure that the rent credits tenants receive continue to be sufficient to cover the reasonable utility consumption amounts provided for in the consumption allowances, thereby ensuring that rents do not exceed 30% of tenant income. PHAs are required to annually review and adjust their utility allowances. 24 C.F.R. §965.507(a). Additionally, in between annual reviews, where there is a change in the utility rates of greater than 10%, PHAs must make interim adjustments to their allowances. 24 C.F.R. §965.507(b).

Since sometime prior to 1997, HCDCH failed to annually review the utility allowances and make adjustments to the dollar allowances to account for utility rate increases. Because utility rates have increased substantially since the dollar allowances were last adjusted, the rent credits provided to residents under the dollar allowances were grossly insufficient to purchase the amount of utilities provided for in HCDCH's consumption allowance schedule. Only recently, after a suit seeking injunctive relief was filed by Plaintiffs in the United States District Court for the District of Hawaii, did HCDCH update the dollar allowances to account for changes in utility rates

since the allowances were last revised.[1] Attached as Exhibit 2 to *Thornton Dec.* is an HCDCH spreadsheet indicating the difference between the old dollar allowances and the new allowances. As the spreadsheet indicates, prior to the revisions, public housing tenants were receiving utility allowances that were as much as $150 per month less than what they should have been receiving. As a result, tenants have had to pay, and HCDCH has collected, rent charges well in excess of 30% of the tenants' income.

The ACC between HUD and HCDCH requires *inter alia* that HCDCH comply with the regulations promulgated by HUD. *See* Part A, Section 5 of the ACC (attached to *Admissions* as Exhibit "A"). Thus, in addition to violating the U.S. Housing Act and its supporting regulations, by failing to comply with the HUD requirements for development and operation of public housing, HCDCH breached the ACC. As third-party beneficiaries to the ACC, Plaintiffs are entitled to recovery based on its breach.

The Rental Agreement between HCDCH and public housing residents provides that HCDCH must "provide an allowance in dollars for water, gas and electricity in accordance with the applicable schedules." *See* Section 5 of the Rental Agreement attached as Exhibit B to Defendant's Motion for Summary Judgment. HCDCH has admitted that the utility allowance schedule in terms of kilowatt hours and cubic feet of gas (i.e. the consumption allowance schedule) is applicable to all HCDCH housing projects where utility allowances are provided. *See* Admission No. 11 of Exhibit 1 to *Thornton Dec.* HCDCH also admitted that the allowances given to residents were not revised (prior to the filing of this suit) to account for changes in utility rates. *See* Admissions Nos. 2, 3, and 5 of Exhibit 1 to *Thornton Dec.* As a result, public housing residents were not provided with an allowance in dollars that was sufficient to cover the cost of utilities provided for in the consumption

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[1] Smith, et al. v. Aveiro, et al., Civil No. 04-00309, United States District Court for the District of Hawaii.

allowance schedule.

The form of the ACC and Rental Agreement are undisputed. It is undisputed that the consumption allowances upon which the dollar allowances were based were applicable to all public housing projects in which tenants paid their own utilities. It is undisputed that Defendant failed to update the dollar allowances provided to Plaintiffs although utility rates increased in excess of 10%. It is also undisputed that as a result of increases in utility rates, at the time this lawsuit was filed, the allowance in dollars that Plaintiffs were provided by HCDCH was insufficient to purchase the amount of utilities provided for in the consumption allowance schedule.

III. ARGUMENT

A. PLAINTIFFS HAVE A RIGHT TO RECOVER FOR BREACH OF THE ACC AS THIRD PARTY BENEFICIARIES IN SPITE OF THE LANGUAGE OF SECTION 21 OF THE ACC

The ACC between HUD and HCDCH has been in full force and effect since May 17, 1998 and has required that HCDCH comply with HUD requirements for the development and operation of public housing. *See* Admission No. 8 of Exhibit 1 to *Thornton Dec.* These requirements include HUD regulations in support of the U.S. Housing Act at 24 C.F.R. §§ 965.501-965.508 (pertaining to the utility allowance) and 24 C.F.R. §964.7. *See* Admission No. 13 of Exhibit 1 to *Thornton Dec.* HCDCH has breached the ACC by failing to comply with the requirements of 24 C.F.R. §965.507, which requires that the allowances be updated where utility rates increase by more than 10%. The clear purpose of the ACC is to benefit the tenants of public housing. *See* 42 U.S.C. §1437c. As third party beneficiaries of the ACC, Plaintiffs are entitled to enforce the contract.

Defendants assert that Plaintiffs are not entitled to enforce the ACC as third-party beneficiaries based on Section 21 of the ACC, which states, "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 assert any claim against HUD or the HA." However, Plaintiffs have rights to enforce provisions of the ACC as third-party beneficiaries notwithstanding Section 21's general disclaimer.

Under Hawai'i common law of contracts, a third party has enforceable rights under a contract if the contract was made for his direct benefit.[2] *See* Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423, 428 (1959); Williams v. Fenix & Scisson, Inc., 608 F.2d 1205, 1208 (9th Cir. 1979). The Hawai'i Supreme Court has adopted a two-part test to determine if a third-party has rights under a contract: (1) recognition of third-party rights would be "appropriate" to effectuate the intent of the parties; and (2) the performance would satisfy an obligation to pay money to the third party or the circumstances indicate that a party to the contract intends to give the benefits of performance to the third party. Blair v. Ing, 95 Haw. 247 (2001); see also Hunt v. First Insurance Co., 82 Haw. 363, 367 (1996) (finding third-party beneficiary rights in an insurance contract). Plaintiffs have fulfilled both requirements by the undisputed facts of this case

First, the ACC between HUD and HCDCH was obviously executed for Plaintiffs' direct benefit. Indeed, "it is difficult to imagine any purpose for [an ACC] other than to benefit the tenants of public housing." Ashton v. Pierce, 716 F.2d 56 (D.C. Cir. 1983). The ACC itself demonstrates that tenants are intended beneficiaries. For example, Sections 4 lays out the mission of HCDCH in operating and developing the project. Specifically, HCDCH must "at all times develop and operate each project solely for the purpose of providing decent, safe, and sanitary housing for eligible families...." *See* Part A, Section 4 of the ACC (attached to *Admissions* as Exhibit "A").

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[2] Hawai'i common law applies to Plaintiffs' third party beneficiary claim. The Supreme Court has held that where a third-party beneficiary claim arises out of a contract between a federal agency and a state or local entity, but the federal agency is not a party to the action, state common law, as opposed to federal common law, applies. Miree v. DeKalb County, 433 U.S. 25, 31 (1977); *see* Holbrook v. Pitt, 643 F.2d 1261, 1270 n.16. Nonetheless, because these issues are more often dealt with in federal courts, federal jurisprudence is instructive.

Secondly, performance of the ACC results in payments, in the form of rent and utility allowances, to tenants. Plaintiffs seek to recover based on HCDCH's failure to update the amount utility allowances deducted from the rent owed by tenants as required by the ACC. It is impossible to imagine a viable argument that tenants were not the intended beneficiary of this provision. Updates in the utility allowance change the amount of monthly payments made by HUD and by tenants. Updates have no effect on the finances of HCDCH, as HCDCH will continue to simply receive the full monthly rent for each unit.

Finally, Defendant wrongly assumes that Section 21 of the ACC between HUD and HCDCH eliminates tenants' rights as the clear third-party beneficiaries. To the contrary, although Hawai'i has not ruled on this issue, courts have upheld the right of public housing tenants to sue as third-party beneficiaries to an ACC, at times despite the existence of an analogous disclaimer of third-party rights within the contract. *See, e.g.*, Ashton v. Pierce, 716 F.2d 56 (D.C. Cir. 1983), as amended by 723 F.2d 70 (D.C. Cir. 1983); Curtis v. Housing Authority of Oakland, 746 F.Supp. 989, 997 (N.D. Calif. 1990) (adopting the reasoning of the court in Ashton). *See also* Henry Horner Mothers Guild v. Chicago Housing Authority, 780 F.Supp. 511, 515-16 (N.D. Ill. 1991); Tinsley v. Kemp, 750 F.Supp. 1001, 1008 (W.D. Mo. 1990); Hobrook v. Pitt, 643 F.2d 1261, 1270-72 (7th Cir. 1981).

In Ashton v. Pierce, the court held that public housing tenants could enforce an ACC, notwithstanding a clause in the contract stating that "nothing in this contract contained shall be construed as creating or justifying any claim against the Government by any third party...." The court reasoned that even assuming parties could contract away tenants' third party beneficiary rights, the boiler-plate language was not sufficient to demonstrate an intent to divest tenants of their rights to enforce the contract.

As in Ashton, Section 21of the ACC between HUD and HCDCH