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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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

Plaintiffs,

v.

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

Defendants.

) CIVIL NO. CV04 00309 DAE KSC

)
)
) **NOTICE OF MOTION; PLAINTIFFS'**
) **MOTION FOR PARTIAL SUMMARY**
) **JUDGMENT; MEMORANDUM IN SUPPORT**
) **OF MOTION; CERTIFICATE OF SERVICE**
)
)

) HEARING:
) Date: July 11, 2005
) Time: 10:30 a.m.
) Judge: David Alan Ezra

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

3 MAR 16 2005
at _____ o'clock and _____ min. _____ M
WALTER A. Y.H. CHINN, CLERK

NOTICE OF HEARING

TO: MARK BENNETT
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JOHN WONG, ESQ.
MARGARET LEONG, ESQ.
Office of the Attorney General
Kekuanao'a Building, Room B-2
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Attorneys for Defendant

PLEASE TAKE NOTICE that the following Motion for Summary Judgment will be heard before the Honorable David Alan Ezra in his courtroom in the United States Courthouse, 300 Ala Moana Boulevard, Honolulu, Hawaii on Monday, July 11, 2005, at 10:30 a.m., or as soon thereafter as counsel can be heard.

DATED: Honolulu, Hawai'i, March 16, 2005.



SHELBY ANNE FLOYD
PAUL ALSTON
THOMAS E. BUSH
GAVIN THORNTON
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

RODELLE SMITH, SHEILA TOBIAS,) CIVIL NO. CV04 00309 DAE KSC
BARBARA BARAWIS, and LEWIS)
GLASER individually, and on)
behalf of all persons similarly) **PLAINTIFFS' MOTION FOR PARTIAL**
situated,) **SUMMARY JUDGMENT**
)
Plaintiffs,)
)
v.)
)
STEPHANIE AVEIRO, in her)
official capacity as the)
Executive Director of the)
Housing and Community)
Development Corporation of)
Hawai'i; HOUSING AND COMMUNITY)
DEVELOPMENT CORPORATION OF)
HAWAI'I, a duly organized and)
recognized agency of the State)
of Hawai'i.)
)
Defendants.)
)

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

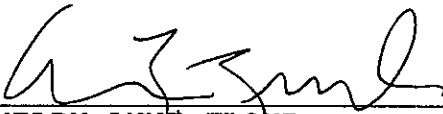
Plaintiffs RODELLE SMITH, SHEILA TOBIAS, BARBARA BARAWIS, and LEWIS GLASER, by and through their counsel, Alston Hunt Floyd & Ing and Lawyers for Equal Justice, respectfully move this Court pursuant to Rules 7 and 56 of the Federal Rules of Civil Procedure for partial summary judgment in this matter.

Defendants administer federally subsidized public housing in which Plaintiffs are tenants and are subject to federal regulations promulgated under the U.S. Housing Act ("Housing Act"). Defendants have failed to follow applicable federal regulations under the Housing Act, which guaranty Plaintiffs certain rights regarding utility allowances.

Defendants have thus violated Plaintiffs' federal rights and summary judgment must be granted on Count I (violation of the Housing Act) and Count III (violation of federal rights under 42 U.S.C. § 1983).

This Motion is based upon the concise statement of undisputed material facts in support of this Motion, the attached memorandum of law, declarations and exhibits filed in support of this Motion, and such other matters as may be brought before the Court and/or presented prior to and at the hearing on this Motion, all of which are incorporated herein.

DATED: Honolulu, Hawai'i, March 16, 2005.



SHELBY ANNE FLOYD
PAUL ALSTON
THOMAS E. BUSH
GAVIN THORNTON
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RODELLE SMITH, SHEILA TOBIAS,) CIVIL NO. CV04 00309 DAE KSC
BARBARA BARAWIS, and LEWIS)
GLASER individually, and on)
behalf of all persons similarly) **MEMORANDUM IN SUPPORT OF**
situated,) **MOTION**
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Plaintiffs,)
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v.)
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STEPHANIE AVEIRO, in her)
official capacity as the)
Executive Director of the)
Housing and Community)
Development Corporation of)
Hawai'i; HOUSING AND COMMUNITY)
DEVELOPMENT CORPORATION OF)
HAWAI'I, a duly organized and)
recognized agency of the State)
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)
Defendants.)
_____)

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

The relevant facts and law in this case are not disputed. Defendant Housing and Community Development Corporation of Hawaii ("HCDCH") is a public housing authority ("PHA"), and Defendant Stephanie Aveiro is HCDCH's Executive Director. Defendants are required by federal law to provide their tenants who pay their own utilities, with a utility allowance. Plaintiffs Rodelle Smith, Sheila Tobias, Barbara Barawis, and Lewis Glaser are tenants of HCDCH.

Federal law mandates, among other things, that Defendants (1) annually review the utility allowance and (2) adjust the utility allowance whenever utility rates increase more than 10% from the time of the last utility allowance adjustment. Since at least May 19, 1998, Defendants have failed to comply with these federal mandates. Defendants have thus breached federal rights guaranteed Plaintiffs, and summary judgment must be granted regarding Plaintiffs' claims under Count III (42 U.S.C. § 1983) and Count I (U.S. Housing Act).

II. UNDISPUTED MATERIAL FACTS

The Housing Act requires that shelter costs for tenants residing in federally subsidized public housing projects, including the cost of utilities, do not exceed 30% of tenant income. 42 U.S.C. §1437a, 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). Where tenants are directly responsible for the payment of utility service, federal regulations under the Housing Act require public housing authorities ("PHA"s), such as HCDCH, to provide the tenants with a utility allowance. 24 C.F.R. §§965.501-965.508.

Pursuant to 24 C.F.R. §965.505(a), Defendants are required to establish a utility allowance that approximates "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." Sometime prior to May 17, 1998, Defendants established a utility allowance schedule applicable to all HCDCH housing projects where utility allowances are provided, which was set in terms of consumption per kilowatt hour of electricity or cubic foot of gas (hereinafter "consumption allowances"). See Separate Concise Statement of Facts ("SCSF"), Nos. 6, 7. Under HCDCH's utility allowance schedule, a tenant who exceeds his or her consumption allowance must pay for the excess consumption out of pocket. The consumption allowances promulgated by HCDCH in its utility allowance schedule remain applicable today. SCSF No. 7.

24 C.F.R. § 965.507(a) mandates that Defendants annually review the basis on which utility allowances have been established and revise allowances where reasonably required to continue adherence to the provisions of 24 C.F.R. § 965.505(a). These annual reviews are required to account for changes in utility consumption by residents. For example, the amount of utilities consumed by residents may increase as appliances supplied by HCDCH become less efficient as they deteriorate with age, or utility consumption may decrease where residents are provided with appliances that are more energy efficient. Defendants have failed to conduct any such reviews since the adoption of their utility allowance schedule. SCSF No. 9.

At some point prior to May 17, 1998, the consumption allowances promulgated by Defendants in their utility allowance

schedule were converted into terms of dollar amounts (hereinafter "dollar allowances"), and each tenant was given a credit equal to his or her dollar allowance so the tenant's total rent, including the cost of utilities, did not exceed 30% of tenant's income. SCSF No. 10. Thus, for example a tenant who had a monthly consumption allowance of 260 kilowatt hours of electricity would have a dollar allowance equal to the cost of this consumption allowance. This dollar allowance would then be a credit on the tenant's monthly rent (e.g., if the rent was \$200 and the dollar allowance was \$30, the rent due would be \$170).

To account for fluctuations in utility rates across time, the federal regulations require Defendants to adjust the dollar allowances where there is a change in the utility rates of greater than 10%. 24 C.F.R. § 965.507(b). For the period from sometime prior to May 17, 1998 through September 30, 2004, HCDCH did not update its utility allowances to account for changes in utility rates. SCSF No. 12. HCDCH failed to make such updates in spite of the fact that utility rates had increased by over 10% since the allowances were last adjusted. SCSF No. 13. As a result, some public housing tenants have had to pay rent charges well in excess of 30% of their income. SCSF No. 14.

On May 13, 2004, this lawsuit was filed seeking declaratory and injunctive relief. A companion case, *Smith v. Housing and Community Development Corporation of Hawaii*, Civil

No. 04-10069K, was filed in the Third Circuit, seeks reimbursement for the unlawful charges.¹

The record is clear and undisputed. HCDCH was required by law (24 C.F.R. § 965.507(a)) to annually review the basis on which utility allowances have been established for public housing tenants, such as Plaintiffs, and to revise allowances where reasonably required to adhere to the mandate of a reasonable utility allowance set forth in 24 C.F.R. § 965.505(a). HCDCH has failed to conduct this annual review since at least May 17, 1998.

HCDCH was also required by law (24 C.F.R. § 965.507(b)) to adjust dollar allowances for all public housing tenants, including Plaintiffs, where there has been a greater than 10% change in utility rates. There has been a greater than 10% change in utility rates since May 17, 1998, SCSF No. 13, but HCDCH never adjusted dollar allowances (at least through September 30, 2004).

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when "the 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

¹A related case, *Amone v. Aveiro*, Civ. No. 04-508ACK, United States District Court for the District of Hawaii, was filed in August 2004 by disabled public housing tenants who have been denied their rights to receive notice of and request increased utilities allowances as a result of their need for medical devices using electricity.

is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In deciding whether there is a genuine issue of material fact, the court is to view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any doubt as to the existence of any genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970). To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

IV. LEGAL ARGUMENT

A. Defendants Have Violated Plaintiffs Federal Rights Under 42 U.S.C. § 1983.

Count III states a claim against Defendants for violating Plaintiffs' rights under 42 U.S.C. § 1983. Section 1983 allows private individuals to enforce violations of federal statute by agents of the State. *Maine v. Thidoutot*, 448 U.S. 1 (1980). In *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), the United States Supreme Court specifically held that public housing residents can maintain a

cause of action under § 1983 against state agents who violate Section 1437a of the Housing Act.

Wright involved a dispute regarding the adequacy of utility allowances in public housing. Tenants living in federally subsidized low-income housing projects alleged that the PHA over-billed them for their utilities by failing to provide an adequate utility allowance, thereby violating the rent ceiling imposed by the Housing Act. The PHA argued that the tenants could not bring a private § 1983 cause of action. The PHA was wrong. The U.S. Supreme Court held that tenants could bring a § 1983 cause of action to enforce these rights secured by federal law. *Wright*, 479 U.S. at 429.

As in *Wright*, the Plaintiffs before this Court have been wronged by Defendants failure to provide them with appropriate utility allowances. Defendants have admitted they have failed to conduct annual reviews required under 24 C.F.R. § 965.507(a) to ensure a proper utility allowance. Defendants have also admitted they have failed to adjust dollar allowances despite utility rate increases in excess of 10% in violation of 24 C.F.R. § 965.507(b). Defendants have thus violated Plaintiffs' federal rights, and Plaintiffs are entitled to declaratory and injunctive relief under § 1983.

B. Defendants Have Violated Plaintiffs Federal Rights Under the Housing Act.

In Count I, Plaintiffs allege a direct cause of action under the Housing Act for Defendants' admitted violations of the

Housing Act. Plaintiffs have a private right of action to assert this claim.

In *Castleman v. United States Dep't of HUD*, 1988 U.S. Dist. LEXIS 10242 (W.D.Mo. 1988), public housing tenants filed suit to obtain relief because they were not provided with proper utility allowances, causing them to pay more in rent than permitted by law. The court held that public housing tenants had a private right of action under section 1437a of the Housing Act. *Castleman*, applying the test set forth in *Cort v. Ash*, 422 U.S. 66 (1975), held that there was an implicit private remedy in Section 1437a of the Housing Act.

Castleman explained that under *Cort v. Ash*, a court must consider four questions to determine whether a private remedy is implicit in a federal statute where not expressly provided: (1) whether the plaintiff is one of the class "for whose especial benefit the statute was enacted", (2) whether "there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one", (3) whether it is consistent with the underlying legislative scheme to imply a private right of action, and (4) whether the cause of action is traditionally one relegated to state law. *Castleman*, 1988 U.S. Dist. LEXIS 10242 at 9 (quoting *Cort*, 422 U.S. at 78).

In answering the first question, *Castleman* explained that the U.S. Supreme Court's decision in *Wright* "makes it unmistakable that section 1437a was enacted for the special

benefit of precisely the class of plaintiffs before the court in this case, namely, low-income public housing residents."

Castleman, 1988 U.S. Dist. LEXIS 10242 at 9.

As to the second question, *Castleman* recognized that *Wright* had made it clear that Congress specifically intended that private individuals bring actions in federal court to enforce their rights under Housing Act section 1437a. *Id.*, 1988 U.S. Dist. LEXIS 10242 at 9-10.

For the third question, *Castlemen* further relied on *Wright* to find that allowing a private cause of action was consistent with federal regulatory efforts, stating that "*Wright* instructs that enforcement of section 1437a by HUD as well as by private individuals is consistent with the United States Housing Act, 42 U.S.C. §§ 1401 et seq., taken as a whole, of which section 1437a is a part." *Id.*, 1988 U.S. Dist. LEXIS 10242 at 10.

As to the final question, *Castleman* held that tenants met this factor because the cause of action was not one traditionally relegated to state law. *Id.*²

Based on the authority cite in *Castleman*, Plaintiffs have a private right of action under section 1437a of the Housing Act. Defendants have violated Plaintiffs' federal rights under

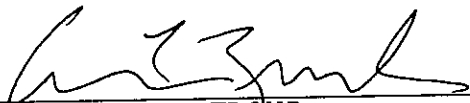
²*Castleman* referenced *Wright*, which noted that although public housing tenants retained the right to bring state law claims for breach of their leases, they were not thereby deprived of their right to bring an action to enforce their federal rights. *Wright*, 479 U.S. at 429.

this act by failing to follow its implementing regulations requiring annual reviews of utility allowances and adjustments of allowances due to utility rate increases in excess of 10%. Plaintiffs are entitled to summary judgment as to Count I and must be granted declaratory and injunctive relief.

V. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that this Court grant summary judgment as to Counts I and III of the Complaint and (1) declare that Defendants have violated Plaintiffs' rights and (2) enter a permanent injunction requiring Defendants to make appropriate adjustments to the HCDCH utility allowances in accordance with the U.S. Housing Act and 24 C.F.R. § 965-507.

DATED: Honolulu, Hawai'i, March 16, 2005.



SHELBY ANNE FLOYD
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THOMAS E. BUSH
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Attorneys for Plaintiffs

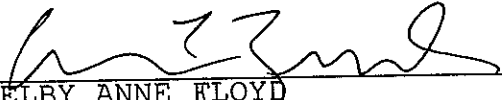
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was duly served upon the following party on this date, by depositing said copy, postage prepaid, first class, in the United States Post Office, at Honolulu, Hawaii, addressed as set forth below:

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Honolulu, Hawai'i 96824

Attorneys for Defendants

DATED: Honolulu, Hawaii, March 16, 2005.



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