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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.	) CIVIL NO. 04-1 0069K)) **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION, FILED AUGUST 10, 2005; CERTIFICATE OF SERVICE**))))) HEARING:) DATE: September 20, 2005) TIME: 8:00 A.M.) JUDGE: HON. ELIZABETH STRANCE

591067-1/7232-2

Defendant.)
)
)

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION, FILED AUGUST 10, 2005

Plaintiffs RODELLE SMITH, SHEILA TOBIAS, BARBARA BARAWIS, and LEWIS GLASER, by and through their counsel, submit this reply in further support of their Motion for Class Certification, filed on August 10, 2005.

I. INTRODUCTION

Plaintiffs Rodelle Smith, Sheila Tobias, Barbara Barawis, and Lewis Glaser, on behalf of themselves and other tenants of public housing in Hawaii,[1] seek to recover excessive rents paid to Defendant Housing and Community Development Corporation of Hawai'i ("HCDCH") when it failed to adjust utility allowances in public housing as utility rates increased, in violation of Plaintiff's rights under the U.S. Housing Act as reflected in the Annual Contributions Contract ("ACC") between HCDCH and the U.S. Department of Housing and Urban Development ("HUD"), and the rental agreement between public housing residents and HCDCH.

Plaintiffs' claims are precisely the type that Hawai'i courts–indeed, courts throughout the U.S.--consistently recognize as appropriate for class

[1] The proposed class is defined as persons that currently reside, or resided at any point from May 17, 2002 to present in a federally funded public housing project in which residents receive or should receive utility allowances. The proposed subclass is defined as persons that resided at any point between May 17, 1998 and May 16, 2002 in a federally funded public housing project in which residents receive or should receive utility allowances.

certification. They are claims based on a common action by the defendant, which are, in the main, too small for any single plaintiff to economically recover in the absence of a class action. The issues to be resolved in determining class certification, to the extent that they exist, are easily resolved. In fact, Defendant does not challenge in any respect the merits of Plaintiffs' claim for class certification. Rather, Defendant simply argues that the Court should first address Defendant's Motion for Summary Judgment, filed on September 12, 2005. For the following reasons, the Court should resolve class certification in favor of Plaintiffs prior to tackling Defendant's Motion for Summary Judgment.

II. ARGUMENT

A. Defendants' Mootness Arguments Are Misplaced

Defendants' argue at some length that the claims of Plaintiffs are moot. Opposition at 4-5. This is clearly wrong, as Plaintiffs are seeking reimbursement of rents paid to HCDCH in excess of the 30% cap created by federal law. Even where a party corrects an illegal policy, where compensatory damages are sought, the claims do not become moot. See Hac v. Univ. of Hawaii, 102 Haw. 92, 99 (2003); see also Allen v. Board of Pardons, 792 F.2d 1404, 1408 n.2 (9th Cir. 1986); 6A J. Moore, Moore's Federal Practice para. 57.13, at 57-116 (2d ed. 1985). Thus, unlike in the companion federal action in which prospective relief only was sought, Plaintiffs claims in this action cannot be barred by the doctrine of mootness.

B. Class Certification Should be Decided Before a Subsequently Filed Motion for Summary Judgment

There are a number of reasons why Defendants' arguments that the court should delay class certification until after a hearing on Defendants' motion for summary judgment is heard must fail. First, class certification must be decided as soon as practicable after the commencement of an action brought as a class action. Haw. R. Civ. P. 23(c)(1). This action has been pending for well over a year, during which Defendants corrected their unlawful conduct, admitted before the federal court that they had violated the law, Opposition, Exhibit B, but did nothing to reimburse tenants for overcharges. Thus, Plaintiffs' motion is timely.

Secondly, class certification will *promote*, not delay, final resolution of the claims.[2] By postponing class certification, the court limits the preclusive effect of any rulings to the named Plaintiffs, as res judicata does not apply to putative class members. *See Schwarzschild v. Tse*, 69 F.3d 293 (9th Cir. 1995). Thus, one would think that the State would welcome having the class certified prior to a ruling on the motion for summary judgment, if it truly believes it will prevail on the motion, as all class members will then be bound by the

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[2] Because Defendants only filed their Motion for Summary Judgment on the day their Opposition was due, and served it by mail, Plaintiffs have not had the opportunity to prepare the formal opposition to the Motion and to address the merits in this Reply. However, Judge Ezra in his ruling in the companion federal case held that "Defendants failed to adjust monetary allowances between May 17, 1998 and September 30, 2004, as required by 24 C.F.R. § 965.507(b)". See Opposition, Exhibit B, at 3. Thus, the essential fact of violation of the U.S. Housing Act has already been established against the State.

judgment entered after the class is certified. In the absence of certification, the possibility for renewed litigation is high because the putative class is so large. Any of the more than 2,000 affected public housing tenants who is not a named plaintiff, will have the right to file a separate action in any of the circuit courts, and will not be bound by an adverse ruling by this Court. This scenario would expose the Court, as well as the parties, to unnecessary expenditure of resources.

Finally, Defendants have not shown that there would be any adverse impact by this Court ruling on this motion prior to a hearing on Defendants' motion. They have offered no evidence of the "tremendous waste of time and resources", Opposition at 7, stemming from class certification, because there is none. The Court has the ability to control the method and timing of notice to the class and there is no reason why the issuance of notice to class members cannot be deferred until after the October 3, 2005 hearing on Defendants' motion. In fact, as a practical matter, it is unlikely that class notice would be given by October 3, 2005 even if the Court did not order any delay.

C. The Substantive Allegations in the Complaint Must be Taken as True

HCDCH's entire opposition to class certification is directed at the merits of Plaintiffs' claims. Although Plaintiffs bear the burden of establishing each element for class certification under Rule 23, Hawaii law and federal law alike hold that in determining whether Plaintiffs carried their burden, the

Court may not consider the merits of Plaintiffs' claims. *See Levi v. University of Hawai'i*, 67 Haw. 90 (1984); *see also Burkhalter Travel Agency v. MacFarms Intern., Inc.*, 141 F.R.D.144, 152 (N.D. Cal. 1991). Instead, the Court must accept the Plaintiffs' substantive allegations as true. *See Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982); *Arthur Young & Co. v. U.S. District Court*, 549 F.2d 686 (9th Cir. 1976); *Blackie v. Barrack*, 524 F.2d 891, n.17 (9th Cir. 1975).

HCDCH attempts to put forward a new threshold requirement for those seeking class certification. HCDCH argues that Plaintiffs must "clearly demonstrate" that they are entitled to the relief they seek. *See* Defendant's Memorandum in Opposition to Motion for Class Certification, filed on Sept. 12, 2005 ("Opposition"). This argument has no basis in the law, and the cases cited do not support it. Courts have been quite clear that class certification should be dealt with *prior* to, not along with, the merits of the case. *See Levi v. University of Hawai'i*, 67 Haw. 90, 92 (1984) (citing *Koolauloa Welfare Rights Group v. Chang*, 65 Haw. 341 (1982); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). When the Hawai'i Supreme Court stated that a "party who seeks to utilize a class action must establish his right to do so," the court was unambiguously referring to the requirements for class certification detailed in Hawai'i Rule of Civil Procedure ("HRCP") 23(a) and (b), not, as Defendant proposes, a requirement to show clear entitlement to the relief sought. *See* Opposition at 5.

CERTIFICATE OF SERVICE

The undersigned hereby certify that a copy of the foregoing document will be duly served upon counsel by U.S. Mail, postage pre-paid at the following address:

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DATED: Honolulu, Hawai'i, September 15, 2005.

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