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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**

591874-2/7232-2

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 1

III. ARGUMENT 5

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 5

B. PLAINTIFFS ARE ENTITLED FOR RELIEF PURSUANT TO THEIR BREACH OF CONTRACT CLAIM BECAUSE THEY WERE NOT PROVIDED UTILITY ALLOWANCES IN ACCORDANCE WITH THE APPLICABLE SCHEDULES 8

1. Defendant's Reliance on the Doctrine of Mutual Assent is Improper 9

2. The Consumption Allowance Schedule is Indisputably Applicable to the Determination of the Allowance in Dollars 10

3. If the Rental Agreement's Terms are Interpreted According to their Ordinary Meaning, Plaintiffs Must Prevail 12

4. If the Rental Agreement is Read in Light of Existing Law, Plaintiffs Must Prevail 12

5. In Order to Effect the Intent of the Parties with Regard to the Rental Agreement, Plaintiff's Must Prevail 14

6. Ambiguities in the Rental Agreement Must be Construed Against HCDCH 14

C. ISSUES SURROUNDING DECLARATORY OR INJUNCTIVE RELIEF IN THIS CASE WERE NOT DECIDED IN THE FEDERAL COURT ACTION 15

IV. REQUEST FOR H.R.C.P. RULE 56(f) CONTINUANCE 15

V. CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES

Ashton v. Pierce, 716 F.2d 56 (D.C. Cir. 1983) 6, 7

Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423, 428 (1959) 6

Curtis v. Housing Authority of Oakland, 746 F.Supp. 989, 997 (N.D. Calif. 1990) 7

Dorsey v. Housing Authority of Baltimore City, 984 F.2d 622, 624 (4th Cir. 1993) 1

Henry Horner Mothers Guild v. Chicago Housing Authority, 780 F.Supp. 511, 515-16 (N.D. Ill. 1991) 7

Holbrook v. Pitt, 643 F.2d 1261, 1270-72 (7th Cir. 1981) 6, 7

Miree v. DeKalb County, 433 U.S. 25, 31 (1977) 6

Tinsley v. Kemp, 750 F.Supp. 1001, 1008 (W.D. Mo. 1990) 7

Williams v. Fenix & Scisson, Inc., 608 F.2d 1205, 1208 (9th Cir. 1979) 6

STATE CASES

Amfac, Inc. v. Waikiki Beachcomber Inc. Co., 74 Haw. 85, 108, 839 P.2d 10, 24, reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992) 14

Blair v. Ing, 95 Haw. 247 (2001) 6

Brown v. KFC National Management Company, 82 Haw. 226, 921 P.2d 146, 106 (1996) 14

Carson v. Saito, 53 Haw. 178, 182 (1972) 9

Cho Mark Oriental Food, Ltd v. K & K International, 73 Haw. 509, 836 P.2d 1057, 1064 (1992) 12

Coney v. Dowsett, 3 Haw. 685, 686 (1876) 14

Crutchfield v. Hart, 2 Haw. App. 250, 252, 630 P.2d 124, 125 (1981) 15

Foundation International Inc. v. E.T. Ige Construction, Inc., 102 Haw. 487, 495, 78 P.3d 23, 31 (2003) 12

Hunt v. First Insurance Co., 82 Haw. 363, 367 (1996) 6

Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 85 Hawaii 300, 305, 944 P.2d 97, 102 (1997) 14

Quedding v. Arisumi Brothers, Inc., 66 Haw. 335, 337, 661 P.2d 706, 709 (1983) 12

Strouss v. Simmons, 66 Haw. 32, 40 (1982) 9

FEDERAL STATUTES

42 U.S.C. §1437a(a) 1

42 U.S.C. §1437c 5

FEDERAL REGULATIONS

24 C.F.R. §§ 965.501-965.508 . . . . . *Passim*

24 C.F.R. §965.505 . . . . . 1, 2

24 C.F.R. §965.507 . . . . . 3, 5

24 C.F.R. §966.4 13

HAWAII ADMINISTRATIVE RULES

HAR §17-2028-7(a) 13

COURT RULES

H.C.R.P. Rule 56 15

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

uses generic language that should not be read to destroy tenants rights, but rather to apply to unintended beneficiaries. Where a third-party is so clearly a beneficiary of a contract, the contracting parties must use more specific language to divest that third-party of his rights under the contract. As explained above, tenants are without a doubt the beneficiaries, indeed the reason for the existence of the ACC. The clear intent of the ACC is to provide tenants with affordable housing with rents set in accordance with federal law. The only way to "effectuate" (in the words of Blair) that intent, is to require HCDCH to refund Plaintiffs for the rent overcharges that resulted from federal law violations. It simply does not make sense to allow public housing residents to be deprived of the benefits they are so clearly meant to receive. Boilerplate disclaimers should not be read to divest tenants of their right to ensure that the public housing authorities function as Congress and the parties to the ACC intended.

B. PLAINTIFFS ARE ENTITLED FOR RELIEF PURSUANT TO THEIR BREACH OF CONTRACT CLAIM BECAUSE THEY WERE NOT PROVIDED UTILITY ALLOWANCES IN ACCORDANCE WITH THE APPLICABLE SCHEDULES

The Rental Agreement between HCDCH and Plaintiffs provides that HCDCH "shall 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 allowances in terms of kilowatt hours and cubic feet of gas (i.e. the consumption allowances) are 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, the allowance in dollars (i.e. the dollar allowance) provided to tenants was "not in accordance with the applicable schedules" because it was insufficient to allow tenants to purchase the amount of utilities

provided for in the consumption allowance schedule.

In spite of Defendant's clear breach of its obligation to provide residents with a sufficient allowance in dollars to accord with the applicable schedules, Defendant argues that Plaintiffs cannot recover under a breach of contract claim because there was no "meeting of the minds" between HCDCH and Plaintiffs regarding whether residents would be provided with a particular utility allowance. This argument is deeply flawed.

1. Defendant's Reliance on the Doctrine of Mutual Assent is Improper

Defendants state that "it is a fundamental principle of law that there must be mutual assent or a meeting of the minds on all essential elements or terms in order to *form* a binding contract." Defendant's Memorandum in Support of Motion for Summary Judgment ("Memorandum") at 5 (quoting Carson v. Saito, 53 Haw. 178, 182 (1972)) (emphasis added). Plaintiffs do not dispute that the requirement of mutual assent is a fundamental principle of contract law. However, as clearly indicated by the language cited by Defendant, it is a principle that applies to the *formation* of a contract, not the enforcement, interpretation or construction of a contract once the contract has been formed. The issue in the cases cited by Defendant is whether or not a contract actually existed. That is not at issue here. Defendant does not appear to dispute that an express contract between Plaintiffs and Defendant exists in the form of the Rental Agreement attached to Defendant's Motion.

Defendant's Memorandum goes on to assert that Plaintiffs do not have a contract implied in fact or law upon which to base their claim. This assertion is irrelevant given that Plaintiffs have an express contract, which Defendants have breached. As quoted by Defendant, "It is the function of courts to construe and enforce contracts made by the parties, not to make or alter them." Defendant's Memorandum at 6 (quoting Strouss v. Simmons, 66 Haw. 32, 40 (1982)). Plaintiffs have requested that the Court enforce the terms of the *express* contract with Defendants, not create a contract or contractual

provisions that do not exist. None of the arguments against Plaintiffs' breach of contract claim set forth in Defendants Memorandum apply to the issues in this case.[3]

2. The Consumption Allowance Schedule is Indisputably Applicable to the Determination of the Allowance in Dollars.

HCDCH has provided no reason why the consumption allowance is not applicable to the allowance in dollars that is to be provided to public housing residents, most likely because there is no such reason. Indeed, as discussed above, HCDCH already made an admission that the consumption allowances were applicable to all HCDCH projects in which tenants receive utility allowances. HCDCH had previously indicated that the consumption allowances were indeed applicable.

The applicability of the consumption allowances is further evidenced by an HCDCH response to a Uniform Information Practices Act request. In a September 30, 2003 letter to HCDCH, *inter alia*, the following information was requested: "Utility allowance and surcharge schedules used from 1997 to present, for rent determination proposed by each housing project in the HCDCH inventory since 1997." Exhibit 3 to *Thornton Dec.* The then Acting Executive Director of HCDCH responded in a November 5, 2003 letter by stating, "Utility allowance and surcharge schedules used from 1997 to present for rent determination purposes for each housing project in the HCDCH inventory since 1997 can be found in Attachment D." Exhibit 4 to *Thornton Dec.* Included in Attachment D as Attachment D3 is a document entitled "Proposed Utility Schedule". *See* Exhibit 5 to *Thornton Dec.* The schedule

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[3] It should be noted that Defendant made a potentially misleading misquote of the Am. Jur. 2d, entry cited in its Memorandum. The true text states, "The law will not imply a contract *to* do a thing merely because a statute imposes a duty to do that thing." *66 Am. Jur. 2d, Restitution and Implied Contracts* § 7 (West 2000) (emphasis added to identify word left out in Defendant's Motion), The principle is that the law will not create a contract where there is none merely because there is a statutory duty to do something. It should not be understood to mean that a contract should not be interpreted in light of existing law. See *infra.*

clearly sets forth the utility allowance in terms of kilowatt hours of electricity and cubic feet of gas (i.e. the consumption allowances).[4] HCDCH cannot at one time identify the document as being applicable to the determination of the utility allowance in public housing and for its own purposes later deny that it is applicable.[5]

Though it is not clear from Defendant's Memorandum, it may be that HCDCH is attempting to argue that the consumption allowance schedule was not posted, and thus is not "applicable" under the Rental Agreement. Even if the consumption allowance schedule were not posted, HCDCH's failure to do so would simply be another breach of contract (i.e. it failed to post the applicable allowances) and does not impact the schedule's applicability; it is undisputed that the schedule is applicable. However, as stated in the Declaration of Rodelle Smith, at least with respect to the project office for the Ka Hale Kahaluu project, the consumption allowance schedule was posted in the office. *See Smith Dec.*

Based on the above undisputed facts, there is only one reasonable interpretation of the Rental Agreement–that residents were entitled to an allowance in dollars that was in accordance with the consumption allowance

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[4] The language of the Rental Agreement states that the allowance in dollars must be in accordance with the applicable *schedules*. It is helpful to note that the title of the document is "Proposed Utility *Schedule*". *(emphasis added).*

[5] On the outside chance that Defendant will attempt argue that the consumption allowances are not relevant to the determination of the allowances in dollars, the following exhibits are attached: Exhibit 6 to *Thornton Dec.* (Attachment C to November 5, 2003 Uniform Information Practices Act response letter from Robert Hall, described as "Records indicating which utilities are paid for by the residents for each housing project in the HCDCH inventory since 1997") and Exhibit 7 to *Thornton Dec.* (Attachment G to November 5, 2003 Uniform Information Practices Act response letter from Robert Hall, described as "Records from 1997 to present which document the basis on which the utility allowance [sic] were revised for HCDCH projects"). As an example, Exhibit 6 to *Thornton Dec.* (Attachment C of Hall letter) indicates that Lanakila Homes tenants pay for "Basic" electric and LPN [sic] gas for cooking and hot water. The consumption allowance schedule (Exhibit "A" to *Smith Dec.*) indicates that tenants in a two bedroom should have an allowance of 300 kilowatt hours for "Basic" and 1030 cubic feet of gas for cooking and hot water. Exhibit 7 to *Thornton Dec.* (Attachment G1 of Hall letter) illustrates how the consumption allowance was used to calculate the allowance in dollars for Lanakila Homes residents, which was calculated to be $133.09. Note that Exhibit 2 to *Thornton Dec.* shows that Lanakila Homes residents in a two-bedroom unit were receiving $133 for an allowance in dollars (see the "Current Allowance" column).

schedule.

3. If the Rental Agreement's Terms are Interpreted According to their Ordinary Meaning, Plaintiffs Must Prevail.

Where a contracts terms are unambiguous, as is the case here, the terms are to be interpreted according to their plain, ordinary, and accepted use. Foundation Int'l Inc. v. E.T. Ige Construction, Inc., 102 Haw. 487,495, 78 P.3d 23, 31 (2003) (*quoting* Cho Mark Oriental Food, Ltd v. K & K Int'l, 73 Haw. 509, 520, 836 P.2d 1057, 1064 (1992). In this case, the concept of a utility allowance originated from federal law and the provision regarding utility allowances must be examined in that context. Utility allowances would not exist but for federal law requirements governing subsidized housing; there is no reason for them except to ensure that tenants benefitting from public housing's rent subsidy do not pay in excess of 30% of their income for rent. Thus, the utility allowance provision in the Rental Agreement and the reference to "the applicable schedules" must refer to the utility allowance as contemplated by the statutes and regulations governing utility allowances in public housing. The utility allowance contemplated by the federal law that created it is an allowance that is sufficient to cover the monthly cost of a reasonable consumption of utilities by public housing residents. 24 C.F.R. §5.603(b). HCDCH developed the consumption allowances as an estimate of reasonable consumption of utilities. It would not make sense to interpret the Rental Agreement's provision regarding utility allowances as permitting tenants an allowance in dollars that would be insufficient to pay for a reasonable consumption of utilities.[6]

4. If the Rental Agreement is Read in Light of Existing Law, Plaintiffs Must Prevail.

Existing law is part of a contract where there is no stipulation to

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[6] It should also be noted that under the ordinary definition of the term "applicable", the consumption allowance schedule is clearly contemplated by the Rental Agreement's utility allowance provision.

the contrary. Quedding v. Arisumi Brothers, Inc., 66 Haw. 335, 337, 661 P.2d 706, 709 (1983) (holding that it was implied in the contract that a contractor would comply with the requirements of the Uniform Building Code even though the Code was not expressly referred to in the contract). Thus, even if the Rental Agreement does not reference federal regulations regarding the setting of rents, the regulations are implied terms of the contract.[7] The federal regulations set forth quite clearly what is required of HCDCH with regard to utility allowances in public housing (as discussed above). Further, 24 C.F.R. §966.4 makes it clear that a lease entered into by a PHA and a tenant must contain provisions to ensure that "[t]he tenant shall pay the amount of the monthly tenant rent determined by the PHA in accordance with HUD regulations and other requirements..." 24 C.F.R. §966.4(b)(1)(i). Additionally, HCDCH's own administrative rules state, "The monthly rent for a tenant residing in a federally assisted housing project shall include utility allowances established in accordance with HUD's standards for utility allowances." HAR §17-2028-7(a). The only way that the Rental Agreement can be read to give any effect to these laws is that tenants must be provided with an allowance in dollars that is in accordance with the applicable schedules (i.e. the consumption allowance schedule). Given that Plaintiffs' interpretation of the utility allowance is reasonable (indeed the only reasonable interpretation), an alternative interpretation should not be favored where it would result in the illegality of the provision (e.g. if another interpretation were used that denied tenants the right to properly calculated rents under the contract, then the provision would violate the federal requirement that tenants pay rents that are in accordance with HUD regulations).

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[7] Note that an implied term in an existing express contract, such as an implied term of good faith and fair dealing, is different from the creation of a non-existing contract implied in fact or law.

5. In Order to Effect the Intent of the Parties with Regard to the Rental Agreement, Plaintiff's Must Prevail.

If there is any doubt as to the meaning of a contractual term, "the interpretation which most reasonably reflects the intent of the parties must be chosen." Brown v. KFC National Management Company, 82 Haw. 226, 240, 921 P.2d 146, 106 (1996) (quoting Amfac, Inc. v. Waikiki Beachcomber Inc. Co., 74 Haw. 85, 108, 839 P.2d 10, 24, reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992)). Presumably (though Plaintiffs do not concede) HCDCH did not intend to violate federal law and overcharge residents for rent. Nor did the Plaintiffs intend to pay more for rent than permitted by federal law. The only way that the intent of both parties can be effectuated is to interpret the Rental Agreement so that Plaintiffs are permitted to recover their damages for HCDCH's failure to provide them with an allowance in dollars sufficient to cover the costs of utility consumption in accordance with the consumption allowance schedule.

6. Ambiguities in the Rental Agreement Must be Construed Against HCDCH

Defendant cannot prevail by arguing that, despite appearances, the Rental Agreement provision regarding utility allowances is ambiguous. Contracts such as the Rental Agreement must be construed against the drafter of the contract. Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 85 Hawaii 300, 305, 944 P.2d 97,102 (1997) (citing to Coney v. Dowsett, 3 Haw. 685, 686 (1876). The Rental Agreement for public housing tenants is a classic adhesion contract. Plaintiffs had no part in the drafting of the agreement and had no bargaining power to request a change to the contract. HCDCH drafted the contract and is solely responsible for any ambiguity therein. Interpreting the Rental Agreement to mean that tenants shall receive an allowance in dollars in accordance with the applicable schedules (i.e. the consumption allowance schedule), if not the *only* reasonable interpretation, is definitely *a* reasonable interpretation. If there is ambiguity, since HCDCH drafted the agreement, the

interpretation that benefits the Plaintiffs must be used.

C. ISSUES SURROUNDING DECLARATORY OR INJUNCTIVE RELIEF IN THIS CASE WERE NOT DECIDED IN THE FEDERAL COURT ACTION

Contrary to Defendant's assertion, the Federal Court did not render judgment barring judgment for declaratory or injunctive relief in this action. The Federal Court held that Defendants had violated federal law, but found that the correction of its practices rendered prospective relief moot. Plaintiff's rights under their Rental Agreement was not considered by the court, and thus, relief for those claims cannot be barred.

IV. REQUEST FOR H.R.C.P. RULE 56(f) CONTINUANCE

H.C.R.P. Rule 56(f) provides for a continuance to permit further discovery by the party opposing a motion for summary judgment prior to making a decision on the motion. Rule 56(f) should be liberally construed to safeguard against an improvident and premature granting of summary judgment. Crutchfield v. Hart, 2 Haw. App. 250, 252, 630 P.2d 124, 125 (1981). Though Plaintiffs have submitted considerable evidence in support of their claims under the ACC and the Rental Agreement, Plaintiffs delayed extensive formal discovery to avoid undue expense and burden for both parties while attempting to negotiate settlement of this case. During the course of settlement discussions, Defendant did not attempt to justify or assert an interpretation of the Rental Agreement different from the interpretation that Plaintiffs have asserted above. Declaration of Gavin K. Thornton attached. If the Court has any doubt about the interpretation of the ACC and Rental Agreement set forth above, pusuant to Rule 56(f), H.R.C.P., Plaintiffs must be provided with an opportunity for further discovery of, among other things, the intent of the parties to the ACC, the materials incorporated into the Rental Agreement, and information from HCDCH's agents and experts regarding the applicability of the consumption allowances.

V. CONCLUSION

Plaintiffs are entitled to relief as third-party beneficiaries under the ACC and pursuant to a breach of contract claim under their Rental Agreements. Based on the foregoing, Defendant's Motion for Summary Judgment should be denied, and Plaintiff's Cross-Motion for Summary Judgment should be granted.

DATED: HONOLULU, Hawai'i; SEPTEMBER 23, 2005.

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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* **DECLARATION OF RODELLE SMITH**

DECLARATION OF RODELLE SMITH

RODELLE SMITH, under penalty of perjury, declares and states the following to be true and correct:

1. I am familiar with and have personal knowledge of the facts stated in this Declaration.

2. I am a resident of the Housing and Community Development Corporation of Hawaii ("HCDCH") public housing project Ka Hale Kahaluu where I have lived for over ten years.

3. I pay for my own electric utilities directly to the utility company, Hawaii Electric Light Company.

4. At some point during the year 2005, I walked into the project office

at Ka Hale Kahaluu and requested a copy of the utility allowance schedule. Attached as Exhibit "A" is a true and correct copy of the utility allowance schedule that was posted in the project office and that I was given by the management of the Ka Hale Kahaluu project in response to my request.

I declare under the penalty of perjury the foregoing is true and correct.

DATED: Kealakekua, Hawaii, September 19, 2005.

Rodelle L. Smith

RODELLE SMITH

Of Counsel:

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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 **SUBMISSION OF ORIGINAL COPY OF DECLARATION OF RODELLE SMITH FILED WITH PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON SEPTEMBER 23, 2005**