UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

JANYCE LEWIS, *et al.*,

Plaintiffs,

v. Case No. 3:12-cv-00026-GEC

CHARLOTTESVILLE REDEVELOPMENT AND HOUSING AUTHORITY, *et al.*,

Defendants.

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS AMENDED COMPLAINT

Defendants, Charlottesville Redevelopment and Housing Authority and Constance Dunn, by counsel, file this memorandum in support of their Motion to Dismiss the Amended Complaint in this action.

Summary of Argument

Plaintiffs have brought an action under 42 U.S.C. § 1983 to enforce their alleged rights under the technical statutory and regulatory framework of the United States Housing Act, which addresses the reasonable consumption of electricity and the efficient use of public funds.

Plaintiffs allege broad violations of federal law and broad remedies for those violations. However, their claims fail to allege violations of federal law that would give rise to those remedies; in fact, Plaintiffs' allegations conclusively establish that they are not entitled to relief based on those alleged failures.

As a preliminary matter, the statute of limitations limits Plaintiffs' claims, and they are barred from seeking relief beyond the applicable limitations period. Moreover, the named plaintiff the Charlottesville Public Housing Association of Residents lacks standing to sue, either in its own right or in a representative capacity.

Furthermore, Plaintiffs fail to sufficiently allege violations on the part of Defendants that would entitle them to money damages. In particular, Plaintiffs have not alleged, and cannot allege, that the rates were "arbitrary and capricious, [or] an abuse of discretion," as required by law, nor that the rates are unreasonable based on an energy-conservative household of modest means, as required by law. Plaintiffs have not alleged that any resident from an energy conservative household was unable to stay within the utility allowance. To the contrary, Plaintiffs allege that one named Plaintiff did adopt conservative energy habits, and Plaintiffs allege that she did not exceed her utility allowance.

Moreover, Plaintiffs have alleged that the allowances and surcharges were based on a 2003 study, and Plaintiffs cannot allege any change in circumstances that would make the resulting rates arbitrary and capricious.

Plaintiffs have alleged that Defendants failed to comply with certain procedural requirements of federal law. However, the Fourth Circuit has held that failure to abide by those procedural requirements, though relevant to whether the rates are arbitrary and capricious, do not, by themselves, invalidate an allowance or a surcharge. Those alleged failures may allow the Court to require Defendants to comply with the requirements in the future, but those failures do not invalidate the past rates.

Accordingly, the Court should dismiss the Complaint to the extent it fails to state a claim.

Argument

I. The Statute of Limitations Limits Plaintiffs' Claims.

This action was filed on or about June 7, 2012.

As a preliminary matter, to the extent that Plaintiffs seek damages or equitable restitution for acts that occurred more than two years from the date of filing, or for contractual claims that occurred more than five years from the date of filing, the statute of limitations at least bars those damages.

The Court can rule on a bar of the Statute of Limitations in a motion to dismiss. *See, e.g.*, *Smith v. McCarthy*, 349 F. App'x 851, 856–57 (4th Cir. 2009) (upholding district court's dismissal of § 1983 claims based on statute of limitations).

As for Plaintiffs' claims arising solely out of the lease and the Annual Contributions Contract (ACC),[1] the applicable limitations period, as alleged, is apparently five years for a written contract, unless the contract varies the period. *See* Va. Code § 8.01-246 (2).

As for Plaintiffs' other claims, there is no federal statute of limitations applicable to § 1983 actions. *Wilson v. Garcia*, 471 U.S. 261, 266, 105 S. Ct. 1938 (1985).

Accordingly, § 1983 actions are governed by the state statute of limitations for general personal injury cases in the state where the alleged violations occurred. *Owens v.*

[1] Pursuant to Rule 12 (b) (6), the alleged facts recited herein are assumed true only for purposes of Defendants' Motion. For all other purposes, Defendants reserve the right to dispute any and all allegations made by Plaintiffs.

Okure, 488 U.S. 235, 239–40, 109 S. Ct. 573 (1989). Virginia has a two-year statute of limitations for general, personal injury claims. *See* Va. Code Ann. § 8.01-243 (a). Therefore, a plaintiff bringing a civil rights action under § 1983 in Virginia must do so within two years from the time when his action accrues. *See, e.g.*, *McCarthy*, 349 F. App'x at 856–57.

The accrual of a cause of action under § 1983 is determined by federal law. *See Nasim v. Warden, Md. House of Correction*, 64 F.3d 951, 955 (4th Cir.1995) (en banc); *see also Wallace v. Kato*, 549 U.S. 384, 388, 127 S. Ct. 1091 (2007). In *Nasim*, the Fourth Circuit held that a cause of action under § 1983 accrues and the statute of limitations begins running "when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action." *Nasim*, 64 F.3d at 955 (citation omitted).

In this case, Plaintiffs have alleged periodic damages as a result of the alleged violations of the part of Defendants. For example, Plaintiffs have alleged that residents were charged excessive allowances and surcharges on a monthly basis. Plaintiffs have sought reimbursement for those damages in the form of "equitable restitution," apparently since 2003. Am. Compl., Prayer for Relief, ¶ 5; Am. Compl., ¶ 8. Plaintiffs have also sought the payment of U.S. Savings Bonds from as early as 2003. Am. Compl., Prayer for Relief, ¶ 6.

As for each of these claims, Plaintiffs have affirmatively alleged that they possessed sufficient facts about the harm done such that reasonable inquiry would reveal their cause of action. Therefore, their claims accrued at the moment of the alleged

conduct. Plaintiffs have not alleged any facts that would toll the applicable statute of limitations.

Even if the limitations period for the state-law claims is longer than the period for claims under § 1983, the claims under § 1983 and the contract claims may be distinct to such an extent that the Court may no longer exercise jurisdiction over the contract claims that are more than two years old. The Court can exercise supplemental jurisdiction over those contract claims, but only to the extent that those claims stem from a common nucleus of operative fact as does the underlying § 1983 claim. 28 U.S.C. § 1367; *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 1138 (1966).

Furthermore, the statute of limitations is relevant to the issue of attorneys' fees under 42 U.S.C. § 1988.

Under § 1988, the Court has discretion to allow "the prevailing party" in an action under § 1983 to recover "a reasonable attorney's fee as part of the costs," as well as a reasonable fee for experts. 42 U.S.C. § 1988 (b), (c).

If the claims under § 1983 are based on a core set of facts that are also relevant to the state law claims, then the attorneys' fees for those state law claims are also recoverable under § 1988, in the Court's discretion. *Johnson v. City of Aiken*, 278 F.3d 333, 337 (4th Cir. 2002).

In this case, assuming, for purposes of argument, that Plaintiffs are successful on their claims under § 1983 and are not deemed to have waived their right to attorneys' fees, *see infra*, Plaintiffs would be eligible to recover, in the Court's discretion, their

attorneys' fees and expert fees for proving two years' worth of allegedly excess utility charges.

But Plaintiffs would not be eligible to recover their attorneys' fees for proving the preceding three years' worth of allegedly excess fees. A determination of the reasonableness of the fees during that period may depend on various unique factors, including the condition of the building and its energy efficiency; the checking and condition of the electric meters; and the availability of the report and the other procedural requirements of the U.S. Housing Act during that time period.

Moreover, by contract, Plaintiffs have already waived their right to attorneys' fees growing out of any breach of the lease.[2] The Lease provides, "In any action to enforce the Lease, each party shall bear its own attorneys fees. The prevailing party shall recover court costs." Am. Compl., Att. 3, Dwelling Lease, ¶ 20 (E).

Plaintiffs seek their attorneys' fees in this action. *See* Compl., Prayer for Relief, ¶ 8. The Court can and should rule now, as a matter of law, that Plaintiffs are not entitled to their attorneys' fees, at least for the alleged violation of the Lease, and perhaps for any violation growing out of the subject matter of the Lease. And at the least, to the extent that Plaintiffs' claims under § 1983 reach beyond two years preceding the filing of the Complaint, Plaintiffs' claims are barred by the statute of limitations, and to the extent that Plaintiffs' contractual claims reach beyond five years, those claims are barred.

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[2] The Lease is attached to the Amended Complaint, and the Court may consider such documents in ruling on a motion to dismiss. *See Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004) (court may consider documents that are "integral to and explicitly relied on [or referred to] in the complaint").

II. Plaintiff PHAR Lacks Standing to Sue, Either in Its Own Right or in a Representative Capacity.

Among the named plaintiffs is the Charlottesville Public Housing Association of Residents ("PHAR").

It appears that suit is brought by PHAR in its own capacity and in a representative capacity. *See* Am. Compl., ¶¶ 169, 175, 182 ("PHAR is a proper plaintiff to bring this claim individually to protect its own interests and the interest of its members.")

Plaintiffs have asserted that PHAR is "an association made up of residents of public housing and other low-income people in Charlottesville, Virginia," that "[e]very adult resident in CRHA properties is a member of PHAR," and that its "mission is to empower low-income residents to protect and improve the CRHA-owned housing through community collective action." Am. Compl., ¶¶ 18, 130.

The Supreme Court has referred to this issue as "standing to sue." *Sierra Club v. Morton*, 405 U.S. 727, 731–32, 92 S. Ct. 1361, 1364 (1972) (citations omitted). The Court has held, "[w]here the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy." *Id.* (citations and quotations omitted).

Plaintiffs has alleged that PHAR "has expended time and resources on the issue of the burden that inappropriate and excessive utility billing has imposed on its membership," Am. Compl., ¶¶ 134, and that "[a]ll of PHAR's resident members are negatively affected by CRHA's improper [utility] allowance setting," Am. Compl., ¶ 136.

However, these allegations are not sufficient to establish direct harm to PHAR, such that PHAR could sue in its own right, or to establish harm to PHAR that is distinct from its members, such that PHAR could sue in a representative capacity.

a. PHAR Lacks Standing to Sue in Its Own Right.

PHAR lacks standing to sue in its own right. If an organization can allege an injury in fact in its own right, then that organization can sue on behalf of itself, rather than in a representative capacity.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79, 102 S. Ct. 1114, 1124–25 (1982), the Supreme Court addressed whether a nonprofit corporation, Housing Opportunities Made Equal ("HOME"), which counseled low- and moderate-income homeseekers, had standing to sue. HOME voluntarily dismissed its claims in a representative capacity, and thus the Court addressed only whether HOME had standing to sue in its own right. *Id.* The Court noted that HOME had alleged that the defendants' actions had "frustrated [HOME] in its efforts to assist equal access to housing through counseling and other referral services," and that as a result, HOME had to devote significant resources to identify and counteract the defendants' practices. *Id*

The Court held that, as alleged, the organization had suffered "injury in fact" in that defendants "ha[d] perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers," and that "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.* (citing *Sierra Club*, 405 U.S. at 739, 92 S. Ct. at 1368).

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79, 102 S. Ct. 1114, 1124–25 (1982), again cited in the instant case by both Plaintiffs and Defendants, the nonprofit corporation Housing Opportunities Made Equal ("HOME") counseled low- and moderate-income homeseekers, and assisted them in procuring homes, and sought to secure equal access to housing. *Id.*

In its complaint, HOME alleged, "Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the … racially discriminatory steering practices." *Id.* at 379, 92 S. Ct. at 1124 (quoting complaint).

The Court concluded that HOME had alleged a sufficient injury in fact to its own organizational mission. The Court reasoned, "If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact." *Id.*

In this case, by contrast, PHAR's own mission has not been directly hampered by CRHA's alleged practices. It has engaged in advocacy as a result of CRHA's alleged practices, but those allegations alone are insufficient to allege standing on behalf of PAR.

PHAR can allege no "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources." *See id.* Plaintiffs have alleged PHAR's "regular outreach" to residents, PHAR's circulation of a petition, and PHAR representatives' testimony before CRHA, and that PHAR "has expended time

and resources on the issue that in appropriate and excessive billing has imposed on its membership." *See* Am. Compl., ¶¶ 132–34. The Complaint does allege that CRHA recognizes PHAR as a representative of the public housing residents for certain purposes under 24 CFR § 964, *see* Am. Compl., ¶ 131, but the Complaint does not sufficiently allege standing on the part of PHAR.

In particular, PHAR cannot allege that its organizational mission was hampered by the allegedly improper practices of CRHA. Instead, PHAR alleges that as a result of CRHA's practices, PHAR engaged in advocacy. But such advocacy, standing alone, is an insufficient injury on the part of the organization to enable it to sue in its own right. *See also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261, 97 S. Ct. 555, 561 (1977) (enabling nonprofit organization to sue when the organization sought to construct certain housing, and the actions of the defendants "stands as an absolute barrier to constructing the housing").

The injury alleged by PHAR is a step removed from the injury alleged in HOME, and is actually in line with the cases cited above, in which advocacy groups were denied standing to sue in a representative capacity to assert only the rights of its members. Accordingly, PHAR lacks standing in its own right and should be dismissed as a plaintiff in this action.

b. PHAR Lacks Standing to Sue in a Representative Capacity.

To have standing to sue in a representative capacity, an organization must assert an injury distinct from that of its members, in the absence of special circumstances. *See, e.g.*, *National Welfare Rights Org. v. Wyman*, 304 F. Supp. 1346 (E.D.N.Y. 1969);

Organized Migrants in Cmty. Action, Inc. v. James Archer Smith Hosp., 325 F. Supp. 268 (S.D. Fla. 1971).

For example, in *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972), the Court allowed the plaintiff Inter-Religious Center for Urban Affairs ("ICUA") to sue in a representative capacity to remove certain allegedly discriminatory zoning, which blocked the construction of a housing project. The Court allowed the ICUA to sue on behalf of the individuals, because "the identity of interest between the party asserting the right and the party in whose favor the right directly exists is sufficiently close." *Id.* at 1213 (quoting *Brewer v. Hoxie Sch. Dist. No. 46*, 238 F.2d 91, 104 (8th Cir. 1956)). The Court ruled that "[t]he interests of the corporate and individual plaintiffs coincide because both desire to be free from the discriminatory zoning," and that "[i]f such zoning did not exist, … ICUA would be able to fulfill [its] purpose of building racially integrated rental housing in a better economic, educational, and recreational environment, and the individual plaintiffs would be able to live in the apartments." *Id.* at 1213–14. Therefore, the Court held that the Center had standing to sue.

Courts have allowed representative standing under "special circumstances," such as this closeness of "identity" and "purpose" between the organization and the members, *see id.*, or a "lack of effective representation, gross adversarial inequality, or other obstacles to the individual plaintiffs which require the presence of the organizational plaintiffs." *See, e.g.*, *Bell v. Auto. Club of Michigan*, 18 Fed. R. Serv. 2d 1494, 1974 WL

168878 (E.D. Mich. 1974) (denying standing to an organization when no such special circumstances existed).

In particular, courts have allowed organizations to sue on behalf of their members under a specific line of cases related to the First Amendment right of freedom of association, when an organization sued to protect and enforce its own interests, and thus the organization stood in a particular posture with respect to the rights of its members.

For example, in *Gremellion*, the NAACP opposed the legality of two statutes: one statute required the association's chief officer to swear that no member was also a member of a Communist organization, and the other statute required the officer to file a list of its members. *Louisiana ex rel. Gremillion v. Nat'l Ass'n for the Advancement of Colored People*, 366 U.S. 293, 294–95, 81 S. Ct. 1333, 1334–35 (1961).

The Court noted that these statutes addressed "a constitutional right, since freedom of association is included in the bundle of First Amendment rights," and that the NAACP had standing to assert the rights of its members "where it is shown … that disclosure of membership lists results in reprisals and hostility to the members." *Id.* at 296, 81 S. Ct. at 1335.

And in *Button*, cited in the instant case by both Defendants and Plaintiffs, the Court reasoned, "We think petitioner [the NAACP] may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail." *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 418, 428, 83 S. Ct. 328, 335 (1963).

Notably, in each of these cases, the NAACP sought a particular remedy for itself. *See also Contract Buyers League v. F & F Investment*, 300 F. Supp. 210 (N.D. Ill. 1969) (denying standing to an organization that asserted no rights of its own and sought no relief for itself).

Finally, in this case, Rule 23 of the Federal Rules of Civil Procedure already provides specific requirements for representative status of class members, and this fact, too, must inform the Court's analysis of whether the organization has standing. For example, in *CORE v. Comm'r, Social Security Admin.*, 270 F. Supp. 537 (D.Md. 1967), the Congress of Racial Equality sued on behalf of an employee of Social Security Administration and alleged racial discrimination. The Court dismissed CORE, noting that CORE was not itself a member of the class, was not itself discriminated against, and had no judicial right it was seeking to enforce. *Id.*

In the instant case, PHAR is not asking for any particular relief for itself. There is no alleged inability of individual residents to bring suit, such as a concern about reprisals; to the contrary, several current residents are named as plaintiffs. Nor does this case fall into the line of cases in which the rights of the members and the right of the organization are intertwined, such as under a statute that prohibits the actions of PHAR, as in *Button*, or which requires PHAR to comply in a manner that might affect its actions, as in *Gremellion*.

Therefore, PHAR cannot bring this action in a representative capacity.

III. Plaintiffs' Claims for Relief Based on Violations of the U.S. Housing Act Fail to State a Claim for Relief.

Plaintiffs are seeking that the Court invalidate the current allowances and surcharges from 2003.

Under federal law, the PHA must adopt a utility allowance based on "monthly cost of a reasonable consumption of utilities … by an energy-conservative household of modest means, consistent with the requirements of a safe, sanitary and healthful living environment." 24 CFR § 965.505 (a). Moreover, "[t]he PHA's determination of allowances, scheduled surcharges, and revisions thereof shall be … valid unless found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 24 CFR § 965.502 (e).

Plaintiffs allege that CRHA has failed to update its allowances since 2003, and that CRHA adopted those allowances in 2003 based on a study that was reported over the telephone. Am. Compl., ¶¶ 48–49.

Plaintiffs have alleged that these procedural defaults invalidate the fees. CRHA has alleged, "[a] documented basis for setting and imposing electric utility allowances is a condition precedent to the CRHA charging residents excess utility charges," Am. Compl., ¶ 157, and "as a result CRHA assess[ed] fees when it had no right to assess any fees," Am. Compl., ¶ 159.

However, the Court is not bound by legal conclusions in the Complaint. *See Nemet*, 591 F.2d at 255 (citing *Iqbal*, 556 U.S. at 677, 129 S. Ct. 1937).

Plaintiffs' claims for violation of the U.S. Housing Act fail to state a claim to invalidate the allowances, and therefore those claims must be dismissed.

a. Applicable Law for Motion to Dismiss Under Rule 12 (b) (6)

Under Rule 12 (b) (6), a complaint may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12 (b) (6). The court must grant a motion to dismiss if, considering the complaint and its allegations in the light most favorable to the non-moving party, the plaintiff fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569, 127 S. Ct. 1955, 1974 (2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555, 127 S. Ct. at 1964–65.

This analysis under Rule 12 (b) (6) is a "context-specific task" that requires the court to draw on its "judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009). "[L]egal conclusions, [recitation of the] elements of a cause of action, and bare assertions devoid of further factual enhancement fail to constitute well-pled facts for Rule 12 (b) (6) purposes." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citing *Iqbal*, 556 U.S. at 677, 129 S. Ct. 1937). Moreover, in evaluating a complaint for purposes of a motion under Rule 12 (b) (6), the court must "decline to consider 'unwarranted inferences,

unreasonable conclusions, or arguments'" contained in the complaint. *Id.* at 255 (citations omitted); *see also Iqbal*, 556 U.S. at 680–81, 129 S. Ct. at 1950–51).

b. The Allowances Are Valid Unless "Arbitrary," "Capricious," or an "Abuse of Discretion."

Under federal law, "[t]he PHA's determination of allowances, scheduled surcharges, and revisions thereof shall be … valid unless found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 24 CFR § 965.502 (e).

The Fourth Circuit has made clear that in an inquiry into the validity of allowances, the controlling issue is whether the rates were "arbitrary and capricious." *See Dorsey v. Housing Authority of Baltimore City*, 984 F.2d 622, 632 (1993).

In *Dorsey*, tenants of a housing authority in Baltimore City sued to challenge the validity of utility allowances. In that case, the tenants presented evidence that the authority had not complied with certain "procedural" requirements, that is, notice and recordkeeping provisions when a new Final Rule was adopted. The tenants also presented evidence that they had received surcharges at a high rate despite "efforts to be energy conscious" and "their efforts to economize." *Id.* at 626, 628.

The district court granted summary judgment for the authority despite the tenants' argument that the authority had failed to follow certain procedural requirements. The district court reasoned that the "procedural requirements are inapplicable to the current allowances or … they were substantially followed." *Id.* at 629.

On appeal, the Fourth Circuit held that it was error for the district court to completely disregard the alleged violations of the procedural requirements. *Id.* at 630. The Fourth Circuit rejected the district court's conclusion that "the procedural requirements … do not create enforceable rights" or that those requirements are "inapplicable" to an inquiry into the validity of the rates. *Id.* at 630.

Notably, however, the Fourth Circuit never held that failure to abide by these procedural requirements, by itself, would invalidate an allowance. To the contrary, the Court held that the regulations do not "authorize[e] a separate analysis of substantive and procedural aspects" of the regulations. *Id.* at 630. Instead, the Court held that the procedural requirements of notice and annual review "in their entirety must inform the reasonableness of a utility allowance." *Id.* at 630.

For this reason, the Fourth Circuit in *Dorsey* held that the authority was not entitled to summary judgment, but it also held that the tenants were not entitled to summary judgment merely because the authority had failed to comply with some procedural requirements. The Court reasoned, "Although all violations of the regulations are actionable, some regulatory mandates are more or less important to the overall directive to set reasonable allowances than others, and not every violation will necessarily render a PHA's allowances, or its method of setting them, arbitrary and capricious." *Id.* at 632.

The holding of the Fourth Circuit in this respect is supported by longstanding principles of statutory interpretation.

The regulations clearly articulate that the allowances are only invalid if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 24 CFR § 965.502 (e). Because the regulations have expressly provided for the circumstances under which the allowances are invalid, the regulations govern.

It is true that those regulations include the word "shall." However, failure to follow those provisions does not invalidate the allowances and surcharges.

The word "shall" in a statute can have two senses: the term can be "mandatory," in the sense that the underlying proceeding is not valid unless the act is completed, or the term can be "directory," in the sense that government officials are directed to act in a particular way, but failure to act in that way does not affect the validity of the proceeding. *See, e.g.*, *S. Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118, 130-31 (D.S.C. 1978) (citing cases).

In this case, the words "shall" in the above-referenced regulations cannot be construed as "mandatory," that is, as affecting the validity of the allowances or the surcharges. The regulation already provides the circumstances under which the allowances or surcharges are invalid: when those rates are "arbitrary or capricious" or an "abuse of discretion."

Nor does the phrase, "otherwise not in accordance with the law," expand the grounds on which the Court may invalidate allowances or surcharges. Under the rule of *ejusdem generis*, "when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586, 128 S. Ct. 1396,

1404–05 (2008) (holding that the list of grounds for judicial review under the Federal Arbitration Act is exclusive, and cannot be expanded).

Therefore, the regulation itself provides that the procedural requirements do not, by themselves, invalidate an allowance or a surcharge. This reading of the statute is reinforced by the Fourth Circuit's reasoning in *Dorsey*.

c. Plaintiffs Have Not Alleged, and Cannot Allege, that the Current Allowances are "Arbitrary" or "Capricious."

Under the above standard, Plaintiffs have not alleged, and cannot allege, that the rates and surcharges were "arbitrary, capricious, [or] an abuse of discretion."

Instead, Plaintiffs have alleged that CRHA did not comply with procedural requirements in the regulations, namely, that CRHA failed to maintain records to document the basis for that allowance under 24 CFR § 965.502 (b), Am. Compl., ¶¶ 25, 49; failed to regularly review the basis for the allowance, 24 CFR § 965.507, Am. Compl., ¶¶ 27–28, 45, 47; and failed to adopt criteria for granting adjustments to elderly and ill residents or for tenants whose usage was beyond their control, Am. Compl., ¶¶ 29–30, 56–57. Moreover, Plaintiffs have repeatedly alleged that the resulting rent was in excess of 30% of Plaintiffs' income. *See* Am. Compl., ¶ 2.

But taken with the other allegations of the pleading, these allegations do not allege that the resulting allowances and surcharges were arbitrary and capricious.

Plaintiffs have alleged that these allowances were based on a 2003 study, the results of which were reported to CRHA. Am. Compl., ¶¶ 5, 49. Plaintiffs have attached Attachment 2 to this Complaint, which provides that CRHA established these allowances

in April 2003 "to reflect modernization efforts of the units at each site." *See* Compl, Att. 2, at 1. The Court may consider those documents in ruling on this Motion to Dismiss.[3]

Plaintiffs particularly allege that the rates are invalid because CRHA has "fail[ed] to update its utility allowances to comply with federal law." *See* Am. Compl., ¶ 10.

Plaintiffs also allege that CRHA has not raised its rates since 2003. Am. Compl., ¶ 46.

Plaintiffs have therefore alleged that CRHA established allowances and surcharges based on a 2003 study, and that CRHA has deliberately elected not to raise its rates, that is, that CRHA has elected not to pass on to the residents the increased electric supplier rates since 2003.

But under *Dorsey*, such allegations are not sufficient to survive a motion to dismiss. In *Dorsey*, the Fourth Circuit expressly held that "although all violations of the regulations are actionable, some regulatory mandates are more or less important than others, and not every violation will necessarily render a PHA's allowances, or its method of setting them, arbitrary and capricious." 984 F.2d at 632.

Moreover, Plaintiffs have not alleged any change in circumstances that would require a change in the rates, such that not changing those rates would be "arbitrary, capricious, [or] an abuse of discretion." For example, between 2003 and the filing of the Complaint, there had been no adoption of a new Rule that would require the notice or adoption of new rates, as was the case in *Dorsey*, when a new Final Rule replaced the

[3] *See Am. Chiropractic Ass'n*, 367 F.3d at 234 (court may consider documents that are "integral to and explicitly relied on [or referred to] in the complaint").

Interim Rule and "the entire rationale behind the adoption of allowances changed." 984 F.2d at 629.

Accordingly, Plaintiffs allege facts that conclusively establish that the allowances are not "arbitrary, capricious, [or] an abuse of discretion." Those claims should be dismissed.

d. Plaintiffs Have Not Alleged, and Cannot Allege, that the Current Allowances Are Unreasonable Based on a Conservative Household.

Moreover, Plaintiffs have not alleged, and cannot allege, that the current allowances are unreasonable based on a conservative household.

Under federal law, the allowable rent must include an allowance for the "monthly cost of a reasonable consumption of utilities … by an energy-conservative household of modest means, consistent with the requirements of a safe, sanitary and healthful living environment." 24 CFR § 965.505 (a). The statute itself provides no guidance on the required appliances; the statute requires only a "decent, safe, and sanitary dwelling," with "all necessary appurtenances thereto." 42 U.S.C. § 1437a (b) (1); *see also Curtis v. Hous. Auth. of the City of Oakland*, 746 F. Supp. 989, 994 (N.D. Cal. 1990) (discussing whether a "stove" is required under this chapter). The statute itself contains no further elaboration on the appliances included in rent.

The language of the Lease affirms this standard of "reasonable" use of electricity. In the Lease, each resident agreed that he or she "may use only a reasonable amount of … electricity, as determined by the Schedule of Utilities Consumption published by the Authority." *See* Am. Compl., Att. 3, Dwelling Lease, ¶ 7 (A); *see also id.*, ¶ 13 (A) (each

resident agreed "[t]o use the Residence, tougher with all electrical … facilities, … only in a reasonable manner").

In this case, Plaintiffs have not alleged that the allowance is insufficient for such an energy-conservative household of modest circumstances. Yet under the statute and established case law, the central inquiry is that inquiry of reasonableness based on an energy-conservative household. *See Dorsey v. Housing Authority of Baltimore City*, 984 F.2d 622, 625 (1993).

The illustrative examples used by the regulations are instructive in interpreting the general terms of the regulations. Under the regulations, the reasonable allowance "shall be designed to include" only "essential equipment … (e.g., range and refrigerator), and … minor items of equipment (such as toasters and radios)." 24 CFR 965.505 (b). Moreover, and in particular, the regulations specifically provide that the allowance shall not cover air conditioning. 24 CFR § 965.505 (e). The regulation provides, "[f]or systems that offer residents the option to choose air conditioning, the PHA shall not include air conditioning in the utility allowances." 24 CFR § 965.505 (e).

The regulations therefore envision a household without air conditioning; with necessary major appliances; but with only modest minor appliances, such as a "toaster" and "radio." The regulations deliberately forego mention of a television, computer, or video gaming system.

Under this standard, Plaintiffs have not alleged, and cannot allege, that the rates are unreasonable based on an "energy-conservative household."

In *Dorsey*, the Court found that the tenants had raised a triable issue of whether the rates were unreasonable. *Dorsey*, 984 F.2d at 631. But notably, in that case, the tenants had presented evidence of their efforts to conserve energy; the Court reasoned that a high rate of surcharges despite such efforts could be grounds for determining that the rates were "arbitrary and capricious." The Court noted that the plaintiffs "submitted the affidavits of Tenants who attested to energy conservative utility consumption but who nonetheless consistently received excessive surcharges," that they had received surcharges at a high rate despite "efforts to be energy conscious," and that they swore to "their efforts to economize." *Id.* at 631, 626, 628.

In this case, by contrast, the named plaintiffs have not alleged, and cannot allege, that any of them employ an "energy conservative utility consumption," or that they have employed "efforts to be energy conscious."

In fact, Plaintiffs only allege such conservation on the part of one plaintiff: Ms. Tinsley. *See* Am. Compl., ¶ 125. Plaintiffs allege, "Ms. Tinsley … has developed and stuck to conservative usage habits." Am. Compl., ¶ 125.

Plaintiffs do allege that certain named plaintiffs had difficulty staying below the allowance; and they allege that 73% of residents were charged with excess utility fees.

But under *Twombly* and *Iqbal*, the Court "is not permitted to step in and make the necessary leaps to make certain that a plaintiff has properly pled his cause of action." *Parks v. Lowe*, No. 1:09-cv-00070, 2010 WL 545679 (W.D. Va. Feb. 12, 2010) (report of Sergeant, J.), *report and recommendation adopted*, 1:09-cv-00070, 2010 WL 753335 (W.D. Va. Mar. 1, 2010), *aff'd*, 407 F. App'x 643 (4th Cir. 2011).

To survive a motion to dismiss, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009).

Because Plaintiffs have not alleged, and cannot allege, that the resulting are unreasonable based on the statutory standard, their claim must be dismissed.

e. Plaintiffs' Reference to the HUD Guidebook Is Unavailing.

Plaintiffs attempt to alter the clear statutory and regulatory standards by citing the 2003 HUD Public Housing Guidebook (the "HUD Guidebook"). *See* Am. Compl., ¶¶ 54, 149. Plaintiffs argue that the HUD Guidebook dictates that routine electricity surcharges are evidence of the insufficiency of the allowance.

But Plaintiffs misconstrue both the content of the HUD Guidebook and its legal effect.[4]

In the Amended Complaint, Plaintiffs allege that "HUD's public housing guidance states that consumption that routinely exceeds the allowance constitutes evidence of the insufficiency of the allowance," Am. Compl., ¶ 54, and that "[u]nder HUD policies, the extremely high proportion of residents charged is prima facie evidence of the inadequacy of CRHA's current excess electric utility billing scheme," Am. Compl., ¶ 149.

[4] Although Plaintiffs have not attached the HUD Guidebook to the Amended Complaint, the HUD Guidebook can be considered by the Court in this Motion to Dismiss; it is explicitly relied on and referred to in the Complaint, and, thus, it can be considered part of the pleadings for purposes of a motion under Rule 12 (b) (6). *See Am. Chiropractic Ass'n*, 367 F.3d at 234.

But, contrary to these allegations, the HUD Guidebook does not lay out any binding or mandatory rule that provides that routine surcharges are evidence of insufficiency of the allowance. To the contrary, the Introduction to the HUD Guidebook states that the contents are not "program requirements." HUD Guidebook, Introduction, at 1. The HUD Guidebook provides, "Unlike the federal regulations, which are program requirements, some of the material in this Guide represents suggestions, practical ideas, or good management practice from successful PHAs." *Id.*

The portions of the HUD Guidebook cited by Plaintiffs in the Amended Complaint appears to be at Section 14.1, "Resident-Paid Utilities." In that section, the HUD Guidebook provides "suggested additions" to the Housing Authority's own policies. *Id.* at 169. One of those "suggested additions" is that "[w]hen the actual energy consumption by tenants routinely exceeds a utility allowance, a PHA shall increase the allowance," and "[t]he fact that tenant consumption is routinely in excess of the PHA's utility allowance is material evidence that the PHA allowance is insufficient or that excess consumption may be due to factors not within the control of the tenants." HUD Guidebook, at 170.

These statements are suggestions only, and are not mandatory or binding on the authority.

But even if those statements in the HUD Guidebook should be taken as prescriptive—against the plain language of the HUD Guidebook—those statements are not entitled to weight from the Court.

It is well established that regulations implementing statutes are given controlling weight unless those regulations are arbitrary, capricious or manifestly contrary to the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778 (1984). One rationale for the binding effect of these regulations is that these regulations go through a formal rulemaking process. *See, e.g.*, *id.* at 858–859, 863, 104 S. Ct. at 2789–90, 92.

But the HUD Guidebook has no such binding force. Instead, the Guidebook is authority only "to the extent that the interpretation has the power to persuade." *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 291 (4th Cir. 2011) (citation omitted) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944)).

In this case, the statement in the HUD Guidebook regarding routine utility surcharges has no independent persuasive power. The HUD Guidebook provides no additional reasoning for this suggested addition, nor was the suggested addition the result of any formal determination by HUD.

For these reasons, the command of 24 C.F.R. § 965.505 (a) controls. That is, CRHA must set an allowance sufficient for "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." *See* 24 C.F.R. § 965.505 (a).

In this case, Plaintiff's claims are speculative and possible, but are insufficient under *Twombly* and *Iqbal*. Plaintiffs have alleged that various residents did not stay within the allowance; however, Plaintiffs have not alleged that the utility allowance is

sufficient for the "reasonable consumption of utilities by an energy-conservative household of modest circumstances." *See* 24 C.F.R. § 965.505 (a).

Accordingly, this pleading does not meet the standard of *Iqbal* and *Twombly*, and the Complaint must be dismissed.

IV. To the Extent that Plaintiffs Have Alleged Violations of Federal Law, Those Violations Only Give Rise to Prospective Remedies.

Defendants dispute the claim that they have not complied with the procedural requirements of the U.S. Housing Act; particularly, Defendants dispute that Plaintiffs cannot review the basis of the 2003 study, or that CRHA has failed to regularly review and annually review its rates.

However, to the extent that the Complaint pleads such facts, nevertheless, Plaintiffs may only seek as a remedy a requirement that CRHA comply with such procedures in the future; for example, Plaintiffs may only seek as a remedy that CRHA make the basis of the study available in the future, or that CRHA annual review its rates under a particular rubric in the future.

While the Fourth Circuit in *Dorsey* held that "not every violation [of the regulations] will necessarily render a PHA's allowances … arbitrary and capricious," the Court did establish that "all violations of the regulations are actionable." *Dorsey*, 984 F.2d at 632.

That is, Defendants concede that Plaintiffs may require CRHA to provide certain notice, and to annually review the rates, as the Court will define those terms.

However, the Court may not invalidate current rates, unless those rates are "arbitrary, capricious, [or] an abuse of discretion." 24 CFR § 965.502 (e).

Therefore, Plaintiffs may seek prospective remedies in the form of an injunction to require CRHA to comply with the procedural requirements of the regulations. However, on the basis of their allegations, Plaintiffs may not seek retrospective remedies in the form of damages for an allegedly invalid rate.

Accordingly, to the extent that Plaintiffs have alleged violations of the procedural requirements of the regulations, which Defendants do not concede, Plaintiffs are limited to prospective relief only.

V. To the Extent that Plaintiffs' Other Claims for Relief Are Premised on Violations of the U.S. Housing Act, Those Claims Fail.

For the reasons stated above, Plaintiffs have not sufficiently alleged that the rates imposed by CRHA are invalid.

Accordingly, their additional claims fail, to the extent their Second Claim for Relief, for violations of the lease, their Third Claim for Relief, for violation of the ACC, or any other claim similarly relies on the proposition that the rates are invalid, *see* Am. Compl., ¶¶ 163–64, 171–72.

VI. Plaintiffs' Claim Based on Failure to Provide Procedural Remedies, or to Notify Residents of Such Procedural Remedies, Fails to State a Claim.

Plaintiffs have also alleged that CRHA failed to develop a plan to reduce rates for tenants with disabilities or whose usage was out of their control, and to otherwise provide

certain procedural rights allegedly required by federal law. *See* Am. Compl., ¶¶ 56, 57, 173.

Under the Lease, each resident was given access to a formal grievance procedure for any adverse action by the Authority. *See* Am. Compl., Att. 3, Dwelling Lease, ¶ 19. The grievance procedures are "incorporated into the Lease by [] reference." *Id.* This grievance procedure is available online, and a copy of the grievance procedure is attached to this Memorandum as Attachment A. *See* Att. A, Complaints, Grievances, and Appeals, at 1, available at http://www.charlottesville.org/Index.aspx?page=720.

This grievance procedure was required by HUD Regulations. *See* Att. A, Complaints, Grievances, and Appeals, at 1.

The procedure provided elaborate procedural safeguards and rights. The procedure provided an impartial hearing officer, *id.*, p. 7; provided that the resident need only pay any funds into an escrow fund pending the outcome of the hearing, *id.*, p. 8; the opportunity to examine evidence, *id.*; and the right to be represented by counsel, *id.*; and the right to an appeal and judicial review, *id.*, p. 10.

Therefore, to the extent the Amended Complaint attempts to state a claim for failure to provide any such procedure, or to notify residents of any such procedure, the Amended Complaint fails.

VII. Plaintiffs' Have Not Alleged Any Attempt to Make Use of the Grievance Procedure.

Plaintiffs have raised various claims based on utility rate surcharges and the failure to provide a savings bond to residents who did not exceed their allowance, grounded both in federal law and in state law.

Under the Lease, each resident was given access to a grievance procedure for any adverse action by the Authority. *See* Am. Compl., Att. 3, Dwelling Lease, ¶ 19; Att. A, Complaints, Grievances, and Appeals. This grievance procedure was required by HUD Regulations. *See* Att. A, Complaints, Grievances, and Appeals, at 1.

In this case, there is no allegation that any named Plaintiff or resident took advantage of any such grievance procedure.

Because of this failure to make use of this grievance procedure, residents waived their right to dispute such adverse actions, and their failure to exhaust these administrative remedies constitutes a bar to any action, at least as to Plaintiffs' state-law claims arising out of an alleged violation of the Lease and the ACC, and Plaintiffs' claims arising out of the alleged failure of CRHA to provide a savings bond to eligible residents.

Accordingly, those claims must be dismissed.

VIII. Plaintiffs' Third Claim for Relief, For Failure to Notify Residents, Fails to State a Claim.

Plaintiffs also allege that CRHA failed to comply with the lease provisions regarding notice of excess utility rates. But Plaintiffs do not sufficiently allege a violation of the lease.

Plaintiffs base their allegations of the terms of the lease, which provide that charges for excess utilities "shall be due and payable on the first month after the Authority has given the Resident a 14 day written notice of the charges." Am. Compl., ¶ 58 (quoting Lease, ¶ 7 (D)).

But Plaintiffs do not allege a violation of this provision. Plaintiffs allege that "the CRHA billed residents in the same month that notice of charges was given." Am. Compl., ¶ 58. The lease itself only provides that CRHA must given the residents "14 days written notice of the charge"; it does not require that the notice and the billing be in different months.

From the allegations, it not clear whether or how CRHA violated the lease. The allegations of Plaintiffs would cover a situation in which CRHA gave the residents written notice of the surcharge in a given month, and then later that month sent a bill for those charges, which would be due on the 1st of the following month. Such a practice would entail giving the residents "14 days written notice of the charge," billing them in a way that is due on the first of the following month, and billing the residents "in the same month that notice of charges was given."

Such an allegation of a violation of the notice provisions is insufficient to survive a Motion to Dismiss. "[B]are assertions devoid of further factual enhancement fail to constitute well-pled facts for Rule 12 (b) (6) purposes." *Nemet Chevrolet*, 591 F.3d at 255 (citing *Iqbal*, 556 U.S. at 677, 129 S. Ct. 1937).

Accordingly, Plaintiffs' Second Claim for Relief should be dismissed to the extent it asserts a violation of the notice provision of the lease.

IX. Plaintiffs' Fourth Claim for Relief, Savings Bond, Fails to State a Claim.

Defendants concede that on a Motion to Dismiss, the Court's inquiry is focused on the allegations. Accordingly, to the extent that Plaintiffs have alleged that Resolution No. 2058 constituted a contract, *see* Am. Compl., ¶ 176, those allegations are established for purposes of a Motion to Dismiss.

However, Plaintiffs have not alleged, and cannot allege, that Resolution No. 2058 was binding on future boards. The Resolution speaks for itself, and there is nothing in the Resolution that suggests that the Resolution would continue in the future. To the contrary, the Resolution only refers to an incentive program based on "annual" uses of electricity.

Plaintiffs have alleged that the Board of CRHA passed a resolution in 2003 that made all residents in all subsequent years entitled to a $50.00 Savings Bond if they met their utility allowance for the year.

On its face, the resolution does not expressly state that the program will endure for a number of years. This resolution provided, "to encourage public housing residents to conserve utilities and respond positively to the revised utility allowance, … each household that does not exceed its annual electrical consumption will receive a U.S. Savings Bond of $50.00." Am. Compl., Att. 2, at 1. The Board then approved this incentive. *Id.*

There is no allegation that the Board adopted a similar resolution for any subsequent year.

Nor is there any allegation that the Board appropriated funds to purchase any such savings bond in 2003 or any other year.

In this case, the promised savings bond program expired at the end of the fiscal year of 2003. There is no allegation that the Board of CRHA passed a resolution re-adopting the program in later years, and the statements in the Resolution apply only to 2003. Accordingly, it expired of its own accord at the end of the fiscal year 2003.

Moreover, even if the program could be read to extend beyond 2003, then that program would be invalid. If an expense exceeds an annual appropriation, then it is debt. The term "debt" includes obligations which are "certain as to the liability and uncertain only as to the amount." *Button v. Day*, 205 Va. 629, 643 (1964). The promise to pay a specific amount in the future constitutes a debt. *Id.*

If the resolution is evidence of a contractual obligation of CRHA, which Defendants do not concede, then it is also evidence of a financial obligation of the housing authority, or an indebtedness.

The Constitution of Virginia prohibits a government entity from incurring debt for the aid of an individual. Article X, Section 10 of the Constitution provides, "Neither the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association or corporation."

This prohibition on incurring debt also applies to authorities, *see Button v. Day*, 208 Va. 494, 502–03 (1968), and in particular to CRHA, which is a "political subdivision of the Commonwealth," Va. Code § 36-4. The housing authority is empowered to incur

debt, "subject to such limitations as may be imposed by law." Va. Code § 36-19. Such limitations would include the constitutional prohibition against incurring debt.

In this case, the Court need not reach the issue of whether the initial program in 2003 was valid; that is, whether funds were appropriated in 2003 to cover this liability. A claim that accrued in 2003 is clearly beyond the outer limit of the statute of limitations under any theory, and thus is not before the Court.

But even if the resolution could be read to apply to years following 2003, that resolution would be invalid. There is no allegation that the Board appropriated funds to the program during any subsequent year. To the extent that the Board did not appropriate specific funds for the program, the promise constitutes unconstitutional debt on the part of the authority, and the program is invalid.

Accordingly, the alleged savings bond program expired, at the latest, at the end of the fiscal year 2003, which is well beyond the statute of limitations as alleged.

Therefore, Plaintiffs cannot recover under the savings bond program, and that claim must be dismissed.

Conclusion

In conclusion, Plaintiffs have failed to state a claim that Defendants have violated the law, and Plaintiffs have also failed to state a claim that would entitle them to money damages. The Court should dismiss the Amended Complaint to the extent that it fails to state a claim based on the above.

Most importantly, as set forth in Section III, *supra*, Plaintiffs have failed to sufficiently plead that the utility allowance was not reasonable based on an energy-

conservative household of modest circumstances. In fact, the Complaint only contains allegations of one such energy-conservative household, and that plaintiff never exceeded the utility surcharge.

But to the extent that the claims of non-compliance with the Housing Act are not dismissed in their entirety, various claims must be dismissed. The statute of limitations is, at the most, five years under the facts as alleged, which provides an outer limit on the potential recovery of Plaintiffs; moreover, because the statute of limitations under §§ 1983 and 1988 is two years, and because Plaintiffs have waived their right to attorneys fees under the Lease, Plaintiffs cannot recover their attorneys' fees for their state-law claims.

Further, Plaintiff PHA lacks standing to sue, either in a representative capacity or in its own right.

Finally, the savings bond program expired, at the latest, at the end of the fiscal year 2003, and Plaintiffs cannot recover any savings bond in this action.

Accordingly, the Amended Complaint should be dismissed.

Date: 10/12/2012

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Certificate of Service

I hereby certify that on October 12, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice to the following CM/ECF participants:

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