IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

JANYCE LEWIS, et al.,	)	
Plaintiffs,	)	
	)	
V.	)	**Case No.: 3:12-cv-00026-GEC**
	)	
CHARLOTTESVILLE REDEVELOPMENT &	)	
HOUSING AUTHORITY, et al.,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Introduction

Defendants' Motion to Dismiss states no legally adequate basis for this Court to dismiss Plaintiffs' Complaint. Defendants' Motion is premised upon a mistakenly narrow analysis of the National Housing Act's provisions, the Department of Housing and Urban Development regulations and the Plaintiffs' leases on which the Plaintiffs rely for their claims. The U.S. Supreme Court's decision in *Wright v. Roanoke,* 479 U.S. 418, 422 n.5 (1987) clearly establishes that Plaintiffs are entitled to relief for the Charlottesville Housing Authority's violations of well established HUD procedures as well as refunds for the improper charges for excess electric utilities the tenants have incurred since June 7, 2007. The Fourth Circuit in *Dorsey v. Housing Auth. of Baltimore City*, 984 F.2d 622, 631 (4th Cir. 1993) emphasized that tenants can enforce both the language of the Housing Act and the procedural regulations.

Facts

For years, Plaintiffs who are tenants and former tenants living in public housing units in Charlottesville have been assessed for "excess utilities" usage by the Charlottesville Redevelopment and Housing Authority (CRHA). Most tenants paid the over-allowance charges because the consequence of failure to pay is eviction. With their families eligible to live in public housing, each of the tenant plaintiffs is by definition low income. CRHA receives federal funds to operate the CRHA housing units from the U.S. Department of Housing and Urban Development (HUD). Answer ¶ 2. The United States Housing Act, 42 U.S.C § 1437a(a)(1)(A) (2006), and HUD's implementing regulation, 24 C.F.R. § 965.505(a) (2012), mandate that public housing tenants residing in all of the CRHA's 376 units should not be charged more than 30% of their income for rent and utilities. To comply with the Act, public housing agencies like CRHA must set adequate utilities allowances to cover a reasonable consumption of utilities when setting the rent in those 251 units for which electric utilities allowances are set and billed.

The CRHA set the utility allowances for electricity in 2003. The allowances are so low that most tenants are assessed excess electric utility charges each month. Each of the Plaintiffs paid between $148-820 in excess utilities charges during each of the years 2010 and 2011. Answer, ¶¶ 94-109. As a monthly average, 73% of public housing residents in Charlottesville were billed for excess charges over the last two calendar years, 2010 and 2011. The percent billed for excess charges ran from 50% in March 2010 to 92% in August 2011. Amended Complaint Attachment 1, September 12, 2012, ECF No. 22.

The CRHA last reviewed the current allowances for electric utility billing in 2003. Compl. Attach. 2.[1] CRHA admits that any written basis for the allowances was developed in 2003. *Id.*.

Each of the Plaintiffs suffered from the low allowances. Ms. Janyce Lewis works as an organizer for a local non-profit and has a teen-age son. Over just the last two years, she has been forced to pay $506 in excess electric utility charges. To meet her financial obligations she felt forced to take out a payday loan charging 161% interest per year. Amended Compl. ¶¶ 4, 64-66,69-71. Ms. Clarissa Folley and Mr. Harold Folley, Jr. knew that if they did not pay the excess utilities charges, they would face a summons for unlawful detainer. To avoid getting a summons, the Folleys did not buy or delayed buying groceries and medicine. Mr. Folley suffers from diabetes and migraine headaches. The increased stress from having to pay excess utility charges aggravated the migraines and made his blood sugar levels rise so high that he suffered blurred vision. Am. Compl. ¶¶ 96-99.

Standard of Review on a Motion to Dismiss under Rule 12(b)(6)

A motion to dismiss can only be granted if there is no set of facts that would entitle plaintiffs to a verdict on the claims in issue. Applicable standards state that the facts alleged in the complaint are accepted as true. *Scheuer v. Rhoades*, 416 U.S. 232, 236 (1974); *Franks v. Ross*, 313 F.3d 184,192 (4th Cir. 2002). In addition, all reasonable inferences must be made in

[1] In its first Answer CRHA could not produce any written document explaining the bases for setting the allowances in 2003, and appeared to have nothing to demonstrate that the electric utility allowances are adequate to cover a "reasonable consumption of utilities" as part of the rent. Answer ¶ 49, August 1, 2012, ECF No. 11. In its more recent Answer 49 to the Amended Complaint, CRHA alleges that a study exists, but had failed to provide it to any Plaintiff or the Plaintiffs' attorneys. October 12, 2012, ECF No. 36. On the morning of October 26, 2012, the same day that this reply brief was due, counsel for Defendants forwarded by email a 186 page study purported to be the missing report.

favor of plaintiffs. *Johnson v. Mueller*, 415 F.2d 354 (4th Cir. 1969); *MacKethan v. Peat. Marwick. Mitchell & Co.*, 439 F. Supp. 1090 (E.D. Va. 1977).

Under *Ashcroft v. Iqbal*, to overcome a motion to dismiss, plaintiffs must have alleged facts in a complaint which also "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Plaintiffs' Complaint easily meets these standards and Defendants raise no legally valid arguments to warrant a dismissal.

ARGUMENT

I. The Relevant Statutes of Limitations Bar No Claims in this Action, and Provide No Basis at this Time to Rule on the Attorneys' Fees that May Be Awarded in the Future.

A. Because of the Defendants' continuing violations, no claims are barred by the five year statute of limitations for a contract claim or the two year statute of limitations for a 42 U.S.C. § 1983 claim.

Plaintiffs agree with the Defendants that the Court can rule on a statute of limitations bar at the Motion to Dismiss stage. Plaintiffs also agree that the contract claims are subject to a five year statute of limitations, and the 42 U.S.C. §1983 claims are subject to a two year statute of limitations. Additionally, Plaintiffs agree that they have alleged no facts that would toll the statute of limitations in this case.

Defendants erroneously claim that because CRHA started violating the law before the applicable statute of limitations, CRHA can continue to assess the unlawful charges today. Memorandum in Support of Motion to Dismiss Amended Complaint at 4-5. (Mem. In Supp. of Mot. to Dismiss). At the core, the Defendants proffer the idea that wrongdoers can continue to abuse their victims in perpetuity if the victims do not file a lawsuit within the original statute of limitations period. Defendants' proffered idea should be rejected.

First, no dispute exists that the Defendants assessed the alleged unlawful charges against these Plaintiffs within the relevant statute of limitations. Defendants' Answer admits that excess charges were assessed in the past two years that significantly exceeded more than half of the electricity charges for the past two years. Answer to Amended Complaint, ¶ 7 (Answer). Regarding specific Plaintiffs, Defendants admit that they know when and how much these Plaintiffs were charged going back several years. (See e.g, Answer, ¶¶ 65, 80, 100, 105, and 106). Therefore, the statute of limitations does not bar a contract claim that these charges in the past five years were a breach of the lease in effect on the date each charge was made. Similarly, the statute of limitations for a 42 U.S.C. §1983 claim does not bar a claim based on unlawful charges in the past two years.

Second, under the "continuing violation" rule, Plaintiffs' claims can properly be grounded, in part, on actions constituting a continuing practice that started prior to the limitations period. As explained by the Fourth Circuit,

> "In general, to establish a continuing violation[,] the plaintiff must establish that the unconstitutional or illegal act was a fixed and continuing practice." *Nat'l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir.1991) (brackets, ellipses, and internal quotation marks omitted). In other words, if the plaintiff can show that the illegal act did not occur just once, but rather "in a series of separate acts[,] and if the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation." *Id.* at 1167 (internal quotation marks omitted). But continual unlawful acts are distinguishable from the continuing ill effects of an original violation because the latter do not constitute a continuing violation. *Id.* at 1166.

A Soc'y Without a Name v. Commonwealth of Va., 655 F.3d 342, 348 (4th Cir. 2011). Courts identify two recurrent themes in analyzing continuing violations: "First, in cases where a court found a continuing violation present, a discriminatory act occurred within the requisite statute of limitations time frame. Second, in cases where a court rejected the continuing violation doctrine an act was not present." *Moseke v. Miller & Smith, Inc.*, 202 F.Supp.2d 492, 505. (E.D.Va.

2002). Under the continuing violation doctrine, "conduct occurring outside the statute of limitations may, by virtue of its link with recent conduct, be made a basis for a legal claim." *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1165 (7th Cir. 1996).

Plaintiffs' claims are not barred under this established law. Therefore, no basis exists to seek dismissal of any of Plaintiffs' causes of action. The Defendants' Motion to Dismiss on the basis of the statute of limitations must be denied.

B. This Court has jurisdiction of the state law claims because they form part of the same case or controversy.

Under 28 U.S.C. § 1367(a), a district court which has original jurisdiction also has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Congress created supplemental jurisdiction in the Judicial Improvement Act of 1990, Pub.L. No. 101-650, Title III, Sec. 310(a), "which codified the doctrine of pendent jurisdiction developed by the Supreme Court in the case of *United Mine Workers of America v. Gibbs*, 383 U.S. 715. . .(1966), and its progeny." *Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995).

In this case, the same exact unlawful policy is put in issue. Defendants have no basis to assert that contract claims based on implementation of that policy more than two years prior to filing raise a different controversy. The controversy is simply whether the over-allowance was unlawful. Based on the continuing violation jurisprudence discussed above, the events prior to the two year statute of limitations for the 42 U.S.C. §1983 claim are relevant. Thus, the legal question and the evidence to be discovered and presented are identical.

Consequently, this Court has supplemental jurisdiction over all the claims before it.

C. Any determination about the lodestar amount to be awarded under the 1983 claim is premature.

Defendants prematurely ask this Court to limit the amount of hours that will form part of the lodestar analysis if Plaintiffs are successful on their 1983 claim. Although Defendants properly acknowledge that attorneys' fees are recoverable for work on state law claims based on the same core set of facts, they improperly assert that the Court should rule now that work done on the Plaintiffs' state law claims that reach back five years are not part of the same core facts. Defendants then assert that the future determination of the reasonableness of Plaintiffs' attorneys' fees "***may depend*** on various unique factors, ..." (Mem. In Supp. of Mot. to Dimiss, p. 6). The premature nature of Defendants' claim is revealed by the use of the word "may" regarding that future determination.

Furthermore, all the work being performed by Plaintiffs' counsel is intrinsically related to the 1983 claim. A review of the Answer to the original Complaint and the Answer to the Amended Complaint shows that the primary issues are the validity of the over-allowance charge, and the failure to provide the $50.00 United States Savings Bond. Regarding the over-allowance charge, one legal determination dominates: does the Defendants' system comport with the federal requirements? For the savings bond, the legal issue is driven by state law and whether the obligation to provide the bond is enforceable. Given that Defendants are able to identify the specific monthly billing for the named Plaintiffs (see e.g. Para. 65, 80, 100, 105, and 106 of the Answer to the Amended Complaint), Defendants have ready access to the records regarding the over-allowance chance and the qualification for the savings bond. No basis exists to claim that somehow the time spent on the 1983 claim is not so related to the state law claims that fees should not be awarded for all the time incurred.

Finally, Defendants erroneously assert that Plaintiffs have waived their federal rights to recover attorneys' fees because of the waiver language in the lease. First, the cited contract language allows for recovery of court costs, and the express language cited by Defendants under 42 U.S.C. § 1983, states that reasonable attorneys' fees are awarded as part of the "costs." Second, Defendants have proffered no authority that a stronger party to a contract can require a weaker party to waive the protections of a federal statute that is specifically designed to protect the weaker parties' federal rights. Indeed, it would be surprising if Defendants could find such authority. If this were the law, then we could expect employers to require employees to waive federal statutory rights to get a job, or businesses to require consumers to waive the consumer protections statute before buying a product. *See Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945) ("[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver contravenes the statutory policy. *Midstate Horticultural Co. v. Pennsylvania R. Co.*, 324 U.S. 356, 360" (1943)), *cited by Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 457 (4th Cir. 2007).

Third, regarding rights under federal law, Defendants have not and cannot show the necessary requirements to enforce the waiver. Under ordinary contract law, any contract clause that waives a right conferred by law will only be enforced "[i]f the party being charged with relinquishment of a right had knowledge of the right and intended to waive it . . . ." *Gordonsville Energy L.P. v. Virginia Electric and Power Comp*. 257 Va. 344, 356, 512 S.E.2d 811 (1999) (*citing Roenke v. Virginia Farm Bureau Mut. Ins. Co.*, 209 Va. 128, 135, 161 S.E.2d 704, 709 (1968)). To be an effective waiver, a party "should be apprised of all the facts: of those which create the forfeiture, and those which

will necessarily influence its judgment in consenting to waive it." *Combs v. Equitable Life Ins. Co.*, 120 F.2d 432, 438 (4th Cir. 1941). Waivers in contracts of adhesion are subject to further scrutiny to determine whether the waiver was actually voluntary. *See D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972) (distinguishing a contract between companies and stating "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue."); *Carlson v. GMC*, 883 F.2d 287, 293-96 (4th Cir. 1989) (holding that determination of a meaningful choice to a contract term requires evidence of the circumstances surrounding the consummation of the agreement).

Therefore, this Court should not at this time limit its future discretion in determining the lodestar amount to be awarded as reasonable attorneys' fees if Plaintiffs are successful on their 1983 claim.

II. Plaintiff PHAR Has Standing to Sue in Its Own Right

PHAR demonstrates through the facts in the Amended Complaint that it meets the required injury in fact sufficient for organizational standing.

Plaintiff PHAR passes the test for organizational standing from *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Defendants' attempt to distinguish the facts alleged by nonprofit organization HOME in *Havens* from the facts alleged here by PHAR misses the mark.

Just as in *Havens*, where HOME suffered "a distinct and palpable injury" as a result of the Defendants' actions, PHAR too has suffered because of "the burden that inappropriate and excessive utility billing has imposed on its membership." *Id.* at 372, citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975); Am. Compl. ¶ 134.

The *Havens* Court concluded that HOME spent time, effort, and money to combat the defendants' discrimination and that frustrated HOME's mission, which established sufficient injury for standing purposes. *Id.* at 379. "Such 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 v. Morton*, 405 U.S. 727 at 739 (1972) (plaintiff organization did not sufficiently allege injury in fact by merely asserting "a special interest" in environmental conservation)). Unlike the Sierra Club but similarly to HOME, PHAR has asserted a distinct injury and diversion of resources, not merely a "special interest" in public housing issues.

In the Amended Complaint, Plaintiffs set out PHAR's mission, activities PHAR undertakes in support of that mission, and how Defendants' illegal utility overbilling frustrated PHAR's work.[2] PHAR works to empower its public housing resident members to attain financial self-sufficiency. Because Defendants have overcharged public housing residents for utilities, Defendants have erected a barrier to financial autonomy – every dollar spent on illegal utility charges is one less dollar saved by public housing residents. As explained in the Amended Complaint, many PHAR members expressed concern about this overbilling and the resulting financial hardships. ¶ 132. PHAR responded by expending organizational time and resources to combat the burden that inappropriate and excessive utility billing has imposed on its membership. See Am. Compl. ¶¶133-34.

[2] PHAR's mission is to empower low-income residents to protect and improve the CRHA-owned housing through community collective action. Am. Compl. ¶ 18. As the citywide public housing resident association, PHAR works on a variety of neighborhood improvement issues. Am. Compl. ¶ 135. PHAR's outreach and organizing work has improved public housing neighborhoods, . . . improvements to maintenance, customer service and safety; and incorporated residents into redevelopment planning. *Id.*

The facts in Plaintiff's Amended Complaint regarding PHAR mirror the facts alleged by HOME in *Havens*. The *Havens* Court refers to the following details from HOME's complaint setting out the nonprofit organization's mission, activities, and injury alleged: HOME's purpose was to make equal opportunity in housing a reality in the Richmond Metropolitan Area; HOME's activities included the operation of a housing counseling service, and the investigation and referral of complaints concerning housing discrimination; and finally, HOME was frustrated by defendants' practices by having to devote significant resources to identify and counteract the defendants' racially discriminatory steering practices. *Id*. at 368 and 379.

Like HOME, PHAR has also alleged that its mission, activities, and injury suffered at the hands of Defendants. These facts are so similar, it is hard to imagine how standing would lie for HOME and not for PHAR.

Defendants erroneously rely upon *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) to assert that advocacy by an organization fails to give rise to standing. Mem. In Supp. of Mot. to Dimiss 10. The holding in *Arlington Heights* stands for nothing of this sort. In *Arlington Heights*, the Supreme Court granted a nonprofit housing development organization standing to sue over a rezoning denial because they adequately alleged injury in fact. 429 U.S. at 261. The Court found "little doubt" that the organization met constitutional standing requirements, because it suffered economic injury through expenses related to advocacy for favorable zoning, as well as noneconomic injury from the defeat of its objective. *Id*. Like the plaintiff organization permitted standing in *Arlington Heights*, PHAR has standing to sue to overcome the barrier to member empowerment and self-sufficiency erected by Defendants' excess utility charges.

Plaintiffs withdraw their claim that PHAR has representative standing. Defendants' illegal utility bills have stood in the way of economic self-sufficiency by PHAR's public housing resident members, frustrating PHAR's mission and requiring diversion of attention and resources to the problem. This distinct injury to the organization is sufficient for PHAR to earn standing in this case to sue in its own right.

III. The Complaint Demonstrates the CRHA's Allowances Violate the U.S. Housing Act.

A. The surcharges for excess utilities are invalid because they exceed rent limits under the Brooke Amendment, and are therefore contrary to law.

The Complaint alleges facts to demonstrate that the surcharges for excess utilities are not only contrary to applicable law because the allowance was set and implemented contrary to the federal mandates, but they are also arbitrary, capricious, and an abuse of discretion. 24 C.F. R. § 965.502(e) (2012). Plaintiffs address the invalid allowances under each standard beginning with the heart of their claims that the allowances are contrary to the law set forth in the Brooke Amendment to the U.S. Housing Act.[3]

1. The surcharges are contrary to applicable law.

The CRHA utility allowances currently in use violate the Brooke Amendment to the U.S. Housing Act by causing Plaintiffs to pay more than 30% of their income in rent, and are therefore invalid. 42 U.S.C. § 1437a(a)(1)(A) (2006). As the U.S. Supreme Court held,

> [t]he Brooke Amendment could not be clearer: . . tenants could be charged as rent no more and no less than 30 percent of their income… Nor is there any question that HUD… expressly required that a 'reasonable' amount for utilities be included in rent that a PHA was allowed to charge… HUD's view is entitled to deference as a valid interpretation of the statute.

[3] Under HUD regulations, "[t]he PHA's determinations of allowances, scheduled surcharges, and revisions thereof shall be final and valid unless found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 24 C.F.R. § 965.502(e) (2012).

Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 430 (1987). *See also McDowell v. Philadelphia Housing Authority*, 423 F.3d 233, 236 (3rd Cir. 2005); *Armstrong v. Gallia Metropolitan Housing Authority*, 2000 WL 1505949 at 3 (S.D. Ohio 2000) (both citing *Wright*).

The CRHA allowances violate the Brooke Amendment by causing the Plaintiffs and class members to pay more than 30% of their income as rent each time they are assessed excess utility charges. By definition, plaintiffs pay 30% of their income for rent, including an inadequate amount of utilities, since that calculation is the basis for the rent figure. Any excess utility charges, *ipso facto*, mean that plaintiffs are paying more than 30% of their income for rent. Therefore, the allowances are not in accordance with the law, and are not valid.

The HUD regulations direct Public Housing Authorities to establish utility allowances that "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. Plaintiffs demonstrate in Attachment 1 to the Amended Complaint that CRHA charged an average of 73% of households for excess utility consumption in the past two years. Making inferences in the light most favorable to the Plaintiffs, these allegations are sufficient to support the Plaintiffs' claim that the utility allowances set by the CRHA in 2003 are not reasonable in accordance with the HUD regulations.

The named Plaintiffs, who were each charged for excess utilities, describe the hardships that they suffer in being forced to pay more than allowed by the Brooke Amendment for rent and utilities. Plaintiff Janyce Lewis was forced to take out a high-interest loan and could not provide other necessities. Harold and Clarissa Folley allege that they could not purchase groceries and medicine, because they had to pay the surcharges or face eviction. Earletta Gladden had to ask

family members for assistance to pay for household necessities because she could not afford the utility charges. Am. Compl. ¶ ¶ 66, 67, 98, 122. It is the clear intent of the U.S. Congress that residents of public housing pay limited rents. CRHA's overcharging for utilities has caused many residents to pay more than 30% of their income as rent, forcing them to suffer hardships similar to those of the named Plaintiffs.

Plaintiffs' claims that the CRHA did not properly review and revise its allowances, maintain a record of the basis of the charges, and allow a procedure for households with special needs to be given exemptions from the surcharges are substantive and go to the heart of the statutory and regulatory requirements. Am. Compl. ¶¶ 48-51, 53, 56-57, 84, 120-121, 146 c- e. These claims are not merely claims of technical or procedural defects. The CRHA failed in its required management responsibilities.

The Defendants misinterpret the Fourth Circuit's ruling in *Dorsey v. Housing Authority of Baltimore City*, 984 F.2d 622, 629 (4th Cir. 1993). Mem. in Supp. of Mot. to Dismiss Am. Compl. ¶¶ 16-17. In that case, the Fourth Circuit found that the factual record in the lower court contained sufficient evidence that the Baltimore Housing Authority did not follow the procedural requirements in the HUD regulations and reversed the lower court's finding of no violation of procedural requirements.

Plaintiffs' facts are remarkably similar to those in *Dorsey*. No study was attached to the board resolution adopting the rates, the CRHA denied having a copy in their January 6, 2011 response to a FOIA request and, in their Initial Answer [August 1, 2012, ECF No. 11] at ¶53, Defendants admit the allowance schedule but deny "that there are any other portions of the 2003 study that are missing" and at ¶49, Defendants aver that the CRHA board received the study over the phone and that there was no additional narrative to produce. In their October 12 Answer ¶53

to the Amended Complaint, Defendants merely deny that the study "is missing or was never provided." On the morning of October 26, 2012, the same day that this reply brief was due, counsel for Defendants forwarded by email a 186 page study purported to be the missing report.

In *Dorsey*, the Defendant Housing Authority "provide(d) no record documenting" that the old allowance schedule should stay in place. *Dorsey* at 629. The *Dorsey* court further found that while the Final Rule from HUD on determining utility allowances "does not mandate consideration of the percentage of surcharges in determining a 'reasonable' allowance," it nonetheless "makes clear that excessive surcharging is material evidence that 'the PHA standard is out-of-line'" with the HUD regulations in 24 C.F.R. § 965.476 (now numbered as 24 C.F.R. § 965.505). *Dorsey* at 629.

For the past two years, CRHA has imposed excessive usage charges on a monthly average of 73% of tenants—this certainly meets the *Dorsey* standard. Am. Compl. Attach. 1. Relying on *Wright*, the Fourth Circuit also explicitly held that the HUD procedural requirements create enforceable rights. Even though the HUD regulations had been amended during the litigation, the Fourth Circuit insisted that *Wright* meant that the heart of the regulations requiring rent to include reasonable utilities could be enforced. "Given the Supreme Court's conclusion in *Wright* that the Brooke Amendment afforded Tenants a private cause of action to enforce the reasonability of utility allowances, *it is untenable* that HUD could, simply by revising regulations . . . foreclose a remedy the Court and Congress had left open." *Dorsey* at 630 (emphasis added).

In order to surmount Defendants' motion to dismiss in the present case, the Plaintiffs need only demonstrate that they have put forth a minimally plausible claim supported by more than statements of law or conclusory allegations. Construing all facts and inferences in favor of

the Plaintiffs, the Plaintiffs have alleged sufficient facts to support a plausible claim that the CRHA's utility allowances violate federal law. The Defendants' discussion that the court in *Dorsey* did not find either party entitled to summary judgment is irrelevant.[4] Mem. in Supp. of Mot. to Dismiss 17. By refusing to grant summary judgment, the *Dorsey* court merely indicated that genuine issues of material fact existed on both sides.

The Defendants argument suggesting that the mandatory language in the HUD regulations does not apply is unpersuasive.[5] The principle of *ejusdem generis* is inapposite here.[6] Furthermore, to hold that "otherwise not in accordance with the law" simply restates the prior three enumerated grounds would be to make that term redundant and without effect. The regulation clearly lists four options in the alternative for finding allowance levels invalid. They can be found invalid if arbitrary *or* capricious *or* an abuse of discretion *or* otherwise not in accordance with the law. To argue that the final enumerated term is simply redundant and means

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[4] The standard for evaluating a motion for summary judgment is fundamentally distinct from the standard for evaluating a motion to dismiss. A motion to dismiss has a much lower standard; it can only be granted if no set of facts would entitle plaintiffs to a verdict. *Scheuer, supra*. Courts grant summary judgment if no genuine dispute exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

[5] Utility allowances shall "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).
"Allowances . . . shall be designed to include such reasonable consumption for major equipment or for utility functions furnished by the PHA for all residents (e.g., heating furnace, hot water heater), for essential equipment whether or not furnished by the PHA (e.g., range and refrigerator), and for minor items of equipment (such as toasters and radios) furnished by residents.". 24 C.F.R. § 965.505(b) (2012).

[6] The Defendants cite *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008), however, that case does not interpret a generic term in a statute. In *Hall*, the Supreme Court held that a prior case, *Wilko v. Swan*, 346 U.S. 427 (1953) did not expand the Federal Arbitration Act grounds for judicial review to include a general ground of "manifest disregard of the law," in addition to the specific grounds listed in the statute. The Court analogized this to *ejusdem generis*, but was not in fact making any holding about such a generic clause that was found in the Federal Arbitration Act itself.

the same as the prior three ignores that the grounds are listed in the alternative, and eviscerates meaning from that part of the regulation. Instead, HUD's interpretation is a valid one by an administrative agency and "is entitled to deference as a valid interpretation of the statute." *Wright* at 430.

The CRHA utility allowances currently in use violate the Brooke Amendment to the U.S. Housing Act by causing Plaintiffs to pay more than 30% of their income in rent, and are therefore invalid. None of the allowances may be charged, and Plaintiff class members are entitled to the return of surcharges as well as injunctive relief from continued unlawful surcharges.

2. The Defendants' continuing use of the 2003 allowances is arbitrary, capricious, and an abuse of discretion.

Plaintiffs contend no longer has any record of or for the entire basis for using the 2003 allowances. The Am. Complaint alleges that the 2003 study "has not been produced, reviewed or updated," and, furthermore, that "[t]he alleged 2003 study was never received or reviewed by the CRHA, and instead CRHA received only an allowance schedule and an explanation given in a phone call about the underlying study" Am. Compl. ¶¶ 45, 49. The CRHA reported that the study was missing since at least the summer of 2010, and yet continues to assess fees based on the 2003 study more than two years later. Am. Compl. ¶ 53.

HUD requires that "[t]he PHA shall maintain a record that documents the basis on which allowances and scheduled surcharges, and revisions thereof, are established and revised. Such record shall be available for inspection by residents." 24 C.F.R. § 965-502(b). This requirement is not merely procedural, but goes to the heart of whether the CRHA can demonstrate that it is neither being "arbitrary or capricious," nor "abus[ing] its discretion," and that it is setting allowances "otherwise in accordance with the law." *Id*. Although the CRHA now claims to have

located this report, it does not deny that from 2003 to 2012 it did not maintain or produce a copy for review.

The CRHA cannot prove that it has a reasonable basis, or in fact any basis, for the excess utility surcharges to tenants. Defendants' reliance on the CRHA resolution referencing the study and adopting the allowances is unavailing. Am. Compl., Attach. 2, Mem. in Supp. of Mot. to Dismiss 19. Tellingly, although the resolution refers to the study, none is attached. CRHA's failure to maintain a written *basis* for the charges, rather than merely a schedule of the charges themselves, plainly violates the HUD regulation. 24 C.F.R. § 965-502(b). Having no documented basis for charging tenants makes the allowances "arbitrary and capricious."

The *Wright* Court, citing 49 Fed. Reg. 31403 (1984), states that HUD intentionally adopted word-for-word the standard of review found in the U.S. Administrative Procedures Act, 5 U.S.C. 706(2), in order to enable tenants to make a claim for judicial review of administrative procedures under these HUD Regulations in both state and federal courts. This is true even in states that had not "adopted procedures providing for judicial review of administrative action." *Wright* at 430, n.11. Although there is a paucity of authority interpreting the standard of review under 24 C.F.R. § 965-502(e), there is no shortage of authority exists interpreting the standard under 5 U.S.C. §706(2).

The U.S. Supreme Court articulated the standard for reviewing administrative agency decisions to determine whether they are "arbitrary, capricious, or an abuse of discretion." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983). The Court stated that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' In reviewing that explanation, we must 'consider whether the decision was based on a

consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* (citations omitted). The Fourth Circuit, citing to *State Farm,* elaborated that "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one," however, the "standard is not meant to reduce judicial review to a 'rubber-stamp' of agency action." *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 192 (2009) (citations omitted). While the standard of review is narrow, a court must nonetheless engage in a 'searching and careful' inquiry of the record." *Id.* This standard of review can be analogized to the HUD's actions through the adoption in 24 C.F.R. § 965-502(e) of an identical standard of review to be applied to a housing authority's actions in setting utility allowances.

Moreover, the CRHA is required to review its allowances on a yearly basis regardless of any other change in circumstances. "The PHA shall review at least annually the basis on which utility allowances have been established and, if reasonably required in order to continue adherence to the standards stated in § 965.505, shall establish revised allowances." 24 C.F.R. § 965.507(a). In simple language, this clearly means an annual examination of the adequacy of the allowances. Defendants' assertion that the CRHA's failure to review the study was due to a deliberate election not to pass increased rates on to tenants is without any support in the record before this court on Defendants' Motion to Dismiss. Furthermore, whether the costs to CRHA per kilowatt/hour usage have increased or decreased is not a basis for determining the actual reasonable usage for tenant households or for setting the level for such usage that will result in a surcharge to households exceeding the limit.

The Defendants' arguments that because Plaintiffs have not alleged a "change in circumstances" they cannot show that the CRHA allowances were unreasonable, misconstrues the plain language of the regulations. "Changed circumstances" are not a threshold for the annual

review: "[t]he review shall include all changes in circumstances . . . indicating probability of a significant change in reasonable consumption requirements . . . ." *Id.* A straightforward reading of the regulations shows that HUD mandates that the Housing Authority take into consideration "all changes in circumstances" each time it does its yearly review. The review is not to take place only when a change in circumstances occurs, but is to take place yearly. Thus, it is not necessary for Plaintiffs to allege that there was any change in circumstances between 2003 and 2012 in order to state a claim for excessive surcharges. The CRHA violates the regulations by the failure to undertake an annual review. Thus, the CRHA's failure to fulfill this legal obligation means that its actions are arbitrary and capricious.

The "searching and careful" review of the record required by *State Farm* and *Ohio Valley* necessitates further development through discovery and fact-finding by the court. Before granting a motion to dismiss by Defendants, the court must find that there is no set of facts that would entitle plaintiffs to a verdict on the claims in issue. Plaintiffs' complaint, in alleging that the CRHA failed to maintain a record of the basis of the utility allowances, review it yearly, make necessary updates and promulgate procedures for accommodating households with special needs have sufficiently stated a claim for relief that the CRHA's action was arbitrary, capricious, or an abuse of discretion, in addition to being otherwise not in accordance with the law.

The Plaintiffs in this case allege sufficient facts to support their claim that no basis can be established for the rates set by the CRHA for utility allowances, and that such rates violate the Brooke Amendment to the U.S. Housing Act by causing tenants to spend more than 30% of their gross adjusted income on rent. As a result, the rates are invalid and cannot be charged, and tenants are entitled to a refund of the unlawful utility charges as well as injunctive relief against further unlawful charges.

C. Plaintiffs allege sufficient facts to support a claim that the current allowances are unreasonable, and Plaintiffs represent a cross-section of tenants without special usage needs.

Plaintiffs' Complaint defines the injured class as all former and current public housing tenants who are subject to the unlawful utility allowances, including Plaintiff Telambria Tinsley, the only Plaintiff who had not been charged for excess usage. The low allowances may injure even tenants such as Ms. Tinsley, who work hard to keep their usage so low that they are not charged. Those tenants may forego some reasonable usage in an attempt to keep from paying the additional unlawful fees. Contrary to Defendants' suggestion, it is not necessary for Plaintiffs to allege that they are conservative energy users in order to state a valid claim. Mem. in Supp. of Mot. to Dismiss Am. Compl. 21-24. All CRHA tenants were entitled under federal law to have rates set by CRHA on a reasonable basis regardless of how much energy individual tenants use.

All but two of the individual Plaintiffs make no allegations of unusual circumstances or usage. Plaintiffs also plead that "none of the subject properties were designed or constructed with an eye to modern energy conservation principles or standards." Am. Compl. ¶ 41. The relevant HUD regulations allow for "reasonable" usage by tenants, and the Plaintiffs allege enough facts to support their claim, viewed in the light most favorable to them, that the amounts they use are reasonable. From the Plaintiffs' facts and from the overall proportion of households charged for excess utilities even in cooler months, it can be reasonably inferred that the CRHA's allowance levels were set too low.

Plaintiffs have alleged sufficient facts to build a claim that is not based merely on conclusory statements or assertions, and which is plausible on its face. Plaintiffs Janyce Lewis and Clarissa and Harold Folley allege no special or out-of-the-ordinary usage of electricity. Plaintiff Telambria Tinsley specifically alleges that she made efforts to conserve energy in order

to avoid the burden of excess fees. The fact that Ms. Tinsley was able to avoid fees through energy conservation does not mean that other plaintiffs cannot be described as energy conservative households as Defendants state in their Memorandum. Mem. in Supp. of Mot. to Dismiss Am. Compl. 23.

The proper inquiry is not how much electricity any individual household used, but whether the allowance itself was set at a reasonable level in accordance with federal law. Since CRHA's allowances were not set at a reasonable level in accordance with federal law, CRHA cannot lawfully charge tenants for the excess amounts, and tenants are entitled to injunctive relief and monetary damages.

Only two of the six individual Plaintiffs allege that they had any special needs for utilities, including Deborah Cooper and Earletta Gladden. Am. Compl. 83, 112. Given that one of the Plaintiff's claims is that the CRHA failed to put into place a method by which families with special needs could ask for an exception to the utility allowance limits, inclusion of two individual Plaintiffs with some special needs out of six is appropriate to the claims for relief. These Plaintiffs do not negate Plaintiffs' principle claim that the utility allowance itself, to which all households were subject whether they ended up paying surcharges or not, was too restrictive and set improperly.

The failure to maintain a procedure by which households with special needs can request adjustments to their allowance also constitutes an actionable claim by the tenants. The relevant regulation states that:

> Requests for relief from surcharges…may be granted by the PHA on reasonable grounds, such as special needs of elderly, ill or disabled residents, or special factors affecting utility usage not within the control of the resident… the PHA's criteria for granting such relief, and procedures for requesting such relief, shall be adopted at the time the PHA adopts the methods and procedures for determining utility allowances.

24 C.F.R. § 965.508. Residents are entitled to notice of the availability of such procedures. *Id.* Defendants argue that failure to adopt such a procedure does not invalidate the rates themselves. However, regardless of whether the rates are valid, Plaintiffs and other class members have a right to such procedures and have sufficiently stated a claim for relief related to the failure of CRHA to adopt any such procedure or standards.

Out of the six individual Plaintiffs named in the Complaint, only Plaintiff Earletta Gladden makes any allegations about running an air conditioner. Despite Defendants' apparent assertion that Plaintiffs' usage is not reasonable due to their use of air conditioning, no such assertion about air conditioning is made in the complaint except by Ms. Gladden. Furthermore, the Plaintiffs demonstrate that a majority of residents were charged for exceeding the utility allowances even in the spring, winter and fall months. Am. Compl. Attach. 1.

Since this is a motion under Rule 12(b)(6) and all reasonable inferences must be made in favor of Plaintiffs, it should be inferred that Plaintiffs and many other class members are using a reasonable amount of utilities. According to the HUD Public Housing Occupancy Guidebook, June 2003, consumption routinely exceeding the allowances constitutes evidence of the insufficiency of the allowance. The Defendants mention that *Dorsey* held that the reasonableness of the rates was a triable issue, but the *Dorsey* court was evaluating the claims under a summary judgment standard, rather than a motion to dismiss standard. Mem. in Supp. of Mot. to Dismiss 15. Here plaintiffs face a motion to dismiss and so, accepting the allegations in their Complaint as true, the Court only needs to find that they have pleaded "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.* at 569.

Defendants' insinuation that the named Plaintiffs or other class members were not "conservative" energy users due to alleged overuse of household electronics, such as computers

or televisions, is merely speculative. Such speculation cannot serve as a basis to dismiss Plaintiffs' complaint on a 12(b)(6) motion to dismiss. As previously stated, all tenants are entitled to have a utility allowance set at a reasonable level and in accordance with federal law, regardless of energy consumption levels for any given household.

Finally, contrary to Defendants' assertions, the HUD Guidebook provides relevant guidance to the analysis of electricity surcharges and insufficient allowances. When energy consumption routinely exceeds the allowance, this is prima facie evidence that the allowance is not sufficient. HUD Public Housing Occupancy Guidebook, June 2003. Although the HUD Guidebook does not have the same legal authority as a statute, "it does not follow that regulated parties can disregard an agency handbook as no more than a collection of suggestions." *In re Tobacco Row Phase IA Development*, 338 B.R. 684, 691 (E.D.Va. 2005). The court in *Tobacco Row* held that a HUD Handbook could be used to "inform the court" in considering the definition of operating expense and its applicability to the facts of that case. *Id.* Defendants concede that the court can consider the Guidebook as persuasive authority (Mem. In Supp. of Mot. to Dismiss at 26, citing *Precon Dev. Corp., Inc. v. U.S. Army Corps of* Eng'rs, 63333, F.3d 278, 291 (4th Cir. 2011). Furthermore, this provision in the HUD Guidebook governs the same principles as the Fourth Circuit's decision in *Dorsey* which does have binding legal authority.

As Defendants concede, 24 C.F.R. § 965.505(a) "command[s]" CRHA to set a utility allowance sufficient for reasonable consumption (Mem. In Supp. of Mot. to Dismiss at 26). Contrary to Defendants' assertion that the Guidebook is entitled to "no weight from the court" (Mem. In Supp. of Mot. to Dismiss at 25), the Guidebook forms part of the factual basis for Plaintiffs' claims that the CRHA did not properly set or review utility allowances and may form part of the court's careful inquiry of CRHA's basis for the charges required under *State Farm*.

With or without the support of the HUD Guidebook, the Amended Complaint is sufficiently pleaded under both *Twombly* and *Iqbal* because the allowance was set and continues to be implemented contrary to the federal mandates, and because the allowances established by CRHA are arbitrary, capricious, and an abuse of discretion. 24 C.F. R. § 965.502(e) (2012).

IV. Plaintiffs are Entitled to Reimbursements for Past Improper Charges.

The Defendants concede that Plaintiffs are entitled to injunctive relief requiring CRHA to comply with the procedural requirements of HUD's regulations. Mem. in Supp. of Mot. to Dismiss 27. No basis exists for Defendants' assertion that Plaintiffs cannot receive refunds for past improper charges. The Supreme Court's decision in *Wright v. Roanoke*, 479 U.S. at 422 n.5, expressly addressed public housing tenants' rights to sue a housing authority to recover "past improper charges." Although the tenants in *Wright* had sued both for injunctive relief about the procedures as well as refunds of illegally collected surcharges, by the time the case got to the Supreme Court, the tenants were "seeking only recovery of alleged past improper charges." *Id.*

The Fourth Circuit has found that procedural violations in setting utility allowances are evidence "pertinent to the evaluation of whether the allowances are reasonable." *Dorsey v. Housing Authority of Baltimore City*, 984 F.2d 622, 632 (1993). Additionally, HUD. has established that utility allowances are invalid if "found to be arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with the law*" (emphasis added). 24 C.F.R. § 965.502(e) (2012). Clearly the procedural violations that Defendants concede may have occurred are a basis for finding that the utility allowances at issue were not in accordance with the law, as well as arbitrary, capricious, or an abuse of discretion, and therefore invalid.

In the Dwelling Lease, CRHA contracts to provide a "reasonable" amount of utilities, including for electricity. Am. Compl. Attach. 3 ¶ 7. CRHA has failed to comply with this express contract term in the lease. Thus, Plaintiffs are entitled to both injunctive relief and recovery of past improper charges under the terms of the lease.

V. Plaintiffs State Viable Claims Pertaining to the Violations of the U.S. Housing Act.

The Defendants' attempt to bootstrap the arguments in Section IV above to assert that Plaintiffs' Second and Third claims, and all claims that pertain to invalid charges, should be dismissed. Defendants offer no supporting law for this argument. CRHA now claims that it has located a copy of the 2003 study setting the rates used almost a decade later. But CRHA has failed to provide the study to Plaintiffs. Answer, ¶ 45. Simply asserting such a fact in the Answer is insufficient to bolster the study as adequate at the present. Finding a document which has not been available for years does not meet the affirmative duty to make the document available for inspection by the Plaintiffs and class members. 24 C.F.R. §965.502(b).

Implicit in the Lease provision ¶7 pertaining to "Excess Utility Consumption" is a requirement that CRHA has met the legal requirements for valid over-allowance charges. CRHA has not done that. Plaintiffs have sufficiently alleged in the Amended Complaint that the rates CRHA is charging violate the HUD Regulations. Am. Compl. 45, 48, 53. These allegations demonstrate a violation of the Lease.

VI. The CRHA Grievance Procedure Does Not Apply to Class Claims and, Therefore, Fails to Meet Defendants' Procedural Obligations to Residents.

Since July 2003 the CRHA has never promulgated criteria or procedures for adjusting utility allowances for tenants when the utility amounts are inadequate. Am. Compl., ¶ 48, 56; Defs. Memo. 28-29. Defendants' assertion that the grievance procedure is adequate to meet this obligation is unavailing. *Id.*

Congress required HUD to promulgate regulations on grievance procedures. 42 U.S.C. § 1437d(k). The resulting public housing grievance procedures of 24 C.F.R. part 966, subpart B (2003) expressly forbid their application to class grievances. "The PHA grievance procedure shall not be applicable to … class grievances. The grievance procedure is not intended as a forum for initiating or negotiating policy changes between a group or groups of tenants and the PHA's Board of Commissioners." 24 C.F.R. 966.51(b) (2003); Mem. in Supp. of Mot. to Dismiss, Att. A., Complaints, Grievances, and Appeals, at 5. Defendants argue for an interpretation of the grievance procedure that is expressly prohibited by federal regulations.

Not only do the regulations specifically exempt class claims from the grievance procedure, but well-established case law holds that exhaustion of state administrative remedies is not required prior to bringing suit under § 1983. *Patsy v. Board of Regents*, 457 U.S. 496, 512 (1982); *Hall v. Marion Sch. Dist. No. Two*, 31 F.3d 183, 190-91 (4th Cir. 1994). Two exceptions exist to this no-exhaustion rule: Congress may (1) explicitly provide that state administrative remedies must be exhausted before bringing suit under a particular federal law pursuant to § 1983 or (2) implicitly require the exhaustion of state administrative remedies where "'the obligation to require exhaustion of administrative remedies may be fairly understood from congressional action.'" *Patsy*, 457 U.S. at 502 n.4, 508. The mere provision of state

administrative remedies is not enough to demonstrate an implicit Congressional intent to impose an exhaustion requirement on a plaintiff seeking to bring a 42 U.S.C. § 1983 action. *Id.*

Neither of the exceptions to the exhaustion rule applies to the public housing grievance procedure. The regulations expressly provide that neither failure to initiate the grievance procedure nor an adverse decision in the grievance procedure waives or limits a tenant's right to either seek "trial de novo or judicial review[.]" 24 C.F.R. §966.55(c) (2003). Indeed, in *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), the Supreme Court invoked the general rule of *Patsy* in concluding that rights conferred by the Housing Act may be enforced in 42 U.S.C. § 1983 proceedings: "[local grievance] procedures are not open to class grievances; and even if tenants may grieve about a PHA's utility allowance schedule, which petitioners dispute, the existence of a state administrative remedy does not ordinarily foreclose resort to § 1983." *Id.* at 426-428 (Citing *Patsy*, 457 at 516). As to agency intent, the Court noted:

> HUD itself has never provided a procedure by which tenants could complain to it about the alleged failures of PHA's to abide by their annual contribution contracts, the Brooke Amendment, or HUD regulations; . . . . HUD thus had no thought that its own supervisory powers or the grievance system that it had established foreclosed resort to the courts by tenants who claimed that a PHA was not observing the commands of the Brooke Amendment. *Wright*, 479 at 426.

Even if the grievance procedure were relevant to Plaintiffs' class claims, the doctrine of exhaustion of administrative remedies would not bar a 42 U.S.C. § 1983 claim.

VII. Plaintiffs' Individual Use of the Informal Grievance Procedure is Implicit in the Factual Allegations.

Defendants also erroneously allege that Plaintiffs failed to make use of the grievance procedure, and, therefore, Plaintiffs' state-law claims are barred by their failure to exhaust administrative remedies. To initiate an informal settlement of a grievance, "[a]ny grievance shall

be personally presented, either orally or in writing, to the PHA office or to the office of the project in which the complainant resides[.]" 24 C.F.R. § 966.54 (2003). Plaintiff Janyce Lewis and Plaintiff Earletta Gladden made use of the grievance procedure through written and oral, respectively, submission of grievances to CRHA that resulted in interactions that should be considered informal conferences under 24 C.F.R. § 966.54 (2003).

Ms. Lewis personally initiated, wrote and circulated a petition in the fall of 2010, which protested the excess utility fees. The petition was signed by approximately forty residents and presented to the CRHA board at their November 2010 meeting. Am. Compl. ¶ 68.

Since July 2003 the CRHA has never promulgated criteria or procedures for adjusting utility allowances for tenants when the utility amounts are beyond the tenant's control. Am. Compl., ¶ 56; Mem. in Supp. of Mot. to Dismiss 28-29. At no time since 2003 have Defendants conducted an analysis, study or professional review to determine if the excess utility surcharges assessed against a resident were beyond the tenant's control. Am. Compl., ¶ 57; Mem. in Supp. of Mot. to Dismiss, at 28-29. The CRHA also failed to comply with HUD regulations requiring the implementation of a hardship plan to waive or reduce charges for families with disabled individuals requiring accommodations for increased electricity use due to their disabilities. Am. Compl., ¶ 173; Mem. in Supp. of Mot. to Dismiss, at 28-29. Ms. Gladden, whose medical problems and those of her son necessitate higher electricity usage, has repeatedly asked the CRHA about why she is receiving excess utility charges. Am. Compl. ¶ 115, 119, 120. The staff almost always responded by saying that they "will look into it". No one has provided Ms. Gladden any explanation. *Id.* at ¶ 121.

The fact that Plaintiffs did not request a formal hearing following their informal conference does not foreclose judicial action. "[F]ailure to request a hearing shall not constitute a

waiver by the complainant of his right thereafter to contest the PHA's action in disposing of the complaint in an appropriate judicial proceeding." 24 C.F.R. §966.55(c) (2003); Mem. in Supp. of Mot. to Dismiss, Att. A., Complaints, Grievances, and Appeals, at 5 ("'Failure to Request a Formal Hearing… This section in no way constitutes a waiver of the complainant's right to contest the Housing Authority's disposition in an appropriate judicial proceeding.")

Defendants failed to demonstrate that they provided a proper procedure for class challenges to inadequate utility allowances or that individual Plaintiffs failed to make use of the limited grievance procedure that was available.

VIII. Plaintiffs Appropriately State A Claim for Lease Violations.

Plaintiffs clearly state a valid Second Claim based upon the lease provisions by challenging the CRHA's (1) failure to provide adequate written notice and (2) accelerating the collection of excess utility charges.[7] Am. Compl., ¶¶162-164. The Defendants fail to give each word of the lease provisions full meaning in asserting that Plaintiffs have not stated a claim. Mem. In Supp. of Mot. to Dismiss 31. The plain language of the dwelling lease, ¶7.D, states: "excess utility consumption shall be charged to Resident's account and shall be due and payable on the first day of the month after the Authority has given the Resident a 14 day written notice of the charges" (emphasis added). The lease language is a compound sentence with both requirements – charging and payable – following the giving of a 14 day notice.

[7] Defendants refer to the lease claims as the "Third Claim," (Mem. In Supp. of Mot. to Dismiss p. 30), but in the Amended Complaint the lease claims appear in the Second Claim. ¶¶ 162-168. Defendants raise no objection to the first alleged lease violation: the failure to provide adequate electric allowances under Section 8.A of the lease. ¶¶ 162-163. The CRHA violated Paragraph 8.A of the lease by making rent determinations and adjustments not in "accordance with applicable Federal regulations and Authority policies".

The Complaint clearly alleges that CRHA charged residents with late fees if it did not receive payment for excess electricity usage by the tenth day of the month. Am. Compl., ¶¶58-59. Excess utility charges are "rent" under the lease and §55-248.4 of the Code of Virginia.

It is a violation of the lease to provide notice and bill in the same month. Defendants inappropriately billed tenants without first notifying them in writing of the excess electric charges as required by the lease. CRHA deprived tenants of an opportunity to question or challenge the fees before they became due. The tenants suffered a concrete injury when the CRHA imposed a late fee on charges and accelerated the collection by premature billing.

From 2003 until February 2011, the CRHA engaged in this illegal practice. On information and belief, the CRHA changed its billing policy when this lease violation was brought to its attention in February 2011.

The current and corrected practice is to send a notice of consumption and proposed billing in one month and to impose the actual billing in the following month, absent any protest or correction.

Plaintiff's allegations in the Complaint are not "bare assertions" and should survive under an analysis outlined in *Iqbal v. Ashcroft*, 556 U.S. 662 (2009). Plaintiff's Second Claim is a contract claim that arises from the lease between tenant and the CRHA. The lease requires performance by each side and the failure of the CHRA to meet its duties under the lease is a breach. The breach has caused harm to the Plaintiffs in the form of allegedly high and illegal rents, which are beyond the 30% of income allowed under HUD regulations.

Plaintiffs' claims are distinguishable from those rejected in *Iqbal*. They are real and result from Defendants' specific actions and inactions. They are contractual, not constitutional.

They are plausible and factual, not speculative. They are not mere conclusions. The Complaint meets the test of *Bell Atlantic v. Twombly*, 550 U.S. 544, cited in *Iqbal.*

The Second Claim is a sufficiently clear statement of an actual practice that was a lease violation and one that was recognized the CRHA. It is sufficiently plead under Rule 8(a)(2) of the Federal Rules of Civil Procedure, being "a short and plain statement of the claim showing that the pleader is entitled to relief."

IX. CRHA's Failure to Issue Savings Bonds to Tenants Who Conserved Energy for a Year or More is Enforceable under State Law.

The CRHA's Revised Public Housing Utility Allowance of July 28, 2003 pledged to pay a $50 saving bonds as an incentive to conserve electricity for all residents who did not exceed the allowance over a twelve month period. *See*, Resolution No 2058, Am. Compl. Attachment 2. Plaintiffs may enforce this claim and maintain an action under Virginia Code § 8.01-27 "upon any note or writing by which there is a promise, undertaking, or obligation to pay money, if the same be signed by the party who is to be charged thereby, or his agent." This is now conceded by the Defendants. Mem. In Supp. of Mot. to Dismiss 32.

The allowance Resolution is a basic unilateral contract: CRHA made an offer of $50 savings bond and invited acceptance through forbearance of utility surcharge over a twelve month period. *See* Restatement (Second) of Contracts § 50 cmt. b (1981); ("Where the offer requires acceptance by performance and does not invite a return promise, as in the ordinary case of an offer of a reward, a contract can be created only by the offeree's performance."); 1-3 Arthur L. Corbin, *Corbin on Contracts* § 3.10 (2d ed. 1982) ("A published offer of a reward for some desired action is nearly always an offer of a unilateral contract. The offeror makes a promise in exchange for which the requested return is action or forbearance, not for a promise to act or to

forbear.") Plaintiffs have demonstrated that the claim under Resolution No. 2058 is enforceable as a contract under Virginia law.

Defendants' assertion that Resolution No. 2058 is not binding on future boards is without merit. Memo at 32. While it is true that the Board may rescind Resolution No 2058 at any time, that can only happen by official action and a vote by the then current board. However, that is irrelevant to contractual obligations incurred by CRHA while Resolution No. 2058 was in effect.

The Resolution No. 2058 had two substantive purposes. It set the revised, and still existing, utility allowances and established the incentive award. The Resolution was an official act by the Board and continues until rescinded. It is illogical to assert that only one of the two planks was intended as on-going resolution. If the revised utility allowances continue in place, so does the incentive award. Plaintiff Telambria Tinsley and other class members who went a full year without exceeding the electric utility allowance for their housing unit accepted CRHA's offer of a $50 savings bond incentive through performance and, thus, formed an actionable contract under Virginia Code § 8.01-27.

The Defendants argument that Resolution No. 2058 is unenforceable as unconstitutional is a misreading of *Button v. Day*, 205 Va. 629 (1964). Most simply *Button* involved the issuance of bonds by the Peninsula Ports Authority of Virginia with the possibility of a contingent indebtedness assumed by the City of Newport News. Here, the CHRA did not issue or guarantee any bonds. The CRHA had no future contingent or absolute liability for the bonds. Therefore no possible violation of Constitution of Virginia exists for an improper or excess extension of credit.

The $50 bond was and would remain until redeemed an obligation of the United States. It is a Federal Treasury debt, not one of the CHRA. A U.S. savings bond was chosen as an incentive vehicle. It could as well have been a toaster oven or a set of steak knives. If the

government of the United States failed or defaulted on all or any one of the savings bonds, the recipient tenant would have no recourse against the CRHA. We can only speculate that the $50 saving bond was chosen as the incentive medium because it was attractive, relatively easy to administer, was uniform and would create no future problems for the CHRA. It in no way was a bond issued by the CHRA. They could be purchased in the market, either at a local bank or through the Treasury on the same terms available to any other buyer, such as parent for a grandchild.

Button considered two Constitutional provisions. First to be examined was the 'credit clause' of Section 185 of the 1902 Constitution. In *Harrison v. Day*, 202 Va. 764 (1961), which involved the leasing of certain port facilities, the Court held that an act, if in pursuit of a "public function, others might incidentally receive a profit did not destroy the public character of the use or violate the letter or spirit of the 'credit clause' of Section 185 of the Constitution." The Court held that the analysis in *Harrison* would apply and there was no violation of Section 185. *Button*, 639. The CRHA's Resolution to give bonds to individuals as an incentive plan is clearly an act with a public purpose. It is not a violation of the Constitution.

Section 185 became Article X, Section 10 of the present Constitution, which is the basis for the Defendant's assertion. The CRHA in their Resolution No. 2058 could not have violated Article X, Section 10 of the Constitution as they did not issue any debt and they did not create indebtedness.

The *Button* Court further analyzed the bonding plan under Section 127 of the Constitution which limited cities and towns bonding to no more than "eighteen per centum of the assessed valuation of the real estate in the city or town subject to taxation, as shown by the last preceding assessment for taxes". They found that the additional indebtedness assumed by the

City of Newport News with bonding exceeded the limitation imposed by Section 127. The CRHA incentive award is not indebtedness subject to the Constitution and, if it was, would only be the smallest fraction of the Constitutional limit.

Plaintiffs have demonstrated that the contract claim under Resolution No. 2058 is enforceable under Virginia law.

Conclusion

Plaintiffs demonstrate above that Defendants' Motion to Dismiss should be denied. Plaintiffs have successfully shown that they are correctly before this Court for the resolution of long years of being assessed illegal excess electric utility charges.

Respectfully submitted this 26th day of October, 2012.

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CERTIFICATE

I certify that on October 26, 2012, I electronically filed the foregoing with the Clerk of the Court of the U.S. District Court, Virginia, Western District, using the CM/ECF system, which will send notice to the following:

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