UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

FRANCES HINES, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 1:01CV70 CDP
	)	
CHARLESTON HOUSING AUTHORITY, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This case is before me for reconsideration of the parties' motions for summary judgment, which I previously denied. As discussed in detail on the record on April 23, 2003, I have agreed to reconsider the motions and in doing so will consider the record and briefs previously provided as well as the parties' recently-filed joint stipulation of facts.

This procedurally-complicated action involves two consolidated cases, both arising out of the plan by the Charleston Housing Authority (CHA) to demolish the Charleston Apartments, a low-income apartment complex in Charleston, Missouri, that has been funded by various federal programs. In the Hines[1] action the plaintiffs raise claims against CHA, the United States Department of Housing

[1]Frances Hines is no longer a plaintiff.

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and Urban Development (HUD), and the United States Department of Agriculture (USDA). In the USDA action,[2] CHA seeks to require the USDA to accept its final payment on the promissory note and mark the note paid, and it seeks quiet title to the Charleston Apartments.

CHA and the Hines plaintiffs filed cross-motions for summary judgment on Counts I and II of the Hines complaint, and CHA also sought summary judgment on Count III. Count I is brought under 42 U.S.C. § 1983 and alleges that CHA violated federal laws by failing to lease vacant units and maintain the property, failing to follow required pre-payment request procedures, and failing to offer to sell Charleston Apartments to qualified non-profit organizations. Count II is a claim for breach of the loan resolution and promissory note, which the Hines plaintiffs claim they have standing to enforce as third-party beneficiaries. Count III is also brought under § 1983, and alleges that CHA violated other federal laws by failing to lease the units and provide proper notice of the intended termination, and by refusing to offer the residents enhanced vouchers and the choice to remain in the apartment complex.

CHA and the Hines plaintiffs have also filed cross-motions on CHA's

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[2]The USDA action was originally filed as Case No. 1:01CV101 CDP, and that file has been administratively closed as a result of its consolidation with Case No. 1:01CV70CDP.

claims in the USDA action, although CHA's motion does not seek summary judgment on its Count II. Although the USDA did not file a separate cross-motion for summary judgment, in its response to CHA's motion, the USDA asked that I grant it summary judgment. In an earlier telephone conference with counsel, the USDA asked that I consider this response as a motion for summary judgment, and I agreed to do so. Since it is not at all clear to me that the Hines plaintiffs can seek summary judgment on a complaint that makes no allegations against them and seeks nothing from them, I will consider their arguments as being supplemental arguments of the USDA.

Although the motions present numerous issues, an overarching issue is whether the Emergency Low Income Housing Preservation Act (ELIHPA), 42 U.S.C. § 1472(c), applies to the loan at issue here. I conclude that it does. I will therefore grant summary judgment to the USDA on all counts of CHA's complaint against the USDA. I also conclude that neither ELIHPA nor the other federal laws alleged in Count I of the Hines complaint are enforceable by the Hines plaintiffs through an action under 42 U.S.C. § 1983. CHA is therefore entitled to summary judgment on Count I of the Hines complaint, even though ELIHPA applies. I conclude that the Hines plaintiffs are not entitled to enforce the contract as third-party beneficiaries, so CHA is entitled to summary judgment on Count II of that

complaint. CHA is not entitled to summary judgment on Count III, however. Counts III through XIII of the Hines plaintiffs' complaint remain pending. I will again refer this case to Alternative Dispute Resolution, in advance of the completion of the trial.

I. Undisputed Facts

Housing Comes First is a nonprofit corporation whose mission includes the preservation of affordable housing for low-income families in Missouri. Essie McCatrey and Timothy Owens are African-American residents of the Charleston Apartments. Priscilla Johnson is an African-American who voluntarily moved from the complex in July 2002. CHA provided Johnson with $150.00 for moving and utility reestablishment.

The Charleston Apartments are owned and operated by defendant Charleston Housing Authority, a public housing agency, under two federal programs. Defendant Paul Page is the executive director of Charleston Housing Authority and is sued in his official capacity.

Defendant Department of Housing and Urban Development administers the housing authority's project-based rent subsidy program. Mel Martinez is the Secretary of HUD and is sued in his official capacity.

Defendant U.S. Department of Agriculture, through its Rural Housing

Services Division, administers the project mortgage financing program for CHA. Ann Veneman is sued in her official capacity as Secretary of USDA.

The Charleston Apartments were built in the early 1970s and consist of 50 rental units in twenty-two buildings located near to one another in Charleston, Missouri. CHA purchased the complex in 1981 and converted the apartments to a FmHA-mortgaged §8 Project-Based Substantial Rehabilitation project. This transaction is reflected in a Loan Resolution, Promissory Note, and Deed of Trust. Pursuant to the documents, the government, through the Farmer's Home Administration, loaned CHA $740,000 under the § 515 Rural Rental Housing Program. The Rural Housing Services, an agency of the USDA, administers FmHA loans such as the one made to the housing authority.

The Promissory Note was for a term of fifty years, with the final payment due in 2031. The Note states that "prepayments of scheduled installments or any portion thereof may be made at any time at the option of the borrower." It also states that "refunds and extra payments as defined in the regulations (7CFR1861.2) of the Farmer's Home Administration according to the source of funds involved, shall, after repayment of interest be applied to the installment last to become due under this note and shall not affect the obligation of the borrower to pay the remaining installments as scheduled therein." It also states: "This note

shall be subject to the present regulations of the Farmer's Home Administration and to its future regulations not inconsistent with the expressed provisions hereof."

The Deed of Trust and Loan Resolution obligate the borrower to comply with all applicable federal laws and regulations.

In addition to the above documents, CHA also entered into a twenty-year Housing Assistance Payments (HAP) contract with HUD to obtain project-based § 8 assistance for the project. In the HAP contract CHA agreed not to terminate any tenancy or assistance except in accordance with HUD regulations and other federal, state and local law. The HAP contract also obligated CHA to maintain the units.

The Promissory Note called for 588 payments in the amount of $5624, with the first payment due April 27, 1982, and the last in 2031. Before the first payment was due, however, CHA returned or refunded $109,903.71 to FmHA, representing a portion of the loan proceeds that was not used in the purchase transaction. On other occasions it also made payments in excess of the amounts called for by the loan.

On or before July 12, 1999, CHA contacted the USDA about payment of the balance of the § 515 loan, which by this time was less than $50,000, because of

the earlier refund and payments in excess of the amounts required. In November of 1999 CHA adopted a de-concentration policy, and in December it decided not to rent units in Charleston Apartments as they became vacant.

On February 14, 2000, CHA adopted Resolution 604, which resolved to pay off the loan agreement, not seek renewal of the HAP contract and demolish the Charleston Apartments. At the time of that decision, 47 units were occupied. CHA has not rented any vacated or vacant apartments since the adoption of Resolution 604. During the period after the adoption of Resolution 604, CHA offered public housing units in its public housing projects to all tenants of the Charleston Apartments and gave them preference over others on the waiting list. For those former tenants of Charleston Apartments who moved out, CHA provided a moving subsidy of $150 based upon its survey of the costs of moving and re-establishing utilities. At this time, only two units remain occupied.

Between February and April of 2000, Page met with HUD about CHA's decision to opt out of the HAP contract and to demolish Charleston Apartments. CHA formally advised HUD on April 24, 2000, of its decision not to renew the HAP contract, effective April 26, 2001. CHA included with this notification a copy of its one-year notice to the residents of Charleston Apartments dated April 20, 2000, which advised them of the decision to terminate the HAP contract and

stated:

> Since we do not intend to renew this project-based contract upon its expiration, it is our understanding that, subject to availability of appropriations, [HUD] will provide tenant-based rental assistance to all eligible residents currently residing in a Section 8 project-based assisted unit. This tenant-based assistance will enable eligible residents to choose the place they wish to rent, which is not likely to include the dwelling unit in which they currently reside . . . Please remember that rental assistance will continue to be provided on your behalf for one year. In addition, if Congress makes funds available, we may agree to a renewal of the contract with HUD, thus avoiding contract termination all together. However, the [Board] has resolved to opt out of the HUD Section 8 contract, vacate the project and demolish it . . . ."

(emphasis added). Although 42 U.S.C. § 1437f(c)(8) required CHA to tell the residents that it was "likely" that they would be able to remain at Charleston Apartments after the HAP contract expired, Page testified that he modified the statutory language to say that it was "not likely" because CHA did not want to mislead the residents about its plans to demolish the complex. HUD had reviewed this language earlier and had orally advised CHA that it was consistent with notification requirements.[3]

[3]In December of 2000, Page submitted to HUD a 120-day written notice confirming CHA's intent to opt out of the HAP contract. CHA also provided a 120-day written confirmation notice to tenants of the apartment complex. The content of the 120-day notice to tenants was essentially the same as its one-year notice.

As of April 2000, the unpaid principal balance on the loan was only $112.36. Payment of the April 27, 2000 installment would have paid the loan in full.

By letter dated December 1, 2000, CHA filed a prepayment request with the USDA to comply with the requirements of ELIHPA. CHA claims in this litigation that it did so only because in 1999 the USDA had "erroneously" told CHA that it must comply with the ELIHPA prepayment procedures. The USDA subsequently notified each tenant of Charleston Apartments of the request for prepayment. On April 18, 2001, USDA informed CHA that it would need additional information to process the prepayment request. CHA did not furnish the information. On May 7, 2001, CHA tendered a check to USDA in the amount of $126.14, which would have paid the loan in full. USDA returned the check and has not accepted any payments from CHA since that time. On June 22, 2001, USDA informed CHA of its determination that prepayment of the loan would have an impact on minorities. Under ELIHPA, CHA would therefore be required to advertise the project for sale to non-profits based upon this determination. On June 27, 2001, CHA notified USDA that it was withdrawing its "erroneous request" to prepay. CHA did not appeal the June 22, 2001 determination. Therefore, there is currently no request for prepayment pending before the USDA.

At its Board Meeting on June 11, 2001, CHA adopted Resolution 639, which revoked and rescinded Resolution 604.

II. Discussion

The loan at issue here was issued under § 515 of the Fair Housing Act of 1949, 42 U.S.C. § 1485, which authorizes loans to public, private and non-profit borrowers for the purpose of providing low or moderate income housing. In exchange for long-term loans, borrowers must "[a]gree to comply with all FmHA requirements . . . . and . . . regulations" and be "willing to honor the long term commitment associated with receipt of a Section 515 loan." 7 C.F.R. §§ 1944.211(a)(8) and (a)(14). The note at issue here gives CHA an unequivocal right to prepay and also provides that the prepayments do not obviate CHA's obligation to make each separate installment payment when due.

ELIHPA, the Emergency Low Income Housing Preservation Act, 42 U.S.C. § 1472(c), was enacted to preserve the availability of low-income housing by restricting a project owner's ability to prepay a § 515 loan. A borrower under the rural rental housing program may request to prepay its mortgage loan in less than 50 years. All requests to prepay such mortgage loans must be processed by the USDA pursuant to ELIHPA. The project owner must submit a pre-payment request to the USDA, which cannot approve it until certain statutory requirements

have been met. First, the USDA must determine whether the project is needed for low-income housing and whether the prepayment will have a material effect on minority housing needs. See 42 U.S.C. §§ 1472(c)(1)(A) and (5)(G)(ii). Based on these determinations, the pre-payment request still cannot be approved unless the borrower agrees to certain restrictions, such as offering to sell the project for 180 days to qualified nonprofit and public entities or entering into a restrictive-use agreement. See 42 U.S.C. § 1472(c)(5)(A). It is undisputed that CHA has not complied with the requirements of the statute.

A. Does ELIHPA apply?

As stated above, an overarching issue in these cases is whether ELIHPA's restriction on prepayment applies to CHA's request to pay off the loan. There is a conflict between the Promissory Note, which contains an unequivocal right to prepay the loan, and the regulations of ELIHPA, which would require CHA to comply with the prepayment process before it could pay off the loan. CHA argues that ELIHPA does not apply here because: (1) its request to pay off the loan is not a "prepayment," and (2) the government, by agreeing in the loan documents to allow prepayment, contracted away its right to enact legislation or regulations inconsistent with the unconditional right to prepay.

I conclude that ELIHPA applies. In Parkridge Invest. Lim. Partnership v.

F.H.A., 13 F.3d 1192, 1198 (8th Cir. 1994), the Eighth Circuit interpreted a loan agreement identical to the one at issue in this case and held that the government did not contract away its sovereign power to alter the loan agreement through subsequent legislation merely by agreeing to an absolute prepayment right. The court further held that the government did not effectuate a taking or otherwise unconstitutionally alter the terms of a loan agreement by requiring the borrower to comply with the provisions of ELIHPA. Id. at 1198-99. The court did not, however, address the issue of whether the enactment of ELIHPA constituted a breach of contract, entitling the borrower to recover damages under the Tucker Act.

The Supreme Court recently decided that the enactment of ELIHPA acted as a repudiation of the government's obligation to accept prepayments without restriction under a loan agreement identical to the one at issue. Franconia Assoc. v. U.S., 122 S. Ct. 1993 (2002). For this reason, the Court held that the statute of limitations on the borrower's claim for damages under the Tucker Act began to run when the borrower tendered its prepayment. Id. at 2002. Although this decision does not directly decide the issue of whether ELIHPA applies to (and modifies) these types of contracts, the Court's reasoning would apply here. ELIHPA applies to CHA's contract and modifies the unconditional prepayment

obligation.[4]

To avoid the ELIHPA issue entirely, CHA tries to characterize the tender of the balance due as a "scheduled installment payment" which, according to CHA, would mean that it was not subject to ELIHPA prepayment regulations. While this argument may have some initial appeal because the remaining loan balance is so low, there is no support for the distinction CHA is trying to make. ELIHPA was enacted specifically to regulate and/or prevent just this type of prepayment. Although "prepayment" is not defined in ELIHPA, the statute on its face applies to payments that satisfy a loan prior to the loan's maturity date. See 42 U.S.C. § 1472(c). In this case, the loan's maturity date is 2031. Moreover, ELIHPA's implementing regulations provide: "If the loan on a project . . . reaches or falls below six remaining payments due to borrower voluntary advance payments . . . the borrower will be notified that the final payment on the account cannot be accepted unless a pre-payment request is made." 7 C.F.R. § 1965.224. CHA's payment of the outstanding balance will pay off the loan before its maturity date and therefore must be considered a "prepayment" subject to the prepayment

[4]CHA may not be without redress for this change to the contract. In Parkridge the court did not address the issue of whether the enactment of ELIHPA constituted a breach of contract, entitling the borrower to recover damages under the Tucker Act. As indicated in Franconia, CHA may well have a Tucker Act claim, but I need not decide that at this time.

approval process mandated by ELIHPA.

CHA argues that basic principles of contract interpretation require the USDA to accept the remaining balance as a "scheduled installment payment." To support this position, CHA relies heavily on a decision from the Ninth Circuit, Kimberly Assoc. v. U.S., 261 F.3d 864 (9th Cir. 2001), but that case simply holds that a borrower is not barred from proceeding against the government on a quiet title action when the government refused to accept final (pre)payment under a loan agreement similar to the agreement at issue here. Id. at 870. The case does not decide the ultimate issue of whether ELIHPA applied to and modified the prepayment provisions of the loan agreement, so it does not support CHA's argument in this respect. Moreover, Kimberly was decided before Franconia, and to the extent it could be construed as providing authority for CHA's position, its reasoning is called into question by the Supreme Court's later decision in Franconia.

The USDA is entitled to summary judgment on all of CHA's claims in the USDA action. CHA is obligated to comply with ELIHPA's requirements relating to prepayment. It admittedly has not done so, and it must.

B. Does § 1983 provide a mechanism for the Hines plaintiffs to enforce ELIHPA?

CHA argues that the Hines plaintiffs cannot bring their Count I claim alleging a violation of ELIHPA under 42 U.S.C. § 1983. I agree.

In Gonzaga University v. Doe, 122 S.Ct. 2268 (2002), the Supreme Court held that only statutes conferring individual rights can be privately enforced through the mechanism of § 1983. Id. at 2275. In other words, a statute must first grant a plaintiff rights before he can enforce them under § 1983. Id. Whether personal rights exist under a statute in the § 1983 context is "no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute 'confers rights on a particular class of persons.'" Id. at 2276 (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).

Gonzaga distinguished between "rights-creating" language, which focuses on individuals, and language that merely focuses on "institutional policy and practice," which does not confer private enforcement rights. Id. at 2277-78. The Court pointed to the language in Titles VI and IX ("no person shall be subjected to discrimination") as "rights-creating" and contrasted it with the language of the Family Educational Rights and Privacy Act ("FERPA"), the statute at issue in

Gonzaga. FERPA conditions the receipt of federal funds on access and disclosure of student educational records as follows:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization.

20 U.S.C. § 1232g(b)(1). The Court held that this non-disclosure provision, while clearly intended to protect the privacy rights of students, did not create rights enforceable by students and their parents under § 1983. Id. at 2277. Because the non-disclosure provision focuses on the policy and practices of the educational institution regulated rather than on the students protected, it does not manifest congressional intent to confer individual rights enforceable by § 1983. Id. at 2278. Finally, the Court found its conclusion buttressed by the fact that the statute provides an enforcement mechanism for violations through an administrative process. Id.

After this decision, it is clear that a statute must do more than merely benefit an individual to create rights enforceable under § 1983. Although ELIHPA was enacted to preserve low-income housing, this intent does not necessarily translate into an individually enforceable right under the statute. The language of ELIHPA's prepayment provisions is comparable to the non-disclosure language in

Gonzaga because it focuses on the governmental agency's regulation of the borrower, rather than on individual tenants. ELIHPA sets out guidelines for the USDA and borrower to follow during the prepayment process and authorizes the USDA to provide financial and other incentives to the borrower to encourage the continued operation of low-income housing. It does not contain the kind of language necessary to confer private enforcement rights on the plaintiffs in this case.

Plaintiffs argue that the Supreme Court's decision in Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987), gives them a private right of action to enforce ELIHPA and other "housing" rights. In Wright, the Supreme Court held that tenants could bring a § 1983 claim to enforce the Brooke Amendment to the United States Housing Act of 1937, which gave them the right to include a reasonable utility allowance in their ceiling rent calculation. Although plaintiffs are correct that the Supreme Court did cite Wright in its Gonzaga opinion, the Court was careful to point out that the legislation was unique because it "unambiguously conferred a mandatory benefit focusing on the individual family and its income." Gonzaga, 122 S. Ct. at 2273. It is clear that Wright does not stand for the proposition that all housing legislation is privately enforceable through § 1983. Gonzaga is the controlling law. I conclude that

plaintiffs have no cause of action under § 1983 to enforce the prepayment provisions of ELIHPA.

C. What about the Hines plaintiffs' § 515 claims in Count I?

Count I of the Hines plaintiffs' complaint also alleges that CHA violated § 515 and its regulations. Although it is not entirely clear to me whether this is a different claim than the ELIHPA claim, I will assume that the alleged violation of § 515 is the failure to "rent up" the vacant units at the apartment complex. Neither § 515 nor its regulations explicitly require CHA to lease the vacant units and maintain the property.[5] The statute, however, may implicitly contain such a requirement because it states that the units "shall not be made available for occupancy by persons and families other than very low income persons and families . . . . " See 42 U.S.C. § 1485(p)(3). The regulations require the borrower to comply with federal law and state that the use "should expand the supply of decent, safe and sanitary housing for very low, low and moderate-income elderly persons, persons with disabilities and families in a non-discriminatory way . . . and should promote a greater choice of housing opportunities in the housing market area." 7 C.F.R. § 1944.215(r). In addition, borrowers must "[a]gree to comply

[5]The Section 8 regulations do contain an explicit "rent up" requirement, see 24 C.F.R. § 880.504, but those regulations are raised by other portions of the plaintiff's complaint, and are not alleged in Count I.

with all FmHA requirements . . . . and . . . regulations" and be "willing to honor the long term commitment associated with receipt of a Section 515 loan." 7 C.F.R. §§ 1944.211(a)(8) and (a)(14). The USDA regulations also require CHA to implement a management plan that provides for "achiev[ing] and maintain[ing] the highest possible level of occupancy" at Charleston Apartments. 7 C.F.R. part 1930, supart C.

The Hines plaintiffs, however, have the same problem with their § 515 claim as they do with ELIHPA. Plaintiffs' summary judgment motion argues that they have enforceable rights under § 1983 because § 515 was intended to benefit low-income families and Congress did not foreclose private action. However, for the same reasons that I do not believe that § 1983 provides a mechanism for enforcing ELIHPA, I do not believe it provides a mechanism for enforcing this implied "rent up" obligation under § 515. Like ELIHPA, 42 U.S.C. § 1985 simply does not contain any individual "rights-creating" language. Instead, it sets out the guidelines to obtain a § 515 loan and imposes obligations on the USDA to issue loans and enforce these requirements.

CHA is therefore entitled to summary judgment on Count I of the Hines plaintiffs' claims, even though I have found that ELIHPA applies to the attempted payoff of the loan.

D. Are the Hines plaintiffs third-party beneficiaries of the contract?

In Count II of their complaint, the Hines plaintiffs seek to enforce the loan agreement as third-party beneficiaries. Whether tenants are third-party beneficiaries of a loan agreement between a housing authority and the USDA is an issue of first impression under federal common law and Missouri law. The proper test for determining third-party beneficiary status is whether the contract reflects the express or implied intention of the parties to benefit the third party. Audio Odyssey, Ltd. v. U.S., 255 F.3d 512, 520 (8th Cir. 2001). "The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefitted thereby." Id. at 521. If the third party was not intended to benefit from the agreement, that third party will be considered an incidental beneficiary with no legally cognizable rights under the contract. Id.

In arguing that they are third-party beneficiaries, plaintiffs cite Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981), which held that tenants were third-party beneficiaries of a HAP contract. This case was also relied upon by the Eighth Circuit in Audio Odyssey. To determine if the tenants were third-party beneficiaries of the HAP contract, the Seventh Circuit looked to the underlying purpose of the contracts. The court found that the HAP contracts were intended to

benefit the tenants because they focused on the financial needs of the tenants in a particular housing project and not the financial needs of the housing project itself. Because the contracts were made for the purpose of facilitating rental assistance to low-income tenants, the tenants were third-party beneficiaries entitled to enforce the provisions of the HAP contract. Id. at 1271-74.

Holbrook is easily distinguishable from the present case. Unlike HAP contracts, which are expressly provided to assist with rental payments of eligible tenants and are dependent upon their financial condition, the loan agreement does not evidence the same direct intent to benefit tenants. Although the loan agreement was executed in connection with a § 515 housing loan, I do not believe that this fact is sufficient to confer third-party beneficiary status on the Hines plaintiffs. Therefore, CHA is entitled to summary judgment on Count II of the Hines complaint.

E. Is CHA entitled to summary judgment on Count III of the Hines plaintiffs' complaint?

CHA has also moved for summary judgment on Count III of the Hines complaint, although the plaintiffs have not sought summary judgment on that count. In Count III, plaintiffs make a § 1983 claim that CHA violated Section 8 of the U.S. Housing Act, 42 U.S.C. § 1437(f), and its implementing regulations by:

failing to lease the vacant units; purporting to terminate the contract without proper notice; and refusing to offer residents enhanced vouchers and the choice to remain in the apartment complex. CHA claims that the termination notice was sufficient (although it did not track the language of the statute) and that the HAP contract expired on its own terms, so the Hines plaintiffs cannot maintain this claim as a matter of law.

I cannot tell on this record whether CHA is entitled to judgment as a matter of law. It certainly appears that the notice was defective, since it told the tenants the opposite of what the statute and regulations required. If the HAP contract did not actually expire because the notice was defective, then does that mean the contract is still in effect? If the HAP contract did not expire, then the Hines plaintiffs may in fact have a right under § 1983 to enforce the contract, under the reasoning of Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981) and the reasoning of Gonzaga. They may also be able to pursue their "rent-up" theories under this claim, since the Section 8 regulations do explicitly have a rent-up requirement. Additionally, Count III alleges a separate violation of the law in the refusal to provide enhanced vouchers, and no one has adequately explained this claim to me. Although some of these issues may be legal ones, instead of factual ones, since the law has not been fully explained, I do not know if I have sufficient undisputed

facts to determine the issues. I will therefore deny CHA's summary judgment motion on Count III, and Count III will be set for trial along with the other remaining counts of the Hines complaint.

III. Conclusion

The summary judgment motions did not address Counts IV through XIII of the Hines plaintiffs' third amended complaint, and those counts, along with Count III, remain pending for trial. At least some of the parties have indicated that they would be interested in resuming settlement negotiations after I reconsidered the summary judgment motions, and before reconvening the trial. I believe that such continued negotiations may be productive, as this decision may affect whether the Hines plaintiffs still wish to pursue all of their remaining claims. CHA's papers have repeatedly stated that it will comply with ELIHPA if the statute is deemed to apply, and since I have determined that it does apply, perhaps there is room for the parties to resolve their remaining disputes. I will therefore again refer this case to Mediation, and will direct the parties to conduct it on an expedited basis so the trial may resume promptly if the case is not settled.

I will reset this trial for July 21, 2003. Because CHA's counsel was previously unable to comply with an order that gave more than a year's notice of a trial setting, I will enter specific rules governing the new trial setting. The parties

will have until May 15, 2003 to seek a change in the trial setting. Any motion seeking such a change must state precise reasons for the request and that counsel has conferred with opposing counsel, and shall state their positions on the request. The trial setting will not thereafter be changed for any reason, so all counsel are advised that they should have back-up counsel ready to try the case if they are unexpectedly unable to do so.

Accordingly,

IT IS HEREBY ORDERED, upon reconsideration, that Charleston Housing Authority is entitled to summary judgment on Counts I and II of the Hines plaintiffs' complaint.

IT IS FURTHER ORDERED, upon reconsideration, that the USDA is entitled to summary judgment on all counts of Charleston Housing Authority's complaint in the USDA action.

IT IS FURTHER ORDERED that all other motions for summary judgment are denied.

IT IS FURTHER ORDERED that this case is reset for continuation of the trial on **Monday, July 21, 2003 at 9:00 a.m.** Any party requesting a continuance of this trial date must file a motion seeking continuance no later than **May 15, 2003**. Any such motion must include a specific statement of the reasons that the

continuance is being requested, a statement that counsel has notified all opposing counsel of the request and what their positions on the request are. No late-filed motions for continuance will be considered, so all counsel are warned that they must prepare back-up counsel to be ready to handle the case in the event of unexpected conflicts.

CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 5th day of May, 2003.

UNITED STATES DISTRICT COURT -- EASTERN MISSOURI
INTERNAL RECORD KEEPING

**** CONSOLIDATED CASE ****

AN ORDER, JUDGMENT OR ENDORSEMENT WAS SCANNED, FAXED AND/OR MAILED TO THE FOLLOWING INDIVIDUALS ON 05/05/03 by mschaefe
1:01cv70 Hines vs Charleston Housing

42:3604 - Title VIII - Housing Discrimination

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SCANNED & FAXED BY:

MAY 5 2003

MRS