UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Nails Construction Company, Newell Abatement Services, Inc., and Lead Investigative Services, Inc., and Derrick Woodson, on Behalf of themselves and all others similarly situated,

Plaintiffs,

v.

The City of Saint Paul,

Defendant.

Court File No. 06-2657 JNE-SRN

DEFENDANT CITY OF SAINT PAUL'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

INTRODUCTION

Defendant City of Saint Paul is moving for summary judgment in its favor and against Plaintiffs Frederick Newell, Nails Construction Company, Newell Abatement Services, Inc., Lead Investigative Services, Inc., and Derrick Woodson. Plaintiffs' lawsuit is entirely premised on the allegation that the City is not complying with section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. § 1701u) and 24 C.F.R. Part 135.

But, there is no private right of action under 12 U.S.C. § 1701u. Nor, does 42 U.S.C. § 1983 create a private right of action to assert section 1701u claims.

Furthermore, plaintiffs have neither established, nor can they establish, standing to sue. Put more specifically, plaintiffs must show that they have suffered (1) an "injury in fact", (2) fairly traceable to the alleged unlawful act(s); and (3) that the injury will be redressed by a favorable decision. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). Simply put, plaintiffs will be unable to demonstrate that they were refused by the City a contract, a subcontract, employment, or some other type of participation that as a matter of fact and law they were entitled to under section 3.

Consequently, pursuant to Rule 56 of the Federal Rules of Civil Procedure, the City is entitled to a dismissal of plaintiffs' amended complaint in its entirety with prejudice.

RECORD FOR SUMMARY JUDGMENT MOTION

AFFIDAVIT OF ROBERT HAMMER

Exhibit A. Document showing HUD funding to the City from 1975 to the present.

Exhibit B. HUD's performance review audit letter for program year 2000.

Exhibit C. HUD's performance review audit letter for program year 2001.

Exhibit D. HUD's performance review audit letter for program year 2002.

Exhibit E. HUD's performance review audit letter for program year 2003.

Exhibit F. HUD's performance review audit letter for program year 2004.

Exhibit G. Consolidated Annual Performance and Evaluation Report (CAPER)from the City sent to HUD for program year 2003.

Exhibit H. Consolidated Annual Performance and Evaluation Report (CAPER) from the City sent to HUD for program year 2004.

Exhibit I. 2002 Request for Proposal for an Independent Monitor of the City's programs.

Exhibit J. Recent Independent Monitor's report dated February 2006.

AFFIDAVIT OF RONALD C. ROSS

Exhibit A. Community Development Block Grant (CDBG) program for year 2004.

Exhibit B. Community Development Block Grant (CDBG) program for year 2005.

Exhibit C. Community Development Block Grant (CDBG) program for year 2006.

Exhibit D. Fourth Amendment to master Development and Loan Agreement.

Exhibit E. EDI Grant Agreement that is incorporated into the Master Development Agreement as Exhibit L.

Exhibit F. Master Subordination Agreement and Estoppel Certificate.

Exhibit G. CDBG Documents, incorporated into the Master Subordination Agreement as Exhibit C.

Exhibit H. Loan agreement for project where a business obtained a loan from HRA funded from CDBG funds.

Exhibit I. Employee and income information.

Exhibit J. Example of a single family redevelopment project.

Exhibit K. Owner-Contractor Agreement.

Exhibit L. 2004 funding data for the Emergency Shelter Grant program.

BACKGROUND

The City provides the Court the following summary of its section 3 programs in order to provide context both for plaintiffs' claims and defendant's summary judgment motion.

The City receives HUD funding primarily from four programs: Community Development Block Grants (CDBG), HOME, Emergency Shelter Grant (ESG), and the American Dream Downpayment Initiative. There are other HUD programs, such as the Economic Development Initiative (EDI), that are commonly found classified or grouped with the CDBG program. Each program has separate goals, policies, and criteria. [Robert Hammer Affidavit, dated September 7, 2006, ¶ 5]. CDBG, HOME, the American Dream, and EDI are "bricks and mortar" programs, originating from different funding authorities or designed for different types of projects. But, they all are targeted to benefit low-income persons by increasing or improving housing, business, or employment conditions or some combination thereof. [Ronald C. Ross Affidavit, dated September 7, 2006, ¶ 6].

The City is required to comply with all federal, state, and local laws that govern HUD programs. This includes but is not limited to all federal and state labor laws, the prevailing wage laws (such as the Davis-Bacon Act and the City's own prevailing wage code mandates), the City's Vendor Out Reach Program that sets goals for use of small, women-owned, and minority-owned businesses), the contract requirements imposed by HUD for each of the financial assistance programs, and the section 3 goals that the plaintiffs focus on. [Hammer Aff., ¶ 7]. The City competes with many other applicants

for HUD program grants and financial assistance. Compliance with federal laws in addition to the strength of the City's programs towards meeting HUD's policies and objectives are leading criteria for HUD's approval of the City's applications. [Hammer Aff., ¶¶ 7 and 18].

After a very thorough review, HUD has annually issued a performance review audit letter stating that the City has complied with federal law governing the use of HUD monies, [Hammer Aff., Exhs. B-F and ¶¶ 4, 7-18]. The latest HUD audit letter, received on March 7, 2006, was particularly complimentary: "Congratulations are due the city on its numerous accomplishments that address Department objectives during this past year and throughout its five-year consolidated plan period." [Exhibit F, Consolidated Plan End-Of-Year Review – 2004 Program Year, 1st page].

HUD's review of the City's programs includes a review of all City applications for HUD financial assistance prior to approval. All of the HUD programs are reimbursement programs, and HUD will not approve a reimbursement until HUD is satisfied that the City has complied with the applicable legal and contractual requirements for the program. Also, HUD assigns a program representative who is responsible for ensuring that the City of Saint Paul complies with federal law and HUD's policies and objectives. [Hammer Aff., ¶¶ 9-17].

From 2000 to 2004, Cindy Behnke was the HUD program representative assigned to oversee the City of Saint Paul. Since 2005 to the present, Maria Paulson is the City's HUD program representative. Each year, the City's HUD program representative spends

1-2 weeks at the City reviewing its files, examining the projects, and interviewing Saint Paul employees and persons associated with various projects. Behnke, and now Paulson, have full access to whatever is needed to undertake the review. [Hammer Aff., ¶ 11].

The City also sends to HUD a Consolidated Annual Performance and Evaluation Report (CAPER), which must be filed with HUD 90 days after the start of the City's program year. The City's program year begins June 1st. [Hammer Aff., Exhs. G and H, CAPERs for program years 2003 and 2004, respectively, and ¶ 12].

The City also files with HUD a five year consolidated plan application and an annual application. In addition, HUD conducts a formal review of the Minnesota State Auditor's report of the City's programs. And, as a further compliance and quality-control measure, the City regularly retains an independent monitor. [Hammer Aff., Exhs. I and J, the 2002 Request for Proposal and the monitor's report, respectively]. The City is not required to undertake an independent review. But, the City does so as a further means of ensuring that its programs are being run at the highest level. [Hammer Aff., ¶ 15].

A few examples of the City's programs using HUD monies illustrates the City's compliance with section 3.

The Hazelwood Terrace Project serves as a recent example of a multi-unit redevelopment where HUD monies helped finance the project. The Hazelwood Terrace Project is an Saint Paul Housing and Redevelopment Authority (HRA) project. HRA is a separate legal entity and the City distributes many of its HUD program monies to HRA for various projects. [Ross Aff., ¶ 10].

The Hazelwood Terrace project involves nine 12-unit apartments. The project's objective is to upgrade these dilapidated buildings and provide well managed affordable housing. The buildings underwent significant interior and exterior improvements, such as the conversion of two 1-bedroom units in each building into a two story 3-bedroom unit. Thus, 99 apartment units resulted from the project, out of which 81 were subject to affordable housing income or rent restrictions. At least 10% of the units must be affordable to persons at the 30% or below the area median income, 10% affordable to persons between 30-50% of the area median income, and 61 units available for persons between 51-60% of the area median income. [Ross Aff., ¶ 13].

For the Hazelwood Terrace project, a total $14,376,143 was the estimated investment out which no more than $5,584,380 was HRA's contribution. HRA's contribution did include HUD financial assistance. And, the Hazelwood Terrace project involved financial contributions from many sources. [Ross Aff., ¶ 14].

EDI Grant and CDBG monies were used for the project. All the recipients of HRA's financial contribution are contractually obligated to comply with all federal statutes and regulations associated with receipt of HUD financial assistance including section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. § 1701u) and 24 C.F.R. Part 135. The parties to the transaction include U.S. Bank National Association and Phalen Village Rental Housing IV Limited Partnership are very sophisticated and experienced entities, represented by very capable law firms,

Oppenehimer Wolff & Donnelly LLP and Winthrop & Weinstine, respectively. For instance the EDI Grant document provides:

> Lender shall provide the EDI Grant to the Phase IV Nonprofit, and the Phase IV Nonprofit shall contribute the proceeds thereof as capital to the Borrower to be applied as Borrower's equity solely for EDI Eligible Costs. The Borrower undertakes to provide Lender with all information necessary for Lender to comply with any and all reporting requirements set forth in EDI Grant Agreement between the City of Saint Paul, Minnesota and the Department of Housing and Urban Development, a copy of which is set forth herein as Exhibit L. The terms and conditions of the Grant Agreement set forth in Article I.A and Article II.C thereof are hereby incorporated by reference in this Agreement and made a part hereof.

[Ross Aff., Exh. D, Agreement, § 2.2(a), at p. 10]. Additionally, any costs incurred by Phalen Village Rental Housing to comply with federal laws and HUD regulations were expressly borne by them under sections 1.14 and 6.7. Section 6.8 further provides, "The Project shall comply with all applicable ordinances, regulations and laws of governmental departments and agencies having jurisdiction over the Property and does not and shall not violate any private restrictions or covenants or encroach upon or interfere with easements affecting the Property." [Agreement, § 6.8, at p. 17]. Paragraph B.5 in the EDI Grant provides:

> For those grants funding construction covered by 24 CFR 135, the requirements of section 3 of the Housing and Urban Development Act of 1968, (12 U.S.C. 1701u) which requires that economic opportunities generated by certain HUD financial assistance shall, to the greatest extent feasible, be given to low- and very low-income persons and to businesses that provide economic opportunities to these persons.

[Ross Aff., Exh. E, EDI Grant Agreement, Para. B.5].

The smaller and less document intensive single family residence programs have similar contractual obligations. When a new business is being financed, again income and section 3 requirements are imposed. The standard loan agreement required "a minimum of three (3) new full time equivalent positions to be filled by persons whose income does not exceed the income levels of persons of low and moderate income households." [Ross Aff., Exh. H, Loan Agreement, dated August 24, 2005, ¶ IX, at p. 8]. The Emergency Shelter Grant program is for the distribution of grants to persons providing services to low and very low income persons. [Ross Aff., Exh. K]. Unlike the programs discussed above, this grant program is not a "bricks and mortar" program. [Ross. Aff., ¶ 22].

In short, all parties to a contract are obligated to comply with 24 CFR 135 and the requirements of section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u).

STATEMENT OF UNDISPUTED MATERIAL FACTS

A list of Community Development Block Grant (CDBG) programs active in years 2004, 2005, and 2006. The list is near to but is not an exhaustive list of every City program involving HUD monies of these three years. [Ross Aff., Exhs. A-C].

LAW AND ARGUMENT

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith" where the evidence in the record demonstrates that there is

no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The Supreme Court has emphasized that trial courts should look favorably upon motions for summary judgment to accomplish the just, speedy and inexpensive resolution of civil litigation. *See Celotex v. Catrette*, 477 U.S. 317, 327 (1986). *See also* Fed.R.Civ.P. 1 (2002) ("[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").

Moving for summary judgment, the City asserts that plaintiffs have failed to set forth a private right of action upon which the Court has jurisdiction and furthermore that plaintiffs lack standing to sue even if a private right of action exists. Plaintiffs assert three causes of action: Count I - Federal Declaratory Judgment Act - 28 U.S.C. § 2201, Count II - 42 U.S.C. § 1983, and Count III - Injunctive Relief. All three counts are premised on the assertion that the City does not comply with 12 U.S.C. § 1701u and 24 C.F.R. Part 135. Thus, the analysis begins and ends with these two federal provisions to determine whether plaintiffs have a private right of action here and whether the plaintiffs have standing, an actual injury arising out an alleged violation of section 1701u.

I. Plaintiffs do not have a private right of action under 42 U.S.C. 1983 to assert alleged violations of 12 U.S.C. § 1701u, the Housing and Urban Development Act of 1968.

Plaintiffs have the burden of establishing a private right of action. *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519, 523 (8th Cir. 1993). Plaintiffs are unable to meet this burden.

There are only two cases in the Eighth Circuit where a 12 U.S.C. § 1701u private right of action was asserted. *Milsap v. HUD*, 1986 U.S. Dist. LEXIS 24342 (D. Minn. June 11, 1986); *Milsap v. HUD*, 1990 U.S. Dist. LEXIS 13954 (D. Minn. Oct. 19, 1990). Similarly, nationwide there are few cases where a 12 U.S.C. § 1701u private right of action has been asserted. From this group only a few address whether there is a private right of action out of which there is a split of authority. *Ramirez, Leal & Co. v. City Demonstration Agency*, 549 F.2d 97 (9th Cir. 1976) (judgment for dismissal reversed; implied private right of action issue not addressed); *Cave v. Beame*, 433 F.Supp. 172, 176 (E.D. NY. 1977)(There is no private right of action); *Feliciano v. Romney*, 363 F.Supp. 656, 672-73 (S.D. NY 1973) (Plaintiffs failed to exhaust administrative remedies); *Drake v. Crouch*, 377 F.Supp. 722 (M.D. Tenn. 1971) (implied private right of action issue not raised); *Shannon v. HUD*, 305 F.Supp. 205 (E.D. Penn. 1969) (Plaintiffs failed to show an actual injury; implied private right of action issue not addressed); *Mannarino v. Morgan Twp.*, No. 02-2237, 64 Fed. Appx. 844 (3rd Cir. 2003) (unpublished opinion) (judgment against township upheld; implied private right of action issue not addressed); *Stanley Price v. Hous. Auth. of New Orleans*, No. 01-3016 Sec. K(5), 2003 U.S. Dist. LEXIS 15351, at *14-15 (E.D. Louisiana Aug. 27, 2003) (unpublished opinion) (12 U.S.C. § 1701u does not create a constitutional right); *Fraise v. Kelly*, No. 98-1863 Sec. C, 1999 U.S. Dist. LEXIS 8970 (E.D. Louisiana June 14, 1999) (unpublished opinion) (implied private right of action issue not raised); *Fraise v. Kelly*, No. 98-1863 Sec. C, 1998 U.S. Dist. LEXIS 18657 (E.D. Louisiana Nov. 24, 1998) (unpublished opinion)

(implied private right of action issue not raised); *Vulcan Arbor Hill Corp. v. Reich*, No. 87-3540, 1995 U.S. Dist. LEXIS 19886 (D.D.C. Mar. 31, 1995) (unpublished opinion) (implied private right of action issue not raised); *Concerned Members Comm. of Chatham Park Vill. Coop. v. Bd. of Dirs. of Chatham Park Vill. Coop.*, No. 81 C 2699, 1981 U.S. Dist. LEXIS 13608 (N.D. Ill. July 13, 1981) (unpublished opinion) (there is no implied private right of action).

Most assuredly, plaintiffs will cite to *Milsap* in support of their contention that a private right of action exists. Three aspects respecting *Milsap* undermine such reliance. First, the court language was very equivocal merely indicating there may be a private right of action. *Milsap v. U.S. Dep't of HUD*, 1990 U.S. Dist. LEXIS 13954, 25 (D. Minn. 1990). Second, the court clearly found a dismissal premature since defendants did not respond to the private right of action issue. Third, and related to the above two points, the court clearly did not believe that it was sufficiently informed or ready to dismiss on such grounds since in part the defendants had not informed the court of "any preliminary administrative procedures which might preclude plaintiffs' claims." Id.

A somewhat more helpful case is *Stanley Price v. Hous. Auth. of New Orleans*, No. 01-3016 Sec. K(5), 2003 U.S. Dist. LEXIS 15351, at *14-15 (E.D. Louisiana Aug. 27, 2003). *Price* also discusses section 1701u. As remains the case still, the district court in *Price* also observed that there is "very little authority" that establishes "a private right of action against the local housing authority." Id. at 9 (citing *Milsap*, 1990 U.S. Dist. LEXIS at 25). Without prejudging whether such a section 1983 action could stand, the

court gave plaintiffs leave to amend their complaint and assert a 42 U.S.C. § 1983 claim. Id. at 10-11 and 13-14. No subsequent opinions have been located indicating the final disposition of the *Price* case.

The only published case located addressing whether section 1701u supports a private right of action is *Cave v. Beame*, 433 F.Supp. 172 (E.D. NY 1977). In *Cave*, the court held:

> Yet plaintiffs have failed to identify any rights created under these acts and have not provided a single clue as to how these rights have been violated. Such unsupported claims are precisely the type of "formal allegations" to which Rule 56 relief is most appropriately applied.

Id. at 177. Section 1983 actions were asserted in *Beame*. *Id. at 174-76.* Basically, *Beame* is about the only case located on point. Thus, given the lack of a published case on point and the paucity of unpublished case law on the issue, the parties and the Court are left on their own to analyze section 1701u pursuant to the applicable standards.

The applicable standards applied by courts in the Eighth Circuit are set forth in *Howe*, which are that to be enforceable under section 1983, 12 U.S.C. § 1701u must intend to benefit the putative plaintiffs and the intent must be expressed in specific and mandatory terms. *Howe v. Ellenbecker*, 8 F.3d 1258, 1261-62 (8th Cir. 1993) (*citing Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 24-25 (1981)). Even then, there may be no private right of action if a comprehensive remedial scheme is available. *Id.* (*citing Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981)). Applying these standards, section 1701u does not support a section 1983 claim.

A. Intended Beneficiaries.

Low and very low-income persons, particularly those in receiving government housing assistance, are the intended beneficiaries of 12 U.S.C. § 1701u:

> It is the policy of Congress and the purpose of this section to ensure that the employment and other economic opportunities generated by Federal financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed toward low- and very low-income persons, particularly those who are recipients of government assistance for housing.

12 U.S.C. § 1701u. Based on the allegations contained in plaintiffs' complaint, plaintiffs are low and very low income persons and the intended beneficiaries. But, the City puts plaintiffs to their burden of proof to establish that they are in fact the intended beneficiaries of section 1701u. Regardless, section 1701u lacks the requisite specificity upon which a section 1983 claim can be made.

B. Specific and mandatory terms.

"To assert a section 1983 action, the statute at issue must give unambiguous notice . . of what is expected . . ., instead of 'broad limits' in which to comply. *Howe*, 8 F.3d at 1262-63 (*citing Suter v. Artist M.*, 503 U.S. 347, 359 112 S.Ct. 1360, 1368 (1992)). Stated, otherwise, "the statute [must be] sufficiently specific and definite as to be within the competence of the judiciary to enforce." *Arkansas Medical*, 6 F.3d at 523. Section 1701u does not set forth the requisite specific and mandatory terms upon which a section 1983 action may be asserted. Rather, section 1701u establishes objectives and then places these objectives within loose priority framework and the directs the Secretary to the Department of Housing and Urban Development to enact regulations furthering

section 1701u objectives. 12 U.S.C. § 1701u. *See* 24 C.F.R. § 135.1 (Part 135 regulations were created "to establish the standards and procedures to be followed to ensure that *the objectives of section 3* [12 U.S.C. § 1701u] are met." (emphasis added)). Furthermore, the objectives of section 1701u are expressed in terms far removed from the specific and mandatory terms required in *Suter*. *See Suter*, 503 U.S. at 363 ("The term 'reasonable efforts' in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner previously discussed."). *See also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19-20 (The Developmentally Disabled Assistance and Bill of Rights Act was more in the nature of communicating preferences for certain types of treatments rather than the creation of an enforceable "right" on behalf of the recipients."). Here too, the statutory language does not establish the creation of an enforceable right.

Section 1701u constantly reassert the general and indeterminate standard: "the greatest extent feasible." 12 U.S.C. § 1701u(b). Adding to the overlay of the broad discretion and goal oriented structure, as opposed to specific and mandatory language, section 1701u separates its objectives into "employment" and "contracting," and neither establishes which category takes priority as between them nor how these priorities fit within the requirements pertaining to the specific funding authority for each HUD program. *See* 17 U.S.C. § 1701u(c) and (d).

With respect to the employment category, plaintiffs' action against the City falls within the "Other programs" subcategory. 12 U.S.C. § 1701u(c)(2). Here, the standard

is the general and indeterminate standard: "to the greatest extent feasible" and this standard is subordinate to "existing Federal, State, and local laws and regulations." 12 U.S.C. § 1701u(c)(2)(A). Furthermore, employment priority starts with those "low-income persons residing within the service area of the project or the neighborhood in which the project is located and to participants in Youthbuild programs." 12 U.S.C. § 1701u(c)(2)(B).

With respect to the contracting category, again the standard is the general and indeterminate: "the greatest extent feasible." 12 U.S.C. § 1701u(d)(2)(A). And, "*[w]here feasible*," the priority goes to businesses providing economic opportunities for low- and very low-income persons residing within the service area of the project or the neighborhood in which the project is located and to Youthbuild programs." 12 U.S.C. § 1701(d)(2)(B).

In short, the above-quoted language speaks for itself. There is a decided lack of the specific and mandatory terms upon which a private right of action may be had. The City anticipates that plaintiffs will attempt to repair the decided deficiency by reference to 24 C.F.R. Part 135, the regulation enacted by HUD as commanded by section 1701u. Reference to 24 C.F.R. Part 135 cannot and does not create a private right of action where one was not created by section 1701u.

C. Plaintiffs do not have a private right of action under H.U.D. Regulations 24 CFR Part 135.

Generally speaking, "regulations that do not authoritatively construe a statute for which a private right of action exists are not enforceable through a private action unless

there is evidence of Congressional intent to create a freestanding private right of action to enforce the regulations." *Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 250 F. Supp.2d 1151, 1155 (D. Mo. 2001) (*discussing Alexander v. Sandoval*, 532 U.S. 275 (2001)). A "private right of action to enforce federal law must be created by Congress." *Alexander*, 532 U.S. at 286. Without Congressional intent to create a private right and remedy, "a cause of action does not exist and courts may not create one." Id. at 286-87. Specifically, "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." Id. at 291.

> Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

Id. See Brantley ex rel. Brantley v. Indep. Sch. Dist. No. 625, 936 F. Supp. 649, 659 (D. Minn. 1996) ("a federal regulation alone does not create a federal right for purposes of a § 1983 cause of action").

The City anticipates that plaintiffs will also reference 24 C.F.R. 135.76(j) in support of the proposition that HUD expressly provided for or anticipated private causes of action such as plaintiffs' action. 24 C.F.R. § 135.76, subp. j, provides:

> Nothing in this subpart D precludes a section 3 resident or section 3 business concerning from exercising the right, *which may otherwise be available*, to seek redress directly through judicial procedures.

24 C.F.R. 135.76(j) (emphasis added). Noteworthy, HUD is not representing what rights are available. Also, recognizing that Section 1701u expressly subordinates itself to existing federal, state, and local laws and regulations, 24 C.F.R. 135.76, subp. j, expresses the limits of its authority and section 1701u and puts complainants on notice that other rights, which may otherwise be available, are not impacted by the filing a complaint and the following administrative hearing process under 24 C.F.R. § 135.76.

Consequently, 24 C.F.R. Part 135 rather than supporting a private right of action underscores the lack of a private right of action. 24 C.F.R. Part 135 was created "to establish the standards and procedures to be followed to ensure that the objectives of section 3 [12 U.S.C. § 1701u] are met." 24 C.F.R. § 135.1. These regulations were passed under the authority given by Congress in Section 3. 12 U.S.C. § 1701u, meaning that if section 1701u does not create a private right of action Part 135 cannot.

D. Even if section 1701u had the requisite specific, mandatory language creating a federal right, Congress foreclosed enforcement under section 1983.

If it is held that the statutory interest asserted is sufficiently specific and definite for the judiciary to enforce, a section 1983 will not be maintained if the defendant is able to demonstrate that "Congress has provided a comprehensive and carefully tailored remedial scheme within the statute in question, so as to make enforcement under § 1983 inconsistent." *Arkansas Medical Society*, 6 F.3d at 523 (citations omitted).

Here, since section 1701u directs the Secretary, without more, to establish regulations governing the administration and distribution of HUD financial assistance

monies pursuing objectives subordinate to federal, state, and local laws and regulations, Congress did not create a remedial scheme. There was simply nothing to remedy. Section 1701u is Congress' order to the HUD Secretary and nothing more.

Consistent with the plan language of section 1701u, jurisdiction and oversight of section 1701u rightfully rests with HUD and HUD only. 24 C.F.R. 135.76 rightly sets forth a very comprehensive remedial scheme for section 3 residents and section 3 business concerns to have their grievances heard.

In conclusions, a section 1983 cause of action, a declaratory judgment cause of action, and an injunctive cause of action does not exist because they are all premised upon section 1701u that does not support a private right of action.

II. Plaintiffs also lack standing to assert a section 1701u claim.

Plaintiffs do not meet the standing requirements necessary to have federal court jurisdiction in the instant case. The standing inquiry is two-tiered: (1) Constitutional Limitations on Federal Court Jurisdiction, and (2) Prudential Limitations on its Exercise *Warth v. Seldin*, 422 U.S. 490 (1975). In order to satisfy the constitutional limitation, the plaintiff must satisfy the "case" or "controversy" requirement under Article III. *Bennett v. Spear*, 520 U.S. 154, 167 (1997). In other words, a plaintiff must show (1) an "injury in fact"; (2) the injury must be fairly traceable to the alleged unlawful act(s); and (3) the injury will be redressed by a favorable decision. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). In their compliant, plaintiffs fail to expressly allege an injury-in-fact that is traceable to the City's alleged wrongful conduct,

and that the court is able to redress the injury. At best, the allegations in the complaint infer these three standing requirements.

Regardless, courts should look to material outside the complaint and plaintiffs have the burden of providing such materials to ensure that court does indeed have jurisdiction. *See Warth*, 422 U.S. at 499-500 ("[I]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed."). *See also* Wright-Miller-Cooper, Federal Practice and Procedure, "Standing–Raising the Issue", § 3531.15 at 99 ("The plaintiff's obligation to establish standing should not be passed to the defendant by the simple device to waiting for a summary judgment motion."). Here, plaintiffs are unlikely to be able to provide any evidence of actual injury traceable to the City's alleged violation of section 1701u.

A. Plaintiffs have not suffered an actual injury.

The United States Supreme Court has cautioned that plaintiffs must themselves be "among the injured", otherwise, the Article III case or controversy requirement would be a meaningless formality. *Sierra Club v. Morton*, 405 U.S. 728, 735, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972). Plaintiffs cannot avoid this basic requirement by asserting that they are seeking relief for others. *See Doremus v. Board of Education*, 342 U.S. 429, 435, 72 S.Ct. 394, 397-98, 96 L.Ed. 475 (1952) ("We have no doubt about the sincerity

of Doremus' stated objectives and the depth of their commitment to them. But the essence of standing 'is not a question of motivation but of possession of the requisite interest that is, or is threatened to be, injured by the unconstitutional conduct.'").

Plaintiffs have the burden of providing probative evidence showing an actual injury.

The *Arkansas ACORN Fair Housing, Inc. v. Greystone Ltd. Corp.*, 992 F. Supp. 1064 (E.D. Ark. 1998) illustrates plaintiffs' obligation to establish an actual injury. In *Arkansas ACORN Fair Housing, Inc.*, the district court found that Arkansas ACORN Fair Housing, Inc. ("ACORN") did not have standing to bring its action. ACORN was a non-profit organization whose stated purpose was to promote fair housing in the State of Arkansas. *Id.* at 1064. ACORN sued a development company called Greystone Development, Ltd. Co., alleging that Greystone discriminated against protected classes of people in part through its housing advertisements. Id. ACORN sought declaratory judgment, injunctive, compensatory, punitive and exemplary damages relief. The district court dismissed ACORN's action finding that ACORN lacked standing to sue. *Id.* at 1070. The district court held that plaintiff failed to quantify its alleged injury and, therefore, failed to prove standing to sue. *Id.* at 1068. The district court later reiterated ACORN's failure to advance much beyond its Complaint: "[ACORN] has failed to produce *specific evidence* supporting an impairment of its ability to perform its regularly conducted activity." *Id.* at 1069 (emphasis in the original).

On appeal, the Eighth Circuit affirmed:

> Although ACORN provides general information concerning the resources spent each month monitoring advertisements of a broad base of housing

> providers and working to counteract the effects of a single, allegedly discriminatory advertisements. ACORN has not shown, for example, what resources were used in identifying Greystone in particular as a alleged violator of the FHA, in monitoring or otherwise investigating Greystone once identified, in determining the discriminatory effects specifically attributable to Greystone's advertisements, or in counteracting those discriminatory effects. While the deflection of an organization's monetary and human resources from counseling or educational programs to legal efforts aimed at combating discrimination, such as monitoring and investigation, is itself insufficient to constitute an actual injury, [citation omitted], the injury must also be traceable to some act of the defendant, [citation omitted].

Arkansas ACORN Fair Housing, Inc. v. Greystone Development, Ltd. Co., 160 F.3d 433, 434 (8th Cir. 1998). *See Sierra Club*, 405 U.S. at 732 n. 3, 92 S.Ct. at 1365. ("Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, or to resolve 'political questions', because suits of this character are inconsistent with the judicial function under Art. III." (citations omitted)).

In short, similar to a discrimination claim, plaintiffs must identify at least one contract in which plaintiffs formally submitted a bid or proposal, met the qualifications, were the lowest responsible bidder, failed to obtain the bid or proposal, and the contract or employment was awarded to a non section 3 recipient. *See Williams v. City of Sioux Falls*, 846 F.2d 509, 511-512 (8th Cir. 1988).

B. Plaintiffs' injuries are not traceable to the City's alleged section 3 non-compliance.

Plaintiffs must further establish that their injuries are "traceable to some act of the defendant." *See ACORN*, 160 F.3d at 434. Simply put, plaintiffs cannot establish that

they would have benefitted from any City HUD project. At best, plaintiffs speculate they would have but for the City's alleged non-compliance with section 3.

To sum up, plaintiffs know what applications or bids they have made involving City programs with section 3 funding. Regardless, the City has provided a list of the CDBG projects for years 2004, 2005, and 2006. The City puts plaintiffs to their burden of proof to establish standing.

C. The Court should not recognize a prudential limitation standing.

However, even assuming some scintilla of Article III standing upon which plaintiffs meet the constitutional threshold, the federal courts recognize that they are courts of limited jurisdiction and must exercise some gatekeeper function to ensure that it does not undertake claims for which its judicial powers are ill-suited. This additional gatekeeper function is commonly referred to as prudential standing requirement. *Warth*, 422 U.S. at 499-500. In *Warth*, the United States Supreme Court cautioned that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Id.* at 2205. The plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties." Id.

"Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* at 2206. The legislation referenced by Plaintiffs cannot be understood as granting to plaintiffs authority to sue

under the 12 U.S.C. 1701u and thereby impose plaintiffs statutory and regulatory interpretation on HUD and the City. As evidenced in the affidavits of Robert Hammer and Ronald Ross, HUD's compliance and auditing oversight and review of the City's use of HUD's funds in thorough and exacting. Section 1701u is consistent with the current realities. Exercise of judicial oversight in this instance given the language of section 1701u threatens to turn the judicial branch into administrative oversight of HUD programing.

CONCLUSION

Plaintiffs have the burden to demonstrate that they have a private cause of action to assert a section 1701u claim and the burden to establish to the Court standing to assert these claims. Based on the all in the information known to-date and the case law as analyzed above, plaintiffs are and will be unable to meet these either a cognizable cause of action or standing. And, thus, the City seeks a dismissal of all of plaintiffs' counts with prejudice.

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