

RECEIVED
JUN 28 1995
NATIONAL CLEARINGHOUSE
FOR LEGAL SERVICES

50,721
L
16p.
1016826

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

MARY CECILIA TONGE, et al.)
)
 PLAINTIFFS,)
)
 v.)
) CIVIL ACTION NO.
) CV 95-88-L-H
 HOUSING AUTHORITY OF BARDSTOWN,)
 and FAYE KEELING, in her individual)
 capacity and in her official)
 capacity as Executive Director of)
 the Housing Authority of Bardstown)
)
 DEFENDANTS.)

Defendants'
MOTION TO ENTER ORDER
GRANTING FINAL APPROVAL TO SETTLEMENT
AGREEMENT AND CERTIFYING SETTLEMENT CLASS *+ Memo. Order*

Pursuant to Rule 23 (e), Fed. R. Civ. P., Defendants, Housing Authority of Bardstown and J. Faye Keeling, by counsel, move the Court to enter the attached order certifying a settlement class and giving final approval, as a class settlement, to the Settlement Agreement made as of March 9, 1995, a copy of which has been previously filed herein. In accordance with the Court's order granting preliminary approval, Defendants submit herewith a memorandum in support of this motion.


BROWN, TODD & HEYBURN PLLC
Stephen R. Schmidt
Stephen R. Schmidt
3200 Providian Center
Louisville, KY 40202-3363
(502) 589-5400

AND
Woodrow F. Downs
Attorney at Law
P.O. Box 277
Bardstown, KY 40004
(502) 348-4420
CO-COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this motion and supporting memorandum were served this 31st day of May, 1995, upon plaintiffs by sending true copies by United States mail, postage prepaid to the following:

ELLEN G. FRIEDMAN
SHELLEY MONTGOMERY SANTRY
LEGAL AID SOCIETY, INC.
425 West Muhammad Ali Blvd.
Louisville, KY 40202
COUNSEL FOR PLAINTIFFS


Co-counsel for Defendants

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

MARY CECILIA TONGE, infant children)
APRIL LAVANDA TONGE, SANDY ROCHELLE)
TONGE, RANDY SCOTT TONGE, SHANNON)
NICOLE TONGE, LORONNE TONGE, and)
LASHANN TONGE, by their next of friend)
MARY CECILIA TONGE and all others)
similarly situated,)
)
PLAINTIFFS,)
) CIVIL ACTION NO.
v.) CV 95-88-L-H
)
HOUSING AUTHORITY OF BARDSTOWN,)
and FAYE KEELING, in her individual)
capacity as Executive Director of the)
Housing Authority of Bardstown,)
)
DEFENDANTS.)
_____)

ORDER APPROVING CLASS SETTLEMENT
AND CERTIFYING SETTLEMENT CLASS;
FINAL JUDGMENT AS TO CLAIMS AGAINST DEFENDANTS

After due notice to the class members as required by Rule 23, Federal Rules of Civil Procedure and the elapse of time allowed for class members to submit comments, objections, and requests for hearing on the approval of the settlement and none having been received, the application of the parties in Case No. C-95-88-L(H) for certification of a plaintiff class for purposes of settlement only and for approval of a class settlement has been submitted for decision. Upon consideration of the supporting documentation, memoranda and certification of class notice, and the arguments presented, the Court concludes that the application should be granted and ORDERS as follows:

1. The court finds that the Defendants and the representative of the Plaintiff Settlement Class, Mary Cecilia Tonge, through their respective attorneys, have negotiated the proposed settlement non-collusively and in good faith, and that the proposed settlement is fair, adequate, reasonable, and in the best interests of the members of the Settlement Class. Accordingly, subject to the provisions of this order, the proposed written Settlement Agreement, previously executed as of March 9, 1995, and filed herein by the parties, is approved by the Court under Fed. R. Civ. P. 23(e) as a class settlement and is incorporated by reference as a part of this order.

2. Civil Action No. C-95-88-L(H) is certified as a class action under Fed. R. Civ. P. 23(a) and 23(b) (2) for purpose of settlement only.

(a) The action is declared as one maintained on behalf of a mandatory non-opt-out class of plaintiffs, consisting of all persons who apply, or will apply in the future, for public housing operated by the Housing Authority of Bardstown and who are therefore adversely affected by the Defendants' admission policies and practices (the "Settlement Class"). Mary Cecilia Tonge is certified as the representative of the Settlement Class.

(b) The class claims are limited to those issues and claims described in the first literary paragraph of paragraph 7 of the Settlement Agreement and subparagraph (a) of paragraph 7 of the Settlement Agreement.

3. The Settlement Class is certified as a mandatory, non-opt-out class, based upon the court's findings, for purposes of settlement only, that the members of the class are so numerous that joinder of all members is impracticable, that there are questions of law common to the class; that the claims of the representative party, Mary Cecilia Tonge, are typical of the claims of the class; that the representative party will fairly and adequately protect the interests of the class and her lawyers are experienced in housing and class litigation; that the Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory relief with respect to the class as a whole; that questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

4. All claims by the individual Plaintiffs and the Settlement Class members against all Defendants, Civil Action No. C-95-88-L(H) are hereby dismissed with prejudice, but preserving the rights, benefits, and obligations accorded to or imposed upon the named Plaintiffs and members of the Settlement Class under the terms of the Settlement Agreement. Without deferring or delaying the finality of this order and judgment, this Court retains exclusive and continuing jurisdiction as needed or appropriate in order to implement, interpret, or enforce the Settlement Agreement.

5. Under Fed. R. Civ. P. 54(b), the Court expressly determines that there is no just reason for delay and expressly directs that this judgment shall, upon filing be deemed entered as a final judgment with respect to all class claims by members of the Settlement Class against the Defendants, and shall be deemed entered as a final judgment with respect to such claims by any Settlement Class member in all cases subsequently filed in, transferred to, or removed to this court immediately upon such cases being so filed, transferred, or removed.

6. In accordance with the provisions of paragraph 7 of the Settlement Agreement, each party shall bear its own costs incurred in this proceeding.

DATED: _____

HON. JOHN G. HEYBURN, II, JUDGE
UNITED STATES DISTRICT COURT

CC: All counsel of record

CLC. B4821
USERS\032\BDSTWNHA\FINPROV.ORD
/dw 5/30/95

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF KENTUCKY
 AT LOUISVILLE

MARY CECILIA TONGE, infant children)	
APRIL LAVANDA TONGE, SANDY ROCHELLE)	
TONGE, RANDY SCOTT TONGE, SHANNON)	
NICOLE TONGE, LORONNE TONGE, and)	
LASHANN TONGE, by their next of friend)	
MARY CECILIA TONGE and all others)	
similarly situated,)	
)	
PLAINTIFFS,)	
)	CIVIL ACTION NO.
v.)	CV 95-88-L-H
)	
HOUSING AUTHORITY OF BARDSTOWN,)	
and FAYE KEELING, in her individual)	
capacity as Executive Director of the)	
Housing Authority of Bardstown,)	
)	
DEFENDANTS.)	
)	

**MEMORANDUM OF DEFENDANTS IN SUPPORT OF
 ENTRY OF FINAL ORDER OF APPROVAL OF
CLASS ACTION SETTLEMENT**

Pursuant to this Court's order entered on April 11, 1995, granting preliminary approval to the class action settlement reached between the parties on March 9, 1995, and subsequently reduced to writing for approval by the Court, the Defendants submit this memorandum in support of entry of an order granting final approval to the class settlement. The settlement is fair, adequate, reasonable, and in the best interest of the class, and should be approved under Rule 23(e), Federal Rules of Civil Procedure.

BACKGROUND

Plaintiffs filed this action in February, 1995, seeking an order for their admission to the housing facility of the defendant, Housing Authority of Bardstown ("Housing Authority"). They filed this case for both individual relief and, under Rule

23 (b) (2), Federal Rules of Civil Procedure, for injunctive and declaratory relief on behalf of a class consisting of all persons who had been or will be denied admission to the housing facility of the Housing Authority.

Soon after the filing of the action and of the answer, the Court held a preliminary injunction hearing on March 9, 1995, at which evidence was taken. At the end of that hearing, the parties entered into a mediation session with U.S. District Judge Thomas Russell, which resulted in a settlement agreement on a class basis contingent on approval by the defendants (which has occurred), the signing of a written settlement agreement (which has occurred), and approval by this Court of the settlement as a class settlement (§8).

After the Court entered the April 11 order granting preliminary approval of the agreement and preliminary certification of the class for settlement purposes only, notice of the proposed class settlement was published in accordance with the order, and counsel for Plaintiffs has filed a Notice of Compliance with Class Notice Requirements, certifying that publication was made of notice of the proposed settlement and of the opportunity to comment and object and of where and how to comment or object.

Counsel for defendants has inquired of the clerk of this Court whether any comments, objections, requests for hearing on the settlement approval have been filed with the Court as directed in the preliminary order of approval and has been informed by Martha Hasty that nothing other than the Notice of

Compliance with Class Notice Requirements has been filed since the April 11 preliminary order of approval.

Defendant Housing Authority has complied with the agreement reached on March 9 by (a) formally approving and executing the written settlement agreement (subject to the contingency of Court approval of the class settlement contained therein); and (b) admitting the named plaintiffs to residence as tenants in its housing facility (¶2). In accordance with the written settlement agreement, the Housing Authority's board has formally adopted, conditional on approval of the settlement as a class settlement, a resolution setting 14 days after date of the written notice of denial of admission as the time period in which applicants determined to be ineligible for admission may request an informal hearing under regulation 24 C.F.R. § 960.207 (a) (¶ 3); and, again assuming that the Settlement Agreement is approved as a class settlement, the Housing Authority will, in future notices to an applicant regarding denial of admission, provide greater specificity on the factual basis of its determination of ineligibility in denying an application for admission to public housing (as agreed in ¶4 of written agreement); and will abide by the requirements of regulation 24 C.F.R. § 960.205(d) (pertaining to "consideration of time, nature, and extent of the applicants conduct and to factors which might indicate a reasonable probability of future conduct or financial prospects" in the event of the receipt of unfavorable information with respect to an applicant) (as agreed in ¶ 9 of the Settlement Agreement). In addition, as a matter of voluntary assistance to applicants and not as a matter required by the settlement agreement, the Housing

Authority has posted notices that the regulations permit applicants to submit written certification of their social security numbers to enable continued processing of their applications for sixty days when the social security cards required by regulation 24 C.F.R. § 750.10 (a)(1)(ii) and (f) are not immediately available for submission.)

ARGUMENT

THIS SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE,
IS IN BEST INTERESTS OF THE CLASS AND SHOULD BE APPROVED.

This is a case in which the parties have recognized that swift and amicable settlement of differences is best for both sides in preference to protracted and costly litigation, after which neither side could be assured of an ultimate victory granting them more than the compromise provides. This case essentially revolves around the experiences of plaintiff Mary Cecilia Tonge, who has, at best, a spotty history of rent payment as a tenant of the Housing Authority and of private landlords. The prospects for class relief rest entirely on the success of this plaintiff. While the situation of Tonge's minor children would tend to create sympathy for them, her own record of non-payment of rent would tend to diminish plaintiffs' prospects for success on the merits in the lawsuit.

From the class side, there were no monetary damages requested which would have flowed to the putative class members even in the event of victory. Rather, the class relief requested (other than attorneys' fees) was solely declaratory and injunctive relief pertaining to:

a. The "reasonable time" requirement for requesting an informal hearing under regulation 24 C.F.R. § 960.207 (a);

b. The degree of specificity of "the basis for such determination" of ineligibility required by 24 C.F.R. § 960.207 (a) in a notice of denial of admission to a housing facility;

c. The requirement that in the event of receipt of unfavorable information is received with respect to an applicant, consideration must be given to the time, nature and extent of the applicant's conduct and to factors which might indicate a reasonable probability of favorable future conduct or financial prospects; and

d. The Housing Authority's alleged requiring from applicants of "verification of eligibility [social security numbers] in excess of that allowed by federal regulations before accepting applications."

Because monetary damages for the class were not in issue, the questions of fairness, adequacy, reasonableness, and best interests of the class relate entirely to the non-monetary terms of the settlement regarding these issues.

As the evidence at the March 9 hearing showed, there have been very few denials of admission to the Housing Authority facility in recent years. Thus, the bulk of the class membership would be future applicants. These future applicants will benefit most from this settlement which attempts to define certain standards required of the Housing Authority in the future.

While the settlement, in effect, has the class concede on one issue regarding "excessive verification," on the other issues the settlement gives the class members as an agreement virtually

everything which they could reasonably expect to achieve under the law and regulations as a declaratory judgment in the event of a victory in the lawsuit, while at the same time eliminating the substantial risks (a) that no class would be certified for trial, (b) that, even if certified, the class would lose at trial on the merits, and (c) that even a victory at trial would not lead to any clearer judicial declaration or injunction on the requirements of the particular regulations in issue.

The settlement (1) requires the Housing Authority to provide to applicants denied admission more specificity in the written notice of factual basis for a determination of ineligibility of an applicant than was given to Tonge; and (2) gives class members a definite time of 14 days after the date of the letter notice of denial of the application in which to request an informal hearing on the denial, thus eliminating the problems inherent in the "five working days after receipt" standard used in Tonge's case; and (c) requires the Housing Authority to comply with the regulation on consideration of "mitigating information."¹

¹While the settlement agreement provides only that the Housing Authority agrees to comply with this regulation, that result is a middle ground which is beneficial to the class members in the circumstances since it leaves the interpretation of the regulation open to future development by the courts rather than adopting as a class-binding ruling the only existing decision--which is unfavorable to the plaintiffs' contention. Lancaster v. Scranton Housing Authority, 479 F.Supp. 134, 137-38 (M.D.Pa. 1979), affirmed 620 F.2d 288 (3d Cir. 1980), holds that the regulations require the agency to consider only information *already submitted by the applicant* ("The regulations do not say 'evidence shall be solicited,' they say that it should be 'considered.' This does not put the burden on the Housing Authority; on the contrary, it squarely puts the burden on the applicant to bring forward evidence for consideration. ...")

As part of the compromise, the class drops the remaining issue (the alleged requirement of "excessive verification" by the Housing Authority relating to social security numbers. It was appropriate for the class to drop this issue as part of the settlement because the prospects for the class prevailing on this issue were remote. This issue had nothing to do with why the Tonges were denied admission since Tonge complied with the requirement of the regulations as enforced by the Housing Authority. Most importantly, as briefed in the Defendants' memorandum opposing preliminary injunction and as shown at the hearing, the Housing Authority was not requiring "excessive verification" of social security numbers and is, in fact, if anything, lenient in its interpretation of the regulation since (1) the practice of its staff has been to accept photocopies of the social security cards although the regulation appears to require actual originals (or officially issued duplicates) of the social security cards, and (2) the regulation clearly places the burden on the applicant, not on the Housing Authority, to initiate the certification of the social security numbers which will allow the application to continue to be processed for sixty (60) days while the cards are being procured. (See pages 7-10 of Defendants' Memorandum in Opposition to Motion for Preliminary Injunction filed herein.)

The point of this is not to reargue for a decision on the merits, but to show that the compromise by which the class concedes on this point is reasonable and does not prevent the overall settlement from being fair, reasonable, adequate or in the best interest of the class.

Counsel for each side bargained hard at arms' length for their clients to achieve the best result possible consistent with the interests of those clients in the subject matter of the case and in the efficient and economical resolution of the issues. Counsel for Defendants is convinced that the settlement is fair, reasonable, adequate and in the best interest of both Defendants and the Plaintiff class. At several stages of the negotiations, when counsel for Defendants were on the verge of ending settlement negotiations, compromises were suggested and reached on the issues in dispute between the parties. The class status of the settlement is one of the major considerations for Defendants' agreement to the settlement. Under the agreement, the parties will return to the status quo ante if the settlement is not approved as a class settlement (§§ 8 and 2(b) and (c)).

The Court's continuing jurisdiction to enforce the settlement agreement as provided in the tendered final order of approval eliminates any need for injunctive relief at this stage. The court hearing of March 9 served to further educate Plaintiffs, Defendants, and their attorneys regarding the regulations pertaining to certification of social security numbers as well as to what types of mitigating information might exist and be considered, thus further reducing any need for injunctive relief.

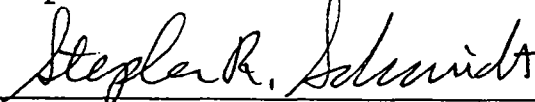
CONCLUSION

This settlement is fair, reasonable, adequate, and in the best interest of the class, especially of future applicants. To the extent that it spares both sides extensive cost and attorneys' fees, it benefits both side: the savings for the

Housing Authority ultimately contributes to the financial stability of the Housing Authority and thus to the ensuring of the availability of housing facilities for those future applicants who constitute the vast majority of the members of the class. The future members will also benefit from the agreement on greater specificity in notice of ineligibility determinations and the setting of fourteen days (an increase from five working days) for requesting an informal hearing on a denial.

Accordingly, the Court should enter the final order certifying the class for purposes of settlement only, approving the settlement agreement as a class settlement, and dismissing all claims against defendants as required by the settlement agreement.

BROWN, TODD & HEYBURN PLLC
Stephen R. Schmidt



3200 Providian Center
Louisville, KY 40202-3363
(502) 589-5400

AND

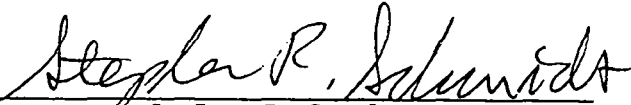
Woodrow F. Downs
Attorney at Law
P.O.Box 277
Bardstown, KY 40004
(502) 348-4420

CO-COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this memorandum was served this 31st day of May, 1995, upon plaintiffs by United States mail, postage prepaid, to the following:

ELLEN G. FRIEDMAN
SHELLEY MONTGOMERY SANTRY
LEGAL AID SOCIETY, INC.
425 West Muhammad Ali Blvd.
Louisville, KY 40202
COUNSEL FOR PLAINTIFFS


Stephen R. Schmidt
Co-counsel for Defendants