APPENDICES

APPENDIX A

United States Court of Appeals for the Federal Circuit

Park Properties Associates, L.P.,
Valentine Properties Associates, L.P.,
Plaintiffs-Cross-Appellants,

v.

United States,
Defendant-Appellant.

Nos. 2017-2279, 2017-2344

Decided: February 19, 2019

Before Stoll, Mayer, and Schall, Circuit Judges.

OPINION

Stoll, Circuit Judge:

The government appeals the United States Court of Federal Claims's denial of its motion to dismiss and grant of summary judgment in favor of landlord-plaintiffs Park Properties Associates, L.P. and Valentine Properties Associates, L.P.[1] Landlord-plaintiffs cross-appeal the trial court's denial of vacancy damages. We reverse the trial court's denial of the government's motion to dismiss. Accordingly, we vacate the trial court's grant of summary judgment regarding liability and damages, and remand for proceedings consistent with this opinion.[2]

---

[1] *Park Props. Assocs., L.P. v. United States*, 128 Fed. Cl. 493 (2016).

[2] Landlord-plaintiffs move to strike portions of the government's reply brief as nonconforming for allegedly raising the new issue of an "implied-in-law" contract. Mot. of Pls.-Cross-Appellants to

BACKGROUND

This appeal concerns jurisdiction over a contract dispute. The United States Department of Housing and Urban Development ("HUD") administers the project-based Section 8 housing program using Housing Assistance Payments ("HAP") renewal contracts. Park and Valentine own publicly assisted housing in Yonkers, New York. They allege that the government breached the renewal contracts, resulting in money damages. The trial court determined that it had jurisdiction, found the government liable for breach of contract, and awarded $7.9 million in total damages to Park and Valentine.

We focus on jurisdiction, the threshold issue. The parties agree that the trial court has jurisdiction only if the parties were in privity of contract. The salient facts regarding jurisdiction are as follows. The contracts at issue were executed in a two-tiered system. First, the government, through HUD, contracted with a public housing agency ("PHA") (here, the New York State Housing Trust Fund Corporation ("NYSHTFC")). Second, the PHA contracted with the private owners of rental housing (here, landlord-plaintiffs). Neither contract explicitly named both the government and the landlord-plaintiffs as directly contracting parties, but the trial court held that the renewal contracts created privity between them.

Section 1 of each renewal contract specifically identified the parties. For example, the Park renewal con-

---

Strike Appellant's Nonconforming Reply Br. 4, ECF No. 51 (particularly citing Reply and Resp. Br. of Def.-Appellant United States, ECF No. 39 at 7, 14–16, 23–24). Because we do not reach the trial court's reformation of the renewed contracts below, we deny the motion to strike as moot.

tract specifically identified the two parties as NYSHTFC and Park:

> **1 CONTRACT INFORMATION**
>
> ...
>
> **PARTIES TO RENEWAL CONTRACT**
>
> **Name of Contract Administrator**
>
> New York State Housing Trust Fund Corporation
>
> ...
>
> Name of Owner
>
> Park Properties Associates, LP

J.A. 41–42 (footnotes omitted). Notably, Section 1 did not identify the government or HUD as a party to the contract.

Section 4(a)(1) of each Park and Valentine renewal contract reiterated that the contract was between the Contract Administrator and the Owner of the Project—as identified in Section 1, discussed above. However, Section 4(a)(2) further specified that, if HUD was the Contract Administrator, HUD would remain a party to the renewal contract even if HUD assigned the renewal contract to a PHA:

> **4 RENEWAL CONTRACT**
>
> **a Parties**
>
> (1) The Renewal Contract is a housing assistance payments contract ("HAP Contract") between the Contract Administrator and the Owner of the Project (see section 1).
>
> (2) If HUD is the Contract Administrator, HUD may assign the Renewal Contract to a public housing agency ("PHA") for the purpose of PHA administration of the Renewal Contract, as Contract Administrator, in accordance

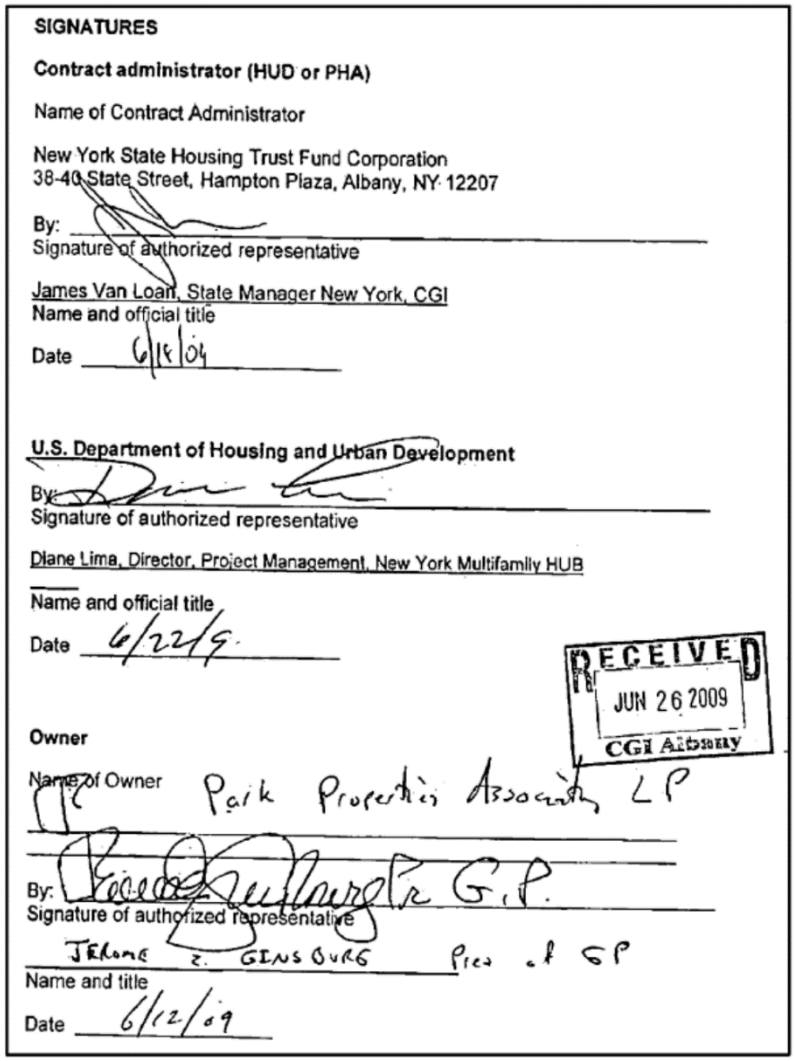
> with the Renewal Contract (during the term of the annual contributions contract ("ACC") between HUD and the PHA). Notwithstanding such assignment, HUD shall remain a party to the provisions of the Renewal Contract that specify HUD's role pursuant to the Renewal Contract, including such provisions of section 9 (HUD requirements), section 10 (statutory changes during term) and section 11 (PHA default), of the Renewal Contract.

J.A. 44. Furthermore, Section 11 of each contract laid out conditions that would apply if the Contract Administrator was a PHA that defaulted, in which case HUD would be able to take action under the terms of the contract:

> **11 PHA DEFAULT**
>
> **a** This section 11 of the Renewal Contract applies if the Contract Administrator is a PHA acting as Contract Administrator pursuant to an annual contributions contract ("ACC") between the PHA and HUD. This includes a case where HUD has assigned the Renewal Contract to a PHA Contract Administrator, for the purpose of PHA administration of the Renewal Contract.
>
> **b** If HUD determines that the PHA has committed a material and substantial breach of the PHA's obligation, as Contract Administrator, to make housing assistance payments to the Owner in accordance with the provisions of the Renewal Contract, and that the Owner is not in default of its obligations under the Renewal Contract, HUD shall take any action HUD determines necessary for the continuation of housing assistance payments to the

Owner in accordance with the Renewal Contract.

J.A. 47. HUD also signed each renewal contract, even though it was not named as a party in Section 1. For example, the signature page of the June 2009 Park renewal contract includes the signature of an authorized HUD representative, as shown below:



SIGNATURES

Contract administrator (HUD or PHA)

Name of Contract Administrator

New York State Housing Trust Fund Corporation
38-40 State Street, Hampton Plaza, Albany, NY 12207

By: _____
Signature of authorized representative

James Van Loan, State Manager New York, CGI
Name and official title

Date 6/18/09

U.S. Department of Housing and Urban Development

By: _____
Signature of authorized representative

Diane Lima, Director, Project Management, New York Multifamily HUB
Name and official title

Date 6/22/9

RECEIVED
JUN 26 2009
CGI Albany

Owner

Name of Owner Park Properties Associates LP

By: _____
Signature of authorized representative

JEROME Z. GINSBURG Pres. of GP
Name and title

Date 6/12/09

J.A. 49.

After considering the above, the trial court found that the terms of the contract created privity between the land-lord-plaintiffs and HUD:

> The terms of the contract create privity between the owners and HUD. Section 4(a)(2) of the contract provides that HUD is party to provisions of the renewal contract. One of these provisions is in [Section] 11, in which HUD agrees to correct any default if the Public Housing Agency ("PHA") breaches the contract, as well as agrees to continue assistance payments to the owners. Furthermore, although the NYSHTFC is listed as the Contract Administrator, HUD is a signatory to this contract.

Park Props., 128 Fed. Cl. at 497 (citations omitted). Next, the trial court found the government liable for breach of contract and awarded rent underpayment damages to Park and Valentine. *Id.* at 498–99. The government appeals those determinations. In calculating damages, the trial court denied Park and Valentine's request for vacancy damages, *see Park Props. Assocs., L.P. v. United States*, 2017 WL 1718751, at *3 (Fed. Cl. May 2, 2017), and Park and Valentine cross-appeal. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

I

We review a trial court's determination of its subject matter jurisdiction de novo. *See Abbas v. United States*, 842 F.3d 1371, 1375 (Fed. Cir. 2016); *see also Litecubes, LLC v. N. Light Prods., Inc.*, 523 F.3d 1353, 1360 (Fed. Cir. 2008). Plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See McNutt v. Gen. Motors Acceptance Corp.*,

298 U.S. 178, 189 (1936). Under the Tucker Act, the Court of Federal Claims has jurisdiction only if there is privity of contract between plaintiffs and the government. *See Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998). Whether a contract exists is a mixed question of law and fact. *See Ransom v. United States*, 900 F.2d 242, 244 (Fed. Cir. 1990). We review jurisdictional findings of fact for clear error. *See Banks v. United States*, 314 F.3d 1304, 1308 (Fed. Cir. 2003). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

Where the government contracts indirectly with a plaintiff, our predecessor court and our court have held that there is generally no privity. In *D. R. Smalley*, for example, the United States Court of Claims held that there was no express privity of contract because there was no express contract between the Federal Government and the contractor. *D. R. Smalley & Sons, Inc. v. United States*, 372 F.2d 505, 508 (Ct. Cl. 1967). Furthermore, the court held that there was no implied privity because the acts and omissions of the State of Ohio did not impose liability on the federal government. Instead, the contracts were between the State of Ohio and the contractor. *Id.* Thus, the court concluded, there was no express or implied privity of contract, and therefore the federal government was not liable in contract for the claimed damages. *Id.*

In *Housing Corp.*, the Court of Claims applied the *D. R. Smalley* doctrine to privity issues involving government contracts under the United States Housing

Act of 1937.[3] *Hous. Corp. of Am. v. United States*, 468 F.2d 922, 923–24 (Ct. Cl. 1972). There, the court considered a contract of sale between the plaintiff and a local authority. Plaintiff entered into the contract of sale with the local authority for the development, construction, and sale of the project. *Id.* at 923. Though the government was not expressly a party to the contract, it was significantly involved in the project. For example, the government approved the contract between the local authority and plaintiff, approved drawings, plans, and specifications, and made direct demands on the plaintiff for contract changes and agreed to pay for them. *Id.* at 923, 925. Plaintiff sued the government for unpaid costs resulting from those changes. In response, the government argued that the court lacked jurisdiction because the government was not in privity of contract and had not waived sovereign immunity.

The court determined that the government was not a party to the contract. Instead, the government obligated itself by separate agreements to local authorities for the funding of approved projects. Ultimately, the court held that this did not create an express or implied contract between plaintiff and the government, nor did it make the local authority the government's agent through HUD. Instead, HUD's actions were performed in the government's capacity as a sovereign. Thus, the Court of Claims determined that the government's actions were sovereign acts that did not subject the government to liability.

The Court of Claims later applied the same logic in *Aetna*. *Aetna Cas. and Sur. v. United States*, 655 F.2d 1047 (Ct. Cl. 1981). There, a construction compa-

---

[3] The predecessor to the United States Housing Act of 1974.

ny and its surety sued the government for alleged losses in completing a federally insured housing project. *Id.* at 1049. The parties executed separate agreements between the construction company, the private corporation created to own the resulting low-income housing, and the government. *Id.* at 1050. There was no written contract directly between the plaintiffs and the government. Nevertheless, HUD was "intimately involved with all details of the project from its inception," including drafting all relevant documents, approving all mortgage advances, and requiring all work to be of a certain quality. *Id.* at 1050, 1052. According to plaintiffs, the private corporation created to own the resulting low-income housing was a creature of HUD. Plaintiffs further argued that HUD provided all financing, drafted all contracts, and conceived, implemented, and supervised the project. The court nonetheless determined that this was not sufficient to establish privity between plaintiffs and the government. The court held that where the United States does not make itself a party to the contracts that implement important national policies, no express or implied contracts result between the United States and those who perform the work. *Id.* at 1052–53 (first citing *D. R. Smalley*, 372 F.2d at 508; then citing *Hous. Corp. of Am.*, 468 F.2d at 924). Accordingly, the court concluded that there was no privity of contract, express or implied.

Our court followed a similar line of analysis in *Katz*. *Katz v. Cisneros*, 16 F.3d 1204, 1207 (Fed. Cir. 1994). Like this case, *Katz* concerned a Section 8 program under the Housing Act of 1937. HUD administered the program by contracting with local PHAs, which in turn contracted with a private developer. HUD approved of one such contract between Housing Allowance and Hollywood Associates (a private developer). Following an audit, HUD ordered Housing Al-

lowance to reduce contract rents paid to Hollywood Associates, concluding that they were too high. The court acknowledged that, to succeed in its subsequent suit against HUD, Hollywood Associates had to show that the district court had subject matter jurisdiction and that HUD waived its sovereign immunity to be sued. *Id.* We noted that there was no contract between Hollywood Associates and HUD; rather, the contract was between Housing Allowance and Hollywood Associates. We further reasoned that HUD's grant of benefits and subsequent oversight was insufficient to create a contractual obligation between Hollywood Associates and the government. Thus, the court concluded, there was no privity.

In *National Leased Housing Ass'n*, we similarly held that Section 8 landlords who entered into HAP contracts with PHAs instead of directly with HUD were not in privity of contract with the United States. *Nat'l Leased Hous. Ass'n v. United States*, 105 F.3d 1423, 1435–37 (Fed. Cir. 1997) (citing *Katz*, 16 F.3d at 1210). To show privity, we held that a party must establish that: (1) the prime contractor was acting as a purchasing agent for the government; (2) the agency relationship between the prime contractor and the government was established by clear contractual consent; and (3) the contract stated that the government would be directly liable to the vendors for the purchase price. *Id.* at 1436. After considering the facts and contracts at issue, we held that the third element was not satisfied. The contract had the following provision: "HUD shall assume the [PHA's] rights and obligations under the [ACC] and/or [HAP] Contract ...." *Id.* The appellants, in making their argument, omitted the rest of the provision, which allowed HUD to assume rights and obligations only in a particular circumstance: "HUD *may*, if it determines the [PHA] is in de-

fault, assume the [PHA's] rights and obligations ...." *Id.* We held that this was not the kind of direct, unavoidable contractual liability that establishes privity and thereby waives sovereign immunity.

In *D. R. Smalley*, *Housing Corp.*, *Aetna*, *Katz*, and *National Leased Housing Ass'n*, our court and our predecessor court consistently held that plaintiffs that had not directly contracted with the government for housing projects did not have privity. In each case, the court carefully reviewed the government's liability imposed by the text of the contract and the relationship between the parties, but nonetheless determined that there was no privity of contract.

Based on these cases, we are compelled to conclude that there is likewise no privity here. Section 1 of each contract clearly identifies the parties as the "Contract Administrator" and "Owner" of each project. The contracts name the parties in Section 4a: "The Renewal Contract is a [HAP contract] between the Contract Administrator and the Owner of the Project (see section 1)." J.A. 44 (Park); J.A. 89 (Valentine). Here, every contract identifies the Contract Administrator as the NYSHTFC and the Owners as either Park or Valentine. And, the instructions for listing the "Name of Contract Administrator" appear at footnote 4 of the contract: "Enter the name of the Contract Administrator that executes the Renewal Contract. If HUD is the Contract Administrator, enter [HUD]. If the Contract Administrator is a [PHA], enter the full legal name of the PHA." J.A. 51 n.4. HUD is not listed in that field, and therefore it is not the Contract Administrator. We also conclude that the Contract Administrator is a PHA: NYSHTFC. In *Katz*, we held on similar facts—where HUD contracted with a PHA who in turn contracted with an Owner with HUD's approval—that the

plaintiff did not have privity of contract. *Katz*, 16 F.3d at 1206, 1210. That same conclusion applies here.

II

The trial court's decision in this case conflicts with our precedent. The trial court and landlord-plaintiffs provide four reasons for rejecting the government's jurisdiction argument. We address each argument in turn.

First, the trial court held and landlord-plaintiffs argue that the statute authorized *only* HUD to execute the renewal contracts. The statute reads:

> The Secretary is authorized to enter into annual contributions contracts with [PHAs] pursuant to which such [PHAs] may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section. In areas where no [PHA] has been organized or where the Secretary determines that a [PHA] is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a [PHA] by this section.

42 U.S.C. § 1437f(b)(1). Contrary to the trial court and plaintiffs' assertion, the statute does not restrict authority to execute the renewal contracts to HUD. Instead, the statute simply provides that the Secretary is authorized to enter such contracts. It does not limit that authorization to the Secretary or HUD.

Second, the trial court reasoned and landlord-plaintiffs argue that NYSHTFC is a mere contract administrator, not a PHA, because NYSHTFC did not initiate, negotiate, or administer the renewal contracts. *See Park Props.*, 128 Fed. Cl. at 497; Cross-Appellants' Br. 29 n.7, ECF No. 36. We disagree because the con-

tracts clearly state that NYSHTFC is the PHA and that NYSHTFC and the plaintiffs are the only parties to the contract. We also disagree because there is nothing in the statute that supports the trial court's conclusion that "the PHA *must* initiate, contract, and administer the contract" to avoid privity. *Park Props.*, 128 Fed. Cl. at 497. Instead, the statute allows HUD to provide assistance through annual contributions contracts with PHAs in accordance with the terms of the statute. *See* 42 U.S.C. § 1437f(b)(1). Nor is there any dispute that NYSHTFC fits HUD's definition of PHA. 24 C.F.R. § 5.100 (defining PHA to mean "any State, county, municipality, or other governmental entity or public body, or agency or instrumentality of these entities, that is authorized to engage or assist in the development or operation of low-income housing under the 1937 Act"). We decline to read additional requirements into the statute's plain language.

Third, the trial court and landlord-plaintiffs argue that regulations implementing the Multifamily Assisted Housing Reform and Affordability Act of 1997 ("MAHRA") require that HUD be the party that renews the contract. Specifically, they point to 24 C.F.R. § 402.5(a), which reads in relevant part:

> Contract renewals under section 524(b) or (e) of MAHRA.
>
> (a) Renewal of projects eligible for exception rents at owner's request. *HUD will offer* to renew project-based assistance for a project eligible for exception rents under section 524(b) of MAHRA at rent levels determined under this section ... but the owner of a project other than a project with assistance under the Section 8 moderate rehabilitation program may request renewal under § 402.4.

Id. § 402.5(a) (emphasis added). According to the court and plaintiffs, this regulation requires that HUD be the party that renews the contract, and accordingly requires that there be privity between the government and landlord-plaintiffs in this case. We disagree. The regulations simply indicate that HUD *can* be a party to the renewal contracts. Permission is not the same as a mandate. And, the regulation, taken in context with its citation to 24 C.F.R. § 402.4, relates more clearly to specifying the rental rates that apply to potential contract renewals. *Compare* 24 C.F.R. § 402.5(a) ("HUD will offer to renew ... at rent levels determined under this section"), *with* 24 C.F.R. § 402.4 ("HUD may renew ... at initial rents that do not exceed comparable market rents.").

Fourth, landlord-plaintiffs argue that the terms of the contract create privity between the government and the plaintiffs. They argue that Section 11 of the contract states that if the PHA breaches the contract, HUD agrees to correct any default by the PHA and to continue the housing assistance payments. They also cite Section 4(a)(2) of the Contract as stating that HUD should remain a Party to the contract. Finally, they submit that Section 2(c) of the contract required HUD to provide the funds necessary under the contract. We disagree. Section 11 gives HUD tremendous discretion, but it does not obligate HUD. Section 11 is similar to the paragraph that our court addressed in *National Leased Housing Ass'n*, which we discussed above. There, the provision required HUD to assume certain rights and obligations in accordance with a provision that "HUD *may*, if it determines the [PHA] is in default, assume the [PHA's] rights and obligations." *Nat'l Leased Hous. Ass'n*, 105 F.3d at 1436 (alterations in original). Because the condition was predicated on HUD's discretion to assume the PHA's rights and obli-

gations, the court reasoned that HUD's liability, if any, was completely within its discretion. Because this was "not the type of direct, unavoidable contractual liability necessary to trigger a waiver of sovereign immunity," the court concluded that there was no privity. *Id.* Here, too, the liability of the government, if any, is contingent upon the government's acquiescence through Section 11, which permits HUD to correct any default by the PHA, but only at HUD's discretion. The contractual liability does not rise to the level necessary to trigger a waiver of sovereign immunity. The same logic applies to Sections 4(a)(2) and 2(c) of the contract. Thus, we conclude that the terms of the contract do not create privity between the government and the landlord-plaintiffs.

CONCLUSION

For the reasons above, we reverse the trial court's determination that it had subject matter jurisdiction and vacate the trial court's decision regarding liability and damages. We have considered the parties' remaining arguments and find them unpersuasive. Accordingly, we remand for entry of judgment consistent with this opinion.

REVERSED-IN-PART, VACATED-IN-PART, AND REMANDED.

COSTS

No costs.

APPENDIX B

United States Court of Federal Claims

PARK PROPERTIES ASSOCIATES, L.P. et al.,
Plaintiffs,

v.

The UNITED STATES, Defendant.

No. 15-554 C

(Filed: September 26, 2016)

OPINION AND ORDER

SMITH, Senior Judge

This is a follow-on case to *Park Properties Associates, L.P. v. United States*, Fed. Cl. No. 04–1757C (*Park Properties I*), in which three property owners, including the two plaintiffs in this case, Park Properties Associates, L.P., ("Park Properties") and Valentine Properties Associates, L.P., ("Valentine Properties") brought breach of contract claims alleging that Congress' 1994 amendments to the Section housing program breached their Housing Assistance Payments ("HAP") contracts with the United States Department of Housing and Urban Development ("HUD"). The Court held that Congress' 1994 amendments breached the plaintiffs' HAP contracts, but plaintiffs were not entitled to damages based on their renewal HAP contracts. In this case, plaintiffs contend that their renewal contracts should be reformed to reflect the higher rent levels consistent with the damages calculations used in *Park Properties I*. This action is before the Court on plaintiffs' motion for summary judgment and defendant's motion to dismiss.

I. Findings of Fact

Plaintiffs, Park Properties Associates, L.P., and Valentine Property Associates (together "the Properties"), are the owners of two multifamily properties located in Yonkers, New York, and participants of the Section 8 housing program. Amended Complaint, ECF No. 11 (hereinafter "Am. Compl."), at 3. Park Properties entered into a Housing Assistance Payment Contract "HAP Contract" with the HUD for an 83-unit multifamily property known as La Martine Terrace ("La Martine") which was designated with HUD project number NY 36-0010-003. Am. Compl. at 8. Valentine entered into a HAP contract with HUD for a 110-unit multifamily property known as Lane Hill Citizens Residence ("Lane Hill") which was designated with HUD project number NY 36-0003-011. *Id.* Pursuant to the La Martine and Lane Hill contracts (collectively "the HAP contracts"), HUD was to provide housing assistance payments to plaintiffs for units in both properties under lease by lower-income families. *Id.* According to 42 U.S.C. § 1437(c)(1), the housing assistance payments provided by the government are designed to reimburse plaintiffs for the difference between the rent called for under the HAP contracts and the amount paid by each family. *Id.*

The original contract for the La Martine project expired on May 31, 2009. *Id.* The original contract for Lane Hill expired on January 1, 2010. *Id.* Upon the expiration of the contracts, plaintiffs were not paid for five (5) months as they negotiated with HUD. Plaintiffs eventually requested a renewal as an exception project and entered into a series of short-term renewal contracts of varying lengths, each less than one year. Am. Compl. at 6. In January of 2011, both plaintiffs entered into long-term 20-year HAP contracts. Am. Compl. at 12-13.

A. The 1994 and 1997 Amendments

The payments to the owners under the original HAP contracts were subject to "automatic annual adjustments," which raised the per-unit rent by a factor published annually by HUD. Am. Compl. at 4. In 1994, Congress amended Section 8 of the U.S. Housing Act, 42 U.S.C. § 1437f, by requiring that, when rents exceed fair market rentals, a property owner had to demonstrate that the adjusted rent would not materially exceed comparable rents in order to be eligible for an annual adjustment. Defendant's Motion to Dismiss, ECF 20 (hereinafter "MTD."), at 3. Congress also amended Section 1437f(c)(2)(A) to require a one percent reduction of the annual adjustment factors for any units occupied by the same tenant during the past year. *Id.*

The 1994 amendments caused the government to provide plaintiffs with lower rent adjustments compared to what plaintiffs were entitled to under the HAP contracts. Am. Compl. at 9-10. After the 1994 amendments, HUD ceased making automatic annual adjustments of the respective contract rents on the HAP contracts' anniversary dates as required by the terms of the HAP contracts. *Id.* This resulted in substantially lower housing assistance payments being made by HUD to plaintiffs each month. *Id.*

In 1997, Congress further amended Section 8 through passage of the Multifamily Assisted Housing Reform and Affordability Act of 1997 ("MAHRAA"). Am. Compl. at 5. The purpose of MAHRAA was to preserve low-income rental housing affordability and availability. *Id.* MAHRAA provided for the restructuring of mortgages going into default, and it further reduced rents. *Id.* MAHRAA also contained provisions designed to compel the owners of Section 8 housing

projects to renew their contracts on terms and conditions dictated by the statute and HUD, who drafted the contracts. *Id.* Under MAHRAA, HUD was required to relocate tenants only where HUD did not want to renew the contract. *See* MAHRAA § 516(d)(2).[1] Rent subsidy payments would terminate under MAHRAA on the contract expiration unless the contract was renewed, even if tenants were still in the building. Am. Compl. at 6.

The MAHRAA provides for two types of rents for renewed contracts: (1) rents under MAHRAA § 524-(a)(4) and (2) "exception rents," under MAHRAA § 524-(b)(1). *Id.* MAHRAA requires contracts to provide for exception rents at the request of the owner in either of two circumstances: (1) where the project is not an eligible multifamily housing project under MAHRAA § 512(2), or (2) where the project is exempt from mortgage restructuring and rental assistance sufficiency plans under MAHRAA § 524(h). *Id.* A project is not an eligible multifamily housing project under MAHRAA § 512(2) if the project was not financed by a mortgage insured or held by the Secretary of HUD under the National Housing Act. *See* MAHRAA § 512(2)(C). The HUD Secretary may treat a project as an eligible multifamily housing project for purposes of MAHRAA under certain circumstances even if the project otherwise does not meet all of the requirements of § 512(2). Am. Compl. at 7. However, the project owner must (1) consent to such treatment, and (2) the project must have qualified as an eligible multifamily housing project at some time prior to renewal. *See* MAHRAA § 512. Plain-

[1] The HAP contracts and HUD regulations require the owners to give a year's notice to HUD and all tenants if they do not intend on renewing their contract to allow HUD sufficient time to relocate the tenants. Am. Compl. at 6.

tiffs' buildings are not financed by any government mortgages or guarantees. Plaintiffs have neither consented to being treated as an eligible multifamily housing project nor do they qualify as an eligible multifamily housing project. Am. Compl. at 7.

MAHRAA § 524(b), the provision on exception rents, provides for the lesser of adjusted existing rents or budget-based rents. *Id.* During the relevant time period, budget-based rents for plaintiffs' projects were higher than adjusted existing rents. *Id.* The rents to be applied to the renewal contracts were the existing rents as of the last month of the expiring contract, as adjusted by an operating cost adjustment factor ("OCAF") established by the HUD Secretary. *See* MAHRAA § 524(b)(1). HUD has published an OCAF applicable to both of plaintiffs' properties. Am. Compl. at 8.

B. The 2006 Decision

In 2004, three property owners, including the two plaintiffs in this case, brought breach of contract claims, alleging that HUD breached their HAP contracts by failing to make housing assistance payments in amounts that corresponded to the automatic annual adjustment and seeking damages for the difference between the amounts due under the contract and the substantially lower amounts paid by HUD to plaintiffs. *See Park Properties Associates, L.P. v. United States*, 74 Fed. Cl. 264, 265–66 (2006) (Allegra, J.) (*Park Properties I*).

In 2006, this Court held that Congress' 1994 Amendments repudiated and breached the plaintiffs' HAP contracts. *Park Properties I*, 74 Fed. Cl. at 274. In a subsequent damages opinion, the Court held, among other things, that the plaintiffs were not entitled to recover damages based on their renewal HAP contracts

on the grounds that plaintiffs had waived the argument and because such damages were not foreseeable at the time of the original HAP contracts. *Park Properties Associates, L.P. v. United States*, Fed. Cl. No. 04–1757C (September 19, 2015) (unpublished) *Park Properties Associates L.P. v. United States*, No. 04–1757C, (Fed. Cl. Sep. 19th, 2015). Following the Court's ruling, the parties submitted a joint stipulation quantifying damages pursuant to the Court's opinion. Stipulation, *Park Properties I*, No. 04–1757C, ECF No. 162, (Fed. Cl. Oc. 31, 2014). On November 4, 2014, the clerk entered judgment in favor of each of the three plaintiffs in the amounts set forth in the joint stipulation. *Park Properties I*, Nov. 4, 2014, ECF No. 164. This complaint followed, requesting this Court to reform the renewal contracts to reflect the higher rent levels consistent with the damages calculations used in *Park Properties I*, and damages for the difference between the rental rate levels in the reformed renewal contracts and those in the unreformed renewal contracts. Am. Compl. at 1.

II. Discussion

A. Standard of Review

This Court's jurisdictional grant is found primarily in the Tucker Act, which provides the Court of Federal Claims the power "to render any judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States ... in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Although the Tucker Act explicitly waives the sovereign immunity of the United States against such claims, it "does not create any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). Rather, in order to

fall within the scope of the Tucker Act, "a plaintiff must identify a separate source of substantive law that creates the right to money damages." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in relevant part).

When the Court's subject matter jurisdiction to hear a case is challenged, the plaintiff has the burden of establishing by a preponderance of the evidence that this Court has jurisdiction over its claims. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The Court "must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011) (citing *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995)). Motions to dismiss under Rule 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC") test the legal sufficiency of a complaint in light of RCFC Rule 8(a), which requires "a plausible 'short and plain' statement of the plaintiff's claim, showing that the plaintiff is entitled to relief." *K–Tech Telecommunications, Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1282 (Fed. Cir. 2013) (quoting *Skinner v. Switzer*, 562 U.S. 521 (2011)). Although a complaint "does not need detailed factual allegations," the plaintiff must plead enough factual allegations "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When considering a motion to dismiss for failure to state a claim, the Court must accept plaintiff's factual allegations as true and draw all reasonable inferences in favor of the plaintiff. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Nonetheless, the Court should dismiss a complaint "when the facts asserted by [the] claimant do not entitle him to a legal

remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

Summary judgment is appropriate when the evidence indicates that there is "no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." RCFC 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A "genuine" dispute is one that "may reasonably be resolved in favor of either party," and a fact is "material" if it might significantly alter the outcome of the case under the governing law. *Anderson*, 477 U.S. at 248, 250. In determining the propriety of summary judgment, the Court will not make credibility determinations, and will draw all inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986).

B. Privity

In its motion to dismiss, defendant argues that plaintiffs lack privity with HUD because HUD is not a party to the renewal contracts. Highlighting that the renewal contracts are technically between the owners and the New York State Housing Trust Fund Corporation ("NYSHTFC"), HUD argues that no privity of contract exists here, and thus, the Court has no jurisdiction to even entertain this action under the Tucker Act. MTD at 9. This Court does not agree.

The terms of the contract create privity between the owners and HUD. Section 4(a)(2) of the contract provides that HUD is party to provisions of the renewal contract. One of these provisions is in Paragraph 11, in which HUD agrees to correct any default if the Public Housing Agency ("PHA") breaches the contract, as well as agrees to continue assistance payments to the owners. Complaint, Exhibit A, ECF 1, (hereinafter

"Compl. Ex. A") at 11. Furthermore, although the NYSHTFC is listed as the Contract Administrator, HUD is a signatory to this contract. *Id.* at 13.

HUD is directed by statute to offer renewal contracts. MAHRAA § 402.5(a). An exception exists under 42 U.S.C. § 1437f, which provides that, where a PHA initiates, contracts, and administers a contract with a local property owner, and where HUD's only contract is to pay the PHA, no privity exists between HUD and the property owner. 42 U.S.C. § 1437f. However, the controlling provision of this exception indicates that the PHA *must* initiate, contract, and administer the contract in order to avoid that privity. *Id*. The NYSHTFC did not initiate the renewal contracts. Rather, according to the contract provisions themselves, HUD, as the Contract Administrator, "may assign the Renewal Contract to a [PHA] for the purpose of PHA administration of the Renewal Contract, as Contract Administrator, in accordance with the Renewal Contract (during the term of the annual contributions contract ("ACC") between HUD and the PHA)." Compl. Ex. A at 9. HUD initiated the renewal contracts and then assigned them to the NYSHTFC. The NYSHTFC did not itself initiate, negotiate, or administer those contracts. As the NYSHTFC did not initiate, negotiate, or administer the renewal contracts, the NYSHTFC has no authority to perform under those renewal contracts. Therefore, despite HUD's attempt transfer the renewal contracts to the NYSHTFC, HUD has not escaped privity with the property owners.

C. Breach of Contract

In its motion to dismiss, defendant argues that the plaintiffs have not alleged a breach of the renewal contracts because they have not identified a specific provision that has been breached. MTD at 18. In their mo-

tion for summary judgement, plaintiffs argue that HUD intentionally breached the renewal contracts by applying the wrong preexisting rents in determining what the renewal rents would be. Plaintiff's Motion for Summary Judgment, ECF 30 (hereinafter "P's MSJ") at 7. In 2006, this Court held that Congress' 1994 Amendments repudiated and breached the plaintiffs' original HAP contracts. *Park Properties I*, 74 Fed. Cl. at 274. As a result of that holding, the plaintiffs' rents should have been upwardly adjusted, but HUD failed to effect that adjustment. A final judgment on this issue was released in 2014, following a joint stipulation in which the parties agreed as to what the contractual rent amount should have been if the breach had not occurred. HUD did not appeal the 2014 order, and plaintiffs argue that the renewal contracts should have been recalculated to reflect the correct preexisting rents. P's MSJ at 9. This Court agrees with plaintiffs' assertion.

"It is a principle of the widest application that equity will not permit one to rely on his own wrongful act." *Deitrick v. Greaney*, 309 U.S. 190, 196 (1940). In the case at bar, HUD is relying on the fact that it did not effectuate the judicially required rent adjustment prior to entering into the renewal contracts to argue that those adjustments are not required for the current contracts at issue. This Court does not agree with that assessment. The Court of Claims, has previously held that "[t]his court may exercise equity jurisdiction to the extent of reforming contracts and base its decree upon the contract as reformed." *Pocono Pines Assembly Hotels Co. v. United States,* 73 Ct. Cl. 447, 482 (1932). Additionally, "[t]he courts have in the past allowed reformation of a contract based on mutual mistake of fact." *Edwards v. U.S.*, 19 Cl. Ct. 663, 674 (1990) (*see Bowen–McLaughlin–York Co. v. United States,* 813 F.2d 1221, 1222 (Fed.Cir.1987));

Ins. Co. v. United States, 812 F.2d 700 (Fed. Cir. 1987); *Southwest Welding & Mfg. Co. v. United States,* 179 Ct. Cl. 39, 52–53, 373 F.2d 982, 989–91 (1967); *National Presto Indus., Inc. v. United States,* 167 Ct. Cl. 749, 338 F.2d 99 (1964), *cert. denied,* 380 U.S. 962 (1965)).

A mutual mistake is defined by the *Restatement (Second) of Contracts*, section 151 as "a belief that is not in accord with the facts." *Hartle v. U.S.*, 22 Cl. Ct. 843, 846 (1991) (citing *Summit Timber Co. v. United States,* 230 Ct. Cl. 434, 445, 677 F.2d 852 (1982)). "[A] mistake, in order to justify rescission, must relate to the intrinsic nature of the bargain.... [A] mistake vitally affecting a fact or facts on the basis of which the parties contracted renders their contract voidable by an injured party." *Hartle*, 22 Cl. Ct. at 846 (citing *Higgs v. United States*, 212 Ct. Cl. 146, 150, 546 F.2d 373 (1976) (citing 13 *Williston on Contracts* § 1544 (3d ed. 1970))). As such, it follows that mutual mistake is also grounds for reformation.

The restatement expounds upon this in stating the following:

> Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

Restatement (Second) of Contracts, § 152 (1981); *see also National Presto*, 167 Ct. Cl. at 761, 338 F.2d 99.

The renewal HAP contracts were entered into in 2011, before the 2014 final judgment on the original contract rents. Am. Compl. at 12-13. The 2014 decision set out the agreed upon preexisting rents. At the time of that decision, the renewal contracts should have

been adjusted to reflect those new rents. Had the adjusted rents been in place at the onset of the renewal contracts, the rents included therein would have been higher and in accordance with the 2014 decision. As a result of the mistakenly applied rents, the defendant has breached the renewal contracts in failing to pay the rental amount that should have been paid but for the mistake made in contracting the renewals.

Equitable principles require a finding that the plaintiff should be put in the same position it would have been in if the government had not breached its contract. There is no disagreement among the parties that, but for the breach, plaintiff would be receiving the rental amount it now seeks. To deny them those rents would be to allow the government to profit significantly from its breach at the expense of the plaintiffs and at the expense of its reputation for fair dealing. As such, we must agree with plaintiffs and order the reformation they seek. Plaintiffs are entitled to a recalculation of the rents for the period beginning with the initiation of the renewal contracts.

III. Conclusion

For the reasons set forth above, defendant's MOTION to dismiss is **DENIED**. Additionally, plaintiffs' MOTION for Summary Judgment is **GRANTED**. On or before Monday, November 28, 2016, the parties shall submit to this Court a stipulation of the amount owed by the government to the plaintiffs.

IT IS SO ORDERED.

APPENDIX C

United States Court of Federal Claims.

No. 15–554 C
(Filed: May 2, 2017)

PARK PROPERTIES ASSOCIATES, L.P. et al.
Plaintiffs,
v.
The UNITED STATES,
Defendant.

OPINION, ORDER, AND STIPULATION QUANTIFYING DAMAGES AND FOR ENTRY OF JUDGMENT

SMITH, Senior Judge

Pursuant to the Opinion issued by this Court on September 26, 2016, in which the Court requested a stipulation of damages by both parties consistent with the findings and the damage calculations used in *Park Properties Associates, L.P. v. United States*, Fed. Cl. No. 04–1757C ("Park Properties I"), this Court awards plaintiffs $7,867,018.00 in total damages. Of those damages, Park Properties Associates, L.P. ("Park Properties") is entitled to $3,740,067.00, and Valentine Property Associates ("Valentine") is entitled to $4,126,951.00.

I. Findings of Fact[1]

Plaintiffs, Park Properties and Valentine (together "the Properties"), are the owners of two multifamily properties located in Yonkers, New York, and participants in the Section 8 housing program. Amended Complaint (hereinafter "Am. Compl.") at 3. Park Properties entered into a Housing Assistance Payment Contract ("HAP Contract") with the Department of Housing and Urban Development ("HUD") for an 83–unit multifamily property known as La Martine Terrace ("La Martine") which was designated with HUD project number NY 36–0010–003. Am. Compl. at 8. Valentine entered into a HAP contract with HUD for a 110–unit multifamily property known as Lane Hill Citizens Residence ("Lane Hill") which was designated with HUD project number NY 36–0003–011. *Id.* Pursuant to the La Martine and Lane Hill contracts (collectively "the HAP contracts"), HUD was to provide housing assistance payments to plaintiffs for units in both properties leased by lower-income families. *Id.* According to 42 U.S.C. § 1437(c)(1), the housing assistance payments provided by the government are designed to reimburse plaintiffs for the difference between the rent called for under the HAP contracts and the amount paid by each family. *Id.*

A. The 1994 and 1997 Amendments

The payments to the owners under the original HAP contracts were subject to "automatic annual adjustments," which raised the per-unit rent by a factor published annually by HUD. Am. Compl. at 4. In 1994, Congress amended Section 8 of the U.S. Housing Act, 42 U.S.C. § 1437f, by requiring that, when rents exceed

---

[1] A full recitation of the facts may be found at *Park Properties Associates, L. P. v. United States*, No. 15–554C (2016).

fair market rentals, a property owner had to demonstrate that the adjusted rent would not materially exceed comparable rents in order to be eligible for an annual adjustment. Defendant's Motion to Dismiss (hereinafter "MTD") at 3. The 1994 amendments caused the government to provide plaintiffs with lower rent adjustments compared to what plaintiffs were entitled to under the HAP contracts. Am. Compl. at 9–10. After the 1994 amendments, HUD ceased making automatic annual adjustments of the respective contract rents on the HAP contracts' anniversary dates as required by the terms of the HAP contracts. *Id.* This resulted in substantially lower housing assistance payments being made by HUD to plaintiffs each month. *Id.*

In 1997, Congress further amended Section 8 through passage of the Multifamily Assisted Housing Reform and Affordability Act of 1997 ("MAHRAA"). Am. Compl. at 5. MAHRAA provides for two types of rents for renewed contracts: (1) rents under MAHRAA § 524(a)(4) and (2) "exception rents," under MAHRAA § 524(b)(1). Am. Compl. at 6. MAHRAA requires contracts to provide for exception rents at the request of the owner in either of two circumstances: (1) where the project is not an eligible multifamily housing project under MAHRAA § 512(2), or (2) where the project is exempt from mortgage restructuring and rental assistance sufficiency plans under MAHRAA § 524(h). *Id.* Plaintiffs' buildings are not financed by any government mortgages or guarantees. Plaintiffs have neither consented to being treated as an eligible multifamily housing project nor do they qualify as an eligible multifamily housing project. Am. Compl. at 7.

MAHRAA § 524(b), the provision on exception rents, provides for the lesser of adjusted existing rents or budget-based rents. *Id.* During the relevant time period, budget-based rents for plaintiffs' projects were

higher than adjusted existing rents. *Id.* The rents to be applied to the renewal contracts were the existing rents as of the last month of the expiring contract, as adjusted by an operating cost adjustment factor ("OCAF") established by the HUD Secretary. *See* MAHRAA § 524(b)(1). HUD has published an OCAF applicable to both plaintiffs' properties. Am. Compl. at 8.

B. The 2006 Decision

In 2004, three property owners, including the two plaintiffs in this case, brought breach of contract claims alleging that HUD breached their HAP contracts by failing to make housing assistance payments in amounts that corresponded to the automatic annual adjustment and seeking damages for the difference between the amounts due under the contract and the substantially lower amounts paid by HUD to plaintiffs. *See Park Properties Associates, L.P. v. United States*, 74 Fed. Cl. 264, 265–66 (2006) (Allegra, J.) (*Park Properties I*). In 2006, this Court held that Congress' 1994 Amendments repudiated and breached the plaintiffs' HAP contracts. *Park Properties I*, 74 Fed. Cl. at 274. Following the Court's ruling, the parties submitted a joint stipulation quantifying damages pursuant to the Court's opinion. *Park Properties I*, October 31, 2014 (ECF No. 162). On November 4, 2014, the clerk entered judgment in favor of each of the three plaintiffs in the amounts set forth in the joint stipulation. *Park Properties I*, November 4, 2014 (ECF No. 164).

C. This Court's Decision

On May 29, 2015, plaintiffs filed a complaint, requesting this Court reform the renewal contracts to reflect the higher rent levels consistent with the damages calculations used in *Park Properties I*, and for damages amounting to the difference between the rental rate

levels in the reformed renewal contracts and those in the unreformed renewal contracts. Am. Compl. at 1. This Court granted plaintiffs' Motion and ordered the parties to submit a stipulation of the costs with supporting documentation and calculations for damages. On December 16, 2016, plaintiffs submitted a memorandum presenting their damage calculations. On January 16, 2017, defendant submitted a response to plaintiffs' calculations with its version of appropriate damage calculations. On January 27, 2017, plaintiffs submitted their reply in support of their memorandum on damages. On January 31, 2017 this Court held Oral Argument regarding the same. On February 8, 2017 plaintiffs filed a memorandum challenging defendant's statements during oral arguments. On February 14, 2017 the defendant filed a Motion to Strike that memorandum, and on February 28, 2017, defendant filed a Motion for supplemental authority. On March 3, 2017, plaintiffs responded to defendant's motions. This case is now fully briefed and ripe for decision.

II. Discussion

A. Plaintiffs' Damages

Plaintiffs began their damages calculation by using pre-existing rents from the 2014 stipulation in *Park Properties I* for each apartment type. Plaintiffs' Memo at 1 ("P's Memo"). Those rents were then multiplied by the applicable Operating Cost Adjustment Factor ("OCAF's") published annually in the Federal Register. *Id.* In the succeeding years, the starting point rent for each apartment type was the prior year's rent multiplied by the applicable OCAF for each subsequent year. *Id.*

The underpayment was determined by subtracting the actual rent paid in any given year from that year's newly determined rent, as explained above, for each

period per apartment by apartment type. *Id.* This calculation provided the monthly contract underpayment amount. *Id.* This number was then multiplied by the number of apartments of each type to establish the monthly underpayment by apartment type. P's Memo at 2.

The contract periods for Valentine were all for one year, so each monthly underpayment was multiplied by 12 to determine the annual underpayment for each apartment type. *Id.* Those numbers were then added together for the total damage calculation for Valentine, which plaintiffs calculated as $4,148,101.06. *Id.* The contract periods varied for Park Properties, so the monthly underpayment was multiplied by the relevant months. *Id.* The damages for each apartment type were added together to form the total damage calculation for Park Properties, which plaintiffs calculated as $3,769,625.93. *Id.*

Next, plaintiffs calculated vacancy damages in accordance with the 2014 stipulation. Vacancy damages were added to the above damage number to establish the plaintiffs' total damage calculation for each property. P's Memo at 2. First, plaintiffs reviewed vouchers submitted to HUD to determine the days vacant for each apartment type by contract period. *Id.* The total number of days in which there was a vacancy was then divided by 30 to establish a "monthly vacancy" percentage. That percentage was then multiplied by the new "OCAF Adjusted Contract Rent" to determine the dollar vacancy total by apartment type for each contract period. *Id.* The vacancy totals for each unit were added together and then multiplied by 80 percent, as government regulations provide for an 80 percent payment for vacant apartments. *Id.* This number represented the gross total vacancies. Plaintiffs note that no vacancy payments were made in the past. *Id.* The

total vacancy damages for Valentine were calculated as $46,495.15, and the vacancy damages for Park Properties were calculated to be $53,745.17. *Id.* Thus, the grand total for all damages under the plaintiffs' calculations is $8,017,967.31.

B. Defendant's Damages

The defendant's starting point is a "but-for" rent drawn from the comparability studies that plaintiffs provided HUD in 2010. Those studies were provided in 2010 in an effort to justify rents at that time, but they are unrelated to this Court's proceedings. Defendant's Response Memorandum at 4 ("D's Resp."). Defendant applies the OCAF as originally included in letters to plaintiffs as part of the contracting process. *Id.* "The difference between the ["but-for"] rent and the actual contract rent represents the damages per unit, which was then multiplied by the number of months for that contract period." *Id.*

The defendant deducted vacancy damages from the gross damages for each apartment type. *Id.* Defendant used the numbers that plaintiffs submitted in their memo on damages calculations, calculated the daily value of the underpayment, and then multiplied that amount by the number of days vacant. *Id.* This "vacancy deduction" was subtracted from defendant's gross damages calculation, which defendant determined was the net damages for each apartment type per contract period. *Id.*

Defendant calculated the total damages for Valentine as $40,936.00. D's Resp. Exhibit A at 7. The defendant calculated the total damages for Park Properties as $1,287,960.00. *Id.* The total damage award proffered by defendant was $1,328,896.00. *Id.*

C. This Court's Calculation

This Court was looking for a straightforward calculation of damages similar to those stipulated in *Park Properties I*. This Court looked to the calculations provided by both parties to determine the damage award. The biggest discrepancy between the two sets of calculations is the baseline rent to which the OCAF was applied and the rent that should have been paid but for the breach. The plaintiffs used the rent for each apartment type and property as set forth in the 2014 Stipulation from *Park Properties I*. They then multiplied this number by the OCAF. In subsequent years, the "but-for" rent was calculated by using the previous years' rent multiplied by the subsequent year's OCAF. This calculation uses similar calculations to those used in the 2014 Stipulation. Defendant's vacancy deduction, which used plaintiffs' numbers, was then subtracted from the gross total damages. The Court has determined the damages to be as follows:

Park Properties Associates, L.P.	$3,740,067.00
Valentine Properties Associates, L.P.	$4,126,951.00
Total damage award	$7,867,018.00

D. Plaintiffs' Memorandum and Defendant's Motion to Strike

On February 8, 2017, plaintiffs filed a memorandum proffering their status as falling under MAHRAA § 524(b), which deals with exception contracts, as opposed to the provisions of MAHRAA § 524(a). On February 14, 2017, defendant filed a Motion to Strike that memorandum as untimely and because plaintiffs were

not given leave to file said memorandum by this Court. While this Court agrees that plaintiffs' memorandum was untimely filed, it should be noted that neither the memorandum's filing, nor the action of striking that memorandum from the record is outcome determinative. It is already well established by the Opinion issued on September 26, 2016, that the HAP contracts in this case are governed by MAHRAA § 524(b), the provision on exception rents. The memorandum filed on February 8, 2017 was superfluous. However, as defendant is correct in its assertion that said memo was untimely, this Court grants defendant's Motion to Strike the same.

E. Defendant's Notice of Supplemental Authority

On February 28, 2017, defendant filed a Motion for leave to file notice of supplemental authority, asking this Court to consider the 7th Circuit's ruling in *Evergreen Square of Cudahy v. Wisconsin Housing & Economic Development Authority*, No. 16–1475, 2017 WL 657438 (7th Cir. Feb. 17, 2017). This Court grants that Motion. However, on March 3, 2017, plaintiffs filed a response to that motion, and this Court is persuaded by plaintiffs' argument that the facts in *Evergreen* are distinguishable from the instant case. As a result, though this Court grants the Motion to file notice of supplemental authority, such a filing will not be outcome determinative, and Opinion dated September 26, 2016 remains unchanged.

III. Conclusion

For the reasons set forth above, defendant's MOTION to strike and defendant's MOTION for leave to file supplemental authority are **GRANTED**. Additionally, plaintiffs are awarded $7,867,018.00 in total damages.

IT IS SO ORDERED.

APPENDIX D

United States Court of Appeals
for the Federal Circuit

Park Properties Associates, L.P.,
Valentine Properties Associates, L.P.,
Plaintiffs-Cross-Appellants,

v.

United States,
Defendant-Appellant.

Nos. 2017-2279, 2017-2344

Appeals from the United States Court of Federal Claims in No. 1:15-cv-00554-LAS,
Senior Judge Loren A. Smith.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before Prost, Chief Judge, Newman, Mayer[1], Lourie, Schall[2], Dyk, Moore, O'Malley, Reyna, Wallach, Taranto, Chen, and Stoll, Circuit Judges*.

Per Curiam.

ORDER

Cross-Appellants Park Properties Associates, L.P. and Valentine Properties Associates, L.P. filed a combined petition for panel rehearing and rehearing en banc. A response was invited by the court and filed by Appellant United States. The petition was referred to

---

[2] Circuit Judges Mayer and Schall participated only in the decision on the petition for panel rehearing.

* Circuit Judge Hughes did not participate.

the panel that heard the appeals, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

It is ordered that:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on June 6, 2019.

For the Court,

May 30, 2019 [signature]