UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL NOZZI, et al.,

Plaintiffs,

v.

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, et al.,

Defendants.

No. CV 07-380-GW (FFMx)

RULING ON DEFENDANTS' MOTION TO DISMISS THE SECOND AND FIFTH CAUSES OF ACTION IN THE FIRST AMENDED CLASS ACTION COMPLAINT

I. INTRODUCTION

Plaintiffs in this action are two recipients of federal benefits under the "Section 8 Housing Voucher Program" (henceforth "S8HVP") pursuant to 42 U.S.C. § 1437f(o) and a non-profit advocacy organization. Defendants are the Housing Authority of the City of Los Angeles (henceforth "HACLA") and Rudolf Montiel, the Executive Director of HACLA.

In their First Amended Class Action Complaint (henceforth "FAC"), Plaintiffs allege that:

> 2. In or around July of 2005, the Housing Authority of the City of Los Angeles ("HACLA"), which administers the Section 8 Program locally, began implementing a large-scale rollback of housing benefits provided to Section 8 recipients in its jurisdiction. [* * * *].
>
> 3. Before doing so, however, HACLA was required by applicable federal regulations, independently enforceable as well through state law, to provide adequate notice at least *one year* prior to the cut in the level of services. [* * * *].
>
> 4. HACLA did not make any meaningful attempt to comply with this notice requirement. Rather than separately providing a formal administrative notice informing Section 8 recipients that they would be

> responsible for a specific increase in rent, HACLA inserted into a large stack of materials sent to each recipient a nondescript and technically worded flyer that failed to convey any useful information relating to the change in benefits.

See FAC at ¶'s 2, 3 and 4. Plaintiffs raise five causes of action: 1) "Denial of Due Process of Law (42 U.S.C. § 1983)" for failing to provide notice to S8HVP recipients pursuant to 24 C.F.R. § 982.505(c)(3)(ii) before implementing the rollback of housing benefits which are a protected property interest under 42 U.S.C. § 1437f(o); 2) "Violation of Rights Created by 42 U.S.C. § 1437f (Private Right of Action Available under 42 U.S.C. § 1983)"; 3) "Violation of Cal. Gov't. Code § 815.6"; 4) "Violation of Art. I, § 7 of California Constitution"; and 5) "Negligence" pursuant to California Government Code § 815.2, Civil Code § 1714 and Evidence Code § 669.[1] Defendants now move to dismiss the second and fifth causes of action.

II. BACKGROUND

A. The S8HVP

As noted in Cisneros v. Alpine Ridge Group, 508 U.S. 10, 12 (1993):

> In 1974, Congress amended the United States Housing Act of 1937 (Housing Act) to create what is known as the Section 8 housing program. Through the Section 8 program, Congress hoped to "ai[d] low-income families in obtaining a decent place to live," 42 U.S.C. § 1437f(a) (1988 ed., Supp. III), by subsidizing private landlords who would rent to low-income tenants. Under the program, tenants make rental payments based on their income and ability to pay; the Department of Housing and Urban Development (HUD) then makes "assistance payments" to the private landlords in an amount calculated to make up the difference between the tenant's contribution and a "contract rent" agreed upon by the landlord and HUD.

One of the Section 8 programs is the S8HVP. See 42 U.S.C. § 1437f(o); 24 C.F.R. § 982.1(a)(1). The S8HVP is usually administered by a state or local governmental entity called a "public housing agency" or "PHA" within a designated geographic area. See 24 C.F.R. § 982.1(a)(1). HUD provides housing assistance funds to the PHAs and also supplies monies for the PHAs' administration of the programs. Id.

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[1] Plaintiffs' original Complaint contained two additional causes of action for "Violation of Cal. Civ. Code § 52.1" (which this Court dismissed without leave to amend) and "Taxpayers' . . . Suit for Declaratory and Injunctive Relief under Cal. Code of Civil Procedure § 526a" (which Plaintiffs voluntarily withdrew). Also, this Court granted Defendants' initial Motion to Dismiss as to the second cause of action, but with leave to amend, because it found that count to be unclear as to the basis of the claim since it appeared to be entirely duplicative of the first cause of action. Further, at the hearing on the Motion to Dismiss, the Court also heard Defendants' Motion to Strike Causes of Action Pursuant to California Code of Civil Procedure § 425.16. In their papers and at the oral argument, Plaintiffs conceded that their lawsuit did not challenge the decision to lower the S8HVP benefits but rather the Defendants' failure to give adequate notice to recipients prior to the effectuating the change. See e.g., Reporter's Transcript of April 30, 2007 hearing at page 12.

HUD publishes the fair market rents (henceforth "FMR")[2] for designated geographic areas in the United States. See 24 C.F.R. §§ 888.111 and 982.503(a). A public housing agency must adopt a payment schedule that establishes "voucher payment standard amounts" (henceforth sometimes "VPSA") for each FMR area within its jurisdiction. See 24 C.F.R. § 982.503(a). As to each FMR area, the PHA must set the VPSA for each "unit size" where unit size is measured by the number of bedrooms (i.e., zero-bedroom or studio, one-bedroom and so on). Id. The public housing agency is initially limited as to its choice of the voucher payment standard amount. As stated in 24 C.F.R. § 982.503(b)(1):

> (i) The PHA may establish the payment standard amount for a unit size at any level between 90 percent and 110 percent of the published FMR for that unit size. HUD approval is not required to establish a payment standard amount in that range ("basic range").
> (ii) The PHA may establish a separate payment standard amount within the basic range for a designated part of an FMR area.

See also 42 U.S.C. § 1437f(o)(1)(B).

The voucher payment standard amount is used to calculate the monthly housing assistance payment for a family. See 24 C.F.R. § 982.505(a). Where the PHA has established a VPSA within the "basic range" and where the rent for a family (including utilities except for telephone) for their particular unit falls within that range, the amount of monthly assistance payment for that family will normally be:

> . . . the amount by which the rent (including the amount allowed for tenant-paid utilities) exceeds the greatest of the following amounts, rounded to the nearest dollar:
> (i) 30 percent of the monthly adjusted income of the family.
> (ii) 10 percent of the monthly income of the family.

42 U.S.C. § 1437f(o)(2)(A);[3] see also 24 C.F.R. § 982.505(a).

Persons seeking S8HVP assistance must apply to the PHA and supply income and other information to establish their eligibility to participate in the program. See 42 U.S.C. § 1437f(o)(4); 24 C.F.R. § 982.201(a) and (b). Once in the program, the PHA must conduct, at a minimum, a yearly review of the family income and other information of the S8HVP participants. See 42 U.S.C. § 1437f(o)(5); 24 C.F.R. § 982.516(a).

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[2] "Fair market rent means the rent, including the cost of utilities (except telephone), as established by HUD . . . for units of varying sizes (by number of bedrooms), that must be paid in the market area to rent privately owned, existing, decent, safe and sanitary rental housing of modest (non-luxury) nature with suitable amenities." 24 C.F.R. § 888.111(b).

[3] "Adjusted income" is defined in 42 U.S.C. § 1437a(b)(5).

As conceded by the Plaintiffs in their FAC, "PHAs have discretion to raise or lower the VPS[A] within a statutorily prescribed range." See FAC at ¶ 26. Under regulations promulgated by HUD, if a PHA decreases the amounts on the payment standard schedule, "the lower payment standard amount generally must be used to calculate the monthly housing assistance payment for the family beginning at the effective date of the family's second regular reexamination following the effective date of the decrease in the payment standard amount." 24 C.F.R. § 982.505(c)(3). There is a three step process.

> *Decrease in the payment standard amount during the HAP* [housing assistance payments] *contract term.* If the amount on the payment standard schedule is decreased during the term of the HAP contract, the lower payment standard amount generally must be used to calculate the monthly housing assistance payment for the family beginning at the effective date of the family's second regular reexamination following the effective date of the decrease in the payment standard amount. The PHA must determine the payment standard for the family as follows.
>
> (i) *Step 1*: At the first regular reexamination following the decrease in the payment standard amount, the PHA shall determine the payment standard for the family [. . .] (using the decreased payment standard amount).
>
> (ii) *Step 2* (first reexamination payment standard amount): The PHA shall compare the payment standard amount from step 1 to the payment standard amount last used to calculate the monthly housing assistance payment for the family. The payment standard amount used by the PHA to calculate the monthly housing assistance payment at the first regular reexamination following the decrease in the payment standard amount is the higher of these two payment standard amounts. The PHA shall advise the family that the application of the lower payment standard amount will be deferred until the second regular reexamination following the effective date of the decrease in the payment standard amount.
>
> (iii) *Step 3* (second reexamination payment standard amount): At the second regular reexamination following the decrease in the payment standard amount, the lower payment standard amount shall be used to calculate the monthly housing assistance payment for the family unless the PHA has subsequently increased the payment standard amount . . . .

24 C.F.R. § 982.505(c)(3)(i) thru (iii) [emphasis added].

As stated in 24 C.F.R. § 982.5: "Where part 982 requires any notice to be given by the PHA, the family or the owner, the notice must be in writing."

B. Operative Allegations

In regards to the HACLA's purported failure to provide notice to the Plaintiff class, the operative allegations are contained in paragraphs 28 through 31 of the FAC which state:

> 28. On April 2, 2004, HACLA made a decision to reduce the pre-

> existing VPS. The impact on Section 8 participants was significant. For example, the VPS for a 0-bedroom ("bachelor") apartment plummeted from $795 to $674, a reduction of $121 per month.
>
> 29. To implement this change in policy, the HACLA stuck a one-page flyer in the materials mailed to each recipient on the date of their annual re-examination. Unlike other explanatory notices contained in these packets, the flyer did not require the recipient to acknowledge receipt by signing and returning the form. The flyer was not on letterhead, did not contain a phone number for inquiries, and did not give a legal basis for the decision. More importantly, the flyer did not advise recipients that their out-of-pocket rent payment would actually be going up, much less specify the amount of the increase. Plaintiffs are informed and believe, and on that basis allege, that these flyers were sent out, buried among other reexamination materials, from approximately July 2004 through July 2005.
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> 30. The language of the flyer did not meaningfully communicate to the recipient that there would actually be a reduction in the portion of his or her rent that HACLA would pay, and a corresponding increase in the portion of his or her rent that the recipient would be required to pay.
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> 31. The VPS decrease went into effect with re-examinations that took place from July 2005 to July 2006.

See FAC at ¶'s 28 through 31.

Plaintiffs' first cause of action is a 42 U.S.C. § 1983 claim of a denial of due process against Defendant HACLA. They contend that they have "a property interest in the provisions of [24] C.F.R. § 982.505(c)(3)(ii) under both state and federal law . . . ." See FAC at ¶ 58. In paragraph 59 of the FAC, Plaintiffs assert that:

> By failing to provide Plaintiff Class clear or meaningful notice of the actions HACLA intended to take and its consequences at the time required by 24 C.F.R. 982.505(c)(3)(ii), most particularly by failing to meaningfully or effectively advise the Plaintiff Class that their out of pocket share of future rents would be increased [. . .] and by failing to indicate from whom the notice emanated, the legal basis for the action, a phone number for inquiries, or how to protest or appeal the action, Defendant HACLA deprived the Plaintiff Class of due process of law in violation of the Fourteenth Amendment, thereby entitling the Class to bring the suit and recover damages pursuant to 42 U.S.C. § 1983.

Plaintiffs seek "injunctive and declaratory relief, an accounting, restitution and/or damages." Id. at ¶ 61.

Plaintiffs' second cause of action seeks to establish a claim based upon a purported violation of rights created by 42 U.S.C. § 1437f(o) which allegedly can be litigated through a "private right of action available under 42 U.S.C. § 1983." See FAC at page 17. As stated in paragraphs 68 and 69 of the FAC:

> 68. In sum, 42 U.S.C. § 1437f(o)(2) and the other sections cited above required HACLA to make monthly payments for the benefit of

> recipients according to the "applicable payment standard." That is a federally secured right. The regulations flush [sic] out how HACLA's monthly payments are to be calculated by specifying how the applicable payment standard is to be determined. By failing to provide the required notice, the new payment standard implemented by HACLA was unlawful. HACLA, therefore, violated 42 U.S.C. § 1437f(o)(2) by failing to make the required payments under the "applicable payment standard."
>
> 69. Defendants, as described in this complaint, deprived Plaintiffs and the Plaintiff Class of their federal rights, specifically their voucher payment standard rights created by 42 U.S.C. § 1437f(o), including § 1437(o)(2) and § 1437f(o)(1), under the color of state law, and thereby violated 42 U.S.C. § 1983.

II. DISCUSSION

A. Applicable Law

Defendants herein seek to dismiss the second and fifth causes of action pursuant to Federal Rules of Civil Procedure 12(b)(6). As stated in Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990).

> A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Dismissal can be based on lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984). On a motion to dismiss, the court accepts the facts alleged in the complaint as true. Shah, 797 F.2d at 745.

B. Plaintiffs' Second Cause of Action

Before considering the viability of the Plaintiffs' Second Cause of Action (henceforth "SCA"), it should initially be noted that Defendants have not moved to dismiss the First Cause of Action (henceforth "FCA") which asserts that HACLA violated 42 U.S.C. § 1983 by denying Plaintiffs due process in failing to give them sufficient notice as required by 24 C.F.R. § 982.505(c)(3)(ii) before reducing S8HVP benefits. Likewise, Plaintiffs have conceded that PHAs (such as HACLA) have the discretion to lower the voucher program standard amount (which is used to calculate the S8HVP benefits) within certain limitations. Plaintiffs have not (and apparently do not) contend that HACLA acted substantively or procedurally in an unlawful manner in deciding to reduce the S8HVP benefits, except as to the notice issue. In light of the above, Plaintiffs' SCA either : 1) is simply the same claim as the FCA but stated in slightly different words, or 2) fails to state a cognizable legal theory other than a due process claim based on lack of notice and fails

to allege sufficient facts that would establish a cognizable legal theory under 42 U.S.C. § 1983.

Plaintiffs' SCA is based on the following syllogism: 1) the S8VHP benefits are "a federally secured right"; 2) HUD regulations flesh out how HACLA's monthly payments are to be calculated; 3) by failing to provide the required notice, HACLA's reduction in S8HVP benefits is unlawful and 4) "HACLA, therefore, violated 42 U.S.C. § 1437f(o)(2) by failing to make the required payments under the 'applicable payment standard'" which constitutes a violation of 42 U.S.C. § 1983. See FAC at ¶'s 68-69. Plaintiffs' SCA fails to state a claim for the reasons stated below.

As held in Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418, 423 (1987), 42 U.S.C. § 1983 is available to enforce violations of federal statutes by agents of a state with two exceptions: where Congress has foreclosed such enforcement and where the statute did not create enforceable rights within the meaning of § 1983. The Court stated, as to the first exception, that "we conclude that nothing in the Housing Act . . . evidences that Congress intended to preclude . . . [a] § 1983 claim against [a PHA]." Id. at 429. In regards to the second exception, the Supreme Court has retreated from its position in Wright that spending legislation automatically gives rise to enforceable rights under § 1983. As delineated in Gonzaga University v. Doe, 536 U.S. 273, 281 (2002): "Our more recent decisions, however, have rejected attempts to infer rights from Spending Clause statutes." The Court went on to state:

> We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. Section 1983 provides a remedy only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Accordingly, it is rights, not the broader or vaguer "benefits" or "interests," that may be enforced under the authority of that section. This being so, we further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.
>
> We have recognized that whether a statutory violation may be enforced through § 1983 "is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute." Wilder, supra, 496 U.S. 498 at 508, n. 9. But the inquiries overlap in one meaningful respect -- in either case we must first determine whether Congress intended to create a federal right. Thus, we have held that "the question whether Congress . . . intended to create a private right of action [is] definitively answered in the negative" where "a statute by its terms grants no private rights to any identifiable class." Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979). For a statute to create such private rights, its text must be "phrased in terms of the persons benefitted." Cannon v. University of Chicago, 441 U.S. 677, 692, n. 13

> (1979). * * * * But even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent "to create not just a private right but also a private remedy." Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (emphases added).

See also Hill v. Richardson, 7 F.3d 656, 658 (7th Cir. 1993) ("Wright was closely divided, and Suter [v. Artist M, 503 U.S. 347 (1992)] shows that the Court is unwilling to press Wright for the most it can be worth.").

In this case, Plaintiffs are not claiming that the HACLA's decision to reduce voucher payment standard amounts was unlawful, improper or beyond its authority. Thus, while S8HVPs may be a federally secured right, HACLA's reduction of the VPSA has not violated that right. Rather, Plaintiffs' actual complaint is as to a purported failure by HACLA to give adequate notice before effectuating the reduction. While such failure of notice may give rise to a due process complaint that could in turn give rise to a § 1983 claim (which is, in essence, the substance of Plaintiffs' FCA),[4] inadequate notice by itself is not otherwise cognizable as a § 1983 deprivation of rights claim.

First, the applicable federal statute does not require any notice to be given before a PHA reduces the VPSA so long as the reduction is not less than 90 percent of the FMR published by HUD for the designated geographic area within the PHA's jurisdiction. See 42 U.S.C. § 1437f(o). Therefore, even if HACLA's notice in this case was inadequate, such conduct would not violate a federal statute so as to give rise to a § 1983 claim under the previously established (but now questioned) holding in Wright that § 1983 is available to enforce violations of federal statutes by agents of a State.

Second, Plaintiffs cite to HUD's regulation at 24 C.F.R. § 982.505(c)(3) for the existence of such notice requirement and then argue that the failure to comply with that regulation gives rise to the § 1983 claim. That contention must fail in light of the decision in Alexander v. Sandoval, 532 U.S. 275 (2001). In Alexander, the Supreme Court rejected the argument that, where a regulation contains some "rights-creating language," the regulation can provide a basis for private enforcement under § 1983 that goes beyond what the statute itself requires. Id. at 291 and 293 fnt. 8. As stated by the Court:

> Language in a regulation may invoke a private right of action that Congress

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[4] For purposes of deciding this motion, this Court need not and does not reach a decision as to whether a failure to give adequate notice would constitute a due process violation which can be litigated as a § 1983 claim in this case.

> through statutory text created, but it may not create a right that Congress has not. *Touche Ross & Co. v. Redington*, 442 U.S., at 577 n. 18 ("[T]he language of the statute and not the rules must control"). 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. at 291. See also Save Our Valley v. Sound Transit, 335 F.3d at 932, 936-940 (9th Cir. 2003).

Plaintiffs' reliance on the Wright decision and Johnson v. Housing Authority of Jefferson Parish, 442 F.3d 356 (5th Cir.), cert. denied, 127 S.Ct. 136 (2006), is unavailing. In both of those cases, the disputes revolved around the allocation of utilities expenses; in Wright it was a claim of over-billing for utilities by the defendant City Housing Authority (see 479 U.S. at 419), and in Johnson it was the failure of the defendant PHA to use current rates in calculating the utility allowance (see 442 F.3d at 359). As explained in Johnson:

> . . . the statutory language of the voucher program unmistakably provides -- in the text of the act itself -- for an "amount [to be] allowed for tenant paid utilities." [42 U.S.C. § 1437f(o)(2)(A), (B).] Contrary to the Housing Authority's assertion, the HUD regulations are not necessary to establish Plaintiff-Appellants' right to the utility allowance, and certainly no more so than they were in Wright, where such an allowance was not even mentioned in the text of the statute itself. Congress's intent to benefit Plaintiffs-Appellants here cannot be gainsaid.

Id. at 364 (footnote omitted). In both Wright and Johnson, the claims were based on the statutory right to receive the correct amount of rent assistance payments as delineated in the Housing Act as amended. Here, unlike the Wright and Johnson cases, Plaintiffs are not challenging the PHA's calculation as to the amount of the assistance as set forth in the statute. Rather, they are raising an issue of adequacy of notice which is not required in the applicable statute but only in the regulation. Thus, the Wright and Johnson decisions are inapplicable, while the holdings in Alexander and Save Our Valley are controlling.

Moreover, even assuming arguendo that a violation of a notice provision in a regulation (that is not required by the underlying statute) can serve theoretically as a basis for a § 1983 action, Plaintiffs would still not have stated a cognizable claim for two reasons. First, HACLA has not violated the notice provision as set out in the regulation. Second, if the notice provision requires more than what HACLA provided, it is too vague and amorphous to confer an enforceable right.

Plaintiffs claim that the notice provided by HACLA was inadequate because it: 1) did not require the recipient to acknowledge receipt by signing and returning the form; 2) was not on HACLA letterhead; 3) did not contain a phone number for inquiries; 4) did not state a legal basis for the decision; and 5) did not advise the recipient of how much their out of pocket rent payments would increase. See FAC ¶'s 29 and 59. However, the only regulation cited by Plaintiffs does not state that any of those items are required. 24 C.F.R. § 982.505(c)(3)(ii) merely provides that, after a PHA has calculated the appropriate payment standard amount at the first yearly reexamination following the decrease in the VPSA, "the PHA shall advise the family that the application of the lower payment standard amount will be deferred until the second regular reexamination following the effective date of the decrease in the payment standard amount." It makes no reference to having the recipient acknowledge receipt, letterhead, phone numbers, explanation of the legal basis for its decision, etc.

Plaintiffs have not alleged that HACLA failed in fact to give the only advisal that is required by the language of 24 C.F.R. § 982.505(c)(3)(ii). Moreover, 24 C.F.R. § 982.5 which sets out the only condition for notice merely states that "Where Part 982 requires any notice to be given by the PHA . . . , the notice must be in writing." Here, Plaintiffs in paragraph 4 of the FAC indicate that HACLA did give written notice.

It is further noted that where specific information is required to be given to a S8HVP participant, the HUD regulation will set forth these requirements. See, e.g., 24 C.F.R. §§ 982.301(b) and 982.554(a). Likewise, where a participant can challenge the PHA decision, the PHA must give that participant notice of the availability of an informal hearing. However, a PHA's decision setting the VPSA within the basic range is not subject to informal hearings. 24 C.F.R. § 982.555.

Finally, in order for a court to conclude that a statute creates a right enforceable under § 1983, it must find: 1) the statute was intended to benefit the plaintiffs; 2) the statute imposes a binding obligation on the government unit rather than merely expressing a congressional preference for a certain kind of conduct, and 3) the interest asserted by the plaintiff is not so vague and amorphous that it is beyond the competence of the judiciary to enforce. See Wilder v. Virginia Hosp. Asin., 496 U.S. 498, 509 (1990); Legal Services of Northern Calif. v. Arnett, 114 F.3d 135, 138 (9th Cir. 1997). Here, as noted above, the statute does not impose any obligation (let alone a binding one) in regards to notice. Even if one were to

utilize the referenced regulation as an appropriate surrogate for a statute, 24 C.F.R. § 982.505(c)(3)(ii) does not set out any binding obligation insofar as the procedural requirements which Plaintiffs seek to impose (e.g., acknowledgment of receipt of notice, explanation of legal basis, telephone numbers, etc.). Moreover, aside from the due process claim which is the subject of the FCA, the interest asserted by Plaintiffs in the SCA is so vague and amorphous that it fails to confer on S8HVP participants an enforceable "right" within the meaning of § 1983.

For all of the above reasons, the SCA is dismissed with prejudice.

C. Plaintiffs' Fifth Cause of Action

Plaintiffs' fifth cause of action is for negligence based on California Government Code § 815.2, Evidence Code § 669, and Civil Code § 1714. None of those provisions provides a basis for Plaintiffs' negligence claim.

As stated in Eastburn v. Regional Fire Protection Agency, 31 Cal.4th 1175, 1179 (2003):

> . . . the California Torn Claims Act provides that "[a] public entity is not liable for an injury," "[e]xcept as otherwise provided by statute." (Gov. Code, § 815; subd. (a).) As that language indicates, the intent of the Tort Claims Act is to confine potential governmental liability, not expand it. (Zelig v. County of Los Angeles (2002) 27 Cal.4th 1112, 1127.

Civil Code § 1714(a) states that "Every one is responsible . . . for an injury occasioned by his want of ordinary care of skill in the management of his property or person . . . ." Eastburn held that the ordinary negligence liability provision in Civil Code § 1714 is inapplicable to public entities. As stated in Eastburn, 31 Cal.4th at 1183:

> In other words, direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714. Otherwise, the general rule of immunity for public entities would be largely eroded by the routine application of general tort principles.

Government Code § 815.2(a) provides that: "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative [emphases added]." § 815.2(a) does not provide a basis for a common law claim for negligence against a public entity for its own negligent conduct. As stated in Zelig v. County of Los Angeles, 27 Cal.4th 1112, 1127 (2002):

> The Tort Claims Act draws a clear distinction between the liability of a public entity based on its own conduct, and the liability arising from the conduct of a public employee. Although the Act provides that a public employee generally is liable for an injury caused by his or her act or omission "to the same extent as a private person" (Gov. Code., § 820, subd. (a)) and that, when the act or omission of the public employee occurs in the scope of employment the public entity will be vicariously liable for the injury (Gov. Code § 815.2), the Act contains no provision similarly providing that a public entity generally is liable for its own conduct or omission to the same extent as a private person or entity. Rather, the Act provides that a public entity is not liable for an injury "[e]xcept as otherwise provided by statute . . . ." (Gov. Code, § 815.)

Evidence Code § 669(a) provides that a "failure of a person to exercise ordinary case is presumed if: (1) he violated a statute, ordinance, or regulation of a public entity . . . ." However, as noted in California Service Station etc. Assn. v. American Home Assurance Co., 62 Cal.App.4th 1166, 1177-78 (1998), a claim of ordinary negligence must be viable before the presumption of negligence in Evidence Code § 669(a) can be employed. The mere fact that a person has violated a statute or regulation does not, by itself, establish that the result will be the tort of negligence. Id. at 1178-79. Plaintiffs have offered nothing to suggest that a purported failure to provide adequate notice under 24 C.F.R. § 982.505(c)(3)(ii) should be treated as negligence. Moreover, as discussed above, Plaintiffs' allegations in the FAC do not set forth a basis for finding that HACLA has violated the notice requirement of § 982.505(c)(3)(ii). That regulation does not delineate any duty or standard of care as to how the advisal is to be given. To the extent that the HUD regulations in 24 C.F.R. Part 982 can be said to forth a duty of care regarding notice, as discussed above, HACLA has complied with it.

IV. CONCLUSION

For the reasons stated above and at the hearings on Defendants' Motion to Dismiss, the second and fifth causes of action in the FAC are hereby dismissed with prejudice.

DATED: November 26, 2007

GEORGE H. WU
United States District Judge