IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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| ROBERT W. BECKMAN, BRIAN R. COOK, WILLIAM F. CROCKETT, Trustee of the William F. Crockett "B" Trust, and GREGORY FINN,<br><br>Plaintiffs,<br><br>vs.<br><br>MAALAEA SURF ASSOCIATION OF APARTMENT OWNERS, an unincorporated organization and ASSET PROPERTY MANAGEMENT, INC., a corporation,<br><br>Defendants. | CIVIL NO. 09-00174 HG-LEK<br><br>**ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO CLAIMS ASSERTED IN SECOND COUNT OF COMPLAINT AND ORDER GRANTING DEFENDANTS' COUNTERMOTION FOR PARTIAL SUMMARY JUDGMENT AS TO CLAIMS ASSERTED IN SECOND COUNT OF COMPLAINT** |
| MAALAEA SURF ASSOCIATION OF APARTMENT OWNERS, an unincorporated organization,<br><br>Counter Claimant,<br><br>vs.<br><br>ROBERT W. BECKMAN, BRIAN R. COOK, WILLIAM F. CROCKETT, Trustee of the William F. Crockett "B" Trust, and GREGORY FINN,<br><br>Counter Defendants. | |

**ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS (DOC. 11)**

**AND**

**ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO CLAIMS ASSERTED IN SECOND COUNT OF COMPLAINT (DOC. 9)**

**AND**

**ORDER GRANTING DEFENDANTS' COUNTERMOTION FOR PARTIAL SUMMARY JUDGMENT AS TO CLAIMS ASSERTED IN SECOND COUNT OF COMPLAINT (DOC. 22)**

On March 24, 2009, Plaintiffs Robert W. Beckman, Brian R. Cook, William F. Crockett, trustee of the William F. Crockett "B" Trust, and Gregory Finn ("Plaintiff Owners") brought this action in Hawaii State Court, Second Circuit, Case No. 09-1-0234. Plaintiff Owners allege claims under the Hawaii Condominium Property Act ("HCPA"), Haw. Rev. Stat. § 514B-41, and the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 162. The action concerns a forty-five dollar check-in fee charged by Defendant Maalaea Surf Association of Apartment Owners ("the Association") to condominium owners each time a transient guest, or group of guests, checks into the owners' unit. The check-in fees are billed to condominium owners on a quarterly basis. Plaintiff Owners claim that the check-in fee is a "common expense" under § 514B-41 of the HCPA and must be charged proportionately to all units within the Property, instead of on a per unit check-in basis.

Defendants have filed a Counterclaim alleging that Plaintiff Owners have wrongfully withheld payment for the check-in fees in violation of § 514A-90(c)-(d) and § 514B-146(c)-(d) of the HCPA.

Plaintiffs now move for summary judgment as to the claims asserted under the federal Fair Debt Collection Practices Act ("FDCPA") in Count Two of their Complaint. Defendants have filed a Countermotion for summary judgment regarding Plaintiffs' Count Two FDCPA claims as well. For the reasons set forth below, Plaintiffs' Motion for Summary Judgment as to Claims Asserted in Count Two (Doc. 9) is **DENIED** and Defendants' Countermotion as to Claims Asserted in Count Two (Doc. 22) is **GRANTED**.

Plaintiff Owners also move to dismiss Defendants' Counterclaim. Plaintiff Owners argue that: (1) Defendants were required to obtain leave of the Court before filing their Counterclaim, pursuant to Fed. R. Civ. P. 15(a)(2) and failed to do so; and (2) the Court does not have subject matter jurisdiction over Defendants Counterclaim under Fed. R. Civ. P. 12(b)(1). For the reasons set forth below, Plaintiff Owners' Motion for Judgment on the Pleadings (Doc. 11) is **DENIED**.

## PROCEDURAL HISTORY

The procedural history relevant to Plaintiffs' Motion for Summary Judgment (Doc. 9), Motion for Judgment on the Pleadings (Doc. 11), and Defendants' Countermotion for Summary Judgment (Doc. 22) is as follows:

On March 24, 2009, Plaintiffs Robert W. Beckman, Brian R. Cook, William F. Crockett, trustee of the William F. Crockett

"B" Trust, and Gregory Finn (collectively "Plaintiff Owners") filed a complaint in Hawaii State Court, Second Circuit, Case No. 09-1-0234, against Defendants Maalaea Surf Association of Apartment Owners ("the Association") and Asset Property Management, Inc. ("AP Management") (collectively "Defendants").

On April 14, 2009, Defendants filed an Answer to Plaintiff Owners' Complaint.

On April 16, 2009, Defendants removed the action to this Court. ("Complaint," Doc. 1.)

On April 23, 2009, Defendants filed a First Amended Answer to Plaintiff Owners' Complaint and Counterclaim. ("Counterclaim," Doc. 6.)

On April 30, 2009, Plaintiffs filed an Answer to Defendants' Counterclaim. (Doc. 8.)

On May 14, 2009, Plaintiffs filed a Motion for Summary Judgment as to Claims Asserted in Second Count of Complaint. ("Plaintiffs' Motion for Summary Judgment," Doc. 9.) Plaintiffs did not file a separate concise statement of material facts. On the same day, Plaintiffs filed a Motion for Judgment on the Pleadings as to Defendants' Counterclaim. ("Plaintiffs' Motion for Judgment on the Pleadings," Doc. 11.)

On June 19, 2009, Defendants filed a Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Countermotion for Partial Summary Judgment ("Countermotion," Doc.

22.), and a Concise Statement in support of Defendants' Countermotion ("Defendants' Concise Statement," Doc. 23.) On the same day, Defendants filed a Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Pleadings. ("Defendants' Opposition," Doc. 21.)

On June 30, 2009, Plaintiffs filed a Reply in Support of their Motion for Judgment on the Pleadings. ("Plaintiffs' Judgment on the Pleadings Reply," Doc. 26.)

On July 24, 2009, Plaintiffs filed a Reply in Support of Motion for Summary Judgment as to Claims Asserted in Second Count of Complaint, and in Opposition to Defendants' Counter Motion for Partial Summary Judgment. ("Plaintiffs' Summary Judgment Reply," Doc. 30.) On the same day, Plaintiffs filed a Concise Statement of Material Facts in Opposition to Defendants' Counter Motion for Partial Summary Judgment. ("Plaintiffs' Concise Statement," Doc. 31).

On August 7, 2009, Defendants filed a Reply in Support of their Motion for Partial Summary Judgment. ("Defendants' Reply," Doc. 32.)

Pursuant to Local Rule 7.2(d), the Court elected to decide Plaintiffs' Motion for Judgment on the Pleadings, Plaintiffs' Motion for Summary Judgment, and Defendants' Countermotion for Summary Judgment without a hearing. (See Docs. 16, 24.)

**BACKGROUND**

This cause of action arises from a dispute over check-in fees charged by Defendant Maalaea Surf Association of Apartment Owners ("the Association") to the Plaintiff Owners. The Association is a Hawaii non-profit corporation that operates and manages the Maalaea Surf condominium project ("the Property"), located on the Island of Maui. (Counterclaim ¶ 1.) Defendant Asset Property Management, Inc. ("AP Management") is a Hawaii corporation that acts as the managing agent for the Property pursuant to a Management Agreement. (Compl. ¶¶ 7, 8);(Def's. Concise Statement of Facts, Ex. 1, Doc. 23.)

The Plaintiffs in this case, Robert Beckman, Brian Cook, William Crockett, trustee of the William F. Crockett "B" Trust, and Gregory Finn are owners of condominium units located within the Maalaea Surf community. (Compl. ¶¶ 10-13.)

In Count One of the Complaint, Plaintiff Owners claim the Association's practice of charging a check-in fee based upon the number of transient guests that check in to each owner's unit each quarter is illegal and invalid under the Hawaii Condominium Property Act ("HCPA"), Haw. Rev. Stat. § 514B-41. (Compl. ¶¶ 15-19) Plaintiff Owners contend that the check-in fee is a "common expense" under the HCPA, and as such, should be charged to each owner "in proportion to the common interests appurtenant to their respective units." (Id.)

In Count Two of the Complaint, Plaintiff Owners claim that a resolution adopted by the Association's Board of Directors in August of 2008 ("Application of Payment Resolution") violates the federal Fair Debt Collection Practices Act, 15 U.S.C. § 162 ("FDCPA"). The resolution allows the Association to apply payments made by the Plaintiff Owners for quarterly maintenance fees towards disputed, un-paid check-in fee first, thereby causing the Plaintiff Owners to become delinquent in the payment of their quarterly maintenance fees.

Defendants have filed a Counterclaim against Plaintiffs Crockett and Beckman for unpaid check-in fees and legal fees.[1] (Counterclaim ¶ 12.) Defendants claim that: (1) the Hawaii Condominium Property Act imposes a "pay first, dispute later procedure that requires an owner to first pay the disputed fees before pursuing remedies to dispute them; (2) Plaintiffs Beckman and Crockett have refused to pay the check-in fees; and (3) as a result of this refusal, the Association has "incurred unnecessary legal fees and costs." (Counterclaim ¶¶ 5, 8, 13, 14.)

## LEGAL STANDARDS

### I. Amendment of Answer

Federal Rule of Civil Procedure 15 governs the amendment of pleadings. Under Rule 15(a)(1)(B), "a party may

[1] Plaintiffs Brian Cook and Gregory Finn paid the disputed check-in fees and legal fees.

amend its pleading once as a matter of course within...20 days after serving the pleading." Fed. R. Civ. P. 15(a)(1)(B). Under Rule 15(a)(2), if twenty days have passed since service of the answer, a party may amend its pleading "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2).

**II. Lack of Subject Matter Jurisdiction**

A case is properly dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) when the court lacks the constitutional or statutory power to adjudicate the case. A court may consider extrinsic evidence in a 12(b)(1) motion to dismiss, including:

> affidavits or any other evidence properly before the court .... It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction.

Ass'n of American Medical Colleges v. United States, 217 F.3d 770, 778 (9th Cir. 2000) (citing St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989) (further citations omitted)).

In evaluating a complaint pursuant to a motion to dismiss, the court must presume all factual allegations to be true and draw all reasonable inferences in favor of the non-moving party. Usher v. City of Los Angeles, 828 F.2d 556, 561

(9th Cir. 1987); see Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (the complaint must be liberally construed, giving the plaintiff the benefit of all proper inferences); Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332, 334 (9th Cir. 1990).

Conclusory allegations of law and unwarranted inferences, though, are insufficient to defeat a motion to dismiss. Pareto v. F.D.I.C, 139 F.3d 696, 699 (9th Cir. 1998); In re VeriFone Securities Litigation, 11 F.3d 865, 868 (9th Cir. 1993) (conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim); Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981), cert. denied, 454 U.S. 1031 (1981) (the Court does not "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations"). Additionally, the Court need not accept as true allegations that contradict matters properly subject to judicial notice or allegations contradicting the exhibits attached to the complaint. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

When the motion to dismiss is a factual attack on subject matter jurisdiction, no presumptive truthfulness attaches to plaintiff's allegations. The existence of disputed material facts will not preclude the trial court from evaluating for itself the existence of subject matter jurisdiction in fact.

Thornhill Pub. Co., Inc. v. General Tel. & Electronics Corp., 594 F.2d 730, 733 (C.A.Wash. 1979); Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004), cert. denied, 2005 WL 282138 (May 2, 2005).

The party seeking to invoke the jurisdiction of the Court has the burden of establishing that jurisdiction exists. Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986); Thornhill, 594 F.2d at 733. "[A] Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency," whereupon the plaintiff must "present affidavits or any other evidence necessary to satisfy its burden." St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989) (holding that in a factual attack on subject matter jurisdiction, the Court may accept and evaluate evidence to determine whether jurisdiction exists).

**III. Summary Judgment**

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56©. To defeat summary judgment there must be sufficient evidence that a reasonable jury could return a verdict for the nonmoving party. Nidds v. Schindler Elevator Corp., 113 F.3d 912, 916 (9th Cir. 1997).

The moving party has the initial burden of "identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The moving party, however, has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. The moving party need not produce any evidence at all on matters for which it does not have the burden of proof. Celotex, 477 U.S. at 325. The moving party must show, however, that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. That burden is met by pointing out to the district court that there is an absence of evidence to support the non-moving party's case. Id.

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of probative evidence tending to support its legal theory. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party must present admissible evidence showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted."

Nidds, 113 F.3d at 916 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986)).

The court views the facts in the light most favorable to the non-moving party. State Farm Fire & Casualty Co. v. Martin, 872 F.2d 319, 320 (9th Cir. 1989). Opposition evidence may consist of declarations, admissions, evidence obtained through discovery, and matters judicially noticed. Fed. R. Civ. P. 56©; Celotex, 477 U.S. at 324. The opposing party cannot, however, stand on its pleadings or simply assert that it will be able to discredit the movant's evidence at trial. Fed.R.Civ.P. 56(e); T.W. Elec. Serv., 809 F.2d at 630. The opposing party cannot rest on mere allegations or denials. Fed. R. Civ. P. 56(e); Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 959-60 (9th Cir. 1994). Nor can the opposing party rest on conclusory statements. National Steel Corp. v. Golden Eagle Ins. Co., 121 F.3d 496, 502 (9th Cir. 1997).

## ANALYSIS

### I. Rule 15 of the Federal Rules of Civil Procedure

Plaintiff Owners argue that: (1) under Fed. R. Civ. P. 13, Defendants' Counterclaim is a compulsory counterclaim; and (2) Defendants failed to obtain leave of the Court to amend their Answer and assert the Counterclaim under Rule 13(f) or Rule 15(a)(2).[2]

[2]Plaintiff Owners argue that Defendants improperly amended their Answer to assert a Counterclaim under Rule 15(a), and as a

Rule 13(f) requires leave of the Court to add an omitted compulsory counterclaim only where Rule 15(a) does not allow the amendment as a matter of right. Deutsch v. Health Ins. Plan of Greater New York, 573 F. Supp. 1443, 1445 (S.D.N.Y. 1983) (stating: "the requirements of 13(f) are applicable only when the counterclaim is interposed outside of the 15(a) time periods.") The time frame for amendments to pleadings set out in Federal Rule 15(a)(1) governs the Amended Answer and Counterclaim in this case. Rule 15(a)(1) plainly states that a party may amend its pleading once as a matter of course within 20 days of serving the pleading.

On April 14, 2009, Defendants filed and served their initial Answer. On April 23, 2009, nine days later, Defendants filed and served their Amended Answer. Defendants were within the twenty-day time frame provided for by Rule 15(a)(1). They were not required to obtain leave of the Court to amend the Answer and assert their Counterclaim.

**II. Subject Matter Jurisdiction**

Plaintiff Owners also seek to dismiss Defendants' Counterclaim on the basis that the Court does not have subject matter jurisdiction over the Counterclaim. For the reasons

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result, have brought a Motion for Judgment on the Pleadings. Pursuant to Rule 12(f), the proper vehicle for making such an argument would have been a Motion to Strike Defendants' Counterclaim.

discussed in Section III, infra, Plaintiffs' Motion is denied as moot.

## III. The Federal Fair Debt Collection Practices Act and "Debt Collector" Status

Both Parties claim they are entitled to summary judgment on Count Two of Plaintiff Owners' Complaint, in which Plaintiff Owners claim that the Defendants violated the federal Fair Debt Collection Practices Act.

The federal Fair Debt Collection Practices Act ("FDCPA" or "the Act") prohibits a "debt collector" from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. It "provides a cause of action for consumers who have been exposed to 'abusive debt collection practices by debt collectors.'" Flemming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009). To be liable under the Act a defendant must, therefore, be a "debt collector." Whether the Defendants are "debt collectors" for purposes of the FDCPA is a question of law to be decided by the Court.

### A. The Association is Not a "Debt Collector"

The Act defines a "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of

any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Defendants first argue that the Association is not a "debt collector," as defined by the FDCPA, because the debt at issue is not "owed to another."

In Brooks v. Citibank, 2009 WL 2870046 *1 (9th Cir. 2009)(Slip Copy), the Ninth Circuit Court of Appeals held that Citibank was not a "debt collector" for purposes of the Act. Id. In so holding, the Court found that the Plaintiff's own complaint alleged that Plaintiff "was obligated to Citibank for consumer debt on a credit card account maintained by Citibank," making it clear that Citibank [was] a creditor, not a debt collector" for purposes of the Act. Id. Citing the Act's legislative history, the Court also stated that "'unlike creditors, who generally are unrestrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them.'" Id. (Quoting S. Rep. No. 95-382 at *3); See also Caron v. Charles E. Maxwell, P.C., 48 F. Supp. 2d 932, 936 (D. Ariz. 1999) (holding that a homeowner's association was not a "debt collector" within the meaning of the FDCPA and could not be held vicariously liable for its attorney's alleged FDCPA violations); Wadlington v. Credit Acceptance Corp., 76 F.3d 103, 108 (6th Cir. 1996) (holding that the FDCPA imposes liability only on a debt collector, not on non-

debt collectors, such as a consumer's creditors).

The same principles apply in this case. Here, as was the case in Brooks v. Citibank, Plaintiff Owners owe the alleged debt at issue directly to the Association. The Association is not attempting to collect a debt "owed to another" as required by the plain language of the Act, nor is the Defendant Association an independent collector with whom Plaintiff Owners are unlikely to have no future contact. See, infra, Berndt v. Fairfield Resorts, Inc., 339 F. Supp. 2d 1064, 1067-68 (W.D. Wis. 2004) (noting that "FDCPA is 'aimed at debt collectors who may have no future contact with the consumer and often are unconcerned with the consumer's opinion of them,'" and holding that condominium managing agent was more like a "creditor" than a "debt collector" under the Act.) Plaintiff Owners have had repeated and ongoing contact with the Association, and they owe the debt at issue directly to the Association. The Court, therefore, finds that the Association is not a "debt collector" within the meaning of the FDCPA.

**B. Asset Property Management is Not a "Debt Collector"**

Defendants further argue that Defendant AP Management is not a "debt collector" because it is exempt under § 1692a(6)(F)(I) and (iii) of the Act. The FDCPA excludes the following persons or entities from the Act's definition of "debt collector:"

any person collecting or attempting to collect any debt

> owed or due or asserted to be owed or due another to the extent such activity (I) **is incidental to a bona fide fiduciary obligation** or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; [or] (iii) **concerns a debt which was not in default at the time it was obtained by such person**. 15 U.S.C. § 1692a(6)(F)(I)-(iii) (emphasis added).

**1. Incidental to a Bona Fide Fiduciary Obligation**

In Rowe v. Educ. Credit Mgmt. Corp., the Ninth Circuit Court of Appeals interpreted the Act's fiduciary obligation exception and held that a student loan guaranty agency, whose debt collection practices were challenged by the plaintiff student loan borrower, was not exempt under § 1692a(6)(F)(I) of the Act. Rowe v. Educ. Credit Mgmt. Corp., 559 F.3d 1028, 1031-1035 (9th cir. 2009). According to the appellate court, "two requirements must be satisfied for an entity to come within the fiduciary obligation exception to the FDCPA. First, the entity must have a 'fiduciary obligation.' Second, the entity's collection activity must be 'incidental to' its 'fiduciary obligation.'" Id. at 1031-1032.

Regarding the first requirement, because the FDCPA does not define "fiduciary obligation," the court applied the definition of "fiduciary" as set forth in Black's Law Dictionary. The court found that the defendant guaranty agency owed a fiduciary obligation to the Department of Education ("DOE"), because: (1) the defendant was acting in the interest of the DOE in administering student loans under the Federal Family Education

Loan Program ("FFELP"); and (2) detailed FFELP regulations governed the relationship between the defendant and the DOE and described it as a fiduciary relationship. Id. at 1033-34.

Regarding the second requirement, the court held that "'incidental to' means that the collection activity must not be 'central to' the fiduciary relationship." Id. at 1034. The purpose of this requirement, according to the court, "is to exclude fiduciaries whose sole or primary function is to collect a debt on behalf of the entity to whom the fiduciary obligation is owed." Id. Ultimately, the court found that although the collection of defaulted debts by a guaranty agency is generally "incidental to" the guaranty agency's primary function, the defendant guaranty agency in Rowe was not the guarantor of plaintiff's loan. Id. at 1035. Rather, its primary role was to act "as a collector of the debt guaranteed" by another guaranty agency. The court, therefore, held that the agency's collection activity was not "incidental to" the agency's fiduciary duty to the Department of Education and the fiduciary obligation exception did not apply. Id.

In Berndt v. Fairfield Resorts, Inc., 339 F. Supp. 2d 1064, 1066-69 (W.D. Wis. 2004), the U.S. District Court for the District of Wisconsin found that defendant Fairfield Resorts, Inc., who purchased a company that managed a timeshare condominium property, was not a "debt collector" under the FDCPA. Id. The condominium Owners Association in this case entered into

a management agreement with Peppertree Resorts Management, Inc., which, through a series of transactions, was purchased by the defendant. Id. at 1065. In the management agreement, the owner's association gave Peppertree Resorts Management, Inc. the authority to collect maintenance fees on its behalf. Id. at 1066. Plaintiffs brought suit against the defendant under the FDCPA, claiming that the defendant's actions in sending them letters stating that plaintiffs owed maintenance fees to the association violated the FDCPA. Id. at 1065.

The district court first concluded that the defendant had inherited the right to collect maintenance fees on behalf of the association when it purchased the company that managed the condominium property. Id. at 1066. The court then turned to the FDCPA's fiduciary obligation exception, stating that "[i]f defendant had the right to collect maintenance fees on behalf of the Association, then it follows that its collection activity was incidental to a bona fide fiduciary obligation under the terms of the Timeshare Management Agreement." Id.

In this case, the Court finds that Defendant AP Management has a fiduciary obligation to the Association. A fiduciary is "one who must exercise a high standard of care in managing another's money of property." Black's Law Dictionary (8th ed. 2004.) Here, as was the case in Berndt, AP Management acts as the managing agent for the Association pursuant to a detailed Management Agreement ("Management Agreement" or "the

Agreement"). (Def's. Concise Statement of Facts, Ex. 1, Doc. 23.)

Regarding the "incidental to" requirement of the fiduciary obligation exception, the Court further finds that the collection of maintenance fees is "incidental to" AP Management's fiduciary obligation to manage the Property. AP Management is charged with numerous duties and responsibilities under the Management Agreement. These include but are not limited to: (1) maintaining a record of all income and expenses related to the Property; (2) preparing an annual budget; (3) maintaining the common elements of the Property; (4) negotiating various utility-related services contracts; and (5) collecting "all monthly and other assessments and fees that are due the Association with respect to the Property." (Id.) In light of the numerous duties and responsibilities AP Management is obligated to perform under the Agreement, the collection of assessments and fees is "incidental to" AP Management's overall fiduciary obligation to manage the Property. AP Management is, therefore, exempt from "debt collector" status under the fiduciary obligation exception of the FDCPA. § 1692a(6)(F)(I).

**2. Debt Not in Default**

Even if AP management were not exempt under the fiduciary obligation exception, section 1692a(6)(F)(iii) of the FDCPA further exempts from "debt collector" status those attempting to collect a debt "which was not in default at the

time it was obtained by such person." In Berndt v. Fairfield Resorts, Inc., supra, 339 F. Supp. 2d at 1066, the district court found that if the defendant in that case "had the right to collect maintenance fees on behalf of the Association, the undisputed evidence supports the conclusion that the debt that defendant was trying to collect was not in default and defendant is not a debt collector under 15 U.S.C. § 1692a(6)(F)(iii)."

The Court agrees with the reasoning in Berndt. Here, AP Management had the right to collect maintenance fees on behalf of the Association pursuant to the Management Agreement. The assessments were not in default at the time AP Management began billing the Plaintiff Owners. (Def's. Reply in Supp. of Countermotion at p. 11, Doc. 32.) Rather, AP Management billed Plaintiff Owners as soon as the maintenance fees and assessments became due. This is further supported by the Management Agreement, which expressly states that AP Management "shall have no pre-authority or responsibility to collect delinquent assessments and fees or other charges." (Def's. Concise Statement of Facts, Ex. 1 at ¶ 2.1, Doc. 23.) AP Management is, therefore, exempt from "debt collector" status under § 1692a(6)(F)(iii), because the debt at issue was not in default at the time AP Management began billing Plaintiff Owners.

**IV. Remand to State Court**

A district court has the discretion to remand a removed

case when: (1) all federal claims have been dismissed and all that remains are state law claims; and (2) the district court determines that retaining jurisdiction over the case would be inappropriate. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988). In exercising this discretion, district courts are to consider "principles of economy, convenience, fairness and comity." Id. At 357.

In this case, the remaining claim and counterclaim are state law claims brought pursuant to the Hawaii Condominium Property Act ("HCPA"), Haw. Rev. Stat. § 514B-41. Plaintiffs claim that Defendants violated § 514B-41 of the HCPA by charging the disputed check-in fee. Defendants claim that Plaintiffs violated §§ 514A-90(c)-(d) and 514B-146(c)-(d) by refusing to pay the check-in fee. These claims strictly involve matters of state law interpretation, and principles of comity weigh heavily in favor of remand. The Court further notes that the case is still in its infancy, the complaint having just been filed on March 24th of 2009, and that remanding the case will cause no prejudice, inconvenience or unfairness to the Parties. The Court, therefore, finds that retaining jurisdiction would be inappropriate and remands the case to Hawaii State Court.

**CONCLUSION**

The Defendants properly amended their Answer within the time frame required by Rule 15 and the remainder of Plaintiffs'

Motion for Judgment on the Pleadings is moot. Plaintiffs' Motion for Judgment on the Pleadings (Doc. 11) is **DENIED**.

The Defendants are not "debt collectors" under the FDCPA. Plaintiffs' Motion for Summary Judgment as to Claims Asserted in Second Count of Complaint is **DENIED** (Doc. 9). Defendants' Motion for Summary Judgment as to Claims Asserted in Second Count of Complaint (Doc. 22) is **GRANTED.**

The Court further **REMANDS** the case to Hawaii State Court.

IT IS SO ORDERED.

Dated: October 29, 2009, Honolulu, Hawaii.

/S/ Helen Gillmor

Helen Gillmor
United States District Judge