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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

**DELTA MECHANICAL INC.,**  
**Plaintiff,**  
**vs.**  
**GARDEN CITY GROUP, INC., et al.,**  
**Defendants.**

**2:06-cv-01095 JWS**  
**ORDER AND OPINION**  
**[Re: Motions at Dockets 125 and 127]**

**I. MOTIONS PRESENTED**

At docket 125, defendants Rheem Manufacturing Company, American Water Heater Company, Bradford White Corporation, A.O. Smith Corporation, and Lochnivar Corporation (collectively “defendants”) move pursuant to Federal Rule of Civil Procedure 56 for summary judgment. Plaintiff Delta Mechanical, Inc. (“Delta”) opposes the motion at docket 130. Defendants’ reply is at docket 133.

At docket 127, Delta cross-moves for partial summary judgment on the issue of whether it was an intended third-party beneficiary of the settlement agreement on which its claims are based. Defendants oppose the motion at docket 132. Delta’s reply is at docket 136.

Oral argument was requested and was heard on January 11, 2012.

1 **II. BACKGROUND**

2 Defendants manufacture water heater tanks. Delta is a plumbing company. In  
3 *Heilman v. Perfection Corp.*,<sup>1</sup> a class action lawsuit against defendants, the United  
4 States District Court for the Western District of Missouri approved a settlement  
5 agreement by which defendants agreed to facilitate the repair of defective water heaters  
6 that they had manufactured.

7 The settlement agreement defined the class as “all persons throughout the  
8 United States who own a water heater manufactured by [defendants] containing a [dip  
9 tube manufactured by Perfection Corporation] or who owned such a heater and suffered  
10 damages.”<sup>2</sup> Under Section 8.2 of the agreement, members of the class who had not yet  
11 incurred out-of-pocket expenses related to the faulty dip tubes or whose problems had  
12 not yet been fully repaired were entitled to either a certificate for a dip tube replacement  
13 or a repair of property damage or both.<sup>3</sup> Class members who timely submitted a proof  
14 of claim would receive a certificate matched to the serial number of their water heater  
15 entitling them to a dip tube replacement. The certificates had to be redeemed within six  
16 months of their receipt. The agreement stated that “[t]he names of authorized service  
17 personnel who [would] be available to provide the service [would] be provided with the  
18 certificate.”<sup>4</sup> Defendants agreed to “ensure that adequate and trained service personnel  
19 [would be] available to provide the service to Class Members in a timely manner.”<sup>5</sup> In  
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22 <sup>1</sup>No. 99-0679-CW-W-6 (May 1, 2000 W.D. Mo.).

23 <sup>2</sup>Doc. 126-2 at 14; see also *id.* at 13 (defining “Subject Dip Tube” as “all dip tubes  
24 manufactured . . . by Perfection between August 1993 and October 1996 that were installed into  
25 [defendants’] water heaters”). A dip tube is a “plastic tube that transports cold water from the  
intake at the top of the water heater to the bottom of the water heater tank.” *Id.* at 10.

26 <sup>3</sup>*Id.* at 15.

27 <sup>4</sup>*Id.* at 16.

28 <sup>5</sup>*Id.*

1 order to receive benefits under Section 8.2., proofs of claim had to be postmarked by  
2 December 31, 2000.

3 Delta was among the “authorized service personnel” enlisted to perform dip tube  
4 replacements. Delta maintains that it performed hundreds of dip tube replacements  
5 between January 2000 and December 2001 for class members who had submitted  
6 proofs of claim. However, defendants did not issue certificates to those class members.  
7 Presumably because certificates were not issued, Delta was not compensated for that  
8 work.

9 Delta hired a collection agency in December 2001 to seek payment from  
10 defendants. In August 2003, defendants informed Delta that the settlement fund had  
11 been exhausted. Delta subsequently moved to intervene in the Missouri action to  
12 enforce the settlement agreement. In September 2005, the Western District of Missouri  
13 denied Delta’s motion.

14 In March 2006, defendants filed this lawsuit in Arizona state court, asserting  
15 claims against defendants and the administrator of the settlement agreement<sup>6</sup> for  
16 breach of contract, breach of the implied covenant of good faith and fair dealing, unjust  
17 enrichment, and promissory estoppel. The case was removed to federal court on the  
18 basis of diversity.

19 In June 2007, the court dismissed Delta’s promissory estoppel and unjust  
20 enrichment claims as barred by the applicable statutes of limitation. In a separate  
21 order, following supplemental briefing that applied Missouri law, the court dismissed  
22 Delta’s breach-of-contract and breach of the implied covenant of good faith and fair  
23 dealing claims, holding that Delta was not an intended third-party beneficiary of the  
24 *Heilman* settlement agreement.<sup>7</sup> The Ninth Circuit Court of Appeals reversed the  
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26 <sup>6</sup>Garden City Group, Inc. was the third-party administrator of the settlement agreement.  
27 It was dismissed as a defendant to this lawsuit. See doc. 48.

28 <sup>7</sup>Doc. 48.

1 court's determination and stated that "[t]he evidentiary record on this issue  
2 demonstrates that at this early stage of the case . . . whether Delta was or was not a  
3 third-party beneficiary is a genuine issue of material fact that might survive summary  
4 judgment."<sup>8</sup>

### 5 III. STANDARD OF REVIEW

6 Summary judgment is appropriate where "there is no genuine dispute as to any  
7 material fact and the movant is entitled to judgment as a matter of law."<sup>9</sup> The materiality  
8 requirement ensures that "only disputes over facts that might affect the outcome of the  
9 suit under the governing law will properly preclude the entry of summary judgment."<sup>10</sup>  
10 Ultimately, "summary judgment will not lie if the . . . evidence is such that a reasonable  
11 jury could return a verdict for the nonmoving party."<sup>11</sup> In resolving a motion for summary  
12 judgment, a court must view the evidence in the light most favorable to the non-moving  
13 party.<sup>12</sup> The reviewing court may not weigh evidence or assess the credibility of  
14 witnesses.<sup>13</sup> The burden of persuasion is on the moving party.<sup>14</sup>

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21 <sup>8</sup>Doc. 66-1 at 2–3.

22 <sup>9</sup>Fed. R. Civ. P. 56(a).

23 <sup>10</sup>*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

24 <sup>11</sup>*Id.*

25 <sup>12</sup>*Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000).

26 <sup>13</sup>*Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1036 (9th Cir. 2005).

27 <sup>14</sup>*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

1 **IV. DISCUSSION**

2 Third-party beneficiary status exists where the terms of a contract “clearly  
3 express intent to benefit [a third] party or an identifiable class of which the [third] party is  
4 a member.”<sup>15</sup> “In cases where the contract lacks an express declaration of that intent,  
5 there is a strong presumption that the third party is not a beneficiary and that the parties  
6 contracted to benefit only themselves.”<sup>16</sup> “[A] mere incidental benefit to the third party is  
7 insufficient to bind that party.”<sup>17</sup> “Third party beneficiary status depends not so much on  
8 a desire or purpose to confer a benefit on the third person, but rather on an intent that  
9 the promisor assume a direct obligation to him.”<sup>18</sup> “In order for third party beneficiary  
10 status to arise, it must be shown that the benefit to the third party was the cause of the  
11 creation of the contract.”<sup>19</sup> “Only those third parties for whose primary benefit the  
12 contracting parties intended to make the contract may maintain an action.”<sup>20</sup>

13 The settlement agreement does not expressly declare an intent to benefit the  
14 authorized service personnel.<sup>21</sup> The court therefore starts with the presumption that  
15 Delta is not an intended third-party beneficiary.

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19 <sup>15</sup>*Nitro Distrib., Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. 2006).

20 <sup>16</sup>*Id.*

21 <sup>17</sup>*Id.*

22 <sup>18</sup>*Chesus v. Watts*, 967 S.W.2d 97, 106 (Mo. Ct. App. 1998).

23 <sup>19</sup>*Chmielski v. City Products Corp.*, 660 S.W.2d 275, 289 (Mo. Ct. App. 1983).

24 <sup>20</sup>*OFW Corp. v. City of Columbia*, 893 S.W.2d 876, 879 (Mo. Ct. App. 1995).

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26 <sup>21</sup>Delta does not argue otherwise. Delta distinguishes certain authority cited by  
27 defendants on the ground that “it is beyond dispute that the [settlement agreement] contains  
28 several references to the class of approved plumbers/authorized service personnel.” Doc. 130  
at 6. Those references do not include an express declaration of intent to benefit the authorized  
service personnel.

1 **A. Defendants’ Motion**

2 **1. Delta’s Breach-of-Contract Claim**

3 Defendants argue first that the contract clearly expresses an intent to benefit the  
4 class members. Defendants note that the contract states the parties’ conclusion “that it  
5 is in the best interests of the Class to enter into th[e] Agreement to avoid the  
6 uncertainties of litigation and to assure a timely benefit to all members of the Class.”<sup>22</sup>  
7 The court agrees that the contract expresses an intent to benefit the members of the  
8 class. Although that intent does not preclude intent to also benefit the service personnel  
9 who would be performing the work, it undermines the notion that a benefit to service  
10 personnel was a motivating factor underlying the settlement agreement.

11 Defendants also argue that the service personnel are not identifiable until a class  
12 member obtains a certificate and selects a plumber from the list of adequate and trained  
13 service personnel. The primary question under Missouri law is whether defendants  
14 intended to assume a *direct obligation* to the class of service personnel. Here, any  
15 obligation assumed by defendants was *indirect* and *conditional*. There was no  
16 obligation running from defendants to Delta—or any other authorized service  
17 personnel—until a class member submitted a proof of claim, obtained a certificate, and  
18 selected Delta from the provided list.<sup>23</sup>

19 As stated above, “[o]nly those third parties for whose *primary benefit* the  
20 contracting parties intended to make the contract may maintain an action.”<sup>24</sup> “[I]t is not  
21 necessary for the parties to the contract to have as their ‘primary object’ the goal of  
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24 <sup>22</sup>Doc. 126-2 at 14.

25 <sup>23</sup>Doc. 126-2 at 16. The settlement agreement stated that “[u]pon submission of a timely  
26 and valid Proof of Claim . . . a certificate for a dip tube replacement” would be issued. *Id.* “The  
27 names of authorized service personnel who [would] be available to provide the service” would  
be included with the certificate. *Id.*

28 <sup>24</sup>*OFW Corp.*, 893 S.W.2d at 879 (emphasis added).

1 benefitting the third parties, but only that the third parties be primary beneficiaries.”<sup>25</sup> It  
2 does not make sense to grant a right to maintain an action on a contract to a third party  
3 where the assumed “obligation” running to the third party is conditional on something  
4 beyond and in addition to that party’s performance.

5 Defendants raise a similar argument based on the proposition that third party  
6 beneficiaries “have no greater rights under [a] contract than . . . a party to the  
7 agreement.”<sup>26</sup> Defendants argue that allowing Delta to sue for breach of contract based  
8 on repairs that were not submitted or approved and where no certificate issued would  
9 give them greater rights under the settlement agreement than the class members who  
10 were bound to follow the claim procedure.

11 Delta’s primary argument in response to defendants’ motion is that the contract  
12 and various extrinsic evidence demonstrate that defendants assumed “a direct  
13 obligation to pay the class of approved plumbers for the dip tube repairs.”<sup>27</sup> It is evident  
14 from both the contract and extrinsic evidence that defendants agreed to pay for the dip  
15 tube replacements. However, defendants’ obligation to pay for the repairs does not give  
16 rise to third-party beneficiary status because their obligation to pay was conditional and  
17 attenuated. Payment was conditioned on class members submitting a proof claim,  
18 issuance of a certificate, and selection of a plumber from the list of authorized service  
19 personnel that accompanied the certificate. Even in the light most favorable to Delta,  
20 there was no obligation running from defendants to the authorized service personnel  
21 until those conditions were fulfilled, and those conditions were not promised  
22 performance under the settlement agreement. Defendants’ potential obligation to  
23 compensate authorized service personnel for the dip tube replacements is not sufficient  
24 to confer third-party beneficiary status.

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26 <sup>25</sup>*Andes v. Albano*, 853 S.W.2d 936, 942 (Mo. 1993).

27 <sup>26</sup>*Laclede Inv. Corp. v. Kaiser*, 541 S.W.2d 330, 338 (Mo. Ct. App. 1976).

28 <sup>27</sup>Doc. 130 at 2–3.

1 The court’s conclusion is bolstered by the “Protocols, Procedures & Processes  
2 for Replacing Consumer Dip Tubes” manual and application to perform the dip tube  
3 replacement work.<sup>28</sup> That manual, signed by Delta’s general manager, describes the  
4 claims procedure and issuance of the certificate as contemplated in the settlement  
5 agreement. It also describes payment to the authorized service personnel. The manual  
6 states that “approved plumbing professional[s] [would] be paid by check within 30 days  
7 of receipt of the dip tube *and properly completed Certificate.*”<sup>29</sup> “Approved plumbing  
8 professionals [were to] be assigned a vendor number and [would] receive instructions  
9 for completing the Certificates.”<sup>30</sup> The manual thus reinforces the proposition that there  
10 was no direct obligation to the authorized service personnel sufficient to give rise to  
11 third-party beneficiary status.

12 Delta argues that the issue of whether it complied with the terms of the  
13 settlement agreement—particularly the procedural terms—is separate and distinct from  
14 the issue of whether authorized service personnel were intended beneficiaries under the  
15 agreement. Delta is correct that the two issues are distinct, and also correct that  
16 whether the authorized service personnel are third-party beneficiaries “is a function of  
17 the parties’ intent.”<sup>31</sup> Compliance or non-compliance with the procedural terms requiring  
18 submission of a proof of claim and issuance of a certificate might not affect third-party  
19 beneficiary status in the abstract. However, those terms bear on the present motion  
20 because they reflect the conditional nature of the obligation that ran from defendants to  
21 the authorized service personnel. As discussed above, a potential obligation to  
22 compensate the authorized service personnel for dip tube replacements is insufficient to  
23 give rise to third-party beneficiary status. Because there was no assurance that the

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25 <sup>28</sup>See doc. 128-13 at 2.

26 <sup>29</sup>Doc. 128-13 at 3 (emphasis added).

27 <sup>30</sup>*Id.*

28 <sup>31</sup>Doc. 130 at 11.



1 benefit would flow, the authorized service personnel cannot be considered primary  
2 beneficiaries.

3 Delta also argues that defendants did not support their claim that Delta's  
4 customers did not submit a valid proof of claim, that replacement certificates were not  
5 issued or returned, and that class members did not select Delta from an approved list.  
6 Those disputed facts would weigh on potential breach and do not affect analysis of the  
7 third-party beneficiary issue. Delta's argument that those disputed facts should  
8 preclude summary judgment only holds if it has standing to enforce the contract as a  
9 third-party beneficiary. The court has concluded that it does not.

## 10 **2. Delta's Breach of the Implied Covenant of Good Faith & Fair Dealing** 11 **Claim**

12 "In Missouri, a covenant of good faith and fair dealing is implied in every  
13 contract." It functions to "prevent[] one party from acting in a manner that evades the  
14 spirit of the transaction or that denies the other party the expected benefit of the  
15 contract."<sup>32</sup> Because Delta is neither a party to the settlement agreement, nor a third-  
16 party beneficiary thereunder, it does not have standing to enforce the implied covenant  
17 of good faith and fair dealing.

## 18 **B. Delta's Cross-Motion**

19 Delta frames the issue in its cross-motion for summary judgment as whether  
20 defendants intended to pay for the dip tube replacements. The court agrees that Delta  
21 is a member of the class of authorized service personnel and that authorized service  
22 personnel were to perform the repairs.

23 Delta points to Section 8.3.1 which states that defendants "are to . . . bear all  
24 administrative costs."<sup>33</sup> "Administrative expenses" are defined elsewhere in the  
25 agreement to include "disbursements to approved third-party vendors in connection with  
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27 <sup>32</sup>*Edoho v. Bd. of Curators*, 344 S.W.3d 794, 799 (Mo. Ct. App. 2011).

28 <sup>33</sup>Doc. 126-2 at 16.

1 the carrying out of the terms of the Settlement Agreement.”<sup>34</sup> However, while that  
2 language supports the notion that defendants assumed an obligation to Delta—as a  
3 third-party vendor—Missouri law requires that there be a “direct obligation.”<sup>35</sup> Other  
4 sections of the contract make clear that defendants had no obligation to authorized  
5 service personnel unless protocol was followed and a class member selected it to  
6 perform the dip tube replacement. The procedures set out in the settlement agreement  
7 functioned as a condition on defendants’ obligation. Because the benefit to authorized  
8 service personnel was conditional and attenuated, the authorized service personnel are  
9 not third-party beneficiaries under Missouri law.

10 Delta cites *Kansas City N.O. Nelson Co. v. Mid-Western Constr. Co.*<sup>36</sup> In that  
11 case, the Missouri Court of Appeals determined that a third-party supplier to a sub-  
12 subcontractor was an intended third-party beneficiary of a contract between the general  
13 contractor and the subcontractor. The subcontract between the general contractor and  
14 the subcontractor contained a promise that the subcontractor would pay for all  
15 materials.<sup>37</sup> The court concluded that the supplier was a donee beneficiary of the  
16 subcontract. Delta analogizes the subcontractor’s promise to pay for materials to  
17 defendants’ promise to pay for dip tube replacements.

18 “A person is a donee beneficiary if the purpose of the promisee in obtaining the  
19 promise of all or part of the performance thereof is to make a gift to the beneficiary or to  
20 confer upon him a right against the promisor to some performance neither due nor  
21 supposed nor asserted to be due from the promisee to the beneficiary.”<sup>38</sup> Therefore,  
22 under *Kansas City*, the questions are whether the class members obtained the promise

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24 <sup>34</sup>*Id.* at 9.

25 <sup>35</sup>*Chesus*, 967 S.W.2d at 106.

26 <sup>36</sup>782 S.W.2d 672 (Mo. Ct. App. 1989).

27 <sup>37</sup>*Id.* at 673–74.

28 <sup>38</sup>*Id.* at 677.

1 that defendants would pay for repairs in order to make a gift to the authorized service  
2 personnel, or to confer a right on the authorized service personnel against defendants  
3 to some performance not asserted to be due from the class members to the authorized  
4 service personnel. Payment to the authorized service providers for the dip tube  
5 replacements would have compensated the authorized service providers for work  
6 performed and therefore would not have been a gift. The court is unaware of any  
7 potential performance between the class members and the authorized service  
8 personnel that could have motivated defendants' promise to pay for the dip tube  
9 replacements. Consequently, *Kansas City* does not compel the conclusion that Delta is  
10 a third-party beneficiary to the settlement agreement.

11 Delta argues that defendants' admissions establish that Delta was an intended  
12 third-party beneficiary. All of the "admissions" cited by Delta, however, establish at  
13 most that defendants intended to pay for the dip tube replacements.<sup>39</sup> As discussed  
14 above, that intended benefit did not give rise to third-party beneficiary status.

#### 15 V. CONCLUSION

16 For the reasons above, defendants' motion for summary judgment at docket 125  
17 is **GRANTED**. The Clerk shall please enter judgment for defendants.

18 Delta's motion for partial summary judgment at docket 127 is **DENIED**.

19 DATED this 11th day of January 2012.

20  
21 \_\_\_\_\_/s/  
JOHN W. SEDWICK  
22 UNITED STATES DISTRICT JUDGE

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<sup>39</sup>See doc. 127 at 11–16.