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**IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA**

Delta Mechanical, Inc., an Arizona corporation,

 Plaintiff,

vs.

The Garden City Group, Inc., a New York corporation; Rheem Manufacturing Company, a Delaware corporation; American Water Heater Company, a Nevada corporation; Bradford White Corporation, a Delaware corporation, A. O. Smith Corporation, a Delaware corporation; State Industries, Inc., a Tennessee corporation, and Lochinvar Corporation, a Tennessee corporation,

Defendants.

No.: CV06-1095-PHX-JWS

**DEFENDANTS' MOTION TO DISMISS
 THE REMAINING CLAIMS OF BREACH
 OF CONTRACT AND BREACH OF THE
 COVENANT OF GOOD FAITH AND FAIR
 DEALING**

(Oral Argument Requested)

(Assigned to: Hon. John W. Sedgwick)

Under Missouri law, Plaintiff (“Delta”), a plumbing company, is not a third-party beneficiary of the *Heilman* settlement agreement. The Agreement does not indicate that either party intended that plumbers would be the primary-intended beneficiaries and there is no indication that either party intended to give rights to plumbers to enforce the Agreement. As an incidental beneficiary, plumbers, including Delta, have no right to enforce the contract and cannot maintain an action for breach of contract or bad faith. Thus, Defendants ask this Court to: 1) find that as a matter-of-law Delta is not a third-party beneficiary, and thus is not entitled to enforce the Agreement, and 2) dismiss this matter because Delta failed to state a claim upon which relief can be granted.

MEMORANDUM OF POINTS AND AUTHORITIES

I. RECENT PROCEDURE AND FACTS:

This Court's Order dismissed Delta's claims for promissory estoppel and unjust enrichment. (Order of 6/8/07 at 13.) The Court denied Defendants' motions to dismiss as to Delta's claims of breach of contract and breach of the covenant of good faith and fair dealing, finding that Missouri law applies to those claims. (Id.) Neither party discussed Missouri law in the briefing of the original Motion to Dismiss. Defendants now seek to dismiss Delta's remaining two claims of breach of contract and breach of the covenant of good faith and fair dealing, based upon an analysis of Missouri's law regarding third-party beneficiaries.

The pertinent facts are: In 1999, consumers who purchased water heaters manufactured by the Defendants, other than Garden City Group, ("the Water Tank Defendants") filed a class action suit asserting that there was a defect in dip tubes manufactured by Perfection Corporation and installed by the Water Tank Defendants. (Exh. A, Settlement Agreement of 9/10/99 ¶1, Recitals ¶2, §1.1.) Two of the parties to the class-action suit, the consumer-class members and the Water Tank Defendants, executed a settlement agreement on September 10, 1999 ("the Agreement"). (Exh. A.) The Water Tank Defendants and the consumer-class members were the only parties to the Agreement. (Ex. A ¶1.) Sometime after the court approved the Agreement, the Water Tank Defendants, through the Garden City Group ("the Administrator"), began to identify plumbers who might be eligible to perform services for the beneficiaries of the agreement, the consumer class. (See Exh. A §8.2.3.)

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II. LEGAL ARGUMENTS:

1. THE FACTS ALLEGED ARE SUFFICIENT TO DETERMINE THAT DELTA'S THIRD-PARTY BENEFICIARY THEORY IS FATALLY FLAWED.

This Rule 12(b)(6) motion tests the legal sufficiency of Delta's claims of breach of contract and breach of the covenant of good faith and fair dealing. When reviewing a 12(b)(6) motion, the court considers all allegations of material fact in the complaint to be true and construes the facts in the light most favorable to the nonmoving party. *Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997). Not every conclusion asserted in a complaint must be accepted, rather the court examines whether conclusory allegations follow from Plaintiff's description of the alleged facts. *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992) (quoting *Brian Clewer, Inc. v. Pan Am. World Airways, Inc.*, 674 F. Supp. 782, 785 (C.D. Cal. 1986)). Dismissal is warranted where the "plaintiff has included sufficient allegations disclosing some absolute defense or bar to recovery." *Hearn v. R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096, 1102 (9th Cir. 2003) (citing *Weishbuch v. County of Los Angeles*, 119 F.3d 778 (9th Cir. 1997)). Motions to dismiss are appropriately granted where there is a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory" or the complaint is "fatally flawed in [its] legal premises and destined to fail . . ." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990); *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993). Delta's remaining claims fail because assuming all allegations of material facts in Delta's Amended Complaint, its premise that it is a third-party beneficiary remains fatally flawed.

2. DELTA MECHANICAL WAS NOT AN INTENDED THIRD PARTY BENEFICIARY TO THE AGREEMENT.

Delta's remaining claims fail because Delta was not a party to the Agreement, nor was Delta an intended third-party beneficiary of that Agreement. Ordinarily, obligations arising out of

a contract cannot be enforced by persons who are not parties to it or in privity with it.” *Kansas City v. Milrey Development Co.*, 600 S.W. 2d 660, 664 (Mo. App. 1980)). Because Delta is not a party to the Agreement, any right it may have to enforce the Agreement and seek damages depends upon its claim that it is a third-party beneficiary. (Exh. B, Am. Compl. ¶31); *Volume Serv., Inc. v. C.F. Murphy & Assoc., Inc.*, 656 S.W. 2d 785, 794 (Mo. App. 1983).

For a third party to maintain an action upon a contract, the contracting parties must have intended to make the third party the primary beneficiary of the contract. *Kansas City N.O. Nelson Co. v. Mid-Western Constr. Co. of MO*, 782 S.W. 2d 672, 677 (Mo. App. 1989) (citing *Laclede Inv. Corp. v. Kaiser*, 596 S.W. 2d 36, 41 (Mo. App. 1980)). The intention of the parties is to be gleaned from the four corners of the contract, and if uncertain or ambiguous, from the circumstances surrounding its execution. *Id.*

A review of the contract language indicates the parties had no intent to benefit plumbers, but instead to pay for replacement of an allegedly faulty part for the benefit of the water-heater customers. The intent to benefit all members of the consumer class is plainly and unambiguously stated in the Agreement: the Agreement was entered to “assure a timely benefit to all members of the [consumer] Class.” (Exh. A §6.) The plumbers -- a group tellingly labeled in the Agreement as “authorized service personnel”, which later included Delta -- act as conduits for the benefit the Water Tank Defendants provided to the consumer class. The authorized service personnel are mentioned in the contract to ensure proper replacement of the allegedly faulty dip tube: “Settling Defendants shall ensure that adequate and trained service personnel are available to provide service to Class Members in a timely manner.” (Exh. A §8.2.3.) The Agreement does not indicate that the parties intended to confer a benefit upon Delta or any other plumber or to confer upon Delta or any other plumber the right to enforce the Agreement. (Exh. A.)

In the absence of an express declaration of intent to benefit a third party, “there is a strong presumption that the parties contracted only for themselves and not for the benefit of others.” *State ex. rel. E.A. Martin Mach. Co., vs. Line One, Inc.*, 111 SW3d 924, 931 (Mo. App. 2003). If the primary beneficiary of the contract is not the third party, that party may not maintain an action on the contract. *Id.* (citing *OFW Corp. v. City of Columbia, MO*, 893 S.W.2d 876, 879 (Mo. App. 1995)). “A mere desire to confer a benefit on a third party or to advance his interests or promote his welfare is not sufficient to confer the ability to enforce the contract.” *Hardware Ctr., Inc. v. Parkedge Corp.*, 618 S.W. 2d 689, 693 (Mo. App. 1981)). “The intent that must be proven is “*an intent that the promisor assume a direct obligation to (the third-party beneficiary).*” *Teter v. Trans. Indem. Co.*, 650 S.W. 2d 277, 282 (Mo.App. 1982)(citing *Stephens v. Great S. Sav. & Loan Ass’n.*, 421 S.W. 2d 332, 335 (Mo.App. 1967) (emphasis added) and *Hardware Ctr., Inc.* 618 S.W. 2d at 693.))

The language of the Agreement manifests the Water Tank Defendant’s desire to benefit the consumer class by replacing the dip tubes in their water heaters, in exchange for ending the *Heilman* litigation. (Exh. A §6.) The Agreement does not indicate the parties intended to assume a direct obligation to Delta or other plumbers. The strong presumption that parties to an Agreement contract for themselves and not for the benefit of others applies. As a result, Delta is not a third-party beneficiary and cannot enforce the contract or an implied covenant of good faith and fair dealing.

III. CONCLUSION:

Delta Mechanical was neither a party to nor an intended third-party beneficiary of the Settlement Agreement in the *Heilman* litigation. Thus, under Missouri law, it is not entitled to assert a breach of contract claim, nor any other claim that would inure to a party or intended third-

