

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Nails Construction Company, Newell  
Abatement Services, Inc., Lead Investigative  
Services, Inc., Derrick Woodson, and  
Frederick Newell, on behalf of themselves  
and all others similarly situated,

Plaintiffs,

vs.

The City of Saint Paul,

Defendant.

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Court File No. 06-CV-2657 (JNE/SRN)

**MEMORANDUM OF LAW IN SUPPORT  
OF PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTIVE RELIEF**

**TO: DEFENDANT ABOVE-NAMED AND ERIC D. LARSON, ASSISTANT CITY  
ATTORNEY, LITIGATION SECTION, 750 CITY HALL, 15 WEST KELLOGG  
BOULEVARD, ST. PAUL, MN 55102, ITS ATTORNEYS:**

Plaintiffs submit this memorandum of law in support of their motion for preliminary injunctive relief.

**I.**

**Introduction**

This lawsuit is brought by three Saint Paul businesses and two individuals in response to the City of Saint Paul's abject failure to comply with Section 3. Section 3 is a federal law requiring recipients of federal housing and community development funds to provide, to the greatest extent feasible, employment, contracting, and training opportunities for low-income people. When Section 3 is properly implemented, the result is jobs and training for low-income individuals and contracts with businesses owned by low-income individuals. The law was enacted in 1968 as Section 3 of the Housing and Urban Development Act of 1968.

The City of Saint Paul is a recipient of United States Department of Housing and Urban Development (“HUD”) funds that trigger Section 3 compliance obligations. Other recipients of HUD funds have established Section 3 compliance programs to ensure and monitor their compliance.<sup>1</sup> Saint Paul, however, has failed to establish any program or other mechanism for complying with Section 3. As a result, Saint Paul continues to violate Section 3 each time it utilizes HUD funds subject to Section 3 requirements.

Plaintiffs now move the Court for preliminary injunctive relief to enjoin the City of Saint Paul from awarding any Section 3 covered contracts until the City first comes into compliance with Section 3.

## II.

### Facts

#### A. The Section 3 Program.

In 1968, the United States Congress passed the Housing and Urban Development Act (“Act”) requiring recipients of HUD funds and contractors employed by these recipients to utilize certain HUD funds to benefit very low-income and low-income persons “to the greatest extent feasible.” 12 U.S.C. §1701u, et seq.

In 1994, the United States Congress amended the Act extending application of Section 3 to all federal housing programs, creating a priority system for awarding Section 3 contracts

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<sup>1</sup> Plaintiffs have included copies of Section 3 compliance programs established by Decatur, Illinois, Jacksonville, Florida and Minneapolis, Minnesota as reference material for the Court and to demonstrate that other municipalities have in fact implemented Section 3 compliance programs. See Newell Aff., Exhibits R-T.

and clarifying standards of compliance applicable to Section 3 recipients. The purpose of Section 3 is to ensure that employment and other economic opportunities generated by certain HUD financial assistance shall, to the greatest extent feasible, and consistent with existing law, be directed to low and very low-income persons, particularly those who are recipients of government assistance for housing, and to business concerns which provide economic opportunities to low-income and very low-income persons. 24 CFR § 135.1.

Section 3 applies to all projects funded with public housing assistance or Indian housing assistance regardless of the amount of the assistance. 24 CFR § 135.3 (a)(3)(i)(B)

Otherwise, Section 3 applies to any recipient that receives over \$200,000.00 in HUD funding for certain construction-related projects including housing rehabilitation, lead abatement, housing construction and other public construction. 24 CFR § 135.3 (a)(3)(ii)(A). Section 3 specifically applies to Community Block Development Block Grants, Fair Housing Assistance, Section 811 Programs and numerous other federal funding programs. Section 3 also mandates that any Recipient's subcontractors that receive contracts of \$100,000.00 or more must also comply with Section 3 if the total amount of assistance received on the project exceeds \$200,000.00. 24 CFR § 135.3 (a)(3)(ii)(B).

HUD regulations require Recipients of Section 3 funds "to provide, to the greatest extent feasible, training, employment, and contracting opportunities generated by the expenditure of this assistance to the low- and very low-income persons and business concerns, or which employ low- and very low-income persons." 24 C.F.R. §135.3 (d).

With respect to any Section 3 project, a Recipient is required to ensure that at least 10% of all new hires for each year of the Section 3 project are Section 3 residents.

With respect to public housing projects, Defendant is required to ensure that at least 30% of all new hires are Section 3 residents.

With respect to community development projects, Defendant is required to ensure that at least 30% of all new hires are Section 3 residents.

With respect to contracting, a recipient of Section 3 funds may demonstrate compliance with Section 3 by committing to award to Section 3 Business Concerns the sum of at least 10% of all Section 3-covered contracts for public housing and 3% of the total dollar amount of all Section 3-covered contracts. *See* 24 CFR §135.30.

Each recipient of Section 3 funds has a further obligation to ensure compliance in the operations of its contractors and subcontractor. 24 CFR § 135.32. This responsibility includes, but is not limited to implementing procedures to notify Section 3 Residents and Section 3 Business Concerns about training and employment opportunities, notifying contractors about the requirements of Section 3, taking proactive steps to facilitate training and awarding of contracts to Section 3 Business Concerns. A recipient of Section 3 funds must also document all actions taken to comply with the requirements of 24 CFR part 135. 24 CFR § 135.32(e).

**B. The Parties.**

Nails Construction Company, Newell Abatement Services, Inc., Lead Investigative Services, Inc., (collectively the “Newell Companies” are Section 3 Business Concerns. See Newell Affidavit, ¶¶ 6-35

A “Section 3 Business Concern” means a business that is either

- a. 51% or more owned by Section 3 Residents, or

- b. whose permanent, full-time employees include persons, at least 30% of whom are currently Section 3 residents, or within three years of the date of first employment with the business concern were Section 3 residents, or
- c. that provides evidence of a commitment to subcontract in excess of 25% of the dollar award of all subcontracts to be awarded to business concerns that meet the qualifications set forth in Paragraphs 12(a) and 12(b). See 24 C.F.R. §135.5.

Newell and Woodson are both Section 3 Residents. See Newell Affidavit ¶¶24-32 and Woodson Affidavit ¶¶5-9. A Section 3 Resident is an individual that is either:

- a. a public housing resident,
- b. a low-income person, or
- c. a very-low income person.

The City of Saint Paul is a “Recipient” of Section 3 covered assistance from HUD within the meaning of that term as set forth at 24 C.F.R. §135.5. Saint Paul is responsible pursuant to federal law for the administration of Section 3 funds in conformity with federal law as set forth in the statute itself and the regulations promulgated by HUD and found at 24 C.F.R. Part 135.

**C. Newell Investigates Saint Paul’s Section 3 Compliance.**

On or about June 28, 2000, Newell attended a meeting convened by the City of Saint Paul to identify HUD lead-based paint contractors. *Id.* at ¶56. The meeting identified a Saint Paul program that utilized HUD funds to abate lead paint. *Id.* at ¶56. At the meeting, Newell indicated that he was a lead abatement contractor interested in working with the City of Saint Paul. *Id.* at ¶58. Newell was informed that the City of Saint Paul would not be

adding additional contractors to their list of existing contractors. *Id.* at ¶59. Instead, Saint Paul would utilize HUD funds to train the City's existing contractors. *Id.* at ¶60.

By 2001, through Newell's interaction with the City of Minneapolis Public Housing Authority ("MPHA"), he became aware of the Section 3 program. MPHA has developed Section 3 compliance program entitled "Program Plan for Compliance with Requirements of Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) (Section 3) part 135 Economic Opportunities for Low-and Very Low Income Persons." *Id.* at ¶38, 69; and Exhibit T.

After learning about the existence of Section 3, Newell approached the City of Saint Paul seeking out information relating to its compliance with Section 3. *Id.* at ¶39. Newell has lodged requests with both the City of Saint Paul and HUD seeking information relating to the City's compliance with Section 3. Newell Aff., ¶ 37. He spoke contacted Robert Hammer, Marilyn Porter, David Lange, Al Hester, Angela Burkhalter, Tyrone Terrill, and Tom Sanchez of the City of Saint Paul. *Id.* at ¶40. Newell also filed Freedom Of Information Act ("FOIA") requests with the United States Department of Housing and Urban Development seeking information relating to the City of Saint Paul's compliance with Section 3. *Id.* at ¶41; Exhibit C. Newell also submitted written requests for all Section 3 compliance reporting filed with HUD by the City of Saint Paul. *Id.* at ¶43.

In October 2005, Newell directed a letter to Mr. Hammer of the City of Saint Paul because Newell was informed that Mr. Hammer was in some way responsible for the City's Section 3 compliance. *Id.* at ¶44. In response to Newell's October 2005 letter, Mr. Hammer stated that he would look into the matter and get back to Newell. *Id.* at ¶45.

Newell also sought information directly from the City of Saint Paul regarding its compliance with Section 3. *Id.* at ¶47. In May 2006, Newell sought information directly from the City of Saint Paul relating to the University Dale Apartment/Rondo Library project. *Id.* at ¶48. The University Dale Apartment/Rondo Library project utilized approximately \$900,000.00 in HUD Community Block Development Grant funds. *Id.* at ¶49. These are funds subject to Section 3 requirements. *Id.*

Newell also sought information from the City of Saint Paul's Department of Human Rights regarding the City's compliance with Section 3. *Id.* at ¶50. On May 23, 2006, Mr. Terrill of the City of Saint Paul's Department of Human Rights informed Newell "We do not collect Section 3 data as it is not part of our contract compliance responsibilities. What projects do we currently have with Section 3 requirements? Thanks." *Id.* at ¶51; Exhibit F.

Newell also sought information regarding the City of Saint Paul's Section 3 compliance from the City of Saint Paul's Department of Planning and Economic Development. *Id.* at ¶52; Exhibit G. Mr. Sanchez of the City of Saint Paul's Department of Planning and Economic Development informed Newell that Saint Paul PED did not collect any Section 3 compliance data. *Id.* at ¶53.

The City of Saint Paul has indicated, through counsel, that it does not file HUD Form 60002 with HUD as required by Section 3 and that it does not believe it needs to file HUD Form 60002. *Id.* at ¶54; Exhibit H. The Form 6002 is designed to monitor a recipient's training and hiring of Section 3 Residents. *Id.*

In March of 2005, the City of Saint Paul informed Newell through Mr. Hester that "Section 3 is part of the federal law but HUD hasn't done much with monitoring in the past,

so we've just done it our way - hiring residents, offering training programs etc. Now we'll have to step it up a bit, but we're still cautious about over-committing." *Id.* at ¶62; Exhibit P.

According to documents entitled "Contract and Subcontract Activity" prepared by the City, during fiscal year 2001, October 1, 2000, through September 30, 2001, it appears that Saint Paul awarded no HUD financial assistance to entities designated by as Section 3 Business Concerns. *Id.* at ¶55; Exhibit I. According to documents entitled "Contract and Subcontract Activity" prepared by Saint Paul, during fiscal year 2002, October 1, 2001, through September 30, 2002, Saint Paul awarded a total of \$231,619.00 in HUD financial assistance to entities designated by the City as Section 3 Business Concerns. *Id.* at Exhibit J.

According to documents entitled "Contract and Subcontract Activity" prepared by the Defendant, during fiscal year 2003, October 1, 2002, through September 30, 2003, it appears that the City awarded no HUD financial assistance to entities designated by the City as Section 3 Business Concerns. *Id.* at Exhibit K.

On or about August 14, 2006, the Public Housing Agency of the City of St. Paul directed a letter to "Businesses that have, or have expressed an interest in doing business with the Public Housing Agency of the City of St. Paul." *Id.* at ¶63; Exhibit Q. The August 14<sup>th</sup> letter from the City of Saint Paul Public Housing Agency seeks to identify Section 3 business concerns. *Id.* at ¶64. Prior to August 14, 2006, neither Newell nor any representative of the Newell Companies have ever been contacted by the City of Saint Paul to identify Section 3 business concerns. *Id.* at ¶65.

As a result of Newell's investigation, he concluded that the City of Saint Paul had failed to meet its obligations as a recipient of HUD Section 3 funding. *Id.* at ¶66.

**D. The Lawsuit**

On June 27, 2006, plaintiffs filed their complaint in the United States District Court for the District of Minnesota. Plaintiffs' allege that the City of Saint Paul is in violation of Section 3 in the following respects:

- i. Saint Paul has not, to the greatest extent feasible, awarded a sufficient percentage of HUD contracts to Section 3 Business Concerns.
- ii. Saint Paul has not, to the greatest extent feasible, exercised oversight over those contractors hired with HUD funds to ensure that, to the greatest extent feasible, those contractors provide training, employment and contracting opportunities to Section 3 residents and Section 3 Business Concerns.
- iii. Saint Paul has not met its reporting requirements with respect to assuring its compliance with the Act and Section 3 by both notifying contractors of Section 3 requirements and informing all units of the City of Section 3 requirements. See 24 C.F.R. §135.32.
- iv. Saint Paul has not met its obligation to seek out and identify Section 3 Business Concerns about contracting opportunities.
- v. Saint Paul has not met its obligation to notify Section 3 Residents about training and/or employment opportunities.
- vi. Saint Paul has failed to train and employ Section 3 Residents.
- vii. Saint Paul has failed to provide preference to Section 3 Residents in training and contracting opportunities.
- viii. Saint Paul has failed to provide preferences for Section 3 Business Concerns in contracting opportunities.
- ix. Saint Paul has failed to meet is obligation to file the form HUD-60002 entitled "Section 3 Summary Report."

*See Complaint.*

The Court should grant plaintiffs' motion for a temporary injunction because all four of the *Dataphase* factors weigh in favor of granting the requested relief.

**A. Plaintiffs Will Likely Prevail On The Merits Of Their Claims Because The Defendant Has Admittedly Failed To Comply With Section 3.**

“When considering the probability of success needed for an award of a preliminary injunction, it does not necessarily require the movant to prove a greater than 50 percent likelihood that he will prevail on the merits, only a probability of success.” *Cordis Corporation v. Medtronic, Inc.*, 2 U.S.P.Q. 2d 1845 (D.Minn. 1986) (citations omitted).

In this case, Plaintiffs have a high likelihood of success based upon the following evidence:

1. The City of Saint Paul has admitted as recently as June 2006 that it has no Section 3 certification process.
2. The City of Saint Paul has, based upon the documents produced thus far, failed to meet the numerical goals set forth with Section 3.
3. The City of Saint Paul has no written Section 3 compliance program.
4. The City of Saint Paul has utterly failed to attempt any identification of Section 3 Business Concerns and Section 3 Residents until August 2006.
5. The City of Saint Paul has admitted that it does not file the Form 60002.
6. The City of Saint Paul has admitted that, even if it does decide to implement a Section 3 program, Section 3 Business Concerns would still have to be low bidders before the City would award them a contract.
7. The City of Saint Paul appears to have no mechanism for tracking the percentage of Section 3 Residents employed on Section 3 projects.

Based upon this evidence, plaintiffs have a strong likelihood of succeeding on their claims that the City has failed to meet its Section 3 obligations. Indeed, without any Section 3 compliance program in place, it appears that the City lacks any mechanism for attempting

to comply with Section 3. Moreover, even if the City does implement a Section 3 program, it apparently plans on refusing to give preference to Section 3 Business Concerns.

The City's inability to accurately articulate its legal obligations under the Section 3 program is further compelling evidence that plaintiffs have a strong likelihood of success on their claims.

**B. The Balance Of Harms Favors Issuing A Preliminary Injunction.**

If injunctive relief is not granted, plaintiffs will continue to be passed over for economic opportunities that Congress specifically intended. For the low-income and very low-income plaintiffs, continued lost economic opportunity is potentially devastating. Plaintiff Woodson struggles on a monthly basis to pay his family's expenses. Woodson Affidavit, ¶¶ 15-17. Indeed, by definition, plaintiffs are at risk should they be denied further economic opportunity.

The City, on the other hand, cannot possibly claim an interest in continuing to conduct business as usual. While there may be some slowdown in Section 3 project construction, it can be easily remedied by the City of Saint Paul complying with Section 3. With other city programs as a resource, the City of Saint Paul is well positioned to come into compliance forthwith.

For these reasons, a balancing of the relative harms that would result from an injunction favors granting plaintiff their requested relief.

**C. The Public Interest Strongly Favors Granting Preliminary Injunctive Relief.**

The public interest is defined at least in part by the acts of the legislature. In this case, Congress and HUD have established with specificity that the public interest is best served by awarding training and employment opportunities to low-income and very low-income individuals and Section 3 Business Concerns. The public's interests are advanced because opportunities for economic advancement are provided to those in need. Workfare is inarguably a more just and desirable policy than welfare. Training opportunities should be given to those without the economic means to seek out higher education or skill training themselves.

For all of these reasons, the public interest weighs in favor of enjoining the City of Saint Paul from continuing to award Section 3 monies without first demonstrating that it has complied with Section 3.

**D. Plaintiffs Will Suffer Irreparable Harm If Saint Paul Is Permitted To Continue Distributing HUD Funds Without A Section 3 Compliance Program.**

In order to obtain injunctive relief, a litigant must demonstrate that irreparable harm will result in the absence of an injunction. Here, plaintiffs will suffer irreparable harm because they will be precluded from obtaining contracts to work on or be trained to work on Section 3 HUD funded projects.

In the case of *Glenwood Bridge, Inc., v. City of Minneapolis*, 940 F.2d 367 (8<sup>th</sup> Cir. 1991), the United States Court of Appeals for the Eighth Circuit confronted an analogous circumstance and held that injunctive relief was appropriate. In *Glenwood*, the plaintiff contractor sought to enjoin the City of Minneapolis from awarding a contract because the bid process was not performed in accordance with law. The District Court denied the