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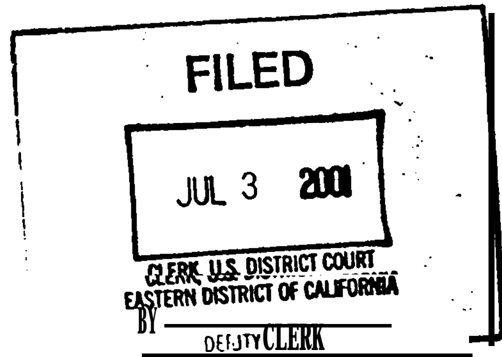

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KENNETH ARMS TENANT ASSOCIATION; MANZANITA ARMS TENANT ASSOCIATION; CALIFORNIA COALITION FOR RURAL HOUSING PROJECT; VIRGINIA BREIMANN; RITA JANSSEN; SHERRY LAUTSBAUGH; and KATHY POUNDS,

Plaintiffs,

v.

MEL MARTINEZ, in his official capacity as Secretary of the Department of Housing and Urban Development; KENNETH ARMS LIMITED PARTNERSHIP; RANCHO ARMS LIMITED PARTNERSHIP; SAN JUAN LIMITED PARTNERSHIP; MANZANITA ARMS LIMITED PARTNERSHIP; and NATIONAL HOUSING PARTNERSHIP,

Defendants.

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NO. CIV. S-01-832 LKK/JFM

O R D E R

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Plaintiffs[1] bring this action against defendants to enjoin the owners of certain apartments from prepaying their mortgages and selling certain HUD subsidized housing.[2] They also seek declaratory relief against the United States Department of Housing and Urban Development (HUD). The matter is before the court on plaintiffs' motion for a preliminary injunction. Also pending before the court is HUD's motion to dismiss or, in the alternative, for summary judgment. I resolve the matter on the pleadings and evidence filed herein and after oral argument.

I.

THE COMPLAINT

Between 1972 and 1973, HUD and the defendant Owners ("the Owners") of the subject multi-family dwellings ("the Properties"),[3]

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[1] The individual named plaintiffs in this action are low-income, disabled persons. Plaintiffs, Kenneth Arms Tenants Association and Manzanita Arms Tenants Association, are organizations composed of low-income tenants of these subsidized housing units. The associations exist for the primary purpose of preserving affordable housing for low-income residents of the Carmichael area in Sacramento County. The California Coalition for Rural Housing Project is a nonprofit organization whose mission is to preserve and produce affordable housing, with a special focus on persons residing in housing receiving assistance from HUD. The Coalition has filed an affidavit averring that among its members are low-income people who are seeking, but presently do not reside in, HUD subsidized housing. <u>See</u> Decl. Rob Weiner, at ¶¶ 2, 5, 7, 3.

[2] The prospective buyer, U.S. Housing Partners) ("the Buyer"), has intervened.

[3] Respectively, the housing Properties are the Kenneth Arms Apartments, a 97-unit rental housing development located in Carmichael, California which is owned by defendant, Kenneth Arms Limited Partnership; the Rancho Arms Apartments, a 95-unit rental housing development located in Rancho Cordova, California which is owned by defendant, Rancho Arms Limited Partnership; the San Juan

entered into agreements with the Government through the so-called Section 236 program. Under the Section 236 program, the Owners received the benefits of HUD mortgage insurance, and the federal agency's commitment to pay all but one percent of the interest on their mortgages.[4] In exchange for these subsidies, the Owners could not receive more than below market rent for any rented unit.[5] The Section 236 mortgages of the four Properties were set to mature at varying dates between 2013 and 2015.

After obtaining their government mortgages, the Owners and HUD executed successive Housing Assistance Payment contracts wherein HUD agreed to provide "project-based" Section 8 assistance payments to the Owners to cover the difference between the rent contributed by the tenant and the maximum approved contract rent for their units. Specifically, Section 8 tenants pay thirty (30) percent of their adjusted gross income as their share of the rent and HUD pays the balance. The Section 8 contracts executed between HUD and the defendants subsidize between 40% to 70% of the rental units on the Properties.

Between October 23, 2000, and November 30, 2000, the Owners sent notices to the residents of the Properties advising them that

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Apartments, a 70-unit rental housing development located in Fair Oaks, California which is owned by defendant, San Juan Limited Partnership; and the Manzanita Arms Limited Partnership, an 89-unit rental housing development located in Carmichael, California which is owned by defendant, Manzanita Arms Limited Partnership.

[4] 12 U.S.C. § 1715z-1(c).

[5] 12 U.S.C. § 1715z-1(f).

they intended to prepay their HUD mortgages and not renew their Section 8 contracts.[6] These notices were sent in connection with the Owners' intention to sell the Properties to U.S. Housing Partners. Plaintiffs allege that the Buyer had entered into certain "use agreements" with HUD concerning the future of the subsidized units.

California has adopted statutes regulating the termination of subsidized housing. Cal. Gov't Code § 65863.10-.11. Plaintiffs allege that Owners violated California's notice requirements in a variety of ways.[7] They also contend that because HUD's Housing Notice 99-36 required the Owners to comply with any State or local notice requirements, the notices, in effect, failed to comply with Federal law. As a result, plaintiffs submit that the Owners' failure to provide their tenants with lawful notice of their intent to opt-out of Section 8 housing has caused great confusion and interfered with plaintiffs' efforts to obtain rent subsidies. In addition, plaintiffs claim that by virtue of the Owners failure to comply with California's right of first refusal provisions, the

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[6] The Owners tender evidence that the tenants received written notices concerning prepayment of their HUD mortgages and the non-renewal of Section 8 assistance on July 26, 2000, August 8, 2000, October 30, 2000, and November 30, 2000.

[7] Plaintiffs allege that the notices were deficient in that they failed to send written notice to the California Department Of Housing and Community Development of their intent not to renew their Section 8 contracts, did not include the current rent and anticipated future rents, were not on the Owners' or duly authorized representatives' letterhead, were only in English, and failed to include the name and telephone number of the county and legal services organization.

Owners have endangered the continued use of the Properties for those classes of tenants intended to be protected under the state statute. <u>See</u> Cal. Gov't Code § 65863.11(b)-(c).

Plaintiffs also allege that HUD violated federal law by approving the sale of the Properties and facilitating it by signing use agreements with the prospective Buyer. Plaintiffs allege that these use agreements permit rents to be set at or above market rate, and thus HUD has failed to ensure that the Properties will continue to operate on terms that are at least as advantageous as those under Section 236. Finally, plaintiffs submit that HUD approved the sale of the Owners' Properties without first considering the statutory goals of the National Housing Act and the racial and socio-economic impact of the withdrawal of the developments from the federal housing program.

II.

MERITS OF PLAINTIFFS' CLAIMS

A. AGAINST HUD[8]

Plaintiffs raise a number of reasons why they will likely succeed on the merits in their suit against HUD. Below, I explain why the court concludes that they have failed to state a claim against the federal defendant.

Plaintiffs concede that there is no federal statute or HUD regulation which inhibits or restricts the Owners right to prepay their mortgages. Under the federal program, the Owners

[8] In this section, I consider HUD's motion to dismiss or, in the alternative, for summary judgment.

need only provide a letter of intent to the tenants, HUD, and the chief executive officer for the state or local government for the jurisdiction in which the their Property is located "no less that 150 days, but no more than 270 days, before such prepayment." FY 1999 Appropriations Act, § 219(b)(3). There is no dispute that the Owners have satisfied this requirement. Rather, plaintiffs maintain that Housing Notice 99-36 requires HUD to ensure that the Owners comply with state law. I cannot agree.

I begin by noting that Congress has specified the conditions under which a Section 8 Owner may "opt-out." All that is required is that the Owner (1) provide written notice to the tenants and HUD at least one year before the proposed termination of the Section 8 contract and (2) a statement that HUD will provide tenant-based rental assistance. 42 U.S.C. § 1437f(c)(8)(A).[9] In cases where the Owner gives notice at a

[9] 42 U.S.C. § 1437(f) (c) (8) provides:

> (A) Not less than one year before termination of any contract under which assistance payments are received under this section, other than a contract for tenant-based assistance under this section, an owner shall provide written notice to the Secretary and the tenants involved of the proposed termination. The notice shall also include that, if the Congress makes funds available, the owner and the Secretary may agree to a renewal of the contract, thus avoiding termination, and that in the event of termination the Department of Housing and Urban Development will provide tenant-based rental assistance to all eligible residents, enabling them to choose the place they wish to rent, which is likely to include the dwelling unit in which they currently reside. Any contract for a period of up to 1 year or any number or years, with payments subject to

time when fewer than twelve months remain in the Section 8 contract term, the statute authorizes HUD to provide a short-term renewal of the expiring contract "for a period of time sufficient to give tenants 1 year of advance notice" under terms and conditions that HUD requires. 42 U.S.C. § 1437(c)(8) (B). The statute, however, also requires that the notice comply with "any additional requirements established by the Secretary." 24 U.S.C. § 1437f(c)(8)(C).

On December 29, 1999, HUD issued Housing Notice 99-36 which addressed election to opt-out of a project-based Section 8 program.[10] Section XVI-G of that Notice recites that "besides meeting the Federal notification requirement, project Owners must also comply with any State or local notification requirements. Owners should check with their appropriate local authorities to find out about such requirements." The question

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the availability of appropriations for any year.

(B) In the event the owner does not provide the notice required, the owner may not evict the tenants or increase the tenants rent payment until such time as the owner has provided the notice and 1 year has elapsed. The Secretary may allow the owner to renew the terminating contract for a period of time sufficient to give tenants 1 year of advance notice under such terms and conditions as the Secretary may require.

(C) Any notice under this paragraph shall also comply with any additional requirements established by the Secretary.

[10] Housing Notice 99-36 expired on December 12, 2000, and was replaced with the Section 8 Policy Renewal Guide issued on January 9, 2001. At oral argument, the parties agreed that the new Guide does not alter the Owners' obligation to comply with State law notice requirements.

tendered is whether the acknowledgment of the Owners' obligation to obey state law is an additional requirement within the meaning of 24 U.S.C. § 1437f(c)(8)(C). I conclude it is not.

By its terms, the Notice does not place any affirmative legal obligation on HUD to ensure that all Owners with Section 8 housing comply with state law when opting out. Rather, the Notice appears to be no more than a reminder to property owners that they must comply with state notification requirements, a particularly appropriate admonition since compliance with federal notice procedures does not necessarily satisfy the requisites of state law. Put another way, given that, ab initio, HUD has no obligation to enforce state and local notice requirements, the advice to the Owners would not appear to represent a self-imposed obligation. Indeed, given that the states are perfectly capable of enforcing their own laws, no immediate reason suggests itself as to why HUD would obligate itself to ascertain the various notice requirements of the fifty states and seek to enforce them. Accordingly, I conclude that plaintiffs' cause of action against HUD premised on its violation of its own regulations must fail, and thus HUD's motion to dismiss this claim must be granted.

Plaintiffs next contend that HUD approved the Owners' request to sell their Properties without ensuring that the projects will continue to operate in a manner that will provide rental housing on terms at least as advantageous to existing and future tenants as the terms required by the 236 program. See 12

U.S.C. § 1701z-11(k)(2).[11] As I explain below, 12 U.S.C. § 1701z-11(k)(2) is simply inapplicable to the -facts of this case.

The statute plaintiffs rely on sets conditions with respect to HUD's approval of the sale of any subsidized project. In the matter at bar, however, the Owners intend to prepay their mortgages. The Housing Opportunity Program Extension Act of 1996 ("HOPE"), Pub.L. No. 104-120, § 2, 110 Stat. 834, permitted mortgage prepayment without HUD's approval.[12] Accordingly, upon prepayment, the Properties will no longer be subject to insured and subsidized mortgages, and it follows that when the sales occur, HUD will have no power to either authorize or prevent the sale of the Properties at issue. Because the Owner's mortgages will be prepaid, 12 U.S.C. § 1701z-11(k)(2) does not apply. Again, this claim is insufficient to premise a

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[11] 12 U.S.C. § 1701z-11(k)(2) provides:

The Secretary may not approve the sale of any subsidized project-

(A) that is the subject to a mortgage held by the Secretary, or

(B) if the sale transaction involves the provision of any additional subsidy funds by the Secretary or a recasting of the mortgage, unless such sale is made as part of a transaction that will ensure that the project will continue to operate, at least until the maturity date of the loan or mortgage, in a manner that will provide rental housing on terms at least as advantageous to existing and future tenants as the terms required by the program under which the loan or mortgage was made or insured prior to the sale of the project.

[12] Thus, termination of affordability restrictions imposed upon the project was also permitted.

cause of action against the Agency.

Plaintiffs also contend that HUD and the Owners have not assured the existence of low-income housing because the Owners may raise rents to a level that HUD deems "unreasonable," and thus the tenants could be forced to seek new housing. HUD, however, does not have the authority to regulate rents of Properties that the Agency does not own or which are not subsidized by it. Plaintiffs' argument that this result is unjust or bad policy is directed to the wrong forum. Congress has decided to allow the prepayment of mortgages and Section 8 opt-outs without HUD approval, and has sought to deal with the resulting loss of affordable housing by the creation of enhanced vouchers. __See__ 42 U.S.C. § 1437f(o). Even if I concurred with plaintiffs' view that moving away from unit-based Section 8 lousing is ill advised, particularly given the limited low-.ncome housing in the Sacramento area, the court is bound by the :ontrary judgment of Congress. What plaintiffs decry as the ınfortunate effects of Congress' determination to move away from ınit-based programs is not a basis for a cause of action against IUD.

Plaintiffs also argue that HUD failed to consider whether :he Properties were eligible for the Mark-Up-to-Market Program :nder which HUD can increase Section 8 rent levels to comparable ıarket rents. Plaintiffs submit that HUD violated its ffirmative duties under the Fair Housing Act by approving and acilitating the sale of the Properties without first

considering the racial and socioeconomic effects of its actions. Both these arguments, however, presuppose that HUD's approval was required prior to prepayment of the Owners' mortgages.

Of course, HUD must act consistent with the purposes of its enabling statutes. That obligation becomes more pressing when there is need to inform the agencies' discretion and authority. See Russell v. Landrieu, 621 F.2d 1037, 1041-42 (9th Cir. 1980) (objectives and priorities of the National Housing Act, must be considered when HUD is disposing of its own property). In the matter at bar, however, HUD has no discretion to refuse the prepayment, and once the Owners prepay their mortgages, HUD no longer has any say concerning the use of the Properties. In sum, HUD's legal obligations are limited to ensuring that Owners who are opting out of Section 8 housing comply with federal notice requirements. See 42 § 14347f(C)(8)(A). I conclude that plaintiffs' arguments are misplaced, and its contentions in his regard cannot support a cause of action against HUD.

Plaintiffs then assert that HUD's execution of the use agreements with the Owners was an abuse of discretion.[13] Diane Brambila, HUD's Supervisory Project Manager of the Office of Multifamily Project Management in Sacramento, was contacted by the Buyer, concerning execution of use agreements. On September 8, 2000, the agreements were formally executed. Because no

[13] A use agreement in this context refers to a document in which an owner or prospective owner of a multifamily housing development, inter alia, agrees to limit the amount that the owner will charge for rents.

federal requirement for such agreements exists, it is clear that the Buyer was seeking to comply with State law. Cal. Gov't Code § 65863.11(d)(2). Why HUD entered into these agreements is uncertain.

HUD argues that I need not reach plaintiffs' claim that the execution of the use agreements was an abuse of discretion, because the agreements are void and unenforceable since Ms. Brambila was not authorized to execute them. It appears to the court, however, that I need not resolve the issue of the validity of the use agreements as between the signatories. Whether the contracts are enforceable inter se, it is irrelevant to the issue of whether HUD's execution of the agreements provide a cognizable claim by the plaintiffs of a violation of Federal law.

Once again, the court notes that under the applicable federal law, beyond insuring that the Owners' prepayment of the Section 8 contract termination complies with federal notice requirements, HUD could not prevent prepayment of the Owner's mortgages. <u>See</u> 42 U.S.C. § 1437f(C)(8)(A). Put directly, given HUD's limited role, execution of the use agreements could not violate its duties under the National Housing Act as they exist vis-a-vis the plaintiffs, i.e., HUD's acknowledgment that; state law was satisfied binds neither the plaintiffs, nor this court. Accordingly, whatever psychological comfort the Buyer gained, the legal effect is, from the plaintiffs' perspective, nil.

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I conclude that this claim, like all its predecessors, lacks legal merit and must be dismissed.

Because the court's conclusions concerning plaintiffs' claims against HUD are essentially legal in nature, amendment of the complaint would be futile. Accordingly, the dismissal will be with prejudice.

B. **AGAINST THE OWNERS**[14]

i. **Federal Claims**

Plaintiffs have alleged two federal claims against the Owners. Below I explain why each claim fails to state a cause of action.

First, plaintiffs allege that the Owners violated 42 U.S.C. § 1437f, premised on the Owners' asserted non-compliance with California's notice requirements. Above, the court determined that Housing Notice 99-36 imposed no federal duty to comply with California law. Accordingly, plaintiffs fail to state a claim that the Owners' have violated federal notice requirements.

Plaintiffs also allege that the defendants have violated 12 U.S.C. § 1715z-1b, because the Owners interfered with the tenants' efforts to obtain rent subsidies. Again, this claim is premised not on a violation of federal notice requirements, but on the State's statutory notice provisions. Put directly, this claim is a state law issue which cannot be transmuted into a

[14] Here, I consider whether the plaintiffs demonstrate a basis for obtaining injunctive relief, i.e., whether they have shown a likely success on the merits, or at least fair grounds to litigate.

federal claim.

In sum, the court finds that plaintiffs' federal claims against the Owners are not viable. Accordingly, they are dismissed on the court's own motion. Again, because the determination herein is legal in nature, the dismissal is with prejudice. The court next turns to plaintiffs' state law based claims.[15]

ii. <u>Retroactivity</u>

The California statutes with respect to the termination of governmental subsidy contracts and the prepayment of HUD mortgages were amended as of January 1, 2001. **<u>See</u>** Cal. Gov't Code §§ 65863.10-11. Accordingly, the court must decide whether to apply the present state notice requirements

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[15] Upon dismissal of all of plaintiffs' federal causes of action, the court will lose the head of federal jurisdiction. I have noted elsewhere that binding Ninth Circuit law precludes pure pendant party jurisdiction. **<u>See</u>** <u>Elsaas v. County of Placer</u>, 35 **F.Supp.2d** 757 (E.D. Cal. 1999). Nonetheless, as plaintiffs note, the Ninth Circuit has authorized resolution of cases where the head of federal jurisdiction is lost. <u>Munaer v. City of Glasgow Police **Department**</u>, 227 **F.3d** 1082, 1089 n.4 (9th Cir. **2000)**, <u>Acri v. Varian Associates</u>, 114 **F.3d** 999, 1000 (9th Cir. 1997). Reconciling these cases with <u>Avala v. United States</u>, 550 **F.2d** 1196 (9th Cir. **1977)**, is a task for those with authority to do so. Suffice it to say that since I am convinced that <u>Avala</u> was wrongly decided, and, more to the point, I am as bound by the subsequent cases as I am by <u>Avala</u>, I conclude that I may dispose of the remaining issues. In deciding to do so, the court notes that it has twice inquired of counsel for plaintiffs and the Buyers and Sellers as to whether it should resolve the state law claims after losing the head of federal jurisdiction. The court was urged by all parties to proceed in light of the need for quick resolution of the issues, and the economic consequences of dismissing the suit. Although the case raises difficult state law issues, the **<u>Pullman</u>** doctrine is one of prudence rather than jurisdiction, and under the circumstances, the court will accede to the request of the parties and address the state court claims.

retroactively. Below, I examine this issue.[16]

The general rule under California law is that absent some clear indication to the contrary, any change in the law is presumed to have prospective application only. See Evanaelatos v. Suoerior Court, 44 Cal.3d 1188, 1207 (1988). The California Supreme Court has held that that "[t] he first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . . The rule has been expressed in varying degrees of strength but always of one import, that a retrospective application will not be given to a statute which interferes with antecedent rights . . . unless such be the 'unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" Id. (citing United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982)). Accordingly, a strong presumption exists against retroactive application of new statutes and administrative rules. See Rosaco v. Commission on Judicial Performance, 82 Cal.App.4th 115, 319 (2000).

To have a genuinely retroactive effect, the application of statute must affect the "rights, obligations or conditions hat existed before the time of the statute's enactment, giving hem an effect different from that which they had under the

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[16] Because the issue deals with the construction of a state tatute, I resolve it as a matter of state law. See, e.g., alifornia Prolife Council v. Scully, 164 F.3d 1189, 1191 (9th Cir. 998) (severability of state statute decided by federal court under tate law standards).

previously existing law." See Evanaelatos, 44 Cal.3d at 1208. Put another way, retroactive application of recently enacted law applies the "new law of today to the conduct of yesterday." In re Joshua M., 66 Cal.App.4th 458, 469, fn. 5 (1998). Under California law, the decisive question with respect to the retroactive application of a state statute is whether the change in the law creates "a substantive change in the legal circumstances in which an individual has already placed himself in direct and reasonable reliance on the previously existing state of the law." Rosaco, 82 Cal.App.4th at 322.

In the matter at bar, between July 26, 2000, and November 30, 2000, the Owners provided notices to their tenants of their intent to sell and opt-out of Section 8 housing. The amendments to Cal. Gov't Code, § 65863.10-.11, which governed the Owners notice obligations, modified the definition of a "qualified purchaser," required. Owners to provide one year rather than nine month termination notices, and altered what was to be contained in such notices and to whom they should be sent. See Cal. Gov't Code, § 65863.10-.11 (amended 2001). Clearly these changes alter the substantive rights and legal obligations of the parties to this action.

Accordingly, the court will apply Cal. Govt. Code § 65863.10-.11 as it existed at the time the Owners issued the notices of their intent to prepay their mortgages and opt-out of providing Section 8 housing.

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iii. **Preemption**

a. **Express Preemption**

The Owners assert that the state's statutory requirements of notice and right to first refusal are preempted by virtue of 12 U.S.C. § 4122.[17] Plaintiffs and HUD contend, however, that this statute does not govern the matter at bar. Thus, before analyzing the effect of the state statutes, I must determine the merits of plaintiffs and HUD's argument. I turn to that task.

Section 4122 of Title 12 is a provision of the Low Income Housing Preservation and Resident Homeownership Act of 1990, codified at 12 U.S.C. §§ 4101 et seq. ("LIHPRHA"). Under

[17] 12 U.S.C. § 4122 provides:

(a) In general

No state or political subdivision of a State may establish, continue in effect, or enforce any law or regulation that -

(1) restricts or inhibits the prepayment of any mortgage described in Section 4119(1) of this title (or the voluntary termination of any insurance contract pursuant to Section 1715(t) of this title) on eligible low income housing . . .

(b) Effect

This section shall not prevent the establishment, continuing in effect or enforcement of any law or regulation of any State or political subdivision of a State not inconsistent with the provisions of this subchapter, such as any law or regulation relating to building standards, zoning limitations, health, safety, or habitability standards for housing, rent control, or conversion of rental housing to condominium or cooperative ownership, to the extent such law or regulation is of general applicability to both housing receiving Federal assistance and non assisted housing.

LIHPRHA, a government subsidized mortgage could not be prepaid without HUD's approval. 12 U.S.C. § 4101(a). To effectuate prepayment, an Owner was required to file with HUD a "notice of intent" and thereafter a "plan of action." 12 U.S.C. § 4102(a). Before approving the plan of action, LIHPRHA required HUD find that implementation of the plan of action would not adversely affect current tenants and that the supply of vacant, comparable housing would be sufficient to ensure that prepayment would not materially affect the availability of decent, safe, and sanitary housing available to low-income persons in the housing market served by the Owner's project. 12 U.S.C § 4108(a). If the Secretary could not make the necessary findings, LIHPRHA required that the Secretary disapprove the plan to prepay and that the Owner's notice of intent to prepay would not have any legal effect. 12 U.S.C. § 4108(c). Events soon overtook this statutory scheme.

For whatever reason, Congress abandoned the scheme embodied in LIHPRHA. While not formally repealing the earlier statute, the 1996 HOPE Act took an entirely different tack. The later statute permitted mortgage prepayment without HUD approval, and thus termination of affordability restrictions imposed upon a project, provided only that the Owners agree not to increase project rents for a period of sixty (60) days after prepayment. As a result of HOPE, Congress began to significantly reduce the funding appropriated under LIHPRHA to pay for financial incentive to Owners, and no funding at all has been appropriated

for incentives for new plans of action since 1998. Indeed, HUD no longer has the authority to accept new preservation applications or to enter into new plans of action, and has continued to implement and enforce the provisions of LIHPRHA only as to those Owners who were in the program prior to the passage of HOPE in 1996.

In the matter at bar, the Owners were never involved in the LIHPRHA Preservation Program, and never operated under the LIHPRHA plan of action. Rather, the prepayment scheme followed by the Owners is that embodied in HOPE, permitting mortgage prepayment without HUD approval, rather than LIHPRHA with its restrictions. Given the above, the court concludes that the preemption provision of LIHPRHA, 12 U.S.C. § 4122, does not govern and thus does not preempt the California notice and right of first refusal statutes.

b. Implied Preemption

The Owners also assert that plaintiffs' state law claims are barred under the doctrine of conflict preemption. The Owners submit that California's notice requirements and provision for a right of first refusal permanently lock Owners of HUD projects into project-based assistance. Below, I explain why the Owners' argument, as a facial matter, is not persuasive. I begin with an overview of the doctrine.

Conflict preemption bars the application of state law which directly contravenes federal law. Freiahtliners Corp. v. Myrick, 514 U.S. 280, 287 (1995); Motus v. Pfizer. Inc., 127

F.Supp.2d 1085, 1091 (C.D. Cal. 2000). Thus, preemption would be found here if the Owners demonstrate that they cannot simultaneously conform to state and federal law. Florida Lime & Avocado Growers,. Inc. v. Paul, 373 U.S. 132, 142-143 (1963). Under such circumstances, the state law must relent. California v. ARC America Corp., 490 U.S. 93, 100, 109 (1989). State law is also preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." International Paper Co. v. Ouellette, 479 U.S. 481, 492 (1987). Accordingly, to the extent a state law interferes with the manner in which Congress intended the Eederal law to operate, the state law is preempted--even where :he state and federal laws share common goals. Gade v. National Solid Wastes Manaaement Ass'n., 505 U.S. 88, 103 (1992).

As I have explained, there is no federal law which :estricts or inhibits the prepayment of HUD insured mortgage or :equires HUD approval. Passivity, however, is not the quivalent of action, and there seems to be no reason to suggest hat California's notice requirements which are designed to nsure the availability of low cost housing, is inconsistent ith the overall purposes of the National Housing Act. No doubt hese state statutes provide for procedural requirements not equired by federal law. It is clear, however, that the states ave the right to impose greater procedural restrictions than hose imposed by federal law. See California Federal Savinus

and Loan Assoc. v. Guerra, 479 U.S. 272, 285 (1987).

The Owners maintain that California's requirements inhibit the Congressional determination to move from unit-based to tenant-based programs. That argument is not well taken. California's restrictions seek to protect the State's most vulnerable population, clearly a proper state interest. It does so, however, not by preventing a shift from unit-based to tenant-based programs, but by attempting to insure that any transfer preserves affordable housing, however achieved. Thus, the Owners contention that these California statutes on their face lock affordable housing projects into their current status is without merit.[18]

Having concluded that the State laws at issue do not facially conflict with federal law, I turn to the question of whether the Owners have complied with the State's provisions.

iv. State Law

The Owners contend that they substantially complied with the State's tenant notice requirements and were not subject to the right of first refusal statute. Below,, I examine each

[18] In considering the merits, I explain that the parties have failed to provided an evidentiary basis for evaluation of the effect of the Buyer's method of setting the maximum rent.; Nonetheless, as I explain there, it is possible that the California statute as it actually effects the Buyer might conflict with federal law. Because Buyer bears the burden of proof as to conflict preemption, Jimeno v. Mobil Oil Corp., 66 F.3d 1514, 1526 . 6 (9th Cir. 1995), however, the failure to provide such an evidentiary basis for the claim of conflict preemption precludes finding that the doctrine bars either plaintiffs' claims against the Owners, or their ability to obtain a preliminary injunction.

argument in turn.

a. **Notice Requirements**

Under the applicable California law,[19] an Owner of an assisted housing development who seeks to terminate a project-based Section 8 contract must provide at least nine months notice of the proposed change to each effected tenant household residing in the assisted housing development." Cal. Gov't. Code § 65863.10(b) mandates that the notices contain specific information for the purpose of explaining to the tenants the process and ramifications of the Owners' decision to opt-out of section 8 housing.[21] In addition, California law provides that

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[19] As stated above, the court will apply California law as it existed at the time the Owners issued notices of their intent to opt-out of Section 8 housing and pre-pay their HUD mortgage.

[20] Cal Gov't Code § 65863.10 provides that:

> (b) At least nine months prior to the anticipated date of termination of a subsidy contract or prepayment on an assisted housing development, the owner proposing. the termination or.prepayment of governmental assistance shall provide a notice of the proposed change to each affected tenant household residing in the assisted housing development at the time the notice is provided.

he amended Cal. Gov't Code § 65863.10(b)(l) requires twelve months otice.

[21] Cal. Gov't. Code § 68863.10 (b) provides:

> (1) The anticipated date of the termination or prepayment of the federal program, and the identity of the federal program . . .
>
> (2) The current rent and anticipated new rent for the unit on the date of the prepayment or termination of the federal program.
>
> (3) A statement that a copy of the notice will be sent

an Owner's notice to tenants "shall" simultaneously be filed with a number of public entities, including the chairperson of the Board of Supervisors of the County, and the Department of Housing and Community Development. Cal. Gov't Code § 65863.10(c)(1). Finally, these entities "shall" send additional notices, containing supplemental information regarding the number of tenants affected, the number of units that are government assisted and the types of assistance, the number of the units that are not government assisted, the number of bedrooms in each unit that is government assisted, and the ages and income of the affected tenants. Id. at § 65863.10(c)(2).

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> to the city or county, or city and county, where the assisted development is located, to the appropriate local public housing authority, if any, and to the Department of Housing and Community Redevelopment.
>
> (4) A statement of the possibility that the housing may remain in the federal program after the proposed date of subsidy termination or prepayment if the owner elects to do so . . .
>
> (5) A statement of the owners' intention to participate in any current replacement federal subsidy program made available to affected tenants.
>
> (6) The name and telephone number of the city, county, or city and county, the appropriate local public housing authority, if any, the Department of Housing and Community Development, and a legal services organization, that can be contacted to request additional written information about an owner's responsibilities and the rights and options of an affected tenant.

Id. § 65863.10(b)(1)-(6).

The Owners do not dispute that they have not strictly complied with each of California's statutory notice requirements. They contend, however, that they have complied with State law in all material respects. This contention is without merit.

Under California law, substantial compliance with a statute is sufficient. Greven v. Superior Court, 71 **Cal.2d** 287 (1969). Thus, when there is actual compliance with all matters of substance, mere technical imperfections of form or variations, such "as obvious typographical errors," do not amount to non-compliance. Stasher v. Haruer-Halderman, 58 **Cal.2d** 2.3, 29 (1962). Substantial performance, however, requires "actual **compliance** with every reasonable objective of a statute." **Id.** **For** that reason, where a statute requires "detailed" notice, a **notice** that contains only the "major ideas or concepts" is not sufficient. Smith v. Board of **Supervisors** of the City and County of San Francisco, 216 **Cal.App.3d** 862, 874 (1989).

By their terms, Cal. Gov't Code **§§ 65863.10-.11** are "notice statutes" which explicitly require the communication of **detailed** information to specified persons and entities. It **follows** that the Owners' deficient notices are more than mere **echnical** imperfections. Rather, strict compliance with the **tate's** notice provisions goes to the heart of the statutes hemselves.

From all the above, the court concludes that the **plaintiffs** have established a probability of success against the

Owners, as to their violations of California's opt-out and prepayment notice requirements.

b. **Right of First Refusal**

California has provided that an owner may not sell or otherwise dispose of his development in a manner which would result in either discontinuance of its status as an assisted housing development, or the termination of any low-income use restrictions which apply to the development, unless the owner provides an opportunity to purchase the developments to specified public and private entities. Cal. Gov't Code § 65863.11(b)-(c).[22] If, however, an owner already has a.bona fide offer to purchase from a "qualified entity" at the time the owner decides to sell the property, the owner is not required to comply with the notice requirements. Cal Gov't Code § 65863.11(f).[23]

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[22] Specifically, under the applicable statutes, an Owner is required to give notice of his or her bona fide intention to sell or otherwise dispose of the property to the tenant association of the development; local nonprofit organizations and public agencies; regional or national nonprofit organizations and regional or national public agencies, and profit motivated organizations and individuals at least nine months prior to the anticipated date of termination of the federal subsidy. Cal. Gov't Code § 65863.11(b)-(c). The bona fide notice is required to include the sales price, the terms of assumable financing, the terms of the subsidy contract, and any proposed improvements to the property to be made by the owner in connection with the sale, and finally, a statement that each of notified entities has the right to purchase the development in the order and according to the priorities established in Cal. Gov't Code § 65863.11(g).

[23] Cal Gov't Code § 65863.11(f) provides in part:

If the owner already has a bonafide offer to purchase from a qualified entity, at the time the owner decides

The Owners assert that the right of first refusal does not apply because they each had received bonafide offers to purchase from qualified entities. Plaintiffs do not dispute that the Owners received "bonafide offers to purchase." Rather, plaintiffs assert that U.S. Housing Partners is not a "qualified entity." See Cal. Gov't Code § 65863.11(d)(1)-(2).[24] In support of that contention, plaintiffs maintain that the use agreements fail to maintain the affordability of the four developments, as required by state law. I turn to the language of the use agreements and evidence submitted to determine whether

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to sell, or otherwise dispose of the development, the owner shall not be required to comply with the provisions of this subdivision.

[24] Cal Gov't Code § 65863.11(d) provides that the requisites of a qualified purchaser are that the purchaser:

> (1) Be capable of managing the housing and related facilities for its remaining useful life, either by itself or through a management agent.
>
> (2) Agree to obligate itself and any successors in interest to maintain the affordability of the assisted housing development for persons and families of low or moderate and very low income for either a 30-year period from the date that the purchaser took legal possession of the housing or the remaining term of the existing. federal government assistance specified in subdivision (a) of Section 65863.10, whichever is greater. The development shall be continuously occupied in the approximate percentages that those persons and families occupied that development on the date the owner -gave notice of intent or the approximate percentages specified in existing use restrictions, whichever is higher. This obligation shall be recorded prior to the close of escrow in the office of the county recorder of the county in which the development is located and shall contain a legal description of the property, indexed to the name of the owner or grantor.

plaintiffs' argument has merit.

Buyer, through the execution of the use agreements, has agreed to limit new tenants to those with incomes that are no greater than 80% of the adjusted area median income ("AM,") for the area where the property is located, as determined by **HUD.**[25] See **Decl.** Steven Klein, at 3 ¶ 12, Exhs. **5-8.**[26] For any future qualifying tenant, Buyer agrees to charge no more than 30% of that 80% figure as rent, and argues that actual rents will also be limited by area market forces as to what a qualified **low-**income tenant can afford to pay. **See Decl.** Steven Klein, at 3 ¶ 12, Exhs. 5-8. With respect to the present tenants, HUD has indicated that the plaintiffs herein are among the statutorily defined classes of eligible tenants for whom enhanced voucher assistance is available. See 42 U.S.C. **§ 1437f(t)(2);** HUD's **Oppo.** at **7:14-16,** 8:1-4; **Decl.** Steven Klein, at 3 **¶¶ 15-19.**[27] The Buyers have averred that income qualified tenants have the right to retain their units, if they so choose, **see Decl.** Steven

[25] This formula was adopted by Buyer because the Federal section 236 Regulatory Agreement permitted only those tenants who **earn** 80% or less of median income to reside in low-income projects. See **Decl.** Steven Klein, at 3 ¶ 12.

[26] While not expressly stated in the use agreements, Buyer **declares** that it will honor the existing security deposits for all **present** assisted tenants of the Properties and honor federal housing vouchers for all existing tenants. **See Decl.** Steven Klein, at 2 **¶¶ 9-10.**

[27] A tenant is able to use an enhanced voucher only if the **dwelling** unit rent is reasonable in comparison with rents charged for comparable dwelling units in the private, unassisted market. See 42 U.S.C. **§ 1437f(o)(10)(A);** see also 24 C.F.R. § 982.507(b).

Klein, Exhs. 5-8, and so long as the current tenants remain income qualified, their rents may not be increased beyond 30% of 80% of the AMI. Id. Thus, Buyers claim that federal law coupled with the use agreements protects the plaintiffs who reside in these units. 42 U. S.C. § 1437(f)(t)(1)(B) & (D); Decl. Steven Klein, at Exhs. 5-8.[28]

Plaintiffs argue that setting all rents for new tenants at 30% of 80% of the AM1 effectively converts the Properties to moderate income developments and thus violates California law. The Buyers respond that they have met the requirements of a "qualified purchaser" since the use agreements maintain affordable rents for persons or families of "low or moderate income and very low income."[29] Before examining whether the use agreements' rent calculations protect income qualified tenants, I must first determine which groups of tenants must be protected under California law.

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[28] With respect to the rents to be charged, the Sacramento lousing and Redevelopment Agency has approved the Buyer's proposed cents of $550 per month for a one-bedroom apartment and $650 per nonth for a two-bedroom apartment. Decl. Steven Klein, at Exh. 2-1.

[29] In the alternative, the Buyer asserts that Cal. Gov't Code § 65863.11(d)(2) has been amended and now ensures the affordability of the assisted housing development for households of "very low, low, or moderate income." See Cal. Gov't Code § 65863.11(e)(2)(amended 2001). Thus, the Buyer argues that, from this amendment, it is clear that U.S. Housing Partners is in compliance so long as it provides affordable housing restrictions for any of the three classes of low-income tenants. As explained above, because this statute has undergone substantial revisions which affect the rights and obligations of the parties to this suit, I will not apply the amended statute retrospectively. Accordingly, this argument cannot prevail.

As noted above, to be a "qualified purchaser" under California law, a purchaser of an assisted housing development must agree to maintain the affordability of the units rented "for persons and families of low or moderate income and very low income" for a specified period. Plaintiffs maintain that this guarantees the protection of "very low income families." The court turns to construction of the statute, beginning and ending with its plain words.

A straight forward reading of the language is that the owner must protect on the one hand "low income persons" and then using the disjunctive "or" "moderate" then using a conjunctive "and" "low income families." Put directly, the statute leaves to the Buyer a choice as to maintaining units for a combination of moderate and very low-income families on the one hand, or low income families on the other. Given this construction, I examine whether the rent calculations set forth in the Buyer's use agreements protect either protected class of tenants.

Cal. Gov't Code § 65863.11(a)(5)-(6) refers to Cal. Health and Safety Code § 50093 as providing the definition of "low or moderate income" and § 50052.5 as defining the meaning of "very low income." <u>See</u> Cal. Gov't Code § 65863.11 (a) (5)-(6). Those statutes define persons of low or moderate income as famifies whose income does not exceed 120 percent of the AMI, subject to HUD amendments, and persons of very low-income as families whose income does not exceed 50 percent of the AMI.

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As noted, California law requires rent protection of the specified classes and that the "development shall be continuously occupied in the approximate percentages that those persons and families occupied the development on the date Owner gave notice of intent." Cal. Gov't Code § 65863.11(d)(2). Moreover, the use agreements must so specify; Id. As I now explain, it appears to the court that the plaintiffs have demonstrated that there are fair grounds to litigate whether the Buyer has complied with these requirements.

The apparent violation of California law derives from the establishment of the 30% of 80% figure as a basis for determining future rents. The 80% figure seems clearly derived from the admission standard. In their opposition to the motion for preliminary injunction, the Buyer explains that the "30% figure was arrived at for the purpose of being consistent with the Section 8 program,,, Buyer's Oppo. at 4:11-12, however, no such consistency exists.

Section 8 limits rent chargeable to the tenant, to 30% of the tenant's adjusted income, see 12 U.S.C. § 1715Z-1(f)(1), while the Buyer's 30% is of the AMI. This difference is potentially enormous. As Buyer concedes, it substituted the AM1 or adjusted gross income because it "cannot limit the rent further without Section 8 assistance because the projects would not be economically viable.,, Buyer's Oppo. at 4:12-15. This concession, at the very least, demonstrates an adverse effect on the protected classes, thus satisfying plaintiffs' obligation to

show fair grounds to litigate a violation of provisions of the State statutes at issue.[30] The absence of evidence of the effect on the protected classes' ability to rent pursuant to the Buyer's mode of setting maximum rents, supports plaintiffs' claim for preliminary injunctive relief.

Whatever else may be true, the mode of setting future rents renders unclear whether Buyer has satisfied its obligation to protect rents for the specified tenant groups. In the absence of such an demonstration, there is doubt that the Buyer is a "qualified purchaser" within the meaning of Cal. Gov't Code § 65863.11(d)(2). Nor has the Buyer in the use agreements, or anywhere else as far as the court can determine, committed to maintaining the approximate ratio of protected tenants, nor how the 30% of 80% figure accomplishes that goal, if indeed it does.

A second reason, related to the first, also casts doubt on the qualification of the Buyer. Cal Gov't Code § 65863.11(d) (2) not only requires that the Buyer protect the specified classes and maintain the ratios noted, it requires that the Buyer commit to doing so in a written recorded document. The Buyer asserts that the use agreements are those documents. Yet the use agreements do not, in terms, commit to satisfaction of the statutory requirements, and, in so far as the Owners rely on the 30% of 80% figure, the absence of any apparent connection of

[30] If Buyer had tendered evidence in support of its conclusion it might at least suggest the possibility of conflict preemption.

that figure to the statutory requirement, strongly suggests that the statute's specifications have not been satisfied.

Having concluded that the plaintiffs' have made a showing on the merits, I turn to the question of the propriety of equitable relief.

III.

PRELIMINARY INJUNCTION WITH RESPECT TO THE PENDENT CLAIMS

A. APPLICABLE LAW

Both plaintiffs and defendants agree that federal law supplies the controlling standards. Because the plaintiffs seek injunctive relief for alleged violations of state law, I must determine whether the Erie doctrine compels application of state law standards.

It is established that the principles enunciated by the Supreme Court in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), regarding the application of state law in suits arising in diversity apply with equal force where a federal court exercises its pendent jurisdiction over state law claims. United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966). Under the Erie doctrine, federal courts are bound to apply state substantive law and federal rules of procedure to state law claims. Hanna v. Plumer, 380 U.S. 460, 465 (1965). Nonetheless, the High Court has cautioned that "choices between state and federal law are to be made not by application of any automatic litmus test, but rather by reference to the policies underlying the Erie rule," id. at 467, and most particularly

the policy which insures "substantial uniformity of predictable outcomes between cases tried in federal court and cases tried in the courts of the state in which the federal court sits." Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109 (1945).

Given the above, the court concludes that federal law provides the appropriate standard with respect to plaintiffs' motion for preliminary injunctive relief for both their federal and state **pendent** claims. **See** Sullivan v. **Vallejo** City Unified School Dist., 731 F. Supp. 947, 957 (E.D. Cal. 1990). Nevertheless, state law may be used to inform the court's exercise of its equitable powers to decide if the issuance of a preliminary injunction is warranted. **Id.** at 956. When determining if plaintiffs' claims are likely to succeed on the merits, "a federal court must inquire into whether injunctive relief would be available as a matter of state law." **Id.** If no **equitable** relief is available under state law, "a federal district court may not exercise the discretion it has under the **federal** standard to grant an injunction." **Id.;** see also Sims **Snowboards,** Inc. v. Kelly, 863 **F.2d** 643, 646 (9th Cir. 1988) (**"[t]he** general equitable powers of federal courts should not **enable** a party suing in diversity to obtain an injunction if **state** law clearly rejects the availability of that remedy.").

While it has not been suggested that state law precludes **injunctive** relief, as I explain below, the state statutes inform the court as to its duty in addressing the equities.

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B. **FEDERAL STANDARDS FOR A PRELIMINARY INJUNCTION**

The purpose of the preliminary injunction is to preserve the relative positions of the parties -- the status quo -- until a full trial on the merits can be conducted. **See** University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). The limited record usually available on such motions renders a final decision on the merits inappropriate. **See** Brown v. Chote, 411 U.S. 452, 456 (1973).

"The [Supreme] Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." Reinberaer v. Romero-Barcelo, 456 U.S. 305, 312 (1982). In the Ninth Circuit, two interrelated tests exist for determining the propriety of the issuance of a preliminary injunction. The moving party carries the burden of proof on each element of either test. Los Anaeles Memorial Coliseum Comm'n. v. National Football Leauue, 634 F.2d 1197, 1203 (9th Cir. 1980). Under the first "traditional" test, the court may not issue a preliminary injunction unless each of the following requirements is satisfied: (1) the moving party has demonstrated a likelihood of success on the merits, (2) the moving party will suffer irreparable injury and has no adequate remedy at law if injunctive relief is not granted, (3) in balancing the equities, the non-moving party will not be harmed more than the moving party is helped by the injunction, and (4) granting the injunction is in the public interest. **See** Martin v.

International Olvmoic Committee, 740 F.2d 670, 674-75 (9th Cir. 1984).

Under the second "alternative" test, the court may not issue a preliminary injunction unless the moving party demonstrates either "probable success on the merits and irreparable injury . . . or . . . sufficiently serious questions going to the merits to make the case a fair ground for litigation and a balance of hardships tipping decidedly in favor of the party requesting relief." Tooanaa Press Inc. v. Citv of Los Anaeles, 989 F.2d 1524, 1528 (9th Cir. 1993) (citations omitted). The Ninth Circuit has explained that the two parts of the alternative test are not separate and unrelated, but are "extremes of a single continuum." Benda v. Grand Lodae of International Association of Machinists, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979). We are taught that the critical element within this alternative test is the relative hardship to the parties. Seed . "[T]he required degree of irreparable harm increases as the probability of success decreases." United States v. Nutri-coloav Inc., 983 F.2d 394, 397 (9th Cir. 1992) (citations and internal quotation marks omitted). Even if the balance tips sharply in favor of the moving party, however, "it must be shown as an irreducible minimum that there is a fair chance of success on the merits." International Olympic Committee, 740 F.2d at 674-75. (citation omitted).

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C. **BALANCING THE EQUITIES**

Given the court's conclusion that the plaintiffs have demonstrated not only fair grounds to litigate on the issue of "qualified purchaser," but also a strong showing on the statutory notice provisions, the next step would ordinarily be to balance the equities. That is because "a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." Amoco v. Village of Gambell, 480 U.S. 531, 542 (1987). Despite this general rule, however, the courts have recognized a species of statutes which either "in so many words, or by necessary and inescapable inference restricts the court's jurisdiction in equity." Save The Yaak Committee v. Block, 840 F.2d 714, 722 (9th Cir. 1988)(quoting Gambell, 480 U.S. at 542.). As I have previously explained, to answer the question of whether the California statutes at issue are of that variety the court "must look to the 'underlying substantive policy' that [the legislature] designed the statute to effect, rather than its statutory procedure." Wilderness Society v. Tyrrell, 701 F. Supp. 1473, 1477 (E.D. Cal. 1998)(quoting Gambell, 480 U.S. 544 and citing Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1156 (9th Cir. 1998)).

It is beyond cavil that the purpose of the California statutes are to preserve low cost housing. To insure this purpose, the statutes require a right of first refusal be offered to parties that will in fact preserve particular

developments for that purpose, unless the Buyer is "qualified," which means in practical terms, a purchaser who agrees to maintain the housing for the statutory purpose. To insure the efficacy of the statutes and to implement its goal, the statutes in their terms prohibit sale unless the notice and right of first refusal provisions are complied with. See Cal. Gov't Code § 65863.10-.11. Under these circumstances, it would appear that the state legislature "in so many words," Save the Yaak, 840 F.2d at 722, has commanded a result, thus restricting the court's discretion. Nor is that the only evidence concerning the matter of balancing the equities.

A second element of the statutory scheme would appear "by necessary and inescapable inference," id., to require an injunction when its terms have been violated. Under the statute, when a notice of the right of first refusal has been sent, the recipients of the notice have 180 days to elect to purchase, Cal. Gov't Code § 65863,11(h), and only after the expiration of that period may the Owner sell to others. Cal. Gov't Code § 65863.11(i).

The self-evident reason for the statutory delay is to provide those receiving notice the opportunity to evaluate the purchase of the property, its condition, an appropriate price, and arrange for financing. In the absence of such delay, not only can the preservation of a property for low-income use not be assured, a plaintiff seeking injunctive relief will have no way to show that alternative purchasers would in fact be

available. Rather, as in the instant case, the best any plaintiff can do is to suggest that there are entities who would be interested and given sufficient opportunity, might purchase the property. This showing is relatively weak as compared to claims of an actual Buyer pressing for sale. In sum, a failure to provide the statutory notice distorts the ability of a plaintiff to make a sufficient showing concerning the equities, and thus not only frustrates the "underlying substantive policy," Gambell, 480 U.S. 544, but distorts the equitable consideration of a proper disposition.

The court is quite sensitive to the command that "a major departure from the long tradition of equity practice should not Lightly be implied." Weinberaer v. Romero-Barcelo, 456 U.S.305, 320 (1982). Nonetheless, in the instant matter, the court is convinced that a violation of the State notice and right of first refusal provisions preclude sale of the properties, and thus commands injunctive relief.

D. BOND

No preliminary injunction shall issue "except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). Under the Rule, it is "well settled that Rule 65(c) gives the court wide discretion in the matter of setting security." Natural Resources Defense Counsel v. Morton, 337 F. Supp. 167,

1 168 (D.D.C. 1971)(motion for summary reversal dismissed), 458
2 F.2d 827 (D.C. Cir. 1972). See also Sebalno v. Knapp Bros. Mfa.
3 co., 217 F.2d 810, 815-16 (6th Cir. 1954); Dovne v. Saettele,
4 112 F.2d 155, 162 (8th Cir. 1940).

5 In considering the appropriate amount of the bond, I note
6 that the named plaintiffs are all person of very moderate means
7 and the organizational plaintiffs are nonprofit corporations.
8 Clearly, if such plaintiffs were "required to post substantial
9 bonds . . . in order to secure preliminary injunctions . . .,"
10 the bonds might undermine mechanisms for private enforcement of
11 the law. Friends of the Earth v. Brineaar, 518 F.2d 322, 323
12 (9th Cir. 1975)(reducing bond in NEPA case from $4,500,000 to
13 $1,000); accord Morton, 337 F. Supp. at 169 (bond set at $100);
14 Environmental Defense Fund v. Corps. of Enaineers, 331 F. Supp.
15 325 (D.D.C. 1971)(bond set at $1).

16 I recognize that the Sellers and Buyers have a significant
17 economic stake in the proposed sale. I take some comfort in the
18 fact that they voluntarily engaged in a highly regulated
19 business clearly impressed with the public interest, and in that
20 sense accepted the risk of missteps leading to suit and
21 injunctive relief.

22 In sum, the court is "unwilling to close the courthouse
23 door in public interest litigation by imposing a burdensome
24 security requirement." State of Ala. ex rel. Baxley v. Corps of
25 Engineers, 411 F. Supp. 1261, 1276 (N.D. Ala.1976).
26 Accordingly, bond is set in the amount of One Dollar.

For the foregoing reasons, IT IS HEREBY ORDERED as follows:

1. HUD'S motion to dismiss is GRANTED with prejudice;

2. Plaintiff's federal claims against the Owners are dismissed with prejudice;

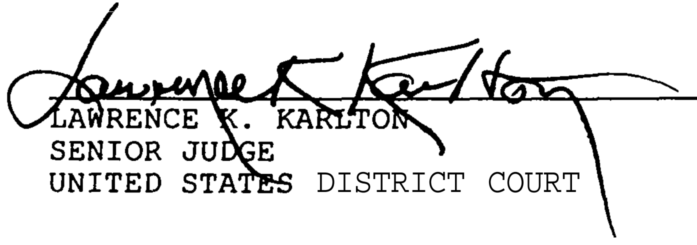
3. The Owners are ENJOINED from prepaying their mortgages and not renewing their Section 8 contracts until they comply with Cal. Gov't Code § 65863.10-.11, or further order of this court;

4. Bond is set at One Dollar; and

5. The Status Conference in the above-captioned matter is RESET to August 23, 2001 at 9:30 a.m. in Chambers.

IT IS SO ORDERED.

DATED: July 2, 2001.



LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

ndd

United States District Court
for the
Eastern District of California
July 3, 2001

* * CERTIFICATE OF SERVICE * *

2:01-cv-00832

Kenneth Arms Tenant

v.

Martinez

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 3, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Deputy Clerk