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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; NATIONAL HOUSING PARTNERSHIP; and DOES I - XX, Inclusive, Defendants.	CASE NO. PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES DATE: TIME: DEPT:

Plaintiffs, by their undersigned attorneys, move pursuant to Federal Rule of Civil Procedure 65(a) for a Temporary Restraining Order and an Order to Show Cause why a preliminary injunction should not be issued against Defendants, their agents, employees, representatives, successors, attorneys, and all persons in active concert with them, that:

(1) enjoins defendants Kenneth Arms Limited Partnership, Rancho Arms Limited Partnership, Manzanita Arms Limited Partnership, and San Juan Limited Partners ("the Owners") from prepaying their subsidized mortgages, opting out of their Section 8 contracts and selling their developments until such time as they have provided tenants and various public entities with lawful notice of their intent to take such actions, and have complied with their legal obligation to provide a right of first refusal to all interested entities;

(2) enjoins defendant Martinez from accepting the Owners' requests to prepay their subsidized mortgages, opt out of their Section 8 contracts and sell their properties until such time as Martinez has enforced the applicable federal and state notice requirements;

(3) enjoins Martinez from approving the Owners' requests to prepay their subsidized mortgages, opt out of their Section 8 contracts and sell their properties until such time as he has first considered the racial and socioeconomic effects of these actions, and has ensured that the projects 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 proposed sale of the project.

WHEREFORE, Plaintiffs request:

(1) a Temporary Restraining Order ordering the relief requested above;

(2) an Order to Show Cause why a preliminary injunction ordering the relief requested above should not issue; and

/ / /

(3) such other appropriate relief to which Plaintiffs may be entitled.

Dated: April 30, 2001

Respectfully submitted,

LEGAL SERVICES OF NORTHERN CALIFORNIA

By: _____
ANNE PEARSON
Attorneys for Plaintiff

INTRODUCTION

This dispute arises in the Sacramento Metropolitan Area where the rental housing vacancy rate is less than 3 percent, the average rent is $770, and where nearly 35,000 families are on a waiting list for rental subsidy vouchers. In such a tight rental market, many low-income families are not able to afford a roof over their heads, unless they are amongst the lucky few who reside in subsidized housing.

Plaintiffs in this action seek injunctive relief to stop the imminent loss of 351 units of federally subsidized housing from Sacramento's already scarce stock of affordable housing. For the individually named Plaintiffs, who are low-income, disabled residents of four federally subsidized complexes, the loss of their buildings' federal subsidies will jeopardize their ability to stay in their homes, and puts them at risk of homelessness. For other low-income renters, whose interests are represented by the named Tenants Associations and the California Coalition for Rural Housing Project, this conversion to market rate irreversibly depletes Sacramento's stock of affordable housing, making it harder for them to find decent, affordable homes.

The conversion to market rate is to be effected by the defendant property owners' ("the Owners") unlawful prepayment of their subsidized mortgages, termination of their "project based" Section 8 contracts, and sale of their four properties. Specifically, the Owners are on the verge of terminating these important subsidies and selling their properties without first providing lawful notice of their actions to tenants and public entities, and without complying with their legal obligation to afford a right of first refusal to interested entities who intend to maintain the affordability of the units. The defective notices issued by Defendant Owners have also interfered with the tenants' ability to apply for alternative rental subsidies and denied non-profit housing developers who would preserve the affordability at these properties the opportunity to purchase any of these properties.

Defendant Martinez has acted unlawfully and facilitated the potential loss of the subsidized units by failing to enforce federal and state notice requirements. Defendant Martinez has also acted unlawfully by: 1) approving the Owners' requests to terminate their subsidies and sell their properties without complying with their legal obligation protect the ongoing affordability of the complex; 2) entering into agreements with a prospective buyer which will likely remove affordability, disqualify the units at risk from the Section

8 voucher program and block any non-profit developer from purchasing the property; 3) failing to affirmatively further fair housing; and 4) failing to act consistently with and further the policies and goals of the National Housing Act.

Defendant Owners' actions violate the United States Housing Act, the Housing and Community Development Amendments of 1978, as amended, California Government Codes sections 65863.10 and 65863.11, and the California Unfair Practices Act. Defendants HUD and Martinez's actions violate the Administrative Procedure Act. Plaintiffs seek declaratory and injunctive relief enjoining the Owners from prepaying their subsidized mortgages, opting out of their Section 8 contracts and selling their developments until such time as they have provided the tenants and various public entities with lawful notice of their intent to take such actions, and have complied with their legal obligation to provide a right of first refusal to all interested entities. Plaintiffs also seek declaratory and injunctive relief enjoining defendants HUD and Martinez from accepting the Owners' requests to prepay their subsidized mortgages, opt out of their Section 8 contracts and sell their properties. Plaintiffs also seek declaratory and compensatory relief.

RELEVANT FACTS

The individually named Plaintiffs in this action ("the Tenants") are low-income, disabled individuals who face the imminent conversion of their homes from affordable housing to market rate housing. Plaintiff Virginia Breimann is a 73-year-old resident of the Kenneth Arms Apartments who has lived there for 21 years. Declaration of Virginia Breimann, paras. 2, 4, attached as Exhibit "A." Because Ms. Breimann's unit is subsidized by the development's Section 236 mortgage and project based Section 8 contract, she pays only $179 of her monthly income of $843 in rent. *Id.*, paras. 3, 4. Plaintiff Rita Janssen is a 75-year old resident of the San Juan Apartments who has lived there for 15 years. Declaration of Rita Janssen, paras. 2, 4, attached as Exhibit "B." Because Ms. Janssen's unit is subsidized by the complex' Section 236 mortgage and Section 8 contract, she pays only $203 of her monthly income of $732 in rent. *Id.* paras. 3, 4. Plaintiff Sherry Lautsbaugh is a resident of the Rancho Arms Apartments, where she has lived for 11 years. Declaration of Sherry Lautsbaugh, para. 2, attached as Exhibit "C." Ms. Lautsbaugh's unit is also subsidized by her development's Section 236 mortgage and Section 8 contract, permitting her to pay only $180 of her monthly income of $825 in rent.

Id., paras. 3, 4. Finally, Plaintiff Kathy Pounds is a resident of the Rancho Arms Apartments, where she has lived since May 2000. Declaration of Kathy Pounds, para. 2, attached as Exhibit "D." Ms. Pound's unit is subsidized by her development's Section 236 mortgage, so her rent is set at $328, which she is able to afford out of her monthly disability benefits totaling $712. *Id.*, paras. 3, 4.

Plaintiff Kenneth Arms Tenants Association ("KATA") is an unincorporated association formed in 1996 for the primary purpose of preserving affordable housing for low-income residents of the Carmichael area in Sacramento County. Declaration of Virginia Breimann as KATA president, (hereinafter "KATA President Declaration") para. 2, attached at Exhibit "E." The members of KATA, who are the residents of the Kenneth Arms Apartments, are low-income tenants, approximately 35 percent of whom are immigrants from Russia, Armenia or the Ukraine. *Id.*, para. 4. Many of these immigrant tenants speak and comprehend little or no English. *Id.*

Plaintiff Manzanita Arms Tenants Association ("MATA") is an unincorporated association formed in 1996 for the primary purpose of preserving affordable housing for low-income residents of the Carmichael area in Sacramento County. Declaration of Denise Burt as MATA president, (hereinafter "MATA President Declaration") para. 2, attached as Exhibit "F." Between 50 and 65 percent of the residents at the Manzanita Arms Apartments are either Russian, Ukranian or Armenian, most of whom speak or comprehend little or no English. *Id.*, para. 4.

Plaintiff California Coalition for Rural Housing Project (CCRHP) is a nonprofit organization whose mission is preserve and produce affordable housing, with a special focus on those residing in housing receiving assistance from the U.S. Department of Housing and Urban Development (HUD), and to participate in and/or affect the outcome of changes that may occur in their housing. Declaration of Robert Weiner, paras. 1,2, attached as Exhibit "G." CCRHP carries out its mission in several ways including the following: educating low-income residents of HUD-financed housing and other types of affordable housing regarding their rights as tenants and their right to participate in the housing programs that benefit them, increasing resident participation in these programs through resident organizing and the establishment of resident associations, and helping residents and resident associations to form partnerships with housing agencies and community groups to promote resident participation and to preserve development undergoing or at high-risk of losing HUD affordability programs. *Id.*

Between October 23 and October 30, 2000, the Tenants received letters from the Owners giving them notice of the Owners' decisions to terminate their project based Section 8 contracts. A true and correct copy of each notice is attached as Exhibit "H." These notices were not on the Owners' letterhead and were not signed, except for the notice from the Manzanita Arms Limited Partnership, which was signed by someone named "Tammy." These notices were not translated into any language other than English. These notices did not include a statement of the current rent at the time of the notice and the anticipated rent after opt out, nor did they provide tenants with the name and telephone number of the county, the appropriate local public housing authority, the Department of Housing and Community Development, and the legal services organization that could be contacted to request additional written information about an owner's responsibilities and the rights and options of an affected tenant.

On or around November 30, 2000, the Tenants received letters from the Owners giving them notice of their decisions to prepay their federally subsidized mortgages and sell their properties. A true and correct copy of each notice is attached as Exhibit "I." These notices did not provide tenants with nine months notice of the impending prepayment. They also did not include a statement of the current rent at the time of the notice and the anticipated rent after prepayment, nor did they provide tenants with the name and telephone number of the county, the appropriate local public housing authority, the Department of Housing and Community Development, and the legal services organization that could be contacted to request additional written information about an owner's responsibilities and the rights and options of an affected tenant.

The effect of these deficient notices on the Tenants has been dramatic. Plaintiff Breimann was scared after receiving them, and the resulting uncertainty of not knowing from one day to the next what going to happen has aggravated her medical problems. Breimann Declaration, Exh. "A," para. 8. Plaintiff Janssen also experienced fear after receiving these notices as they signaled to her the conversion of her unit to market rate, and she has no where else to go. Janssen Declaration, Exh. "B," para. 9. The notices in question have aggravated plaintiff Lautsbaugh's depression, and have "sent her over the edge." Lautsbaugh Declaration, Exh. "C," para. 8. Likewise, Plaintiff Pounds was scared after receiving the notices, and also felt disappointed and frustrated since she had lived in her unit for only 6 months before

receiving these notices, after having been on the waiting list for the subsidized unit for two and a half years. Pounds Declaration, Exh. "D," para. 8.

In the wake of these notices, the Tenants did not know what to do. Because the notices did not give the name or phone number of any person or agency to call for assistance or information, Plaintiff Breimann did not know who to talk to about her concerns. Breimann, Exh. "A," para. 10. The notices indicated that upon termination of the Section 8 subsidies, HUD would provide Section 8 vouchers to "eligible tenants." Plaintiff Breimann had pressing questions and concerns about her eligibility for those vouchers, but did not know who to call. *Id*. The lack of contact information also inhibited Ms. Breimann's ability in her capacity as President of the Tenants Association to answer the many questions about vouchers that she received from other residents of her complex. KATA President Declaration, Exh. "E," para. 7. Additionally, Ms. Breimann has not known who to contact to see if the Tenants Associations have any special rights during the opt out and prepayment process. *Id.*

While the Tenants Associations and CCRHP have made every effort to educate the tenants about what is going on, they have not been able to reach every single affected tenant. Plaintiff Breimann, in her capacity of president of the Kenneth Arms Tenant Association, has tried to answer the many questions of her neighbors, but she has no doubt that many of her immigrant neighbors have not even known of the need to ask questions. *Id*., para. 8. CCRHP has also tried to educate the affected tenants about the pre-payment/opt-out process, but does not have the capacity to contact every affected tenant. Declaration of Dewey Bandy, para. 6, attached as Exhibit "L." As a result, many tenants only know that information that was provided to them by the notices they've received from the owners. *Id.* Indeed, some tenants have left their units after receiving the notices because they didn't understand that they needed to stay to be eligible for a voucher. *Id.*

The Tenants now understand that they are entitled to apply for "enhanced vouchers" in the coming months, but they are also aware that the vouchers do not adequately replace the current federal subsidies. First, the Tenants are concerned that they may not actually receive vouchers, since they have to apply for them, and their applications may be rejected. Breimann, Exh. "A," para. 11; Lautsbaugh, Exh. "C," para. 9. Even if they do receive vouchers, the Tenants are concerned about the long term value of those subsidies, since they understand that after their developments convert to market rate, their

landlords will be free to raise their rents to a level at which a voucher may not be used. Pounds, Exh. "D," para. 10. They are also worried about losing some of the tenant protections which they currently enjoy under the Section 236 and project based Section 8 programs. Namely, under those programs, tenants can be evicted only for cause. By contrast, the Tenants understand that under the voucher program, a landlord can evict a tenant after the first year for no cause whatsoever. Lautsbaugh, Exh. "C," para. 12. Finally, the Tenants worry about how long the vouchers will last, since they understand that they are being made available "subject to appropriations" and could be de-funded within a year or two, unlike their developments' subsidized mortgages which, if not prepaid, are not scheduled to mature until at least 2014. *Id.* at para. 13.

An additional consequence of the termination of federal subsidies is that under the proposed replacement voucher program, tenants can be required to pay security deposits amounting to as much as two months rent. By contrast, under the Section 236 mortgage program, security deposits are limited to a nominal amount. Pearson Declaration, attached as Exhibit "U", para. 8. Therefore, if the federal subsidies are terminated, those tenants who are able to stay in their homes, as well as those tenants who will be forced to move, could be required to come up with hundreds of dollars at one time in order to pay their new security deposits. *Id.*

The November 30, 2000 notices to the Tenants also notified them of the Owners' intent to sell the four developments. HUD has not only approved that sale, but has facilitated it by signing "use agreements" with the prospective buyer, U.S. Housing Partners. A true and correct copy of the use agreements between HUD and U.S. Housing Partners concerning the sale of the Rancho Arms Apartments and the Kenneth Arms Apartments are attached as Exhibits "J" and "K" respectively. The use agreements between HUD and U.S. Partners concerning the San Juan Apartments and the Manzanita Apartments are identical in all respects to the two use agreements attached. Bandy Declaration, Exh. "L," para. 5. According to those use agreements, the new owner of the properties would be permitted to set rents for current tenants at 30 percent of 80 percent of Area Median Income (AMI). *See* Use Agreements, Exhs. "J" and "K," para. 3.E. In the Sacramento Metropolitan Area, 80% of the Area Median Income for a family of one is $31,550. *See* HUD 2001 Income Limits, attached as Exhibit "M." Therefore, under the use agreement, the new owner could sent rents for the

one-bedroom apartments in which the named Plaintiffs live at $867.63 per month (30% of $31,550 divided by twelve months.)

A significant consequence of the landlord's ability to set rents at such a high rate is that tenants with enhanced vouchers may be prohibited by the Housing Authority from using their vouchers to lease their current units. This prohibition derives from federal law which permits enhanced vouchers to be used only so long as the rent in the unit remains "reasonable in comparison with rents charged for comparable dwelling units in the private, unassisted local market." 42 U.S.C. § 1437f(o)(10)(A). According to rent comparability studies conducted by consultants hired by the Owners in 1999, the fair market rent of a one bedroom apartment at the Manzanita Arms was $445/month; the fair market rent of a one bedroom apartment at the Rancho Arms was $370/month; and the fair market rent for a one bedroom at the Kenneth Arms was $450/month. A true and correct copy of each of the three Rent Comparability Study Summary Reports are attached as Exhibits "N," "O," and "P" respectively. These fair market rents were derived by inspecting the units in question, and comparing them to the local market. Given the fact that a rent set at 30% of 80% of AMI ($867 month) is almost twice as high as rents charged for comparable dwelling units in the private, unassisted market, it is highly unlikely that such a rent will be deemed "reasonable," in which case voucher holders could be prohibited from leasing up there, and would be forced to move and try to use their vouchers elsewhere.

If forced to move and use their vouchers elsewhere, the Plaintiffs don't know what they will do. Plaintiff Lautsbaugh is legally blind and also suffers from emphysema and osteoporosis. Lautsbaugh, Exh. "C," para. 5. As a result of her conditions, her doctors have advised her not to lift heavy things or exert herself too much. *Id.* If she were forced to move, she doesn't know where she would go since she has no family to take her in. *Id.*, para. 14.

Plaintiff Janssen is 75 years old and suffers from severe heart problems. Janssen, Exh. "B," para. 6. As a result, she can't move around very much. *Id.* Given her disabilities, she feels that it would be nearly impossible for her to find another home and move her belongings. She is simply not healthy enough to pack or move. *Id.* para. 15.

Plaintiff Breimann is 73 years old and has cancer, lupus, asthma and severe allergies. Breimann, Exh. "A," paras. 4, 5. As a result of the lupus, her joints ache and she can't walk around very well.

Indeed, she recently received approval for an in-home aide to help her with activities that she cannot perform, like cleaning. *Id.* Ms. Breimann's allergies are so severe that she had to customize her apartment by removing the carpeting and replacing it with linoleum. If she had to move, she would have to either find an apartment already customized to accommodate her disabilities or go through the expensive and time-consuming process of modifying an apartment. *Id.*

Plaintiff Kathy Pounds is disabled by fibromyalgia and Chronic Fatigue Syndrome. Pounds, Exh. "D," para. 4. As a result of these conditions, her muscles cramp which causes her pain. *Id.* She believes that it would be nearly impossible for her to find another unit, given her health problems. *Id.*, para. 13.

Plaintiffs' ability to find new housing is not only limited by their physical disabilities, but also by Sacramento's tight housing market. In 2000, Sacramento's apartment vacancy rate fell to less than 3 percent. *See* Silvina Martinez, *Housing Hunt Grows Harder: Holders of Section 8 Voucher Subsidies Are Unable to Find Affordable Apartments in the Capital's Tight Rental Market*, SACRAMENTO BEE, April 17, 2001, attached as Exhibit "Q." Given today's supply-demand equation, landlords no longer rely on Section 8 vouchers as a steady source of income. *Id.* Indeed, in the past two years, the housing authority's listings of owners accepting vouchers has gone from nearly 100 to just a dozen. *Id.*

In spite of the fact that the sale of the developments, as approved by HUD, would result in the operation of the housing as above-market rate housing, the Owners have not complied with their legal obligation to afford a right of first refusal to purchasers who are committed to maintaining the affordability of the complexes. Pursuant to California Government Code section 65863.10, an owner who intends to terminate federal subsidies is required to provide the California Department of Housing and Community Development (HCD) with a copy of the notice of intent sent to tenants. Once HCD has received this notice, it is must provide the owner with a list of "interested entities" to whom the owner must afford a right of first refusal. While HCD is charged with facilitating an owner's compliance with its obligation to afford a right of first refusal by maintaining the list of "interested entities," the duty to notify those purchasers squarely falls on the owner. Cal. Govt. Code § 65863.11(b)-(c) (amended 2001).

Here, the Owners did not send the notices in question to HCD. *See* letter from HCD to Anne Pearson, dated February 27, 2001, attached as Exhibit "R" (indicating that HCD had received only two notices from the Kenneth Arms Limited Partnership, dated March 2000 and July 2000, and *no* notices from the Manzanita Arms Limited Partnership, the San Juan Limited Partnership, or the Rancho Arms Limited Partnership.) Nor did they afford a right of first refusal to all interested entities who are on HCD's list. For example, the Sacramento Mutual Housing Association (SMHA), which is a nonprofit developer of affordable housing, has been on HCD's list of interested entities since 1999. Declaration of Rachel Iskow, para. 2, attached as Exhibit "S." *See also* HCD List of Interested Developers, dated February 2000, attached as Exhibit "T." Despite SMHA's presence on that list, it has never been notified by the Owners of the availability for sale of the four developments. Iskow, Exh. "S," para 3. Had SMHA received notice of the availability of the four developments, it would have been interested in exposing the possibility of buying them. *Id*., para. 4. Indeed, if given the opportunity to do so now, SMHA would welcome the opportunity to explore the possibility of purchasing the four complexes so as to preserve them as affordable housing. *Id*., para. 6.

Likewise, pursuant to state law, tenants associations are among the entities who are supposed to be notified afforded a right of first refusal when an assisted housing development is available for sale. However, the Kenneth Arms Tenants Association was never afforded a right of first refusal. KATA President Declaration, Exh. E, para. 11.

Despite the fact that HUD has approved the sale of the four developments, as evidenced by the use agreements, there is no evidence that HUD has at any time considered the racial and socioeconomic effects of these the sale prior to approving it. Pearson Declaration, para. 4, attached as Exhibit "U."

ARGUMENT

I. A TEMPORARY RESTRAINING ORDER MUST BE ISSUED BECAUSE THE PLAINTIFFS HAVE SHOWN A PROBABLE SUCCESS ON THE MERITS AND THE BALANCE OF HARDSHIP TIPS IN THEIR FAVOR.

> With respect to the standards for issuance of a temporary restraining order, [g]uidance may be gleaned from cases considering the propriety of preliminary injunctions. Since these latter have a far longer duration than TROs and therefore involve more extensive control of the parties, the standard for their issuance should, if anything, be more rigid than that governing the issuance of TROs. Accordingly, if the district court's order meets the exacting requirements of a preliminary injunction, it follows a fortiori that it is acceptable as a TRO.

L.A. Unified School District v. U.S. District Court, 650 F.2d 1004, 1008 (9th Cir. 1981) (Ferguson, J., dissenting).

The Ninth Circuit has "repeatedly instructed" that to obtain a preliminary injunction, the moving party m success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in its favor. These two formulations represent two points on a sliding scale in which the required degree

of irreparable harm increases as the probability of success decreases.

Roe v. Anderson, 134 F.3d 1400, 1401-02 (9th Cir. 1998), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489 (1999). *See also Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730 (9th Cir. 1999).

The critical element in determining where a case falls along the above-described "continuum" is the relative hardship of the parties. *Briggs v. Sullivan*, 886 F.2d 1132, 1143 (9th Cir. 1989); *Benda v. Grand Lodge of the International Association of Machinists*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed* 441 U.S. 937 (1979). Accordingly, where "the balance of harm tips decidedly towards plaintiff," the plaintiff need only demonstrate "a fair chance" of success on the merits, or raise questions "serious enough to require litigation." *Benda*, 584 F.2d at 315; *see Briggs*, 886 F.2d at 1143.

The Ninth Circuit has recognized that reductions in public benefits, "even reductions of a relatively small magnitude, impose irreparable harm" on low-income recipients of those benefits. *Beno v. Shalala*, 30 F.3d 1057, 1063-64 n.10 (9th Cir. 1994) (discussing welfare benefits and collecting cases); *see also Roe*, 134 F.3d at 1404 (same). Accordingly, "[w]hen a family is living at subsistence level, the subtraction of any benefit can make a significant difference to its budget and to its ability to survive." *Beno*, 30 F.3d at 1064 n.10, quoting *Paxton v. Secretary of Health and Human Services*, 856 F.2d 1352, 1354 (9th Cir. 1988). For this reason, in cases involving the threatened loss of public benefits, "the public interest is a factor to be strongly considered" in deciding a request for preliminary relief. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

Likewise, in *Mitchell v. United States Department of Housing and Urban Development* 569 F.Supp. 701 (N.D. Cal. 1983), the court found that plaintiff, a participant in the Section 8 federal rent subsidy program, would be irreparably harmed if a preliminary injunction did not issue to stop the administering housing authority from evicting her because, based on her limited income and the fact that

the county in which she resided did not have a significant amount of low income housing, eviction would likely render her homeless. *Id.* at 705.

In this case, Plaintiffs can establish both that they will suffer irreparable harm (namely, the irretrievable loss of 351 units of affordable housing, and, potentially, the inability to qualify for or to use alternative housing subsidies) if injunctive relief is not granted, as compared to Defendants who will experience only minimal harm, i.e. maintain the current program or status quo if required to comply with the applicable notice provisions. Plaintiffs have also shown a probable success on the merits. Thus, Plaintiffs provide more than is required to support a temporary restraining order and preliminary injunction.

A. Plaintiffs Have Established That They Will Likely Succeed on the Merits of Their Claims Against Defendant Owners.

Based on the fact that Defendant Owners have issued clearly deficient prepayment and opt-out notices and the clarity of the applicable laws, Plaintiffs can establish that they will likely prevail on the merits on each of their claims.

1. Defendant Owners Have Not Complied with State and Federal Law Governing Section 8 Opt Out and Prepayment out Notices.

The Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA), Title V of the HUD Fiscal Year1998 Appropriations Act, Pub.L. 105-65, enacted on October 27, 1997, established new policies for the renewal and non-renewal of Section 8 project-based contracts. Recognizing that an owner may decline to renew a Section 8 project-based contract at the expiration of its term and thereby affect the supply of low-income affordable rental housing, Congress required that project owners deciding to terminate their Section 8 contracts provide written notice to the Secretary and the tenants involved of the proposed termination not less than one year before termination of any contract under which assistance payments are received. 42 U.S.C. § 1437f(c)(8)(A) (amended 1998). Congress also required that a notice of an owner's intent to terminate a Section 8 contract comply with "any additional requirements established by the Secretary." 42 U.S.C. § 1437f(c)(8)(C).

The Secretary has established a number of "additional requirements." First, a notice of intent to opt-out must be on the Owner's or duly authorized representative's letterhead and signed, and must be served by delivery directly to each unit in the project or mailed to each tenant. *Section 8 Renewal Policy: Guidance for the Renewal of Project-Based Section 8 Contracts*, HUD Office of Multifamily Housing, Section 11-4-B, attached in the Appendix of Additional Authorities. Second, the Renewal Policy further notes that "if the population of the property speaks a language other than English, Owners are strongly encouraged to provide the notification letters in the appropriate language(s)." *Id.* Third, project owners issuing notices of intent to terminate Section 8 contracts "must also comply with any State or local notification requirements." HUD Directive 99-36, XVI-G, attached in the Appendix of Additional Authorities.

At the time that the Owners purported to give notice of their intent to opt-out of the Section 8 project-based program and prepay their subsidized mortgages, applicable California law required an owner of an assisted housing development who seeks to terminate a federal subsidy to provide at least nine months notice of the proposed change to each affected tenant household residing in the assisted housing development as well as to numerous "public entities," including the chairperson of the board of supervisors, and the California Department of Housing and Community Development (HCD). Cal. Govt.

Code § 65863.10(b),(c)(1) (amended 2001), attached in the Appendix of Additional Authorities. Plaintiffs assert that a party aggrieved by a violation of the state notice requirements is entitled to seek injunctive relief. *Id*. § 65863.10(i).[1]

The notice sent to tenants and public entities was required to contain: (1) the anticipated date the federal subsidy would be terminated; (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 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 termination of the subsidy; (5) a statement of the owners' intention to participate in any current replacement federal program after the proposed date of subsidy termination; and (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) (amended 2001).

In addition to the notice described *supra*, owners of assisted housing were also required to send to the chairman of the board of supervisors, the local housing authority, and HCD an *additional* notice 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.* § 65863.10(c)(2) (amended 2001).

[1] Under the original version of Section 65863.10 (pre-January 1, 2001), the notice requirements cited herein applied. Under the amended statute (effective January 1, 2001), slightly different requirements apply. Plaintiffs assert that since the notices were issued before January 1, 2001, the old notice requirements apply. Also, under the original statute, the right to injunctive relief was not explicit. It is explicit under the amended statute. Plaintiffs assert that the injunctive relief section of the amended statute merely clarifies what was reasonably implied under the original statute and that they are therefore entitled to such relief.

The required notice to public entities is critical because state law requires that a jurisdiction include in the housing element of its General Plan an analysis of existing housing developments that are eligible to change from very low-income housing units during the next ten years due to termination of subsidy contracts, mortgage prepayment or expiration of restrictions on units. Cal. Govt. Code § 65583(a)(8). Therefore, unless a jurisdiction receives notice of the owner's intent to opt out of a Section 8 contract or prepay a subsidized mortgage, that jurisdiction will be unable to comply with its obligation to develop an accurate housing element which sets forth the housing needs of its residents by income category and serves as the basis for adoption of plans and policies to meet those needs.

Strict compliance with notice requirements governing termination of federal subsidies is required where those notice requirements are intended to provide the person or entity who is being put on notice with an opportunity to *do something* to prevent or affect the termination of the subsidy. *215 Alliance v. Cuomo*, 61 F.Supp.2d 879 (D.Minn. 1999). In *215 Alliance*, low-income residents of a subsidized complex challenged the sufficiency of a project owner's notice of intent to opt out of a Section 8 contract on the grounds that the notice failed to advise them of the reasons for the owner's intended termination of that contract, as was required at that time by 42 U.S.C. § 1437f. *Id.* at 886.

In rejecting HUD's argument that the notice was sufficient because the tenants knew that their position was precarious and that "something was afoot," the court held that compliance with the "clear language of the statute" was necessary because "the statutory notice requirement was [not] intended as a measure of courtesy to HUD tenants; rather, it was clearly intended to provide tenants affected by a change in their subsidy status an opportunity to *do something* to prevent that change." *Id.* at 887 (emphasis in the original.)

Strict compliance is required not only with notice requirements governing notices to *tenants*, but also with notice requirements governing notices to relevant *public entities*. *Id.* In *215 Alliance*, the project owners also failed to provide HUD with the requisite one-year notice of their intent to refuse renewal of the HAP contracts. *Id.* at 886. In requiring strict compliance with the requirement to notify HUD of an owner's intent to opt out of a Section 8 contract, the court noted that:

> HUD's failure to enforce that requirement allowed the owners to avoid renewal of the HAP contracts in the fall of 1997 and thus deprived the tenants of time to find a suitable

> buyer for the facility or, at a minimum, to seek and secure other suitable housing. While the statute requires notice to HUD, it does so to protect the interests of the tenants by giving HUD an opportunity--and a mandate--to negotiate with landlords and to seek to prevent termination of the contracts. The notice requirement, then, was not something HUD could, in its discretion, waive.

Id. at 887.

In this case, the letters sent to the individually named plaintiffs purporting to give notice of the Owners' intents to terminate their federal subsidies do not comply with the federal and state notice requirements set forth above. Namely, *all eight* notices failed to contain: (1) the current rent and anticipated new rent for the unit on the date of the prepayment or termination of the federal program; (2) a statement that a copy of the notice will be sent 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; and (3) 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.

Additionally, the notices of Owners' intent to opt out of their Section 8 contracts violated federal law because they were not on the Owner's letterhead, not signed (except for the notice to tenants of the Manzanita Arms) and not translated into any language other than English, despite the fact that in some of the developments, as many as 50-65% of the residents are of Eastern European origin, and do not speak English.

Strict compliance with these requirements is necessary because they are intended to provide the tenants with an opportunity to *"do something"* to prevent or affect the termination of the subsidy about which they are being notified. For example, the requirement that owners provide tenants with the names and phone numbers of the of the city, county, local public housing authority, the Department of Housing and Community Development, and a legal services organization is included in the statute for the express purpose that tenants be able to "request additional written information about an owner's responsibilities and the rights and options of an affected tenant." Cal. Govt. Code § 65863.10(b)(6) (amended 2001).

Additionally, the Owners failed to send copies of the notices to the relevant public entitities, including HCD. *See* letter from HCD to Anne Pearson, Exh. "R." The failure to notify HCD has serious ramifications, as it is the notice to HCD which triggers HCD's duty to give to the Owners a list of entities who are interested in purchasing a development and maintaining its affordability. Cal. Govt. Code § 65863.11(p)(2) (amended 2001). The Owners' failure to notify HCD of it intent to terminate their subsidies, which inhibited HCD's ability to send to the Owners' a list of entities who were interested in purchasing the developments and maintaining their affordability, "thus deprived the tenants of time to find a suitable buyer for the facilit[ies]." *215 Alliance*, 61 F.Supp.2d 879, 887.

Likewise, the Owners' failure to notify the relevant public entities will impair their ability to include in the housing element of their General Plans an analysis of existing housing developments that are eligible to change from very low-income housing units during the next ten years due to termination of subsidy contracts, mortgage prepayment or expiration of restrictions on units. Cal. Govt. Code § 65583(a)(8). Therefore, they will be unable to comply with their obligation to develop an accurate housing element which sets forth the housing needs of their residents by income category and serves as the basis for adoption of plans and policies to meet those needs.

These notice provisions were intended to give tenants and public entities an opportunity to get information, inform interested purchasers, and plan for housing needs. For these reasons, they demand strict compliance. Because Defendants' notices are clearly defective, Plaintiffs will more than likely prevail on these claims and be entitled to injunctive relief, i.e. enjoining Defendants from proceeding with the opt-out and prepayments altogether, until proper notices are issued to both the tenants and to the applicable public entities.[2]

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[2] Plaintiffs' notice claims arise both under federal law (the United States Housing Act, codified at 42 U.S.C. § 1437f) and state law (Cal. Govt. Code § 65863.10) The court has pendent or supplemental jurisdiction over Plaintiffs' state notice claims under Sec. 65863.10 because such claims are derived from a nucleus of facts common to Plaintiffs' United States Housing Act claim, i.e. the conduct surrounding Defendants' efforts to opt-out of the project-based Section 8 program and prepay their mortgages, and would be expected to be resolved in one judicial proceeding. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *Henry Horner Mothers Guild v. Chicago Housing Authority*, 780 F. Supp. 511 (N.D. Ill 1991) (court had supplemental jurisdiction over claim for enforcement of the leases under state law); and *Nelson v. Greater Gadsen Housing Authority*, 606 F. Supp. 948 (N.D. Ala. 985) (aff'd in part, vacated and remanded on other grounds) 802 F.2d 405 (11th Cir. 1986).

2. Defendants Have Failed to Comply with Their Legal Obligation to Afford a Right of First Refusal to Interested Entities Who are Committed to Maintaining the Affordability of the Complexes.

At the time that the Defendants notified the Tenants of their intention to terminate their federal subsidies, California state law provided that an owner of an assisted housing development which received governmental assistance under the project based Section 8 program or under Section 236 of the National Housing Act, was not permitted to sell or otherwise dispose of the development in a manner which would result in either (1) discontinuance of its use as an assisted housing development, or (2) the termination of any low-income use restrictions which apply to the development, unless the owner first provided an opportunity to purchase the development to the tenant association of the development; local nonprofit organizations and public entities; regional or national nonprofit organizations and regional or national public entities, and profit-motivated organizations and individuals. Cal. Govt. Code § 65863.11(b)-(c) (amended 2001) attached in the Appendix of Additional Authorities.[3]

Specifically, an owner was required to give notice of his or her bona fide intention to sell or otherwise dispose of the property to the aforementioned entities at least nine months prior to the anticipated date of termination of the federal subsidy. *Id.* at § 65863.11(f). The bona fide notice to sell was required to contain a variety of information, including: the sales price; the terms of assumable financing; the terms of the subsidy contract; proposed improvements to the property to be made by the owner in connection with the sale; and a statement that each of the type of notified entities listed had the right to purchase the development in the order and according to the priorities established in California Government Code section 65863.11(h). *Id.* at § 65863.11(g).

If an owner already had a bona fide offer to purchase from a "qualified entity" at the time the owner decided to sell the property, the owner was not required to comply with the right of first refusal requirements described above. *Id.* at § 65863.11(f). In order to be a "qualified entity" a prospective

[3] The January 2001 amendment to Government Code section 65863.11 did not eliminate the requirement to provide a right of first refusal to qualified purchasers. Rather, it merely clarified the conditions that must be met regarding offers to purchase an assisted housing development.

purchaser of an assisted housing development: (1) had to be capable of managing the housing and related facilities for the remainder of its useful life; and (2) had to agree to obligate itself to maintain the affordability of the development "for persons and families of low or moderate income *and very low income*" for either a 30-year period from the date the purchaser takes possession, or the remaining term of the existing federal government assistance, whichever is greater. *Id.* at § 65683.11(d)(1)-(2) (emphasis added). "Very low income" persons and families are defined in the Government Code by reference to the California Health and Safety Code as those whose incomes do not exceed 50 percent of Area Median Income (AMI). Cal. Govt. Code § 65863.11(a)(6) (amended 2001), referencing Cal. Health & Safety Code § 50052.5. *See also* California Code of Regulations, Title 25, section 6926, attached in the Appendix of Additional Authorities.

Here, the use agreements executed by HUD and U.S. Housing Partners fail to obligate the new purchaser to maintain the affordability of the four developers under the terms described above, and therefore do not alleviate the Owners of their obligation to afford a right of first refusal to the entities enumerated in Government Code section 65863.11. Specifically, while the Government Code requires that a "qualified purchaser" agree to obligate itself to maintain the affordability of the assisted housing development for low *and very low income families*, including those families whose incomes do not exceed *50 percent* of AMI, the use agreements executed by HUD set rents for current tenants at 30 percent of *80 percent* of AMI, and rents for new tenants at 80 percent of AMI. The difference is staggering. While a rent based on 30 percent of 50 percent of AMI for a family of four is $704, the corresponding rent based on 30 percent of 80 percent of AMI is $1,126. Clearly, the latter rent is not affordable to the *very low income* families who derive protection from the Government Code's limit on the ability of an owner to circumvent the right of first refusal process.

In spite of the fact that the existing use agreements do not alleviate the Owners of their obligation to give "qualified" purchasers notice of their bona fide intent to sell their properties, the Owners have failed to provide such notice. For example, the Sacramento Mutual Housing Association (SMHA) is a nonprofit developer of affordable housing which since 1999 has been on HCD's list of entities that are

interested in being notified of the sale of subsidized developments. Iskow, Exh. "S," para. 2. Despite its inclusion on that list, SMHA has not received notice from any of the Defendant Owners of their intent to sell their properites. *Id*., para. 3. Had it received notice, it would have been interested in exploring the possibility of purchasing the buildings to preserve them as affordable housing. *Id*., para. 4. Indeed, to this day they remain interested in exploring the purchase of the developments. *Id*., para. 5. Likewise, state law requires owners to provide notice of their intent to sell a development to the tenant association of that development. Despite that obligation, the Kenneth Arms Tenants Association has not been provided with a notice of the owner's intent to sell the property, as required by Government Code section 65863.11. KATA President declaration, Exh. "E," para. 11.

By failing to comply with their legal obligation to afford a right of first refusal to interested entities who are committed to maintaining the affordability of the developments, Defendant Owners have violated the plain language of California Government Code section 65863.11. Thus, Plaintiffs would more than likely prevail on this claim and be entitled to injunctive relief, i.e. enjoining Defendants from proceeding with the sale of their developments, until they have afforded a right of first refusal to the enumerated entities.

3. By Issuing Defective Notices, the Defendant Owners Have Interfered with Plaintiffs' Efforts to Obtain Enhanced Voucher Rent Subsidies.

In passing Section 202 of the Housing and Community Development Amendments of 1978, Congress recognized "the importance and benefits of cooperation and participation of tenants in creating a suitable living environment in multifamily housing projects and in contributing to the successful operation of such projects, including their good physical condition, proper maintenance, security, energy efficiency, and control of operating costs." 12 U.S.C. § 1715z-1b(a). To support and encourage tenant participation in multifamily housing projects, Congress specifically prohibited project owners from "interfer[ing] with the efforts of tenants to obtain rent subsidies or other public assistance." *Id.* at § 1715(b)(2).

By providing the Tenants with severely defective notices, as discussed *supra*, the Owners have interfered with the efforts of Tenants to obtain rent subsidy vouchers. The notices discussed *supra* not

only advised Tenants that the owners would be terminating their subsidies, but they also advised tenants of the availability of replacement enhanced voucher subsidies, as required by law. *See* 42 U.S.C. § 1437f(c)(8)(A) (requiring owners to advise tenants by notice that "in the event of termination [of a project based Section 8 contract] the Department of Housing and Urban Development will provide tenant-based assistance to all eligible residents...")

Of the many defects contained in the notices, the Owners' failure to advise tenants of the name and telephone number of the city, county, local public housing authority, HCD, and the local legal services organization, has most seriously impacted the Tenants' ability to apply for enhanced vouchers, as that information is required to be provided so that tenants can contact those entities "to request additional written information about an owner's responsibilities and the rights and options of an affected tenant." Cal. Govt. Code 65863.10(b)(6) (amended 2001.) In the absence of that information, Plaintiffs who had pressing questions and concerns about their eligibility for the vouchers that are referenced in the notices did not know who to call. Breimann, Exh. "A," para. 10. The lack of contact information also inhibited the Tenant Associations' abilities to answer the many questions about vouchers that they received from other residents of the complexes. KATA President Declaration, Exh. "E," para. 7.

The failure to translate the notices into any language other than English has also caused confusion amongst residents. *Id.*, para. 5. As a result of the failure to translate the notices, many of the non-English speaking residents do not understand what is happening and do not understand the urgency of filling out the enhanced voucher applications. *Id.*, para. 6.

While many tenants have since made contact with the entities who can assist them, including Plaintiff CCRHP and Legal Services, not *all* of the affected tenants have accessed the information they need to be able to fully and adequately apply for replacement subsidies. CCRHP tries its best to educate the affected tenants, but does not have the resources to do outreach to each and every tenant. Bandy Declaration, Exh. "L," para. 6. And while the Tenants Associations try answer the questions posed by their members, there are some tenants who don't understand that they need to ask questions since they don't understand the notices in the first instance. KATA President, Exh. "E," para. 8. And, in the midst

of the confusion and fear that has resulted from the notices, some tenants have left their units, Bandy Declaration, Exh. "L," para. 6, and will not benefit in any way from the availability of voucher subsidies.

By failing to provide tenants with lawful, translated notices, Defendant Owners have interfered with the Tenants' abilities to obtain rent subsidies, in violation of Section 202 of the Housing and Community Development Amendments of 1978, 12 U.S.C. § 1715z-1b(a). Thus, Plaintiffs would more than likely prevail on this claim and be entitled to injunctive relief, i.e. enjoining Defendants from proceeding with the opt-out and prepayments altogether, until proper notices are issued to both the tenants and to the applicable public entities.

B. Plaintiffs Have Established That They Will Likely Succeed on the Merits of Their Claims Against Defendant Martinez.

The Administrative Procedures Act (APA), 5 U.S.C. § 702, *et seq*., authorizes courts to set aside federal agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, or in excess of statutory jurisdiction, authority or in violation of statutory right." 5 U.S.C. § 706(1) and (2).

The APA provides an express right of action to persons aggrieved by HUD acts or omissions that are inconsistent with its statutory and regulatory obligations. 5 U.S.C. § 702; *Aujero v. CDA Todco, Inc*. 756 F.2d 1374 (9th Cir. 1985) (low-income elderly residents of federally-funded development had right under APA to sue HUD regarding mandatory meal policy).

In many housing cases, the courts have provided relief to tenants where HUD abused its discretion or where its acts or omissions were found in violation of or inconsistent with its statutory obligations. See *National Tenants Organization, Inc. v. Department of Housing and Urban Development*, 358 F. Supp. 312 (D.D.C. 1973), *remanded without opinion*, 505 F.2d 276 (D.C. Cir. 1974) (court found violation of Administrative Procedures Act where HUD failed to follow mandatory statutory obligation limiting all public housing rents to one-fourth of "family income" and authorizing certain deductions in the calculation of rent); *Findrilakis v. Secretary of Housing and Urban Development*, 357 F. Supp. 547 (N.D. Cal. 1973) (court enjoined enforcement of HUD circular on basis that it was inconsistent with the National Housing Act in that it that excluded from eligibility for rental subsidy units the very persons that Congress mandated be given a preference for such

units); *Abrams v. Hills*, 415 F. Supp. 500 (C.D. Cal 1976), *aff'd* 547 F. 2d 1062 (9th Cir. 1976), *cert granted sub nom*. (appellate court upheld lower court's finding that HUD abused discretion by refusing to apply an operating subsidy to assist with utility and property tax expenses in developments assisted under Section 236 of the National Housing Act and upheld order requiring HUD to take actions consistent with statute, including retroactive payment of subsidy amount.)

Plaintiffs here can establish that HUD committed multiple abuses of discretion and violations of its statutory obligations by allowing the pre-payments and opt-outs to proceed when it had notice that they were based on unlawful notices, by facilitating the transfer of the four properties under conditions that will cause the rents at all four properties to increase by hundreds of dollars and disqualify the units at the four properties from rental assistance tenant protections, and by taking related actions without considering their racial and socioeconomic impact and without considering the national housing goals.

1. Defendant Martinez Has Failed to Enforce Federal and State Notice Requirements.

As set forth in section I.A.1 of this Memorandum, the purported opt-out and pre-payment notices issued by defendant owners do not comply with state or federal law. To reiterate, the notices violate federal law which requires owners to comply with any additional requirements established by the Secretary (*see* 42 U.S.C. § 1437f(c)(8)(c)) including the requirements that project owners "must also comply with any State or local notification requirements" per HUD Directive 99-36, XVI-G, and that such notices be on the owners' official letterhead and signed. *See HUD Section 8 Renewal Guide.*

Defendant HUD was well-versed in the state law requirements as evidenced by correspondence from HUD staff to the Owners which advised that owners must comply with state law and which specifically referenced California Government Code section 65863.10, the statute under which the owners committed numerous violations. *See* letter from Bonita Hovey, HUD Project Manager, to NHP Management Company dated September 3, 1999, attached as Exhibit "V." Indeed, HUD went to far as to do research for the defendants owners regarding the state law requirements. *See* letter from Bonita Hovey to NHP Management Company, dated September 9, 1999, attached as Exhibit "W." Nevertheless, when HUD received the defective notices in question, attached as Exhibits "H" and "I," it took no corrective action.

HUD may not waive enforcement of opt-out and prepayment notice requirements. *215 Alliance, supra*, 61 F.Supp.2d 879 (HUD had no discretion to waive notice requirements because HUD's failure to enforce 42 U.S.C.A. 1437f(c)(9) deprived the tenants of time to find a suitable buyer for the facility, to negotiate with the owners to seek to prevent the termination of the contract, or to seek and secure other suitable housing and that consequently). Here, not only did HUD fail to enforce its own requirements regarding opt-out and prepayment notices as it did in *215 Alliance*, it is also *facilitating* the unlawful opt-out, pre-payment, and related sale. HUD's acts are contrary to law, specifically, the *215 Alliance* decision, and an abuse of its discretion.

2. Defendant Martinez Has Failed to Prohibit the Owners from Interfering With Tenants' Efforts to Obtain Rent Subsidies.

In order to carry out the purpose of Section 202 of the Housing and Community Development Amendments of 1978 –"to recognize the importance and benefits of cooperation and participation of tenants in creating a suitable living environment in multifamily housing projects and in contributing to the successful operation of such projects" Congress provided, *inter alia*, that, "[t]he Secretary shall assure that . . . project owners not interfere with the efforts of tenants to obtain rent subsidies or other public assistance." 42 U.S.C.A. 1715z-1b(a) and (b)(2).

As set forth above, the fact that the opt-out and prepayment notices lacked critical information and were not translated into languages other than English impeded, and in some cases, completely robbed plaintiffs and other residents of the ability to find out about their rights regarding enhanced vouchers, and consequently to obtain those vouchers. Breimann, Exh. "A," para. 10. Though HUD received these notices and was therefore put on notice of these notice defects, it did nothing to correct them and thus breached its statutory obligation to assure that the owners did not so interfere with Plaintiffs' rights to obtain subsidies.

3. In Approving the Owners' Requests to Sell Their Properties And Executing Use Agreements Defendant Martinez has Failed to Ensure That the Terms of the Sale are as Advantageous as Existing Terms.

Section 203 of the Housing and Community Development Amendments of 1978, as amended, provides that the Secretary may not approve the sale of any subsidized project if the transfer of physical

assets involves the provision of any additional subsidy funds by the Secretary unless such sale is made as a 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 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 proposed sale of the project. 12 U.S.C. § 1701z-11(k)(2).

The sale of the properties is scheduled to take place in late May or early June 2000 Bandy Declaration, Exh "L," para. 3. According to the Owners' notices, HUD has committed to executing short term Section 8 contracts at each of the properties through at least October 2001. *See* Notices, Exh. "H." In other words, HUD will be providing additional subsidies in the form new Section 8 contracts to the new owner after the sale has taken place, thus subjecting the intended sale to the requirements of Section 1701z-11(k)(2).

HUD not only approved the sale of the four properties, but has facilitated it by entering into use agreements with the prospective buyer apparently without which this buyer would not have been willing to proceed. *See* e-mail correspondence between HUD (Diane Brambila) and prospective buyer (Larry Levy) attached as Exhibit "X." As described earlier, one of the terms of the use agreements permits the new owner to charge rents to current tenants that would be as high as 30 percent of 80 percent of Adjusted Median Income, which would actually be hundreds of dollars above market rent. *See* Use Agreements, Exhibit "J" and "K." Under the current terms, i.e. the terms under which the mortgage was originally insured under the 236 program (interest reduction program), HUD sets a basic rent based on operating costs calculated using a subsidized one percent interest rate. *See* 12 U.S.C.A. § 1715Z-1(f). Tenants qualified to receive the benefits of the 236 program (those earning 80 percent of less of median income in a given area) must pay the higher between the basic rent and 30 percent of their adjusted gross income. *Id.* Section 1715z-1, subsec. (f)(v)(B)(i) and (i)(2). Plaintiff Kathy Pounds' current 236 program rent is $328 per month. Pounds Declaration, Exhibit "D", para. 3. If the sale is permitted to take place in May 2001, under the use agreement, her rent would go up to $900. Thus, the terms under the use agreement clearly do not guarantee operation of the project on terms as favorable as those set by the original 236 program until the maturity dates of the mortgages at issue (between the years 2013 and

2015).[4] Thus, HUD's approval of the proposed sale and execution of the use agreements facilitating such sale violates Section 1701z-11(k)(2) and consequently violates the APA.

4. Defendant Martinez' Execution of Use Agreements With the Prospective Owner Permitting it to Charge Current Tenants up to 30% of 80% of AMI is an Abuse of Discretion.

HUD's decision to enter into the use agreements for the four properties was discretionary. Apparently HUD's action was compelled formerly by the prospective buyer's insistence. In fact, the prospective buyer, who apparently wanted the use agreements so that it could be deemed a "qualified purchaser," and assist in the Owners' circumvention of the right of first refusal requirements, would not proceed with the sale without HUD's approval. See e-mail correspondence between HUD and Levy, Exh. "X". In e-mail correspondence with the prospective buyer, HUD staff expressed puzzlement over the need for such agreements, yet entered into them anyway. *Id.* On the other hand, there was much to compel HUD *not* to enter into the use agreements, including the potentially devastating effects such agreements have on the current tenants. If the sale is effected, HUD's assent not only will violate the federal statute which prohibits HUD under such a sale from putting current tenants at a disadvantage with respect to the rental housing terms, but also violates HUD's obligation to enforce state notice provisions which require certain entities, i.e. resident associations and non-profit purchasers, to obtain notice so that they may exercise their right of first refusal. As set forth previously, HUD's obligation to ensure and enforce compliance with notice provisions is not waivable and the failure to meet such obligation an abuse of discretion. See *215 Alliance v. Cuomo*, 61 F.Supp.2d at 887, *supra*.

Further, HUD made its decision to enter into the use agreements apparently without considering national housing goals, as evidenced by e-mail correspondence cited above. *See* Email Correspondence between HUD and Levy, Exh. "X." *See also* Pearson Declaration, Exh. "U," para. 5. Courts have held that failure to consider national housing goals is an abuse of discretion. In *Walker v. Pierce*, 665 F.2d

[4] The Section 8 Voucher Program does not cure this violation because even if Ms. Pounds qualifies for a Section 8 voucher based on her income and rental history, she may not be able to use the voucher in her present unit. There is a substantial likelihood that her unit wouldn't qualify because the $900 rent, which is $530 above comparable market rates, according to the Owners' own analysis, would be deemed unreasonable by the Housing Authority which administers the voucher program.

831 (N.D. Cal. 1987), the court found that HUD's goals in implementing a government-wide loan assets sales program, which included reducing administrative costs and increasing budget collections,

> were not even remotely related to the objectives of national housing policy, which are set forth in 42 U.S.C. Sec. 1441 as follows: The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development *sufficient to remedy the serious housing shortage*, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, *and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family*.

Walker v. Pierce at 839 *citing* 42 U.S.C. Sec. 1441 (*emphasis added*).

Additionally, the court in *Walker* determined that HUD's goals in implementing the assets sales program were inconsistent with the statutory objectives of the National Housing Act as they caused tenants to lose substantial legal protections available only for residents residing in properties with mortgages held or insured by HUD, and that the Secretary failed to consider these factors or look at alternatives that would not have been inconsistent with the Act. *Walker* at 839. In making this determination the court noted the paucity of any evidence in the record regarding any consideration to the national housing goals. *Id.* at 841. Accordingly, the court found that HUD abused its discretion in violation of the APA and granted a preliminary injunction enjoining the proposed sale of mortgages on several multifamily developments.

Even if the court finds that HUD considered the national housing goals prior to entering into the use agreements, the *act* of signing the use agreements is inconsistent with National Housing Act goals insofar as it will likely render the units ineligible for Section 8 voucher assistance, remove the current affordability programs from the property without proper notice and permit a prospective buyer to step ahead of potential non-profit purchasers that would keep the properties affordable to low income persons. Such inconsistency is also an abuse of discretion. *Russell v. Landrieu*, 621 F.2d 1037 (9th Cir. 1980) (court denied HUD and other defendants' motion to dismiss on grounds that allegations that HUD failed to consider and implement alternatives consistent with the National Housing Act, if true, would constitute an abuse of discretion under the APA and held that "Secretary must act, whenever possible, in a manner which is consistent with the objectives and priorities of the National Housing Act.") *See also Commonwealth of Pennsylvania v. Lynn* 501 F.2d 848, 855 (D.C. Cir. 1974) (HUD acts

taken without consideration of or in conflict with Naitonal Housing act "will not stand"); *Cole v. Lynn* 389 F.Supp. 99 (D.D.C. 1975) (demolition of multifamily housing enjoined because HUD failed to consider whether alternatives might better serve the goals of the National Housing Act).

5. The Decisions of Defendant Martinez to Permit the Owners to Withdraw the Properties from the Federal Housing Programs were Undertaken Without any Consideration of the Racial and Socio-Economic Impact of These Actions in Violation of HUD's Affirmative Duties Under the Fair Housing Act.

Under 42 U.S.C. § 3608(e)(5), HUD is required to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of the [Fair Housing Act]." The obligation to affirmatively further fair housing has been universally construed to mean more than an obligation simply to refrain from engaging in illegal discrimination. *See NAACP v. Secretary of Dept. of Hous. and Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987) ("[E]very court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating (and from purposely aiding discrimination by others).").

HUD's duty to affirmatively further fair housing requires it, at a minimum, to examine the fair housing impact of its decisions with clear and open eyes. It must have in place procedures for evaluating the fair housing implications of its actions and to employ these procedures to inform the decisions it makes. HUD "must utilize some institutionalized method whereby . . . it has before it the relevant racial and socioeconomic information necessary for compliance with its duties under . . [the Fair Housing Act]." *Shannon*, 436 F.2d at 821. This means keeping necessary statistics and conducting studies at significant decision-making junctures, such as deciding to allow a subsidized housing project to prepay its mortgage and opt out of the subsidy program. In *Shannon*, the court required HUD to conduct a study of the effect of a new development on the racial composition on the surrounding area. More recently, in *Pleune v. Pierce*, 765 F. Supp. 43, 47 (E.D.N.Y. 1991), the court found that HUD had acted arbitrarily and capriciously in failing to consider the impact of a mixed-use development on the racial composition of surrounding neighborhoods.

In this case, HUD was aware or should have been aware that the withdrawal of the four developments from the federal low-income housing programs implicated significant fair housing issues.

According to HUD regulations in effect at the time that the developments were designated to receive federal housing assistance, the developments were required to be evaluated with respect to a set of "Project Selection Criteria." 24 C.F.R. § 200.710, 37 Fed. Reg. 205 (Jan. 7, 1972). These criteria were intended to advance eight categories of civil rights and other objectives, including "providing] minority families with opportunities for housing in a wide range of locations." *Id.* at 2.

Yet, despite the fact that the developments site was selected in the first place to further fair housing and civil rights interests, HUD took no steps to examine the racial and socio-economic effects of the withdrawal of the developments from the federal housing programs. Pearson Declaration, para. 4, attached as Exhibit "U." HUD failed to examine the racial and socio-economic effects of its decisions: (1) to approve the owners' requests to prepay their subsidized mortgages despite the owners' failure to provide adequate notice of these prepayments; (2) to approve the owners' request to sell their properties; (3) to execute discretionary use agreements. *Id.*.

Under these facts, it is clear that HUD has violated its affirmative obligation to further fair housing under 42 U.S.C. § 3608(e)(5), and thereby acted in a manner which was arbitrary, capricious, abusive of its discretion, or otherwise not in accordance with law in violation of the federal Administrative Procedure Act, 28 U.S.C. § 701, *et seq*.

C. Plaintiffs Indisputably Will Suffer Irreparable Harm If Injunctive Relief Enjoining Defendants' Unlawful Termination of Federal Subsidies and Sale of the Developments Is Not Granted, While Defendants Will Remain at the Status Quo If Preliminary Relief Is Issued, and Thus the Balance of Hardships Tips Sharply in Plaintiffs' Favor.

As set forth above, if Defendants are not enjoined from illegally terminating their federal subsidies and selling their developments, 351 units of affordable housing will be irretrievably lost from Sacramento's already short supply of affordable housing. For the individual Plaintiffs, who currently live in those units, it means that they will lose the long term security of knowing that their homes will be affordable to them, in exchange for which they will receive the opportunity to apply for a voucher which may not be usable now, or in the near future.

Granted, HUD has indicated its intention to offer replacement vouchers, but those vouchers hardly replace the tenant protections and program benefits that are afforded by the current subsidy programs. The loss of tenant protections constitutes irreparable harm. *Walker*, 665 F.Supp. 831, 840) ("[A]lthough HUD now claims to have a policy of offering Section 8 vouchers to individual tenants of projects with expired HAP contracts...there is no guarantee that the practice will remain in effect.... Furthermore, under the individual voucher program there is no rent ceiling as there is under a project based Section 8 contract." 665 F.Supp. 831, 840.

If the current tenants are not eligible for and do not receive replacement vouchers, they will be forced to leave their homes. For the four individually named tenants, who are all disabled, this would be an extreme hardship. *See* Pounds, Exh. "D" para. 13; Lautsbaugh, Exh. "C," para 14. Two of the Plaintiffs are disabled *and* in their seventies. Breimann, Exh. A, paras. 4, 5; Janssen, Ech. B, paras. 4,5. For these plaintiffs, moving would not only be a hardship, but an impossibility. The potential loss of one's home and the "many perils that homelessness brings" is precisely the kind of harm that was recognized by the court in *Mitchell*, 569 F.Supp. 701, 705.

Even if the Plaintiffs are eligible for and receive vouchers they may have to move in a year or two, if not immediately. As discussed previously, Section 8 vouchers can be used only in apartments where rents are "reasonable in comparison with rents charged for comparable dwelling units in the private, unassisted local market." 42 U.S.C. § 1437f(o)(10)(A). Given the fact that a rent set at 30% of 80% of AMI ($867 month) is almost twice as high as rents charged for comparable dwelling units in the private, unassisted market, it is highly unlikely that such a rent will be deemed "reasonable," in which case voucher holders could be prohibited from leasing up there, and would be forced to move and try to use their vouchers elsewhere.

The difficulties the Plaintiffs would have in securing new housing would be exacerbated by the dearth of available affordable units and owners willing to rent to persons receiving Section 8 assistance in the Sacramento area. *See* Exhibit "Q." In *Mitchell, supra*, the Court took such market factors into account in finding that the tenant would suffer irreparable harm if evicted. *Id*. at 705.

Finally, if the sale to the prospective buyer is allowed to go forward, not only will all the aforementioned ill affects follow, but the qualified purchasers committed to preserving affordability such as SMHA, would be shut out and the tenants only hopes of preserving affordability long-term dashed.

By contrast, even in the unlikely event that Plaintiffs ultimately do not prevail on their legal claims against Defendants, Defendants should not suffer any significant harm if forced to comply with the applicable notice and right of first refusal requirements. The notice provisions would merely delay the owners' termination of their federal subsidies. And compliance with the state right of first refusal would not obligate the Owners to sell their properties at a price or under terms that are disadvantageous to them or, in any way inferior to the terms and price that they may have already negotiated. Rather, the state right of first refusal law merely obligates the Owners to advise interested parties of the availability of the properties for sale. In so doing, the Owners will put the buildings up for competitive bidding and may in fact receive offers that are comparable or even superior to the current one. Thus, the balance of hardships in this case tips decisively in favor of granting Plaintiffs' application for a restraining order and motion for preliminary injunction.

II. BECAUSE PLAINTIFFS MEET THE PRELIMINARY INJUNCTION STANDARD, THE COURT MUST FIND THAT THEY ALSO MEET THE STANDARD FOR ISSUANCE OF A TEMPORARY RESTRAINING ORDER.

As cited earlier, the Ninth Circuit held that the standard for issuance of a TRO is less onerous than that for a preliminary injunction, and thus if the latter standard is met, the TRO standard has necessarily been satisfied. *L.A. Unified School District v. U.S. District Court, supra*., 650 F.2d at 1008. Plaintiffs have met the preliminary injunction standards, accordingly, the court should issue a temporary restraining order enjoining Defendants from proceeding with the termination of their federal subsidies and sale of their properties until the hearing on the preliminary injunction motion.

III. THE BOND REQUIREMENT SHOULD BE WAIVED BECAUSE PLAINTIFFS ARE INDIGENT AND BRING THIS ACTION IN THE PUBLIC INTEREST.

"The court has discretion to dispense with the security requirement [under F.R.C.P. 65(c)], or request mere nominal security, where requiring security would effectively deny access to judicial review."

People ex. rel. Van De Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1325, *amended*, 775 F.2d 998 (9th Cir. 1986).

Courts have frequently waived the bond requirement for indigent plaintiffs. *See e.g. Wayne Chemical, Inc. v. Columbus Agency Services Corp.* 567 F.2d 692, 701 (7th Cir. 1977); *Miller v. Carlson*, 768 F.Supp.1331, 1340 (N.D. Cal. 1991) (waiving security for indigent plaintiffs who relied on public benefits for the necessities of life). In particular, waiving security for low income tenants of HUD subsidized properties is appropriate. *Walker v. Pierce*, 665 F.Supp. 831, 843 (N.D. Cal. 1987). The reason for such a waiver is obvious. "Poor persons . . . are by hypothesis unable to furnish security as contemplated in Rule 65(c), and the court should order no security in connection with this preliminary injunction." *Bass v. Richardson*, 338 F.Supp. 478, 490 (S.D.N.Y. 1971), *quoting Denny v. Health and Social Services Board*, 285 F.Supp. 526, 527 (E.D. Wis. 1968).

Courts have also waived the bond requirement or required only a nominal bond for nonprofit public interest organizations where such organizations are unable to post a substantial bond and where the likelihood of success on the merits tips in their favor. *Van de Kamp*, 766 F.2d 1319, 1326 (allowing nonprofit environmental group to proceed without posting a bond where the "public interest" supports the preliminary injunction); *Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army*, 331 F.Supp. 925 (D.C.D.C. 1971) (ordering nonprofit environmental group to post bond of $1.00). Even where the potential financial injury to a company is great, courts have ordered the payment of only nominal bonds in order to avoid stifling the intent of the remedial statutes under which a case is brought. *See Natural Resources Defense Council, Inc. v. Morton*, 337 F.Supp. 167 (D.C.D.C. 1971) (requiring environmental organization to post a bond of $100 instead of the $750,000 for the first month and $2,500,000 for each month thereafter requested by the defendant as compensation for its estimated loss of revenue).

The individually named Plaintiff are by definition indigent as they receive Section 8 housing assistance and/or assistance under the Section 236 mortgage program. To require them to post a bond, even nominal security, would deny them effective access to judicial review and would also discourage

them from seeking to remedy the abuses in the subsidy programs. *See Bartels v. Biernat*, 405 F.Supp. 1012, 1019 (E.D. Wis. 1975).

Likewise, the plaintiff associations and nonprofit organization are unable to post a bond, as they have no income available for such purpose. The Plaintiff Tenant Associations are merely associations of low-income tenants which earn no income with which they could pay a bond. Plaintiff CCRHP is likewise unable to post a bond. Wiener Declaration, Ech. "G," para. 3. The requirement of a bond would stifle the purpose of the remedial housing acts under which Plaintiff CCRHP brings these claims since this "'concerned private organization[]' would be precluded from obtaining judicial review of the defendants' actions." *Natural Resources Defense Council, Inc.*, 337 F.Supp. at 169. Because the Plaintiffs have demonstrated their inability to post a bond, as well as a clear likelihood of success on the merits, the bond requirement should be waived.

CONCLUSION

Plaintiffs have established that they will likely succeed on the merits of their claims. Plaintiffs have also established that unless Defendants are enjoined from terminating their federal subsidies and selling their properties the Plaintiffs will suffer irreparable harm, while Defendant will suffer virtually no harm at all if the requested relief is granted. Thus Plaintiffs have met, if not exceeded, the applicable standards to support the issuance of a temporary restraining order and preliminary injunction. Accordingly, Plaintiffs respectfully request the Court to issue such injunctive relief to 1) enjoin Defendant Owners from prepaying their federally subsidized mortgages, terminating their Section 8 contracts, and selling their properties until they have provided lawful notice of their actions and have afforded a right of first refusal to interested entities; 2) enjoin Defendant Martinez from approving any of the Defendants' aforementioned activities until Defendant has ensured that Defendant Owners have complied with applicable laws, and has itself undergone the proper procedures to approve the termination of federal subsidies and transfer of physical assets which are subsidized by HUD.

Dated: May 1, 2001

Respectfully submitted,

LEGAL SERVICES OF NORTHERN CALIFORNIA

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