IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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U.S. Court of Appeals Docket No. 10-15303
Lower Court Docket No. 4:09-cv-04780-SBA

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PARK VILLAGE APARTMENT TENANTS ASSOCIATION, et al.,
Plaintiffs-Appellees

vs.

MORTIMER HOWARD TRUST, et al.,

Defendants-Appellants

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Preliminary Injunction Appeal from an Order
Of the United States District Court
For the Northern District of California, Oakland Division
The Honorable Sandra B. Armstrong, Judge

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**BRIEF OF APPELLANTS**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, plaintiffs certify as follows: the only appellant who is not an individual is the Mortimer Howard Trust, which does not issue stock.

Dated: March 25, 2010 THOMAS M. SWIHART

By: /s/ Thomas M. Swihart
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# I. STATEMENT OF JURISDICTION

This case involves an appeal of the granting of a preliminary injunction enjoining Defendants from evicting or raising the rents of tenants in the apartment building Defendants own, requiring Defendants to accept "enhanced vouchers" from those tenants, and requiring the Defendants to enter into contracts with the Oakland Housing Authority ("OHA") against their will. The order granting the injunction involves a construction of Pub. L. No. 106-74, § 531. 113 Stat. 1047, 113 (1999) ("Section 531") and 42 U.S.C. §§ 1437f(t) ("Section 1437f(t)"), whereby Plaintiffs and the District Court read those statutes to *require* Defendants to accept such vouchers and enter into such contracts, while Defendants contend that such a reading cannot be reconciled with 42 U.S.C. 1437f(c)(8) ("Section 1437f(c)(8)"), which allows an owner to raise rent or evict tenants once he has given the required statutory notice and waited the prescribed one-year period.

The jurisdiction of the District Court is founded on 28 U.S.C. § 1331. This Court has jurisdiction of the appeal of the District Court's granting of Plaintiffs' Motion for Preliminary Injunction pursuant to 28 U.S.C. § 1292(a)(1). The District Court's Order granting the Motion for Preliminary Injunction was entered on February 1, 2010. (Excerpts of Record ("ER")

090-096). The instant Preliminary Injunction Appeal was timely filed in this Court on February 10, 2010. Fed. R. App. P. 4.

## I. STATEMENT OF ISSUES

1. Did the District Court commit an abuse of discretion in granting Plaintiffs' Motion for Preliminary Injunction when it concluded that Plaintiffs were likely to succeed on the merits because "Federal law mandates Defendants to accept enhanced vouchers," even though neither Section 531 nor Section 1437f(t) contains any such "mandate," and even though the Court's interpretation of those statutes cannot be reconciled with 42 U.S.C. § 1437f(c)(8)(B)?

2. Did the District Court commit an abuse of discretion when it ordered Defendants to sign assistance contracts with the OHA and/or "take other steps necessary to effectuate Plaintiffs' right to remain" in their apartments after Defendants had properly given notice that they no longer wished to be landlords for Section 8 housing and had waited the prescribed one-year period, either

A. for the reasons described in Issue #1; or

B. because, since the District Court's goal of preventing Defendants from evicting or raising the rents the Plaintiff tenants prior to the resolution of the District Court litigation

could have been achieved without ordering Defendants to enter into such contracts, the portion of the injunction that ordered such relief was overbroad?

## II. STATEMENT OF THE CASE

Appellants Mortimer Howard and the Mortimer Howard Trust (jointly, "Howard") are the owners of Park Village Apartments ("Park Village"), which, until 2005, when Howard's project-based contract with the Department of Housing and Urban Development ("HUD") expired by its own terms, was a federally-subsidized housing development in Oakland. Plaintiffs are tenants of Park Village and an unincorporated association of Park Village tenants.

Under Section 1437f(c)(8)(A) and (B), an owner whose project-based contract has expired must send a notice to the Secretary of HUD and to his tenants informing them of the proposed termination of the project-based contract ("Notice"). Assuming the Notice was compliant, the owner is permitted, once at least one year has elapsed from the giving of that Notice, to either evict his tenants or increase each "tenant's rent payment." In this case, the parties agree that Howard's project-based contract expired in 2005, that the Notice Howard gave his tenants in 2008 was proper, and that he waited until the one-year waiting period had elapsed before he attempted to

raise his tenants' rents to market rates. Howard contends that because he has fulfilled the foregoing statutory requirements, he therefore is now entitled to raise tenant rent payments if he chooses.

Plaintiffs, however, contend that they have a "right" to remain in their apartments regardless of the owner's wishes and regardless of the fact that he has complied with 1437f(c)(8)(A) and (B), and a "right" to have their landlords accept enhanced vouchers to assist them with rent payments, and that the government has the "right" to *force* property owners – against their will -- to sign contracts with local housing authorities that will enable tenants to use these enhanced vouchers. The source of these federal "rights," Plaintiffs assert, is Section 1437f(t)(1)(B), which provides, in relevant part: "the assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event for the project . . . ," and 1437f(t)(1)(A), which relates to "enhanced voucher assistance," and provides that the "assisted family shall pay as rent no less than the amount the family was paying on the date of the eligibility event[1] for the project in which the family was residing on such date."

Although none of these alleged "rights" is ever mentioned in the

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[1] An "eligibility event" is defined in section 1437f(t)(2) to include "the termination or expiration of the contract for rental assistance under this section for such housing project."

foregoing statutes, HUD has adopted policies that – quite conveniently -- refer to these "rights" as if their existence is already clearly established. It is not. And these statutes *should* not be read to create unilateral rights in tenants to force their landlords to keep them as tenants and accept enhanced vouchers from them indefinitely, given the dictates of 1437f(c)(8)(A) and (B). The District Court's incorrect reading of these statutes, based on an unwarranted deference to unpersuasive and unreasonable agency interpretations of those statutes, constituted abuses of discretion that require reversal.

On October 7, 2009, the Park Village tenants filed a Complaint in the Northern District of California seeking preliminary injunctive relief, alleging that even though Howard's July 25, 2008 notice was compliant and the one-year waiting period had elapsed, federal law obligated Howard to accept enhanced vouchers from these tenants and enter into individual tenant-based subsidy contracts with the Oakland Housing Authority on behalf of each tenant who wished to continue living at Park Village. (ER 001-017).

The district court, by order entered on February 1, 2010, granted the Park Village tenants' Motion for a Preliminary Injunction and ordered Howard to refrain from demanding increased rents from or evicting those tenants, and on behalf of each tenant, "as mandated by Federal Law. . . [to]

take all steps necessary to enter into and execute housing assistance payments contracts with the Oakland Housing Authority for the acceptance of tenant-based vouchers." (ER 096).

## III. STATEMENT OF FACTS

Park Village was developed in 1978, and Howard rented apartments there pursuant to a housing assistance payments ("HAP") contract with HUD under Section 8 of the Housing Act of 1937, 42 U.S.C. § 1437f. Howard's final project-based contract with HUD expired on November 20, 2005 (ER 07-08). On or about October, 2006, more than a year after the expiration of the contract, Howard served upon each of the tenants a notice that they had 90 days to begin paying market rate rents or vacate their units. (ER 09).

Upon receipt of these notices, some of these tenants filed suit in Alameda County Superior Court; that case was then removed to federal court. The primary issue in that action was whether Howard's notice had been adequate; the tenants' complaint sought injunctive relief prohibiting Howard from either evicting the tenants or raising their rents until a compliant notice had been served. The District Court eventually ruled that the notice was not compliant and granted tenants the relief they sought. Defendant appealed to this Court, which affirmed the District Court's ruling.

In 2007, Howard served another notice, but when he provided a 120-day notice informing his tenants of the expiration of the one-year notice, the tenants again filed for injunctive relief in the District, alleging that the new notice was also non-compliant. The District Court granted the tenants the relief they sought, and Howard was forced to serve a third notice and let another year elapse. (ER 09).

Sometime in early 2008, the parties stipulated that the third notice, provided on July 25, 2008 and expiring on July 24, 2009, was compliant. On August 31, 2009, Howard notified the tenants that they would have to begin paying a rent of $1129 per month, the rent charged at the expiration of the HAP contract in November, 2005. The tenants then filed the case, which sought, *inter alia*, a preliminary injunction enjoining Howard from evicting them or raising their rents, and ordering Howard to sign new tenant-based assistance contracts with the OHA and accept enhanced vouchers from those tenants. (ER 010; 001-017). The District Court granted that preliminary injunction, from which this appeal is taken.

## IV. <u>SUMMARY OF THE LEGAL ARGUMENT</u>

Howard contends that the District committed an abuse of discretion when it found that the Plaintiff tenants were "likely to succeed on the merits" because "Federal law mandates" that Howard accept enhanced

vouchers from those tenants. Howard contends that no federal statute gives these tenants a "right" to remain in their apartments after the expiration of the HAP contract and after proper notice and expiration of the one-year waiting period, and no federal statute requires Howard to accept such enhanced vouchers or to enter into contracts to facilitate the acceptance of such vouchers. Any interpretation of Section 531 or Section 1437f(t) that "finds" such a right or such a requirement implied therein is not persuasive or reasonable because it cannot be reconciled with 42 U.S.C. § 1437f(c)(8)(B), which recognizes a property owner's right to evict tenants or raise rents after termination of the project-based contract, proper notice, and the expiration of that waiting period.

Howard also contends that the District Court abused its discretion by ordering Howard to sign new tenant-based contracts with OHA against his will, not only for the reasons described above, and because the District Court's goal of preventing the raising of rents or the evicting of the Plaintiff tenants prior to the resolution of the District Court litigation could have been achieved without ordering Howard to enter into such contracts. Therefore, at a minimum, the part of the injunction ordering such relief was overbroad and therefore an abuse of discretion, and should be reversed.

## V. STANDARD OF REVIEW

A district court's grant of a preliminary injunction is reviewed for abuse of discretion, and should be reversed if the district court based "its decision on an erroneous legal standard or on clearly erroneous findings of fact." *FTC v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1211-12 (9th Cir. 2004). "[W]e consider a finding of fact to be clearly erroneous if it is implausible in light of the record, viewed in its entirety, or if the record contains no evidence to support it." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 794 (9th Cir. 2005) (citations omitted).

This Court has set out a two-part test for determining whether there has been an abuse of discretion in the granting of a preliminary injunction: first, the court must "determine de novo whether the trial court identified the correct legal rule to apply to the relief requested." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir.) (en banc). If the trial court did not identify the correct legal rule, it abused its discretion. Id. Second, it must determine if the district court's "application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" Id. (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 577 (1985).

The district court's interpretation of the underlying legal principles is subject to *de novo* review. See *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 849 (9th Cir. 2009) (en banc); *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1221 (9th Cir. 2003). Finally, because "[i]njunctive relief. . . must be tailored to remedy the specific harm alleged," *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991), "[a]n overbroad injunction is an abuse of discretion." Id.

## VI. LEGAL ARGUMENT

In seeking a preliminary injunction in a case in which the public interest is involved, Plaintiffs must show that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Cal. Pharms. Ass'n, supra,* 563 F.3d at 849 (citing *Winter v. Natural Res. Def. Council, Inc.*, -- U.S. --, 129 S. Ct. 365, 376 (2008). See also *Am. Trucking Ass'ns, Inc. v. City of Los Angeles,* 559 F.3d 1046, 1052 (9th Cir. 2009). In this case, the Court committed an abuse of discretion when it granted Plaintiffs' Motion for a Preliminary Injunction based on its finding that Plaintiffs were likely to succeed on the merits because "Federal law mandates" Defendants to accept enhanced

vouchers, and when it ordered Howard to enter into new tenant-based contracts with OHA in order to enable the use of such enhanced vouchers.

## A. The District Court Committed an Abuse of Discretion When It Granted Plaintiffs' Motion for a Preliminary Injunction Based on Its Finding That Plaintiffs Were Likely to Succeed on the Merits

### 1. No "Federal law" mandates the acceptance of enhanced vouchers, and HUD's interpretation of federal law to imply such a mandate, adopted by the District Court, is unpersuasive and unreasonable because it does not reconcile all of the relevant statutes.

In its Order granting Plaintiffs' Motion for Preliminary Injunction, the District Court began its "likelihood of success on the merits" discussion by stating: "Federal law mandates Defendant to accept enhanced vouchers." (ER 092). However, its first citation was to Section 531, which provides, in relevant part:

> (d) ENHANCED VOUCHERS UPON CONTRACT EXPIRATION.--
> (1) IN GENERAL.--In the case of a contract for project-based assistance under section 8 for a covered project that is not renewed under subsection (a) or (b) of this section (or any other authority), to the extent that amounts for assistance under this subsection are provided in advance in appropriation Acts, *upon the date of the expiration of such contract the Secretary shall make enhanced voucher assistance under section 8(t) of the United States Housing Act of 1937 (42 U.S.C. 1437f(t)) available on behalf of each low-income family who, upon the date of such expiration, is residing in an assisted dwelling unit in the covered project.*

Id. at §531(d)(1) (emphasis supplied). Clearly, this section is about an obligation of the Secretary, not the property owner. Nothing in this section (or anywhere else in § 531) relates in any way to the *owner's* obligation (or lack of obligation) with respect to *acceptance* of such enhanced vouchers (or to the execution of contracts to facilitate such acceptance); it simply states that HUD has to make enhanced voucher assistance "available" to eligible tenants. This section also says nothing about any alleged *rights* of the tenants, either to have these vouchers accepted by unwilling owners, or to remain in those projects at all, let alone indefinitely and against the will of the owner.

The Court next refers to 42 U.S.C. § 1437f(t) as the alleged source of the federal law that "mandates Defendant to accept enhanced vouchers." (ER, 092-093). Section 1437f(t)(B)(1) provides, in relevant part:

> the assisted family *may elect* to remain in the same project in which the family was residing on the date of the eligibility event for the project, and if, during any period the family makes such an election and continues to so reside, the rent for the dwelling unit of the family in such project exceeds the applicable payment standard established pursuant to subsection (o) of this section for the unit, the amount of rental assistance provided on behalf of the family shall be determined using a payment standard that is equal to the rent for the dwelling unit. . . .

(Emphasis supplied). Again, this section is about *HUD*'s obligations in the event a family would like to remain in their apartment; there is nothing in

this language that suggests that owners *must* accept these enhanced vouchers against their will, or that tenants have a *right* to have them accepted against the owner's wishes.

Just as one might imagine the government's making school vouchers available to families who "elect" to send their children to certain schools they could not otherwise afford, neither the fact that the government must make such vouchers available, nor the fact that families in possession of such vouchers may "elect" to use them at a particular school, leads inexorably to the conclusion that a school is therefore *required* to accept every child with such a voucher as a student, or accept that voucher as partial payment; those types of choices would logically be left to the school. The situation is no different here: in the absence of Congress's inclusion of clear, mandatory language directed at the owners of such former Section 8 projects – language Congress could easily have included had it wanted to – it was error for the District Court to read such language into the statute.[2]

The Court next cites to HUD, "Section 8 Renewal Policy, Sec. 11-3(B) (as revised Jan. 15, 2008) as its source for "federal law" that mandates

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[2] Moreover, at oral argument, Plaintiffs' counsel freely acknowledged that there was nothing in any of these statutes that *requires* an owner to accept enhanced vouchers. (Reporter's Transcript of December 15, 2009 Proceedings ("RT"), at 26:10-27:15).

Howard to accept enhanced vouchers against his will.[3] That Policy (which, in Section B.1, cites only to the portion of Section 1437f(t) cited above as authority), provides, in relevant part:

> Right to remain. Tenants who receive an enhanced voucher have the right to remain in their units as long as the units are offered for rental housing when issued an enhanced voucher sufficient to pay the rent charged for the unit, provided the rent is reasonable. Owners may not terminate the tenancy of a tenant who exercises this right to remain except for cause under Federal, State or local law. In order to receive the full rent charged for the unit, the owner must agree to enter into a Housing Choice Voucher Housing Assistance Payment contract with the local PHA on behalf of each covered family. If an owner refuses to honor the tenants right to remain, the tenant's remedy will depend on State and local law.

Thus, by this Policy, HUD has clearly interpreted statutes which contain *no* explicit "right to remain" and *no* mandatory duty to accept enhanced vouchers (after compliance with the notice and waiting period requirements) to mean that such rights and duties exist.

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[3] Although it is also not "Federal law," the District Court also cites the language that Howard was forced to include in his July 25, 2008 opt-out notice as a basis for its holding that Howard is required to accept enhanced vouchers. (ER 093). However, that notice merely states: "Federal law allows you to elect to continue living at this property provided that the unit, the rent, andI, the Owner, meet the requirements of the Section 8 tenant-based assistance program. As an Owner, I will honor your right as a tenant to remain on the property *on this basis* as long as it continues to be offered as rental housing, provided that there is no cause for eviction under Federal, State or local law." (ER 053) (Emphasis supplied). As discussed *infra*, the only way to reconcile all of the applicable federal statutes is to understand the phrase "on this basis" to mean that if the owner chooses to enter into tenant-based contracts to accept enhanced vouchers (*i.e.*, "meet[s] the requirements of the. . . program"), then he will honor the tenant's right to remain at the property. To interpret this sentence as the Court did is to render Section 1437(c)(8)(B) meaningless.

It is not clear the degree of deference to which this Policy is entitled. *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001); see also *Federal Express Corp. v. Holowecki*, -- U.S. -- , 128 S. Ct. 1147, 1156 (2008). However, Defendants do acknowledge that it is at least "eligible to claim respect according to its persuasiveness." *Mead*, 533 U.S. at 221 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). However, as discussed below, HUD's extremely aggressive interpretation of statutes which admittedly contains no language at all about tenants' rights or owners' obligations – an interpretation that give the government the "right" to *force* owners to sign contracts against their will indefinitely – is not "persuasive" for several reasons, and therefore should have been given little or no deference by the District Court.

First, HUD's interpretation of this statute cannot be successfully reconciled with Section 1437f(c)(8)(B), which provides, in relevant part:

> In the event the owner does not provide the notice required [the one-year notice before the termination of a project-based assistance contract HUD becomes effective], *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. . . .*

(Emphasis supplied). Unlike Section 1437f(t), Section 1437f(c)(8)(B) is directed at the rights of owners, not the obligations of HUD. Under HUD's interpretation of Section 1437f(t), however, even an owner who provides the

proper notice and waits the required length of time *cannot* then "evict the tenants" – tenants are permitted to stay in their apartments indefinitely, regardless of the owner's wishes. Under HUD's interpretation, such an owner also can never "increase the tenants' rent payment," as promised by Section 1437(c)(8)(B): if a tenant resides in "a public housing dwelling," then a *tenant*'s "rent payment" – in contrast to the "rental assistance payment" represented by the enhanced voucher under 42 U.S.C. § 1437f(t) – is calculated under 42 U.S.C. 1437a(a)(1)-(2) as a portion of the family's monthly income. The owner of the unit has no power whatsoever to increase it. If Congress had intended, or contemplated, that an owner could or would be forced to enter into a tenant-based contract upon expiration of the one-year waiting period, it would never have stated or implied that an owner could "increase the tenants' rent payments. . ."

The only reasonable way to reconcile Section 531(d)(1), Section 1437f(t)(B)(1), and Section 1437f(c)(8)(B), is to read the first statute as providing that HUD must make enhanced vouchers available to tenants in units where the project-based contract between the owner and HUD expires, to read the second statute as envisioning the possibility that some such tenants might wish to remain in their units after the contract expiration ("the assisted family may elect to remain"), in which case they are entitled to

enhanced vouchers, and to read the third statute as affirming that owners no longer in contract with HUD who have met the notice and waiting-period requirements now have an option that they did not have while the contact was in force or during the waiting-period: they may enter into new HAP contracts and accept enhanced vouchers from tenants whom they wish to keep, or they may elect to evict or increase the tenants' rent payments. The District Court's failure to interpret the foregoing statutes so as to make them all meaningful was an abuse of discretion, and merits reversal.

**2. There is no binding Ninth Circuit law on this issue, and other federal cases interpreting these statutes are inapposite.**

The District Court cited to four cases that concerned the issue whether owners "must accept the vouchers" (ER 093-095). The first of these is *Jeanty v. Shore Terrace Realty Ass'n*, 2004 WL 1794496 (S.D.N.Y. Aug. 10, 2004), an unreported District Court decision from the Southern District of New York not binding on this Court. Moreover, *Jeanty* is distinguishable from this case on several grounds. First, in *Jeanty*, the owner was accepting enhanced vouchers from some tenants, but refusing to accept an enhanced voucher from the plaintiff – a situation that raises potential estoppel issues not present here. Second, while *Jeanty* does hold that the owner must accept enhanced vouchers, it does *not* hold that the owner must enter into new

tenant-based assistance contracts with tenants who have enhanced vouchers, and thus it does not provide support for one crucial portion of the District Court's preliminary injunction order that is being challenged in this action: the District Court's order requiring that Howard "shall take all steps necessary to enter into and execute housing assistance payments contracts with the Oakland Housing Authority for the acceptance of tenant based vouchers." (ER 096). Finally, the plaintiff in *Jeanty* did not raise the argument being made by Howard in Section VII.A.1., *supra*: indeed, it did not discuss Section 1437f(c)(8)(B) at all, let alone how it could be reconciled with the statutes upon which the court was relying to find a "right" to have enhanced vouchers accepted.

The next case relied on by the District Court was *Feemster v. BSA Limited Partnership*, 471 F. Supp. 2d 87 (D.D.C 2007, *aff'd in part, rev'd in part*, 548 F.3d 1063 (D. C. Cir. 2008), which, citing to *Jeanty*, held that an owner must accept enhanced vouchers, and also "take the steps necessary to complete the required paperwork to enable the plaintiffs to use their vouchers and renew their leases." 471 F. Supp. 2d at 97. However, like *Jeanty*, *Feemster* did not consider Section 1437f(c)(8)(B), or how it could be reconciled with the other statutes that the Court relied on.

The third case relied on by the District Court was *Estevez v.*

*Cosmopolitan Assocs. L.L.C.*, 2005 WL 3164146 (E.D.N.Y. Nov. 28, 2005), another unreported District Court decision from New York. In *Estevez*, the building owners, after termination of their project-based contract, proper notice, and the expiration of the one-year waiting period, *had* signed new tenant-based assistance contracts with tenants who wished to remain, and had been accepting enhanced vouchers. After a period, the owners wanted to stop doing this; this fact (as was true in *Jeanty*) raises estoppel issues not present in this case (where Howard has *never* agreed to sign new HAP contracts and to accept enhanced vouchers from *any* tenant for *any* period). More important, *Estevez* is distinguishable from this case because there, ***the defendants "do not dispute plaintiffs' right to use 'enhanced vouchers for the very same apartment which had previously been the subject of a project based Section 8 Program and which no longer has any such status as a consequence of the Landlord's opting out.'"*** Id. at *4. This fact was very significant to the *Estevez* court, which said:

> because Cosmopolitan [the owner] agrees that such a right exists, this is not the question before me. Rather, I am asked to decide whether §1437f(t) creates an obligation for Cosmopolitan to accept enhanced vouchers in partial payment of plaintiffs' rents.

Id. at *4 n.2. Here, in contrast, Howard does *not* acknowledge the existence of such a right, in light of the fact that such an acknowledgment would make

the rights granted to owners under Section 1437f(c)(8)(B) illusory. *Estevez*, too, fails to address this issue.

Finally, the District Court cites to an Order re: Plaintiff's Motion for Summary Judgment in *Barrientos v. 1801-1825 Morton LLC*, No. CV06-6437 (C.D. Cal. Sept. 10, 2007, *aff'd on other grounds*, 583 F.3d 1197 (9th Cir. 2009). (ER 093). However, although the District Court's order did find a statutory right to remain for post-contract termination tenants, the Ninth Circuit did not "reach the statutory right to remain issue," 583 F.3d at 1207 n.3, and affirmed the District Court's decision on other grounds. *Barrientos,* like the other cases cited by the District Court, did not consider the effect of Section 1437f(c)(8)(B).

### B. The District Court Committed an Abuse of Discretion When It Ordered Defendants to Enter Into New Contracts With OHA.

#### 1. There Was No Statutory Authority For This Portion of the Order, Either.

As discussed above, not only did neither of the federal statutes cited by the District Court delineate a tenant's "right" to remain or an owner's obligation to accept enhanced vouchers, but neither of them anywhere articulated a requirement that an owner enter into contracts with local housing authorities against the owner's will. Such an interpretation would also make the rights granted to owners under Section 1437f(c)(8)(B)

illusory, and the District abused its discretion in ordering Howard to enter into such contracts for the same reasons discussed in Sections VII.A.1-2 *supra.*

**2. The Portion of the Order Requiring Howard to Enter into New HAP Contracts Is Overbroad, and Thus an Abuse of Discretion on That Ground as Well.**

It is an abuse of discretion to enter an order granting a preliminary injunction that is overbroad. *Lamb-Weston, Inc., supra,* 941 F.2d at 974. In this case, the portion of the injunction ordering Defendants to "take all steps necessary to enter into and execute housing assistance payments contracts with the Oakland Housing Authority for the acceptance of tenant based vouchers," (ER 096), was clearly overbroad, because pending the outcome of the proceedings below, the Plaintiffs could have been adequately protected by an order that simply forbade Howard to evict them or to raise their rents.

## VII. CONCLUSION

For the foregoing reasons, we request that this Court vacate the granting of the preliminary injunction and remand this case to the District Court with instructions.

## VIII. REQUEST FOR ORAL ARGUMENT

The Defendants request oral argument.

Dated: March 25,2010 THOMAS M. SWIHART

By: /s/ Thomas M. Swihart
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## STATEMENT OF RELATED CASES

Defendants are not aware of any related cases.

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Appellants' brief is proportionately spaced, has a typeface of 14 points or more and contains 4,641 words.

Dated: March 25, 2010March 29, 2010 THOMAS M. SWIHART

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he is a member of the bar of this Court in good standing and counsel of record for Appellants.

I hereby certify that on March 26, 2010, I electronically filed the foregoing Opening Brief in PARK VILLAGE APARTMENT TENANTS ASSOCIATION, et al., v. MORTIMER HOWARD TRUST, et al., No 10-15303 with the Clerk of the Court in the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system.

I further certify that some of the parties of record to this appeal have not consented to electronic service. The foregoing Opening Brief in PARK VILLAGE APARTMENT TENANTS ASSOCIATION, et al., v. MORTIMER HOWARD TRUST, et al., No. 10-15303, was served this date by placing copies in the United States mail, with postage prepaid thereon, addressed to:

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I declare under penalty of perjury that the foregoing is true and correct, and that this Certificate was executed in Berkeley, California on March 26, 2010

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