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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

PARK VILLAGE APARTMENTS  
TENANTS ASSOCIATION, *et al.*,

Plaintiffs,

v.

MORTIMER HOWARD TRUST, *et al.*,

Defendants.

No. C 06-7389 SBA

**ORDER**

[Docket No. 10]

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Plaintiffs Park Village Apartments Tenants Association, York Tinkham, Mong Ha Kwong-Cheung, William Foster, Chi Ying Lee, King Ming Lee, Cecelia Nelson, Shirley Smith, and Cornelius Weekley (collectively "tenants") filed a motion for a preliminary injunction [Docket No. 10] seeking to enjoin the defendants Mortimer R. Howard and the Mortimer Howard Trust (Howard), the owners of Park Village Apartments, from raising rents or evicting the residents of Park Village. The tenants allege that Howard failed to provide the required notice under federal and state law prior to the non-renewal of a contract with the United States Department of Housing and Urban Development (HUD).

A hearing was held on the motion on February 13, 2007. Because the tenants have demonstrated a substantial likelihood of success on their claim that the federal notice requirements were not met and because they have also shown the possibility of irreparable harm, the Court GRANTS the motion for preliminary injunction.

**BACKGROUND**

The tenants filed a complaint for declaratory and injunctive relief in the Superior Court of Alameda County on November 3, 2006. On December 1, 2006, Howard removed the case to this Court. Howard also removed the related case of *City of Oakland v. Mortimer Howard Trust, et al.*, 06-7390 SBA, N.D. Cal. 2006. Unlike the *City of Oakland* case, however, the tenants are not seeking to remand this action to the Superior Court of Alameda County.

Park Village Apartments is a rental housing community for low-income senior citizens located at 3761 Park Boulevard in Oakland, California. Mortimer R. Howard became the owner of the property

1 around 1976. Ownership of the property was transferred to the Mortimer Howard Trust, of which  
2 Mortimer R. Howard is the trustee, in the last several years. The property is an eight-four unit  
3 residential apartment complex housing approximately seventy-two people, and has served as subsidized  
4 housing for low-income seniors for approximately thirty years. Howard had contracted with HUD to  
5 provide low-income housing pursuant to 42 U.S.C. § 1437f, commonly referred to as “section 8.” The  
6 City of Oakland issued a conditional use permit for development of the property in approximately 1978,  
7 exempting Park Village from certain density restrictions and parking allotments, and requiring the  
8 property to continue as senior housing for fifty years.

9 In 1999, the Housing Assistance Payments contract (H.A.P.) was renewed for five years and  
10 expired in November 2004. Between 2003 and 2004, Howard negotiated his last H.A.P. contract with  
11 HUD. In addition to entering into the H.A.P. contract, Howard entered into a separate lease, approved  
12 by HUD, with each tenant of the property. Howard Decl. at ¶ 4. On September 9th, 2004, Howard sent  
13 a letter to the tenants stating that the H.A.P. contract had been renewed for the term of November 2004  
14 to November 2005.

15 On or about July 26, 2005, Howard submitted a written request to the California Affordable  
16 Housing Initiatives (CAHI) for an Operating Cost Adjustment Factor (OCAF) rent increase from \$1,192  
17 to \$1,224.19, and for a two-year renewal of the existing H.A.P. contract.

18 On November 18, 2005, two days before the expiration of the H.A.P. contract, Howard sent a  
19 letter to the tenants “RE: One-Year Notification Letter.” Ex. H to Howard Decl. The letter states  
20 “Federal Law requires that owners provide tenants with a one-year notification before the expiration of  
21 a Section 8 contract.” *Id.* The letter also announced that “we intend to renew” the contract. *Id.*

22 As Howard did not receive a renewal contract from CAHI or HUD on or before November 20,  
23 2005, the existing H.A.P. contract expired. Howard Decl. at ¶ 13. Following the expiration of the  
24 subsidy contract, the tenants continued to pay the same amount of rent.

25 Around December 1, 2005, Howard received a letter from CAHI informing him that his OCAF  
26 rent increase had been approved. Howard Decl. at ¶ 14. Howard learned that HUD had ceased making  
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1 subsidy payments around December 3, 2005. *Id.* at ¶ 15.

2 On or about December 7, 2005, Howard received a proposed renewal contract and rent schedule.  
3 *Id.* at ¶ 16. Howard responded by expressing concern that a section of the renewal contract “may  
4 obligate [him] to terms and conditions not contained in the expiring contract.” Ex. C to Greif Decl. He  
5 requested information “to ascertain if any statutes on the proposed date of signing would supersede the  
6 terms of the expiring contract, and if so, [a citation of] those statutes.” *Id.* CAHI informed him that it  
7 had no authority to make amendments found in the renewal contract and that requested amendments and  
8 explanations should be forward in writing to HUD. *Id.*

9 On February 7, 2006, Howard, through counsel, requested HUD’s clarification about enacted  
10 statutes superseding the expiring contract’s terms. *Id.* Specifically, Howard’s counsel noted that section  
11 5 of CAHI’s proposed renewal contract might supersede the terms of the expiring contract if those terms  
12 were inconsistent with statutes in effect at the time of the H.A.P. contract renewal. *Id.*

13 On March 6, 2006, Howard delivered a letter to each tenant stating that the H.A.P. contract had  
14 expired the previous November and, as a result, each tenant had to give notice to vacate or pay \$1,192  
15 in rent. Ex. K to Howard Decl. Howard noted that he found a provision of the renewal contract  
16 unacceptable because “without my knowledge, changes to the previous, or expired contract, could result  
17 in increased obligations on Park Village to HUD.” *Id.* A few days later Howard sent another letter to  
18 each tenant demanding an increase in rental payments by \$12.00 per month to compensate for a utility  
19 allowance that he asserts would have been received from HUD had the H.A.P contract been renewed.

20 On March 10, 2006, HUD responded to Howard’s request for clarification of the terms of the  
21 renewal contract by explaining that one major change included the “Income Targeting requirement,”  
22 requiring at least forty-percent of the assisted units become available to “extremely low-income”  
23 families. Ex. D to Greif Decl. On March 17, 2006, HUD provided the following additional  
24 clarification:

- 25 1. Section 1.1g - There are no changes.
- 26 2. Section 1.7 - There are no changes in this section except for the definition of the  
27 term “Decent, Safe, and Sanitary” as provided to [Howard’s counsel.]
- 28 3. Section 1.9c of Part 1 - This was previously addressed to [Howard’s counsel.]

- 1 4. 2.6 of Part 2 - There are no changes.
- 2 5. 2.8 of Part 2 - There are no changes.

3 Ex. E to Greif Decl. HUD also indicated its awareness of the thirty-day notice sent to tenants of the  
4 property on March 6, 2006. It also insisted that Howard rescind his demand that tenants pay an  
5 additional \$12 per month for utilities. Ex. E to Greif Decl.

6 On March 27, 2006, Howard delivered another letter to each tenant stating that the September  
7 9, 2004 letter satisfied statutory notice requirements, or “[i]n the event that notice failed to meet the  
8 legal sufficiency required by law, . . . a 12-months notice will be deemed to have commenced on  
9 November 20, 2005, the expiration date of the HAP contract.” Ex. N to Howard Decl. Howard  
10 continued that “the notice [given to the tenants on September 9, 2004] did not state or imply that it was  
11 the owner’s intention to renew or not to renew the HAP contract prior to its expiration date, thereby  
12 precluding any statements in the notice relating to an owner’s intention.” *Id.*

13 On March 29, 2006, Howard corresponded with HUD and declared that “I am still willing to  
14 renew the HAP contract but on a negotiated basis. In the event that we are not able to come to some  
15 agreement, I am prepared to abandon the relationship that we have had since May of 1978.” Ex. F to  
16 Greif Decl. Howard sent another letter to HUD on April 10, 2006, describing in detail what terms of  
17 the renewal contract would have to be negotiated, namely, provisions 5a, 7b, and 9. Ex. G to Greif Decl.  
18 He stated he “would not be agreeable to any HUD requirements that can or have amended” certain  
19 provisions of the expired contract, dated May 24, 1978. *Id.* Howard found that because nothing in the  
20 expired contract at 1.7 “requires that owner be subject to standards arrived at by grading to determine  
21 whether he is in compliance with the contract, owner will only respond to conditions that rise to the  
22 level of a clear breach of the contract, pursuant to 1.7c, not grading.” *Id.* Further, Howard stated that  
23 section 2.6 of the expired contract “does not require the owner to submit to a standard of grading, as  
24 required by HUD’s Management and Occupancy reviews and will only submit to conditions that rise  
25 to the level of breach of contract, under 2.6.” *Id.*

26 The epistolary exchanges continued. On April 11, 2006, HUD sent a letter to Howard stating  
27 that the March 6th letter “does not satisfy statutory notice requirements to the tenants and to HUD  
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1 regarding termination of the HAP contract” and that he was “prohibited as a matter of law . . . from  
2 evicting the tenants or raising their rents as [a] consequence of any lapse in the latest HAP contract.”  
3 Ex. H to Greif Decl. With respect to the March 27th letter, HUD advised Howard that “the tenant  
4 payment amount on the lease is the (TTP) less the utility allowance provided by HUD” and that “the  
5 utility allowance is included in the project’s subsidy payment.” *Id.*

6 On May 4, 2006, HUD responded to Howard’s April 10th letter about the proposed revisions  
7 to the renewal contract. Ex. I to Greif Decl. HUD declared:

8 With regard to the new contract that is offered, we are unable to delete provisions 5a, 7b,  
and 9.

9 We do not understand how provision 5a of the proposed contract invalidates provision  
1.16 of the original contract.

10 We do not see that the proposed contract amends provisions . . . 1.6, 1.7, 1.9, 1.10, 2.6,  
2.7, and 2.8.

11 We are unable to answer the comments on provisions 1.7 and 2.6 with regards to  
standards that rise to the level of a breach of contract not knowing what constitutes that  
12 breach of contract.

13 *Id.* HUD further noted that the utility allowance was addressed previously and that tenants were not  
14 required to pay the \$12 per month requested by Howard. *Id.*

15 On October 23, 2006, Howard delivered to each tenant a letter entitled “90 Day Notice of the  
16 Termination of Your Lease Agreement,” announcing that “you have the option of entering into a new  
17 lease agreement with the owner [by January 23rd, 2007] which will increase your rent to \$1192.00 per  
18 month, the rent paid prior to the expiration of the HAP contract, or vacate your unit before January 23<sup>rd</sup>,  
19 2007.” Ex. O to Howard Decl.

20 Howard received a letter from HUD informing him that HUD was “seriously concerned” about  
21 his refusal to execute the renewal contract around November 6, 2006. Ex. P to Howard Decl. HUD  
22 reiterated its prior offer:

23 Up to this point, we have offered you a retroactive contract, which would enable you to  
24 receive subsidy payments from November 2005. In addition, the rents would be  
25 increased from the current \$1192.00 per month to \$1225.00 per month. HUD is still  
fully prepared to enter into a renewal contract with you, or with the trust to which you  
recently transferred ownership, under the same terms that we proposed in 2005.

26 *Id.*

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**LEGAL STANDARDS**

Federal Rule of Civil Procedure 65 permits the issuance of a preliminary injunction, the purpose of which is to preserve the relative positions of the parties until a trial on the merits can be conducted. See *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 990 (9th Cir. 2006); *LGS Architects, Inc. v. Concordia Homes*, 434 F.3d 1150, 1158 (9th Cir. 2006). A party seeking a preliminary injunction must show either: (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. *Faith Ctr. Church Evangelistic Ministries v. Glover*, 462 F.3d 1194, 1201-02 (9th Cir. 2006). 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. *LGS Architects*, 434 F.3d at 1155; see also *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1174 (9th Cir. 2006) (the greater the relative hardship to the moving party, the less probability of success must be shown to support the grant of a preliminary injunction).

Under the sliding scale theory, a party seeking an injunction “need not demonstrate that he will succeed on the merits, but must at least show that his cause presents serious questions of law worthy of litigation.” *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993), cert. denied, 511 U.S. 1030 (1994). Additionally, in cases where the public interest may be affected, the court must consider the public interest as a factor in balancing the hardships. *Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004).

While a preliminary injunction will not be issued without security by the applicant under Federal Rule of Civil Procedure 65(c), a district court has wide discretion in setting the amount of a bond, and the bond amount may be zero if there is no evidence the party will suffer damages from the injunction. See *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003).

**ANALYSIS**

The tenants request a preliminary injunction to maintain the status quo for the pendency of the

1 litigation. The tenants seek to enjoin Howard “from: 1) demanding or collecting any amounts from any  
2 tenant at Park Village Apartments in excess of the amount that tenant was paying as of November 20,  
3 2005, and 2) evicting any tenant at Park Village Apartments or taking any action to accomplish such  
4 an eviction, including the filing of any action for unlawful detainer.” Pl.’s Mot. for Prelim. Inj. at 7.  
5 For the reasons below, the tenants’ request for a preliminary injunction should be granted.  
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7 **A. Likelihood of Success on the Merits**

8 **1. Federal Statutory and Regulatory Notice Provisions**

9 Title 42 U.S.C. § 1437f(c)(8)(A) provides:

10 Not less than one year before termination of any contract under which assistance  
11 payments are received under this section . . . , an owner shall provide written notice to  
12 the Secretary and the tenants involved of the proposed termination. The notice shall also  
13 include a statement that, if the Congress makes funds available, the owner and the  
14 Secretary may agree to a renewal of the contract, thus avoiding termination, and that in  
15 the event of termination the Department of Housing and Urban Development will  
16 provide tenant-based rental assistance to all eligible residents, enabling them to choose  
17 the place they wish to rent, which is likely to include the dwelling unit in which they  
18 currently reside. Any contract covered by this paragraph that is renewed may be  
19 renewed for a period of up to 1 year or any number or years, with payments subject to  
20 the availability of appropriations for any year.

21 The following subsection, 42 U.S.C. § 1437f(c)(8)(B), adds:

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

27 In addition to the statutory notice, HUD has its own additional notice provisions. *See* 47 U.S.C.  
28 § 1437f(c)(8)(C) (“Any notice under this paragraph shall also comply with any additional requirements  
established by the Secretary”). HUD specifically requires that “[t]he one-year notification must state  
the owner’s intentions (i.e. to renew or not renew) at the time of the contract’s expiration.”<sup>1</sup>

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<sup>1</sup> HUD, OFFICE OF MULTIFAMILY HOUSING, SECTION 8 RENEWAL POLICY: GUIDANCE FOR THE RENEWAL OF PROJECT-BASED SECTION 8 CONTRACTS § 11-4(A) (2005), *available at* <http://www.hud.gov/offices/hsg/mfh/exp/guide/s8renew.pdf> (HUD SECTION 8 RENEWAL POLICY).

1 Howard maintains that the statutorily required notice provisions do not apply to here because  
2 he had every intention of renewing the prior contract; it was HUD that allowed the assistance contract  
3 to expire. This argument fails because the expiration of the assistance contract falls within the definition  
4 of “termination” as defined in the federal statute. “Termination” is defined to mean “the expiration of  
5 the assistance contract or an owner’s refusal to renew the assistance contract, and such term shall  
6 include termination of the contract for business reasons.” 42 U.S.C. § 1437f(c)(8)(D). Thus, either of  
7 the two events constitutes “termination” and triggers federal notice requirements: (1) the expiration of  
8 the assistance contract or (2) an owner’s refusal to renew. Even accepting Howard’s contention that he  
9 did not refuse to renew the contract, the assistance contract still expired, and therefore there was a  
10 termination as defined by statute. It follows then that notice is required.

11 Moreover, Howard fundamentally misunderstands the nature of the obligation imposed by 42  
12 U.S.C. § 1437f(c)(8)(D). Howard argues that because the H.A.P contract expired, he has no notice  
13 obligations. Howard relies upon *Whitehall Manor Properties, Inc. v. Lamothe*, 430 N.E.2d 852, 853  
14 (Mass. App. Ct. 1982), an opinion offering quite limited factual or legal analysis. In that case the court  
15 rejected a section 8 tenant’s argument that her tenancy was improperly terminated. *Id.* The court  
16 reasoned that the procedures for terminating a section 8 lease apply only when the lease is in effect. *Id.*  
17 Because the lease expired, the landlord was not required to follow those procedures. *Id.* But the notice  
18 requirement in this matter is not a contractual obligation that expired when the contract did. The notice  
19 requirement here is a statutory obligation. As long as there was “any contract under which assistance  
20 payments are received under this section,” a point which is not disputed, the statute demands that a one  
21 year notice be given.

22 Howard acknowledges that none of the purported notices given to the tenants included a  
23 statement following the statutory language of 42 U.S.C. § 1437f(c)(8)(A). Howard argues, however,  
24 that the notice provided to tenants “substantially complied” with the federal notice requirements, relying  
25 heavily on *Owens v. Charleston Housing Authority*, 336 F. Supp. 2d 934, 940-41 (D. Mo. 2004). In  
26 *Owens*, the plaintiffs challenged the notice given by the defendant because of a failure to advise the  
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1 affected tenants that they could use their tenant-based assistance vouchers to stay in the units where they  
2 resided. The court held the notice “substantially complied” with federal requirements because the  
3 defendant intended to demolish the housing units and noted that “[a]lthough the notice did not follow  
4 the statutory language, it would have been misleading had it strictly followed the statute.” *Owens*, 336  
5 F. Supp. 2d at 946. This case is inapposite. Here there is no comparable potential confusion that would  
6 excuse the notice required by statute.

7 An examination of each of the purported notices shows that they fail to satisfy the statute and  
8 the HUD provisions. The September 9, 2004 letter is insufficient. As noted above, HUD required that  
9 the notice specifically indicate the owner’s intention to renew or not to renew. Howard himself declared  
10 that, “[t]he notice to the tenants did not state or imply that it was the owner’s intention to renew or not  
11 to renew the HAP contract prior to its expiration date, thereby precluding any statements in the notice  
12 relating to an owner’s intention.” Ex. N to Howard Decl.

13 Likewise, the November 18, 2005 letter fails to satisfy the notice requirements. The tenants  
14 correctly point out that the November 18th notice does not have the required language notifying tenants  
15 of Howard’s intent to opt-out of the contract. Pls.’ Reply at 5 (citing Howard Decl. ¶11.) In fact, the  
16 letter clearly states the opposite: “[t]his letter is to notify you that we intend to *renew* the current Section  
17 8 contract when it expires.” Ex. H to Howard Decl. (emphasis added).

18 Finally, Howard contends that, at the very latest, the March 6, 2006 notice to vacate within thirty  
19 days or pay the full contract rent served as sufficient notice. The HUD section 8 renewal policy,  
20 however, mandates that, “[i]f an owner states that they intend to renew the contract but later changes  
21 their mind and decides to opt-out of the contract, they must provide tenants with a new one-year  
22 notification of this change of plans. In other words, tenants must receive a one-year notification of an  
23 owner’s decision to opt-out.”<sup>2</sup> In addition, the March 6, 2006 letter also does not conform to the  
24 statutory notice language of 42 U.S.C. § 1437f(c)(8)(A).

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27 <sup>2</sup> HUD SECTION 8 RENEWAL POLICY at § 11-4(C)(4).

1           **2. State Notice Requirements**

2           The tenants also argue there was not compliance with state notice requirements as codified by  
3 California Government Code sections 65863.10(b)(1) and (c)(1). Pls.' Reply at 5-6. Howard's main  
4 argument is that state notice requirements do not apply to this case. Howard asserts that the California  
5 statutory notice provisions do not apply in this case because "[he] did not make any decision to 'not  
6 extend or not renew' [his] participation in the Section 8 project-based subsidy." Defs.' Opp'n at 8.  
7 Because the tenants have demonstrated a substantial likelihood of success on their claim that the federal  
8 notice requirements were not met, it is not necessary to at this time to determine if the state notice  
9 requirements were also not met.

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11           **B. Irreparable Harm**

12           The tenants argue that they face immediate, irreparable injury if the preliminary injunction is not  
13 granted. Howard asserts the tenants' purported harms are "illusory" because HUD vouchers are  
14 available to the tenants and because the tenants fail to show "a dearth of subsidized housing in  
15 Oakland." Defs.' Opp'n at 14. Howard argues that the tenants will be able to take advantage of tenant-  
16 based section 8 vouchers. The tenants counter that mere access to the vouchers does not guarantee the  
17 ability to use them to remain in their homes. Howard has as much declared that he "does not wish to  
18 contract with the federal government *or otherwise continue to provide low-income housing.*" Howard  
19 Decl. ¶ 26 (emphasis added). From this declaration, it seems likely that Howard would not accept the  
20 tenant-based vouchers if not legally required to do so.

21           A number of tenants have submitted declarations that they are elderly, frail, and in ill-health.<sup>3</sup>  
22 In addition, most, if not all, of the tenants are on fixed incomes.<sup>4</sup> Finally, federal law grants the tenants  
23 a right to a given amount of notice. If that notice is not provided, it is difficult to see how the tenants  
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25 <sup>3</sup> Pls.' Reply at 7; *see also* Exs. H, I, J, K, L, M, N, and O to Pls.' Mot. for Prelim. Inj. in State  
26 Court (Ex. D to Defs.' Notice of Removal of Tenants' Case).

27 <sup>4</sup> Pls.' Reply at 8; *see also* Exs. H, I, J, K, L, M, N, and O to Pls.' Mot. for Prelim. Inj. in State  
28 Court.

1 can be compensated in terms of damages.

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3 **C. Scope of Preliminary Injunction and Bond Determination**

4 **1. Scope**

5 Howard argues that if the injunction is granted, it should only extend to March 6, 2007 at the  
6 latest because the tenants received notice of the owner's intention not to renew March 6, 2006.  
7 However, this notice failed to meet federal statutory notice requirements. Therefore it did not  
8 effectively "start the clock" as it were.

9 **2. Bond**

10 While the literal language of Federal Rule of Civil Procedure 65(c) suggests that a preliminary  
11 injunction will not be issued without security by the applicant, a district court has wide discretion in  
12 setting the amount of a bond. *See Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321  
13 F.3d 878, 882 (9th Cir. 2003). Given that the tenants are of limited means, and have shown fairly  
14 convincingly that the federal notice requirements were not met, the Court will exercise its discretion and  
15 waive the bond requirement.

16  
17 **CONCLUSION**

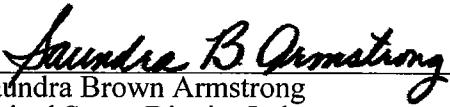
18 IT IS HEREBY ORDERED THAT the Plaintiffs' Motion for Preliminary Injunction [Docket  
19 No. 10] is GRANTED. Defendants Howard Mortimer Trust and Howard R. Mortimer are enjoined from  
20 demanding or collecting rent payments in excess of the amount the tenants were paying as of November  
21 20, 2005, and from evicting any tenant at Park Village Apartments or taking any action to accomplish  
22 such an eviction, including the filing of any action for unlawful detainer, for the duration of this action  
23 or until such time as Howard has provided the notice required by 42 U.S.C. § 1437f(c)(8)(A) and one  
24 year has elapsed.

25 IT IS FURTHER ORDERED THAT a case management conference is set for March 15, 2007,  
26 at 2:45 PM, via telephone. Counsel for the tenants are to set up the conference call with all the parties  
27 on the line and call chambers at (510) 637-559.

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IT IS SO ORDERED.

February 13, 2007

  
Sandra Brown Armstrong  
United States District Judge