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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

SYLVIA MARTINEZ, et al.,

Plaintiffs,

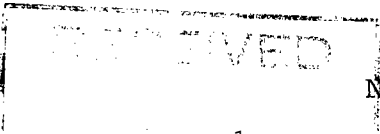
VS.

No. CV-93-1156 LH/DJS

BENJAMIN J. and GERALDINE

M. ROSCOE,

Defendants/f



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AS. b. J

**SUPPLEMENTAL MEMORANDUM IN SUPPORT  
OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs, by their undersigned attorney, submit this supplemental memorandum in order to address certain issues raised at the July 28, 1995 hearing on Plaintiffs' Motion for a Temporary Restraining Order (the "TRO Hearing").

**I. THE INJUNCTION, BY ITS TERMS, PROHIBITS THE CONDUCT PLAINTIFFS SEEK TO ENJOIN IN THE PRELIMINARY INJUNCTION**

The Plaintiffs have requested that this Court issue a preliminary injunction against Defendants, as set forth in Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, to prevent the Defendants Benjamin J. and Geraldine M. Roscoe (<sup>11</sup>Roscoe<sup>1</sup>) from further violating the Order Certifying Class Membership and Granting Permanent Injunction, entered by this Court on October 8, 1993 (the "Injunction") . At the TRO Hearing, Roscoe set forth a number of arguments in support of their contention that Plaintiffs are not entitled to a preliminary injunction based on Roscoe's

violations of the Injunction. In essence, Roscoe claims that the Injunction, by its terms, does not prohibit the conduct complained of by Plaintiffs -- namely Roscoe's acting in a managerial capacity involving Valle Del Norte Apartments ("VDNA"), Roscoe's attempting to evict and seek damages from VDNA tenants, and Roscoe's attempting to alter the current HUD approved leases. This memorandum is submitted to assist the Court by addressing the issues previously raised by Defendant Ben Roscoe.

**A. The Plain Meaning of the Injunction, On Its Face, Prohibits Roscoe's Conduct**

The plain language of the Injunction clearly proscribes Roscoe's conduct. "A judgment which is clear and unambiguous must be given its plain meaning and consequent legal effect. It may not be collaterally attacked under the guise of 'construction.' In construing the judgment, general rules for the construction of written instruments are applicable. Thus, if the judgment is clear and unambiguous, this court must adopt, and give effect to, the plain meaning of the judgment; however, if the judgment is ambiguous, this court must construe its meaning." Soearman v. J & S Farms, Inc., 755 F. supp 137, 140 (S.S.Ca. 1990) (citations omitted).

In the instant case, the plain meaning of the Injunction both directly proscribes and incorporates statutes and regulations that proscribe, the conduct which Plaintiffs are requesting that this Court enjoin.

**1. The Injunction's Terms Directly Proscribe the Conduct For Which Plaintiffs Request Relief in the Preliminary Injunction.**

Among other things, the Injunction specifically provides that Defendants are permanently enjoined from:

"2) Attempting to evict any tenants who have complied with all requirements of the current HUD approved leases, unless the eviction emanates from the terms of those leases."

"3) Altering the HUD approved leases currently in force."

As set forth in Plaintiffs' Memorandum in Support filed with the Court on July 27, 1995, Plaintiffs assert that Roscoe's current attempts to evict Sylvia Martinez, Yvonne Lovato, and Elsie Mares directly violate provision 2 of the Injunction. Plaintiffs acted in good faith and paid their rent to the Management Agent as directed by HUD; no other violations of the rental agreement are alleged. Plaintiffs also assert that Roscoe's June 1, 1995 letter to all VDNA residents (Motion Ex. C-1), which attached a new non HUD-approved lease which was intended to supersede the tenants' current HUD-approved lease, directly violates provision 3 of the Injunction.

**2. The Injunction Incorporates Statutes and Regulations Which Proscribe the Conduct For Which Plaintiffs Request Relief in the Preliminary Injunction**

In addition to its other provisions, the Injunction provides that Defendants are permanently enjoined from:

"5) Violating any of the regulations of 5 236 of the National Housing Act, 12 U.S.C. 1715b and 17152-1 (sic),..."

Plaintiffs assert that Roscoe's current conduct violates § 236 of the National Housing Act in several respects. The Section 236 legislation is implemented through a number of statutes, regulations, HUD-issued handbooks, and the regulatory agreement between project owners and HUD. All of the conduct which Plaintiffs seek to enjoin violates the regulatory framework created by the Section 236 legislation.

**a. The Section 236 Regulatory Framework**

Following is a brief overview of the Section 236 regulatory framework. In 1961, Congress created the Section 221(d)(3) Below-Market-Interest Rate program, that provided subsidized financing to private developers of rental housing for families. In 1968, Congress replaced (for purposes of new projects) the Section 221(d)(3) program with the Section 236 program. Section 236 of the National Housing Act, 12 U.S.C.A. s 17152-1 (West Supp. 1995) ("Section 236"). Under this program, interest rates on mortgages are set at the prevailing market rate, but HUD pays to the lender a subsidy, called an interest reduction payment. This mortgage subsidy is sufficient to reduce the monthly mortgage payments of the owner/purchaser to an amount equal to an interest rate of one percent (1%). The National Housing Law Project, HUD Housing Programs: Tenants' Rights, (2d ed.) §1.3.5.

As consideration for receiving the benefits of interest reduction payments, **a** project owner must operate the project "in accordance with such requirements with respect to tenant

eligibility and rents as the Secretary may prescribe." 12 U.S.C.A. § 1715z-1(e) (West Supp. 1995). Among other things, the owner is required to charge rents equal to thirty percent (30%) of adjusted tenant incomes, but rents cannot be higher than market rents (the rent which would be charged if there were no subsidy) nor lower than "basic rents" (the rents which would be charged if the mortgage interest rate were actually 1%).

Section 236 also authorizes the Secretary to make rules and regulations, to enter into agreements, and to adopt procedures to carry out the provisions of Section 236. 12 U.S.C.A. § 1715z-1(h) (West Supp. 1995). The regulations that implement the Section 236 program are located at 24 C.F.R. Parts 219, 236, 245, 246, 247, 248, 265 and 290.

HUD has also issued several Section 236 program handbooks which govern the landlords' methods of operation. See Department of Housing and Urban Development Handbook 4350.3, Occupancy Requirements of Subsidized Multifamily Housing Developments (Dated 11/4/81); Department of Housing and Urban Development Handbook 4351.1 REV, Management of HUD-Insured Multifamily Projects (Dated 10/15/74); Department of Housing and Urban Development Handbook 4510.1, Rental and Cooperative Housing for Lower Income Families Section 236 Basic Instructions (Dated June 1973); The Management Agent Handbook, HUD Handbook No. 4381.5 REV-2 (Dated 12/29/94).

In addition, 12 U.S.C. § 17152-1 provides that to be eligible for insurance under the Section 236 program, a mortgage must meet certain requirements, including the requirement that the mortgage incorporate the Regulatory Agreement, which sets forth the owner's responsibilities and provides for HUD control over the owner. 12 U.S.C. § 1715z-1(j) (3); see also HUD Handbook 4351.1REV, Ch. 2, § 6(b) (Oct. 1974).

Defendants Roscoe purchased VDNA in 1986 and own the property subject to a mortgage insured by HUD under Section 236 of the National Housing Act. As a precondition to receipt of the insurance subsidy, Defendants Roscoe entered into a Regulatory Agreement with HUD on September 29, 1986. (Attached hereto as Exhibit 1). Among the requirements set forth in the Regulatory agreement, the Owners must comply with eligibility and occupancy requirements as set forth by HUD (1 4), provide for the management of the project in a manner satisfactory to HUD (I 9), and execute a lease in a form proscribed by HUD (f 4).

b. Specific Violations of the Section 236  
Regulatory Framework For Which Plaintiffs  
Request Relief in the Preliminary Injunction

By provision of the Injunction Defendants Roscoe are specifically prohibited from conduct which in anyway violates the rules and regulations implementing the §236 program. Whereas this prohibition is inherent in the regulations themselves, the force of the injunction gives added weight to

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these obligations of the Defendants. Defendants Roscoe are prohibited by HUD regulations from altering the HUD approved leases currently in force; such actions are covered by 24 C.F.R. § 236.75 (4-1-94 Edition) and Handbook 4350.3 CHG-1, at 1s 4-1 - 4-7, which require that owners must obtain prior approval by the Commissioner [HUD] for all leases with tenants who pay less than the fair market rent (24 C.F.R. § 236.75(a)), and that prohibit inclusion of certain provisions in leases (24 C.F.R. § 236.75(b)).<sup>1</sup> Roscoe's attempt to enter into a new lease with VDNA tenants prior to receiving HUD approval violates the Regulatory Agreement and these rules and regulations. In addition, the new lease proposed by Roscoe does not conform to 24 C.F.R. § 236.75(b) because, among other things, it eliminates the requirement that a tenant's tenancy may only be terminated for "good cause".

Roscoe is prohibited from any attempt to evict tenants who have complied with their leases; this is also covered by 24 C.F.R. § 247, and Handbook 4350.3 at 1s 4-17 -- 4-21, which govern evictions from Section 236 projects. Among other things, these provisions state that tenants may not be evicted, except for (1) material noncompliance with the rental agreement, (2) material failure to carry out obligations under a state landlord and tenant act, or (3) other good cause. Also, 24 C.F.R. § 247.4 dictates the contents and service of

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<sup>1</sup> This corresponds to Provision 3 of the Injunction.

notices of termination upon tenants.<sup>2</sup> Roscoe's attempts to evict Ms. Martinez, Ms. Lovato, and Ms. Mares because they paid their July rent to the Sovereign Management Company, rather than to Defendants, does not constitute good cause; these actions are in violation of these rules and regulations.

Roscoe's right to act in any managerial capacity is also covered by the Regulatory Agreement and the Management Agent Handbook, Handbook No. 4381.5 REV-2 (the "Management Handbook"), which sets forth procedures to implement the statutory, regulatory, and contractual management obligations imposed on owners under the Section 236 and other programs.<sup>3</sup>

The Management Handbook identifies four types of management agents, and sets forth approval procedures for the selection of management agents with regard to each. The four types of management entities are: (1) the "owner/manager," where the owner and the management agent are the same business entity, (2) the "identity-of-interest (101) management agent," where an individual or entity that provides management services to the project has a relationship with the project owner such that selection of the management agent and determination of the management fee will not be determined through an arms-length transaction; (3) the "independent fee management agent," where a management company or individual that has no identity-of-interest relationship with the owner

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<sup>2</sup> This corresponds to Provision 2 of the Injunction.

<sup>3</sup> This corresponds to Provision 4 of the Injunction.

provides management services; and (4) the "project administrator," where an individual who is an employee of the project directs the day-to-day activities of a project designed for elderly, handicapped, or disabled residents, and receives a salary rather than a management fee.

The Regulatory Agreement, at 19 and the Management Handbook requires that HUD approve & management agents, including owner/managers and identity-of-interest management agents. Management Handbook, p. 2-2. As part of the approval process, HUD conducts a Previous Participation Clearance review for all proposed management agents (Form HUD-2530), to protect the public and its own interests. Management Handbook, p. 2-2. In conducting such reviews, HUD considers, among other things, a potential agent's past performance and probability of future compliance. Management Handbook, p. 2-4.

Roscoe's attempts to usurp the management role constitutes violations of the Handbook, the Regulatory Agreement and §236. Further evidence of these violations is found in the ongoing suspension and subsequent debarment of Defendants. As of March 23, 1993, Roscoe was suspended by HUD from participating in covered transaction, including the management of VDNA. This suspension was taken in coordination with a proposal to debar Defendants for a period of five years beginning October 5, 1992. On June 26, 1995, the debarment decision was entered by the ALJ. By this decision and as a

result of the ongoing suspension, Roscoe was at all times pertinent to these matters before the Court prohibited by HUD from acting in any managerial capacity in regards to VDNA. Since 5236, the Regulatory Agreement and Handbook all require HUD approval of management, these actions also constitute an independent violation of the Injunction.

Roscoe's argument in this regard is that the settlement agreement was the only instrument which prohibited them from engaging in managerial acts and that since it terminated, by its own terms, in January, 1995, they were no longer barred from such involvement. This position could not be further from the truth, in that it wholly disregards the import and impact of the Regulatory Agreement, the rules and regulations governing §236, HUD's action of suspension, the ALJ's decision of Debarment and the provisions of the Permanent Injunction herein. Therefore, Roscoe's attempt to act as a management agent for VDNA without submitting to the above-mentioned approval procedure violates 5 236, the Regulatory Agreement and the above-cited Handbook provisions.

Furthermore, this argument also fails because the Settlement Agreement states only that Roscoe "agrees to voluntarily relinquish his position as Management Agent for the Project for a period of three years." Settlement Agreement, 1 3. However, in the Settlement Agreement, HUD specifically did not agree that Defendants would be able to assume managerial responsibilities after that time. Instead,

the Settlement Agreement states, "This Settlement Agreement is solely related to this administrative action of limited denial of participation and does not waive any rights or responsibilities of HUD or any other Federal agency to investigate or bring actions pursuant to its lawful authority, including the right of the Department of Justice to bring criminal or civil action." Settlement Agreement, 1 11. Therefore, the Settlement Agreement did not guarantee that Roscoe would be able to assume managerial duties after that time. In fact, as a consequence of his debarment, Roscoe was forced to involuntarily relinquish their rights to manage VDNA. Accordingly, Roscoe cannot successfully argue that under the terms of the Settlement Agreement they would be permitted to manage VDNA at this time. In addition, Plaintiffs assert that Roscoe's attempt to replace Sovereign with King's Management, an identity-of-interest managing agent, directly violates the Injunction because such conduct also constitutes acting in a managerial capacity.

Because provision 5 of the Injunction incorporates all of the rules and regulations that comprise the statutory framework of the Section 236 program, it necessarily proscribes all of the conduct Plaintiffs seek to enjoin in the preliminary injunction.

**B. Any Ambiguity in the Injunction Should Be Construed To Prohibit Roscoe's Current Conduct**

Roscoe's conduct falls within the language of the Injunction as reasonably construed. However, Defendants have

raised before the Court a claim that they thought they were in compliance with the terms of the injunction. It is clear that an enforcing court has power to interpret a decree when its language results in confusion. E.E.O.C. v. Safeway Stores, 611 F.2d 795, 797 (10th Cir. 1979) citing Pasadena City Board of Education v. Spangler, 427 U.S. 424, 438, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976). Rules for construction of orders and judgments were set out by the Tenth Circuit in Ridley v. Phillips Petroleum Company, 427 F.2d 19 (10th Cir. 1970)., and restated in E.E.O.C. v. Safeway Stores, 611 F.2d 795 (1979). These cases stand for the proposition that the purpose of construing ambiguous provisions in a judgment is to give effect to what is already latently in the judgment, and that "Where a judgment is susceptible of two interpretations, it is the duty of the court to adopt the one which renders it more reasonable, effective and conclusive in the light of the facts and the law of the case." Ridley, 427 F.2d at 23 (citation omitted); E.E.O.C. v. Safeway Stores, 611 F.2d 795, 798 (1979). See also Hendrie v. Lowmaster, 152 F.2d 83, 85 (6th Cir. 1945). In Ridley, the court also noted that an ambiguous judgment must be construed so as to give effect to all of its parts. Id. Such principles of interpretation are commonly applied by courts in other circuits. See Grove Fresh Distributors, Inc. v. John Labatt, Ltd., 1995 WL 359879 (N.D.111. 1995) ("Courts are not and should not be compelled to accept 'twisted interpretations' or 'tortured

constructions' of an order. Furthermore, a court order is issued to be obeyed. In effectuating this purpose, a court should not interpret the order in such a way as to render it a nullity. Rather an order should be interpreted to give effect to its purpose and spirit." ) It is the spirit and purpose of the Injunction, not merely its precise words that must be obeyed. John B. Stetson Co. v. Stephen L. Stetson, Co., 128 F.2d 981, 983 (2nd Cir. 1942).

At the TRO Hearing, Roscoe argued that the Injunction incorporated by reference the January 22, 1993 settlement agreement between Roscoe and HUD, that the Settlement Agreement was no longer in force, and that therefore the Injunction was no longer in effect. Roscoe also argued that the specific provision enjoining them from acting in a managerial capacity involving Valle Del Norte Apartments contrary to the Settlement Agreement had specifically expired because under the Settlement Agreement, Roscoe only voluntarily relinquished their position as management agent for a three-year period.

Roscoe's construction of the Injunction is tortured. They interpret the provisions of the Injunction as doing nothing more than addressing Roscoe's specific conduct at the time the Injunction was entered. Such an interpretation would render the general proscription from violating Section 236 a nullity. The purpose of the Injunction is not fulfilled and the conduct at which it is aimed is not curtailed if Roscoe's

interpretation is accepted.

Moreover, Roscoe's interpretation is twisted. By arguing that the Injunction and the Settlement Agreement do not proscribe him from acting in a managerial capacity, Roscoe engages in the fallacy of omission: he claims he could act as management agent as long as the face of the Injunction and the specific terms of the Settlement Agreement do not expressly prohibit it. This not only defies common sense, but basically denies any prophylactic effect to orders intentionally written to be broad. Therefore, notwithstanding the tortuous construction that Roscoe advocates, any reasonable construction of the Injunction enjoins Roscoe's conduct.

In addition, Roscoe's claim of ambiguity of the Injunction is not an excuse for noncompliance. If the Injunction is ambiguous, which Plaintiffs deny, then a clarification should have been sought before acts were performed in the ambiguous area. National Research Bureau, Inc. v. Kucker, 481 F. Supp 612, 615 (S.D.N.Y. 1979) citing McComb v. Jacksonville Paper Co., 336 U.S. 187, 193, 69 S.Ct. 497, 93 L.Ed. 599 (1948). In Chase Industries v. Frommelt Industries, 806 F. Supp. 1381 (N.D.Iowa 1992), the court held that the burden of avoiding violation of an order at the risk of contempt falls upon the one enjoined. Chase Industries v. Frommelt Industries, 806 F. Supp. 1381, 1386 (N.D.Iowa 1992). In that case, the court held that the defendant had an affirmative duty to petition the court for clarification of

any ambiguous areas of the injunction. Citing Nasco, Inc. v. Calcasieu Television & Radio, Inc., 583 F. Supp. 115, 120 (W.D.La. 1984), the court stated, "A party's compliance with a court order cannot be avoided by a literal or hypertechnical reading of an order, for it is the spirit and purpose of the injunction, not merely its precise words, that must be obeyed." Id.

In Nasco, the court stated that even though the order at issue in that case may have been ambiguous, "it is not excuse for the respondents to make an ad hoc interpretation to determine its meaning. Our Order must be obeyed and cannot be ignored unless it is withdrawn or vacated." Nasco, 583 F. Supp. at 120.

By letter dated June 26, 1995 (attached hereto as Exhibit 2) and by letter dated June 15, 1995, (attached as Exhibit D to Plaintiff Motion for Temporary Restraining Order... ) both counsel for Plaintiffs and HUD advised Defendants that their proposed actions were in conflict with the prohibitions of the Injunction. Defendants chose to disregard this warning. Therefore, in the instant case, Roscoe's failure to determine whether or not his actions were in compliance with the injunction constitute heedless and reckless disregard of this Court's Injunction. Roscoe had an

affirmative duty to petition for clarification or construction of the Injunction before performing acts in the ambiguous area. Roscoe clearly made no attempts to pursue this course of action. Instead, they unilaterally determined what the Injunction enjoined. Roscoe's total lack of diligence in attempting to erase any ambiguity should discredit any argument made by Roscoe concerning ambiguity in the Court's assessment of the appropriate remedial and coercive relief due Plaintiffs. As such, any alleged ambiguity in the Injunction is no defense to Roscoe's actions, and a preliminary injunction should be entered against the Defendants.

### III. CONCLUSION

Roscoe has violated both the letter and the spirit of the Injunction. If Roscoe had any doubts about exactly what they could or could not do, they had the continued opportunity to seek clarification. Defendants failure to seek clarification of the Injunction, combined with actions based upon a twisted or implausible interpretation of the Injunction, is strong evidence of willful violation of the Injunction. Accordingly, this Court should grant Plaintiffs' Motion for a Preliminary

Injunction, and enter an Order to Show Cause on the Motion for Contempt.

Respectfully submitted,

LEGAL AID SOCIETY OF ALBUQUERQUE, INC.

By: \_\_\_\_\_

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**MAILING CERTIFICATE**

I HEREBY CERTIFY that a true and correct copy (one each) of the foregoing Plaintiffs' Supplemental Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction was hand-delivered to opposing Defendants, Benjamin J. Roscoe and Geraldine M. Roscoe at 5328 Montgomery Boulevard, N.E., Albuquerque, New Mexico 87109, on this \_\_\_\_\_ day of August 1995.

Respectfully submitted,

LEGAL AID SOCIETY OF ALBUQUERQUE, INC.

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