

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF ILLINOIS  
 EASTERN DIVISION

CHICAGO ACORN, WYVONIA PICKETT, )  
 CALLIE DAVIS, FLORIDA WASHINGTON, )  
 and JOAN BANKS, on behalf of themselves )  
 and all others similarly situated, )

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF )  
 HOUSING AND URBAN DEVELOPMENT )  
 ("HUD"), and ALPHONSO JACKSON, in his )  
 official capacity as Secretary of HUD, )

Defendants.

No. 05 C 3049

Judge Manning

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

**Introduction**

Plaintiffs are comprised of tenants who currently reside in Lawndale Restoration, a privately-owned multifamily housing project in Chicago, and an organization purporting to represent the interests of low-income Chicago residents in need of affordable housing. Defendants ("HUD") insured the mortgage on Lawndale, which is now in default. Plaintiffs brought this action in an attempt to enjoin HUD from disposing of Lawndale without project-based Section 8 rental assistance. However, Congress expressly authorized HUD to manage and dispose of multifamily properties like Lawndale "on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law." Consequently, plaintiffs are not entitled under *any* law to mandate the terms and conditions of HUD's future disposition of the Lawndale property. Therefore, the court should dismiss plaintiffs' Amended Complaint for lack of subject matter jurisdiction and for failure to state a claim.

## Background

Lawndale Restoration is a privately-owned apartment complex on the West Side of Chicago with over 1,000 individual housing units. Pls.' Am. Compl. at ¶ 21. Several years ago, the current owner of Lawndale entered into a Section 8 Housing Assistance Payment ("HAP") contract with HUD. *Id.* at ¶ 25. Under the terms of the HAP contract, the owner received a subsidy from HUD for each of the housing units in Lawndale. *Id.* at ¶ 23. In other words, HUD provided project-based Section 8 assistance for the property. *Id.* at ¶¶ 23, 42, 44. The Lawndale HAP contract was recently renewed for a five-year term. *Id.* at ¶ 28.

HUD also insured the Lawndale mortgage. *Id.* at ¶ 25. When the owner of Lawndale failed to make a number of payments last year, the lender assigned its rights under the mortgage to HUD and HUD paid the mortgage insurance claim. *Id.* at ¶ 27. Plaintiffs allege in their Amended Complaint that HUD intends to foreclose on the Lawndale mortgage, terminate the project-based Section 8 contract, sell the property to the City of Chicago or private owners with use restrictions, and provide Section 8 vouchers to current Lawndale tenants. *Id.* at ¶¶ 30-31.

Several current tenants of Lawndale and Chicago ACORN, a not-for-profit organization which advocates for affordable housing for low-income families in Chicago, filed this action seeking a declaratory judgment that HUD's alleged planned actions for disposing of the Lawndale property violate several laws which they allege govern the management and disposition of defaulted HUD-insured multifamily projects. *Id.* at ¶¶ 1, 7, 10-13. Specifically, plaintiffs allege that HUD's planned actions violate the following provisions of the Multi-Family Housing Property Disposition Reform Act of 1994 ("Disposition Act"), 12 U.S.C. S 1701z-11: (1) 12 U.S.C. § 1701z-11(a)(1) and (a)(3) (failing to dispose of properties in a manner consistent with the goals of the National Housing Act

and the Disposition Act); (2) 12 U.S.C. § 1701z-11(c)(3)(B) (failing to adequately fund repair needs for the Lawndale property); (3) 12 U.S.C. § 1701z-11(e)(2)(B) (failing to conduct a market study before deciding to offer Lawndale residents tenant-based assistance in lieu of project-based assistance); and, (4) 12 U.S.C. § 1701z-11(e)(2)(B) (annually failing to limit replacement of vouchers nationally to 10% of units in a subsidized or formerly subsidized project). Pls.' Am. Compl. at ¶¶ 68, 73-74, 76-77, 79-80.

Plaintiffs also allege that HUD's planned actions violate: (1) 12 U.S.C. § 1715z-11a(b)(1) and (b)(10) (failing to preserve the HAP contract after transferring a foreclosed property to another owner); (2) 12 U.S.C. § 1701(t) (failing to dispose of property consistent with the goals of the National Housing Act); (3) 42 U.S.C. §§ 3604, 3613 (engaging in actions that will have an adverse disparate impact upon African-Americans, female-headed households and families with children); and (4) 42 U.S.C. § 3608(e)(5), Executive Order Nos. 12892 and 11063, 24 C.F.R. § 107.21 (failing to affirmatively further fair housing). Pls.' Am. Compl. at ¶¶ 71, 82, 85, 87.

In their prayer for relief, plaintiffs ask the court to declare that HUD's alleged planned actions are arbitrary, capricious and otherwise not in accordance with the Administrative Procedure Act, and to find that "HUD is required to provide a project-based Section 8 contract after foreclosure covering the same number of units as before foreclosure."

## Argument

### **Plaintiffs' Amended Complaint Should Be Dismissed For Lack of Jurisdiction and For Failure to State a Claim.**

#### **I. Lack of Jurisdiction**

In their Amended Complaint, plaintiffs attack HUD's alleged proposed disposition of the Lawndale property without project-based section 8 assistance as violating the controlling laws on multifamily dispositions, but their claims are based upon a misinterpretation of the applicable statutory provisions. Indeed, contrary to plaintiffs' arguments, 12 U.S.C. § 1701z-11, does not dictate HUD's choice of actions. Although HUD *may* use the Disposition Act and the other cited statutes or regulations as a guide when making disposition decisions, Congress expressly gave HUD the "flexible authority" to decide how to dispose of multifamily projects such as Lawndale when it enacted 12 U.S.C. § 1715z-11a.

Section 204 of the Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997, 12 U.S.C. S 1715z-11a, entitled "Disposition of HUD-owned properties" provides as follows:

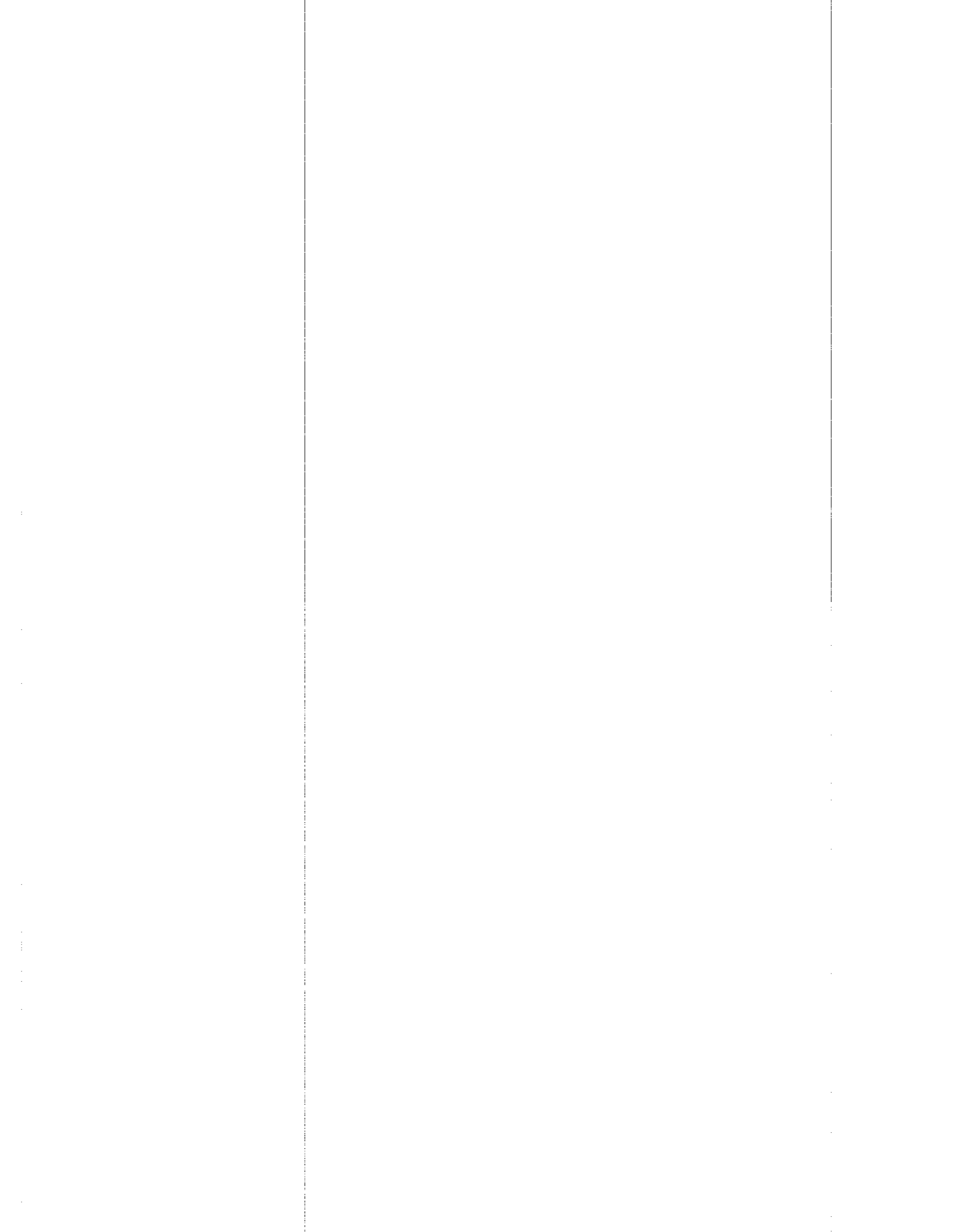
(a) Flexible authority for multifamily projects.

**During fiscal year 1997 and fiscal years thereafter, the Secretary may manage and dispose of multifamily properties owned by the Secretary, including, for fiscal years 1997, 1998, 1999, 2000, and thereafter the provisions of grants and loans from the General Insurance Fund (12 U.S.C. §1735c) for the necessary costs of rehabilitation, demolition, or construction on the properties (which shall be eligible whether vacant or occupied), and multifamily mortgages held by the secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law.**

(emphasis supplied). This provision gives HUD unfettered discretion in establishing the terms and conditions involved in the management and disposition of multifamily properties where HUD is the owner or mortgage holder. As such, the "flexible authority" provision, 12 U.S.C. § 1715z-11a(a), supercedes the requirements in the Disposition Act, 12 U.S.C. 1701z-11a. More importantly, for jurisdictional purposes, the use of the phrase "notwithstanding any other provision of law" in the statute plainly commits the decision on the disposition of multifamily projects to the discretion of the Secretary and thus HUD's actions are not subject to review.

The APA establishes a framework that generally permits courts to review agency actions, by waiving federal sovereign immunity in certain circumstances to allow equitable relief where warranted. *See* 5 U.S.C. § 702. If review is accorded, a court may "compel agency action unlawfully withheld or unreasonably delayed" or "hold unlawful and set aside agency action" that is determined to be "arbitrary, capricious, an abuse of discretion," or "short of statutory right." 5 U.S.C. § 706. The APA allows judicial review of agency actions unless the "(1) statute[] preclude[s] judicial review, or (2) [the] agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). In this case, because the plain meaning of the "flexible authority" statute is that HUD's actions concerning the management and disposition of multifamily properties are committed to agency discretion by law, there is no law to apply and HUD's plan for disposing of Lawndale is not reviewable by this court.

*Mays v. Cuomo*, No. C-01-96-929, (S.D. Ohio May 21, 1998), attached hereto as Exhibit A, is directly on point. In that case, plaintiffs were residents of three multifamily housing projects in Ohio which had been foreclosed by HUD. *Mays* Order at 1. HUD instituted the foreclosure because the owner of the projects failed to maintain the buildings. *Id.* at 2. HUD ultimately decided not to



impose low-income use restrictions *i.e.*, restrictions ordering the buyer to maintain the property as affordable housing for low income persons. *Id.* at 2-3. Plaintiffs filed suit challenging HUD's decision to sell the projects without any low-income use restrictions or project-based rental assistance. *Id.* at 1, 4. The *Mays* court granted HUD's motion to dismiss based on lack of subject matter jurisdiction, explaining that "by the language used in [12 U.S.C. § 1715z-11a], Congress clearly illustrated its intent that [the flexible authority provision] preempt other statutes and regulations. . . ." *Id.* at 9. The court continued, finding that 12 U.S.C. § 1715z-11a "authorizes [the Secretary of HUD], in making [disposition] decisions, to use his discretion, unencumbered by any statutory or regulatory guidelines." *Id.* at 10. The court concluded that the 5 U.S.C. § 701(a)(2) exception to judicial review was applicable in the case because HUD's exercise of discretion in setting the terms and conditions of disposition constituted agency action committed to agency discretion by law. *Id.* at 10-11.

Likewise, 12 U.S.C. § 1715z-11a(a) accords HUD unfettered discretion in disposing of the Lawndale property. Accordingly, judicial review of that decision under the APA is not appropriate and plaintiffs' claims should be dismissed for lack of subject matter jurisdiction.

## **II. Failure to State a Claim**

Plaintiffs claim an entitlement under various statutes, regulations and Executive Orders to dictate the future terms and conditions under which HUD may dispose of the Lawndale property. However, their Amended Complaint should be dismissed for failure to state a claim since Congress, by enacting 12 U.S.C. § 1715z-11a(a), negated any rights plaintiffs could have asserted under those provisions and granted HUD the absolute authority to determine the terms and conditions under which it will dispose of multifamily properties.

The "notwithstanding any other provision of law" clause in 12 U.S.C. § 1715z-11a(a) unequivocally trumps other laws that direct or could be interpreted to affect HUD's management and disposition of defaulted multifamily properties. See *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18, 113 S. Ct. 1898, 1903 (1993) ("As we have noted previously in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."). Inclusion of the word *any*, "which has an expansive meaning," in the "flexible authority" provision, merely emphasizes the Congressional intent to override every other statutory authority and to provide HUD unilateral discretion to determine the terms and conditions of any future disposition of the Lawndale property. See *Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 131, 122 S. Ct. 1230, 1233 (2002).

In fact, the Supreme Court recognized that laws containing the "notwithstanding" language are generally interpreted as superseding all other laws because "[a] clearer statement [of Congressional intent] is difficult to imagine." *Alpine Ridge Group*, 508 U.S. at 18, 113 S. Ct. at 1903. (citations omitted) (collecting cases). *Accord Conyers v. Merit Sys. Protection Bd.*, 388 F.3d 1380, 1382 (D.C. Cir. 2004) ("We think that the 'notwithstanding any other provision of law' language renders inapplicable general federal statutes that otherwise would apply to the Under Secretary's power. . . ."); *Springs v. Stone*, 362 F. Supp. 2d 686, 698 (E.D. Va. 2005) ("It matters not whether the conflicting provisions are in the same statute or a different one; a 'notwithstanding' clause as broad as the one used here by Congress provides a blanket exemption."); *Tucker v. Ridge*, 322 F. Supp. 2d 738, 743 (E.D. Tex. 2004) ("When Congress states that a law will apply 'notwithstanding *any* other provision of law,' the court must assume that Congress means what it

says—namely, that the law applies even when it would violate otherwise applicable statutes.”); *Orelski v. NCS Pearson*, 337 F. Supp. 2d 695, 703 (W.D. Penn.2004) (same).

“Congress has directly spoken to the precise question at issue.” *Rucker*, 535 U.S. at 136, 122 S. Ct. at 1236, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778 (1984). Given that 12 U.S.C. § 1715z-11a(a) is clear on its face, the court’s analysis begins and ends with the words of the statute. *Burlington No. R.R. Co. v. Oklahoma Tax Comm’n*, 481 U.S. 454, 461, 107 S. Ct. 1855, 1860 (1987) (When “the terms of a statute are unambiguous, judicial inquiry is complete.”). In this case, the “flexible authority” provision is unambiguous and HUD’s interpretation of its authority—that it may dispose of the Lawndale property on those terms and conditions it deems appropriate—is consistent with the plain language of the statute. Allowing plaintiffs to proceed with their claims challenging HUD’s future disposition of the Lawndale project would mean the court would have to ignore the “notwithstanding any other provision of law” clause of the applicable statute. The law here simply does not afford relief for alleged violations of the statutes identified in plaintiffs’ Amended Complaint. As a matter of law, then, plaintiffs cannot state a claim with respect to HUD’s future disposition decision.

Moreover, plaintiffs’ attempt to invoke 12 U.S.C. § 1715z-11a(b), which is not preempted by the “flexible authority” provision, falls short. Plaintiffs allege that 12 U.S.C. § 1715z-11a(b)(10) requires HUD to transfer ownership of the Lawndale property with the pre-existing section 8 contract intact. Pls.’ Am. Compl. at ¶ 2. However, 12 U.S.C. § 1715z-11a(b) applies only when HUD is disposing of a “qualified HUD property,” which is statutorily defined in 12 U.S.C. § 1715z-11a(b)(2) as an unoccupied or substandard multifamily property *that has been owned by HUD for at least six months*. (emphasis supplied). The Amended Complaint here alleges that “Lawndale is the largest

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*privately owned* subsidized apartment project in Chicago” and that “[the lender] has assigned its interest in the mortgage to HUD.” Pls.’ Am. Compl. at ¶¶ 21, 27. Indeed, the Amended Complaint contains numerous allegations about the current owner and HUD’s relationship with that owner. Pls. Am. Compl. at ¶¶ 24-26, 28, 30. Plaintiffs therefore have not stated a claim for a violation of 12 U.S.C. § 1715z-11a(b). Because this is a situation where “it appears beyond doubt that plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief,” dismissal of the claim is warranted. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Albiero v. City of Kankakee*, 122 F.3d 417, 419 (7th Cir. 1997).

### Conclusion

For all the foregoing reasons, the court should dismiss plaintiffs’ amended complaint for lack of subject matter jurisdiction and for failure to state a claim.

Respectfully submitted,

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