

No. 02-36165
No. 03-35422 (consolidated with No. 02-36165)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KIMBERLY ASSOCIATES, an Idaho limited partnership,
Plaintiff/Appellee,

v.

UNITED STATES OF AMERICA,
Defendant/Appellee.

ANN DOE,
Applicant in Intervention/Appellant.

Appeal from the United States District Court for the District of Idaho
Civil No. 98-83-LMB
Honorable Larry M. Boyle, Presiding

**KIMBERLY'S MOTION TO TAKE JUDICIAL NOTICE OF CLASS
ACTION PENDING IN THE OREGON DISTRICT COURT**

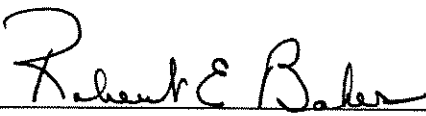
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COMES NOW Kimberly Associates, appellee in the above-entitled appeal, and pursuant to FRAP Rule 27 requests the Court to take judicial notice of the attached Class Action Complaint by tenants of Section 515 housing against the United States, entitled *Goldammer, et al., v. Ann Veneman, Sec. of Agriculture, et al.*, currently pending in the United States District Court for the District of Oregon, Civil No. 031749. Applicant in intervention-appellant Ann Doe, if permitted to intervene, seeks to raise the claim that the district court erred in not allowing her to intervene and assert the ELIHPA statutes, 42 U.S.C. ¶ 1472, as a defense to Kimberly's quiet title judgment against the United States. That same issue is now pending in *Goldammer v. Veneman*. The *Goldammer* case is a more appropriate action to litigate what rights, if any, tenants such as Ann Doe may have against the United States and owner/borrowers under ELIHPA, rather than intervention in this *Kimberly* proceeding, which has gone to a final quiet title judgment from which no valid appeal is pending. In the prior appeal in this action, *Kimberly v. United*

States of America, 261 F.3d 864 (2001) (*Kimberly I*), this Court previously determined that ELIHPA did not modify Kimberly's right to a quiet title judgment.

DATED this 22nd day of April, 2004.

MOFFATT, THOMAS, BARRETT, ROCK
& FIELDS, CHARTERED

By 
Robert E. Bakes – Of the Firm
Attorneys for Appellee
Kimberly Associates

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of April, 2004, I caused a true and correct copy of the foregoing **KIMBERLY'S MOTION TO TAKE JUDICIAL NOTICE OF CLASS ACTION PENDING IN THE OREGON DISTRICT COURT** to be served by the method indicated below, and addressed to the following:

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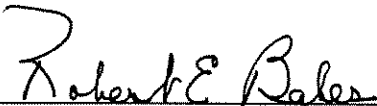
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**KIMBERLY'S MOTION TO TAKE JUDICIAL NOTICE OF CLASS
ACTION PENDING IN THE OREGON DISTRICT COURT - 3**

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

**SHERRY GOLDAMMER, DONALD GERHARD,
RON VEILLON, CARMEN THOMAS,
SHARON CHUDY, LINDA POOL,
BREN H. TAYLOR, FAUNA RAE EHRMAN and
DIANA RHODES** on behalf of themselves and all
others similarly situated,
Plaintiffs,

vs.

ANN VENEMAN, in her official capacity as
Secretary of the United States Department of
Agriculture;
ART GARCIA, in his official capacity as the
Administrator of the Rural Housing Service;
LYNN SCHOESSLER, in his official capacity as
State Director of the Oregon Rural Development
Office;
DBSI/TRI IV, an Idaho limited partnership;
DBSI REALTY CORPORATION, an Idaho
corporation; and
**NORTHWEST REAL ESTATE CAPITAL
CORPORATION**, an Idaho nonprofit corporation,
Defendants.

Civil No. 031749

CLASS ACTION COMPLAINT

Administrative Procedure Act;
Emergency Low-Income
Housing Preservation Act;
Oregon Residential Landlord
and Tenant Act and Contract

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cc: ARG Doc ECL
C. Gill

I. INTRODUCTION

1. Plaintiffs, very low-income residents of Forest Village Apartments ("Forest Village"), Seacrest Apartments ("Seacrest") and Meadowbrook Apartments ("Meadowbrook"), three developments financed by the United States Department of Agriculture ("USDA") under Section 515 of the Housing Act of 1949, 42 U.S.C. § 1485, and subsidized under Section 521 of that Act, 42 U.S.C. § 1490a, bring this class action (a) to reverse the illegal acceptance by USDA of the prepayment of the loans that financed two of the developments, (b) to restore the subsidies and other rights and benefits accorded them under the Housing Act of 1949, and (c) to enjoin USDA from accepting the prepayment of any other loans it made under Section 515 to any entities in which DBSI/TRI IV ("DBSI") has an interest, without first complying with all applicable laws and regulations, including the Emergency Low-Income Housing Preservation Act of 1987 as amended by the Housing and Community Development Act of 1992 ("ELIHPA"), 42 U.S.C. § 1472(c). The illegal prepayment of the loans for Forest Village and Seacrest have irreparably harmed the plaintiffs by forcing an increase in their rents and threatening them with displacement and by prematurely and illegally terminating various rights guaranteed them by law. The prepayment of the remaining loans threatens similar irreparable harm to the members of the class that the plaintiffs represent.

2. In order to preserve the stock of federally assisted low-income housing and prevent the displacement of tenant families, Congress, through ELIHPA, enacted restrictions on the prepayment of loans made pursuant to Section 515 to finance the construction of, among others, Forest Village, Seacrest and Meadowbrook. Despite these restrictions, USDA has accepted prepayment of the loans made to Forest Village

and Seacrest, which has violated ELIHPA in that defendant DBSI refused to apply to USDA to prepay the loans, failed to offer the housing for sale to a qualified public or nonprofit organization that would continue to operate the complexes as low-income housing, and failed to protect the residents of these developments from displacement through rent increases that they cannot afford. USDA's acceptance of these prepayments has violated its affirmative obligations under ELIHPA.

3. Defendant USDA and its agents may illegally acquiesce in the efforts of owners of Section 515 properties affiliated with DBSI to prepay their loans on additional developments located in Oregon, including Meadowbrook, and to allow them to withdraw from further participation in the Section 515 rural rental housing program without placing any restrictions on their prepayment and without requiring the owners of those developments to first comply with provision of ELIHPA. If USDA is allowed to accept prepayment under these circumstances, it will violate its affirmative obligations under ELIHPA.

II. JURISDICTION

4. Jurisdiction is conferred on this court by 28 U.S.C. §§ 1331, 1337, 1343(a)(3) and (4), 1361 and 1367. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

5. Pursuant to 28 U.S.C. § 1367, this Court has supplemental jurisdiction over the claims based on state law, as they are so related to claims within the court's original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

III. PARTIES

6. Plaintiff Sherry Goldammer is an elderly very low-income resident of Seacrest who pays \$173 per month in rent to defendant DBSI Realty Corporation, under the terms of a one-year written rental agreement, dated February 1, 2003.

7. Plaintiff Donald Gerhard is an elderly low-income resident of Seacrest who pays \$129 per month in rent to defendant DBSI Realty Corporation, under the terms of a one-year written rental agreement, dated October 2003.

8. Plaintiff Ron Veillon is an elderly low-income resident of Seacrest who pays \$293 per month in rent to defendant DBSI Realty Corporation, under the terms of a one-year written rental agreement dated September 1, 2003.

9. Plaintiff Carmen Thomas is an elderly low-income resident of Seacrest who pays \$119 per month in rent to defendant DBSI Realty Corporation, under the terms of a one-year written rental agreement dated September 10, 2003.

10. Plaintiff Sharon Chudy is a low-income resident, who lives with her two children at Forest Village, and pays \$99 per month in rent to defendant DBSI Realty Corporation, under the terms of a one-year written rental agreement dated March 26, 2003.

11. Plaintiff Linda Pool is a low-income resident of Forest Village who pays \$109 per month in rent to defendant DBSI Realty Corporation, under the terms of a one-year written rental agreement dated May 7, 2003.

12. Plaintiff Fauna Rae Ehrman is a low-income resident of Forest Village who pays \$91 per month in rent to defendant DBSI Realty Corporation, under the terms of a one-year written rental agreement dated June 6, 2003.

13. Plaintiff Bren H. Taylor is a low-income resident of Forest Village who pays \$352 per month in rent to defendant DBSI Realty Corporation, under the terms of a one-year written rental agreement dated July 1, 2003.

14. Plaintiff Diana Rhodes is a low-income resident of Meadowbrook who pays \$103 per month in rent to defendant DBSI Realty Corporation, under the terms of a one-year written rental agreement dated March 11, 2003.

15. Defendant Ann Veneman is the Secretary of USDA and, as such, is charged with the overall administration and enforcement of all functions, powers, and duties of USDA including those related to the Section 515 program. She is sued in her official capacity.

16. Defendant Art Garcia is the Administrator of the Rural Housing Service ("RHS"), the USDA agency directly responsible for the management and administration of the Section 515 loan program and the Section 521 subsidy program. He is sued in his official capacity.

17. Defendant Lynn Schoessler is the director of Oregon Rural Development, a division of USDA located in Portland, Oregon, that administers the RHS housing programs in the state of Oregon. Mr. Schoessler is responsible for the administration and enforcement of all functions, powers and duties of RHS including those related to the Section 515 and 521 programs in Oregon. He is sued in his official capacity.

18. Defendant DBSI/TRI IV ("DBSI") is a limited partnership created under the laws of Idaho, with its principal place of business in Boise, Idaho. Defendant DBSI owns and operates Forest Village and Seacrest, both of which it is required to operate and administer in accordance with the Housing Act of 1949, the U.S. Housing Act, and

other federal law. Defendant DBSI also has ownership interest in other Section 515 properties in Oregon, including Vittoria Square, Hillside Terrace, Meadowbrook and Norsemen Village.

19. Defendant Northwest Real Estate Capital Corporation ("Northwest") is an Idaho non-profit corporation that has told the plaintiffs that it has purchased Forest Village and Seacrest from defendant DBSI.

20. Defendant DBSI Realty Corporation ("DBSI Realty") is an Idaho corporation, and the management company for Seacrest and Forest Village. DBSI Realty entered into rental agreements with the plaintiffs.

IV. CLASS ACTION ALLEGATIONS

21. Plaintiffs seek certification under FRCP 23(b)(2) to pursue their claims on behalf of themselves and all others similarly situated. The class is composed of all persons in Oregon who are tenants of the six Section 515 Rural Rental Housing ("RRH") projects threatened with prepayment by defendant DBSI and its affiliated entities.

22. The class is so numerous that joinder of all members is impracticable. While the information on the number of persons affected by USDA's policies is within the knowledge of USDA, residents of at least 150 units in projects in Oregon are potentially subject to these policies.

23. There are questions of law and fact common to the class. All members of the class are tenants of the six Section 515 RRH projects in Oregon. All class members have recently been threatened with increased rent by Northwest, or are at immediate risk of that threat because of defendants' failure to comply with the requirements of

ELIHPA. The legal question of whether defendants failed to follow ELIHPA is common to members of the class.

24. USDA has acted and refused to act on grounds generally applicable to the class, making declaratory and injunctive relief appropriate with respect to the class as a whole.

25. The named plaintiffs' claims are typical of the claims of the class in that named plaintiffs and other class members will lose important tenant protections and will be subjected to rent increases from which they were meant to be protected by acts of Congress.

26. The named plaintiffs will fairly and adequately protect the interests of the class. Plaintiffs will suffer the same injury as all other members of the class in that they have been wrongfully denied their tenant protections. The named plaintiffs are represented by counsel who are experienced in this type of litigation and who will prosecute this action vigorously on behalf of all members of the class.

V. FACTS

27. Forest Village, Seacrest and Meadowbrook are developments that were built, financed and subsidized by the FmHA (hereinafter referred to as "RHS", the agency's new name) under the Section 515 program. The defendant owners of these projects executed loan resolutions, promissory notes, and deeds of trust on the properties in favor of RHS securing repayment of the notes.

28. In the loan resolutions the defendant owners agreed, inter alia: to comply with all applicable USDA regulations while the loan obligations remain unsatisfied; to comply with all agreements and obligations in or under the notes, security instruments and any related agreements executed in connection with the loans; to do such other

things as may be required by the Government in connection with the operation of the housing; to "not use the housing for any purpose other than as rental housing and related facilities for eligible occupants" unless "the Government gives prior consent."

29. Defendant DBSI tendered to USDA the balance due and owing on the loans for Forest Village and Seacrest sometime in or about October or November 2003.

30. USDA accepted the prepayment from DBSI and released the deeds of trust securing the loans without requiring the owner, defendant DBSI, to comply with ELIHPA, thus terminating the Section 515 restrictions on Forest Village and Seacrest.

31. RHS has not made any findings that Forest Village and Seacrest are no longer needed as affordable housing in the community.

32. RHS has not required defendant DBSI to advertise or offer the developments for sale to a nonprofit or public agency as required by ELIHPA.

33. RHS has not placed on defendant DBSI any condition that would protect current residents of the developments from displacement after prepayment for reasons other than good cause.

34. Neither defendant USDA nor defendant DBSI have informed any local, regional, state or national housing organizations of defendant DBSI's intent to prepay the loan, or of the impact of such a prepayment, as required by RHS regulations.

35. Defendant Northwest has told some of the plaintiffs orally that their rent may have been increased as of December 1, 2003.

36. Plaintiffs have received letters from defendants Northwest, DBSI, and Schoessler warning them of rent increases, but with no specific information as to when

and if they will get written notice of the rent increase, how large the increase would be or when the increase would be in effect.

37. Defendants' actions threaten the plaintiffs, other residents of these developments, persons on the waiting list for assisted housing, and other families needing assisted housing throughout Oregon, with imminent injury, including loss of their rights as tenants under RHS regulations, eviction and displacement from their homes, the severing of personal, family and community ties, discrimination, lack of access to assisted housing, and possibly homelessness. Plaintiffs have no adequate remedy at law.

VI. CLAIMS FOR RELIEF

First Claim -- Administrative Procedure Act

38. By accepting DBSI's full payment of their loan obligations and releasing its security in the developments without regard to the requirements of ELIHPA and its implementing regulations, USDA has abused its discretion and has acted arbitrarily, capriciously, not in accordance with law, without observance of procedure required by law, short of statutory right, and contrary to constitutional right in violation of the Administrative Procedure Act, 5 U.S.C. § 706 (2)(A)-(D).

39. The acceptance by RHS of full payment of any other loan obligations by the owners of these six developments and the release of its security interest in those developments without regard to the requirements of ELIHPA and its implementing regulations will cause USDA to abuse its discretion and act arbitrarily, capriciously, not in accordance with law, without observance of procedure required by law, short of statutory right, and contrary to constitutional right in violation of the Administrative Procedures Act, 5 U.S.C. § 706 (2)(A)-(D).

Second Claim -- 42 U.S.C. §§ 1472, 1485

40. By failing to file a prepayment request with RHS or to provide RHS with other required information and documentation necessary for RHS adequately to make a prepayment report, defendant DBSI has violated plaintiffs' rights under ELIHPA, 42 U.S.C. § 1472(c), and its regulations.

41. By failing to offer to sell the developments to qualified nonprofit organizations or public agencies that would maintain the developments as low-income housing, defendant DBSI has violated plaintiffs' rights under ELIHPA, 42 U.S.C. § 1472(c) and its regulations.

42. By failing to inform plaintiffs of their intent to terminate the Section 515 financing and to relieve themselves of all obligations under the Section 515 program, defendant DBSI has violated plaintiffs' rights under Sections 510 and 515 of the Housing Act of 1949, 42 U.S.C. § 1480(g), 1485 and their implementing regulations, including 7 C.F.R. Part 1930, Subpart C, and 7 C.F.R. Part 1944, Subpart L.

Third Claim -- Due Process

43. By terminating the Section 515 loan contract for these developments without proper notice, the government defendants have deprived plaintiffs of their property interest in continued occupancy in the developments and in their rights to certain statutory and regulatory protections without adequate procedural due process, in violation of the due process clause of the Fifth Amendment to the United States Constitution.

Fourth Claim for Relief- Violation of Rental Agreement

44. Defendant DBSI Realty Corporation, and defendants that are its successors in interest in the rental agreements with plaintiffs, have violated the rental

agreements between themselves and plaintiffs by raising rent without notice and during the term of the rental agreement.

**Fourth Claim for Relief
Violation of the Oregon Residential Landlord and
Tenant Act, ORS 90.240(5)(a)**

Defendant DBSI Realty Corporation, and defendants that are its successors in interest in the rental agreement with plaintiffs, have violated ORS 90.240(5)(a) by raising Plaintiffs' rent without 30-day written notice.

VII. PRAYER FOR RELIEF

WHEREFORE, plaintiffs request this Court to:

1. Enter a declaratory judgment that the actions and omissions of USDA and the owners violate Section 515 of the Housing Act of 1949, 42 U.S.C. § 1485; ELIHPA, 42 U.S.C. § 1472(c); the loan resolutions, deeds of trust, and promissory notes regarding Forest Village and Seacrest; and the due process clause of the fifth amendment to the United States Constitution.
2. Enter a declaratory judgment that the actions of USDA set forth above violate the Administrative Procedure Act and the Fifth Amendment to the United States Constitution.
3. Enter a preliminary injunction, later to be made permanent:
 - a. Enjoining defendant Northwest from raising plaintiffs' rents or operating the developments in any manner other than in conformance with RHS statutes and regulations and Oregon law.
 - b. Ordering defendants to reverse the prepayment of the Section 515 loans for Forest Village and Seacrest by requiring defendant USDA to return to

defendant DBSI the amounts prepaid in or about October and November 2003, and to require defendant DBSI to reinstate the RHS liens that were released after the prepayment.

c. Enjoining USDA from accepting full payment of any Section 515 loans in which defendant DBSI has an interest, and from releasing its securing interest in these developments, until such time as the prepayment of the loan and release of the mortgage have been processed in accordance with USDA requirements;

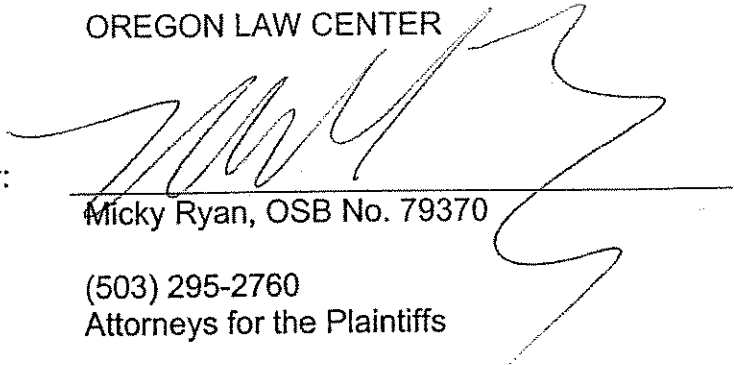
4. Award plaintiffs their costs and reasonable attorney fees; and

5. Grant such other and further relief as the Court may deem just and proper.

DATED this 14 day of December 2003

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