UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA *ex rel.* ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, INC., | **ECF CASE** |
| Plaintiff/Relator, | 06 CV 2860 (DLC) |
| -v- | |
| WESTCHESTER COUNTY, NEW YORK, | |
| Defendant. | |

**DECLARATION OF CRAIG GURIAN**
**IN SUPPORT OF MOTION TO INTERVENE**

CRAIG GURIAN, an attorney admitted to practice before this Court, declares, pursuant to 28 U.S.C. §1746, that the following is true and correct:

1. I am the Executive Director of, and co-counsel for, the Anti-Discrimination Center ("ADC"),[1] and make this declaration in support of ADC's Motion to Intervene.

2. From 2005 to 2009, I conceptualized, investigated, commenced, and actively co-counseled the litigation that resulted in this Court's landmark decision on ADC's motion for partial summary judgment and this Court's entry of a historic housing desegregation Consent Decree from 2005 through 2009.[2]

3. I actively participated in the negotiations that led to the entry of the Consent Decree.

4. I, with the assistance of ADC colleagues, have actively monitored events in Westchester throughout the last 21 months.

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[1] ADC's name has been officially shortened from "Anti-Discrimination Center of Metro New York" to "Anti-Discrimination Center," and the case caption should hereafter be altered accordingly.

[2] My overall experience in the field includes 23 years of civil rights experience in litigation, policy advocacy, legislative drafting, teaching, and writing, most of it focused on fair housing.

5. As such, I am uniquely positioned to see both how Westchester's current attitudes and policies reprise those that landed it in trouble in the first place, and how Westchester's conduct is utterly incompatible with the terms, objectives, and intent of the Consent Decree.

6. Since the entry of the Consent Decree, ADC, consistent with its corporate purposes,[3] has provided information to the United States Government and the Monitor regarding Westchester's non-compliance with its Consent Decree obligations, and has repeatedly urged the Government and the Monitor to fulfill their duty to vindicate the integrity of the Consent Decree and of the affirmatively further fair housing ("AFFH") goals that animate the Decree.

7. It is my view that neither the Government nor the Monitor has done what is necessary to assure Westchester's compliance, as neither has sought the assistance of the Court to compel compliance despite Westchester's pattern of undercutting the terms and objectives of the Decree.

8. Each of these disjunctions — between Westchester's required conduct and its actual behavior, between the obligation of the Government and the Monitor to vindicate the integrity of the Decree and their failure to do so, and between ADC's unwavering civil rights interest and the Government's and the Monitor's frequent appeasement of Westchester's violations of the Decree's AFFH goals — support the granting of ADC's Motion to Intervene.

**The need for enforcement**

9. Resistance to the terms and objectives of the Decree began immediately, manifested

[3] ADC's corporate purposes specifically include combating housing discrimination (whether that discrimination occurs by design or effect); analyzing, conducting research on, and investigating the factors that have historically perpetuated, and those that currently perpetuate, improper discrimination, including segregation and unequal opportunity, especially with regard to the systemic operation of those factors within metropolitan areas; and increasing access to and the availability of affordable housing to members of all communities.

both by an outpouring of explicitly racist comments from many Westchester residents excoriating the Decree,[4] and by the County's own immediate back-pedaling from its obligations.

10. That back-pedaling included the County contradicting the terms and objectives of the Decree in a statement issued on the day the Decree was entered. Westchester had, in the Decree, just acknowledged its authority and responsibility to use all means — including litigation —to overcome barriers to fair housing choice imposed by local zoning restrictions,[5] but then-County Executive Andrew Spano said that such obstacles could be the basis for reducing the number of units to be built, asserting that the Government had already recognized that "that the county does not control local zoning."[6]

11. In a similar vein, then-Deputy County Executive Susan Tolchin echoed the Decree-violating view that the County's interest in AFFH development would need to yield to local zoning, not visa-versa, reprising the theme that development requirements could be reduced "if local zoning or property prices prove to be barriers."[7]

12. Spano had clearly learned nothing from this Court's rulings on the difference between "fair housing" and "affordable housing," as he began on the day the Decree was entered what has been Westchester's signature phrase to conflate and obscure its AFFH responsibilities: "We have always been committed to *fair and affordable housing,"* said Spano.[8]

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[4] *See, e.g.,* Appendix A to ADC's Feb. 2010 "Prescription for Failure" report. That report is annexed hereto as Exhibit 14, [A full list of exhibits in numerical order is set forth beginning at paragraph —82 of this Declaration.]

[5] As discussed, *inter alia,* in Point IV of ADC's Memorandum in Support of its Motion to Enforce.

[6] Aug. 10, 2009 Westchester press statement, p. 3 annexed hereto as Exhibit 19—. The Consent Decree, of course, would not allow any such modifications without

[7] "In Westchester, an Open Plea to Accept a Housing Accord," New York Times, Aug. 18, 2009, *available at* **http://www.nytimes.com/2009/08/18/nyregion/18spano.html**.

[8] Aug. 10, 2009 Westchester Press statement, *supra,* at p. 2.

13. On Aug. 24, 2009, ADC, reiterating views previously expressed to the Monitor, sent the Monitor letter setting out the need for a strong and immediate enforcement of the Decree. That letter is annexed hereto as Exhibit 10.[9]

14. ADC warned that there has been a long history in civil rights matters that, "Appeasement only emboldens resistance," and noted that, "Overcoming zoning barriers is the linchpin of successful implementation of both the County's unit-specific and broader" Consent Decree obligations."[10]

15. The letter pointed out that, "Without confronting local zoning barriers, neither the County's obligation to place units on the Census blocks with the lowest concentrations of African-Americans, nor the County's broader obligation to eliminate *de facto* residential segregation will be achieved."[11]

16. The letter identified the need for a concurrent, two-track strategy: "Carrots often fail to provide the intended incentive to act because the person or entity sought to be influenced retains an assumption that the 'non-cooperation' option will remain a viable option. Change the viability of the non-cooperation option, and you change the calculus of the person or entity deciding on a course of conduct...Put another way, the idea that one would offer either equivalent input or equivalent result to a municipality regardless of whether that municipality is cooperating or not is naïve and counterproductive."[12]

17. Both the Government and the Monitor failed to heed ADC's counsel, and the history

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[9] The exhibits to the letter are omitted.

[10] *Id.* at pp. 1, 3.

[11] *Id.* at p. 4.

[12] *Id.* at pp. 8-9.

of the last 21 months has been a history of ADC trying to get the Government and the Monitor to treat the Consent Decree as a binding and enforceable order of this court.

18. In the period following the Aug. 24, 2009 letter, the Monitor identified to me a strategy directly contrary to the two-track approach ADC had suggested: try to go after "easy" sites — those that did not require overcoming barriers (sites the Monitor called "low-hanging fruit") — to get units on the board.

19. In an Oct. 7, 2009 letter to the Monitor, attached hereto as Exhibit 11, ADC reiterated and expanded upon some basic principles, including a critique of the idea of accommodating AFFH resistance by seeking to develop on "easy" sites. Among the points:

> (a) "Leveraging is everything...[one] form of leveraging is generally not known by that name, but is ultimately the most important and effective form of leveraging. That is the process of overcoming zoning barriers. Doing so stimulates private and not-for-profit sector involvement far beyond anything that $56 million or $112 million might accomplish."
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> (b) "The need to husband resources means first of all that a premium should be placed on reducing the level of [Consent Decree] funds per development by achieving substantial cross-subsidy from market-rate units."
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> (c) The "importance of the County achieving ownership or an ownership interest (as with a purchase option) in a parcel cannot be overestimated."
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> (d) "[W]e think it is worth reiterating that monitoring of the County's performance of its non-unit-specific obligations under the Settlement Order is at least as important as the monitoring of the unit-specific obligations. Indeed, doing the former will do more to cause the development of affordable AFFH units than can the latter. To put it another way, focusing on accommodating AFFH resistance by seeking to develop on 'easy sites' may have for some the initial allure of fulfilling a numerical quota, but such a strategy ultimately both dishonors the letter and spirit of the [Consent Decree], and winds up being less effective than a prompt demonstration that all parties are committed to rewarding cooperation and defeating resistance."

20. ADC shared its concerns (and the aforementioned letters to the Monitor) with the

Government, reiterating to the Government in Oct. 2009, for example, that it was a crucial period, one during which the "signals and expectations that will determine the success or failure" of the Consent Decree are being conveyed by the Government and the Monitor. As ADC pointed out to the Government in this period, by going after low-hanging fruit and not seeking structural change, "towns and villages will see that an *uncooperative* attitude is effective in maintaining the status quo. Those inclined not to cooperate will be emboldened; those considering cooperation will have qualms... The alternative, of course, is to have a two-track policy. That is, simultaneously working with and rewarding those who are cooperative, and developing housing in uncooperative municipalities over the objections of those municipalities, using state and federal legal remedies (and other tools) as needed."

21. ADC reiterated to the Government that ADC's desire was to work in partnership to see that the Decree results in core, structural change in Westchester. Neither the Government nor the Monitor (to whom ADC had also proposed working in partnership) has ever accepted ADC's invitation.

22. In Nov. 2009, ADC pointed out to the Government how the Monitor's then-assistant was giving aid and comfort to those resisting the terms and objectives of the Decree. That assistant — Rose Noonan, currently a defendant in a racial steering lawsuit — contradicting, *inter alia,* Consent Decree, ¶¶ 7(i) and 7(j), publicly denied the existence of any "stick" that could be used to force municipalities to make their zoning more inclusionary.[13]

23. In December 2009, ADC pointed out to the Government that, reports continue to

[13] *See* "Yorktown holds forum on impact of county housing deal," Westchester Journal News," Nov. 22, 2009, annexed hereto as Ex. 17 ("The threat of withholding funds for open space and community projects is one of the few ways Westchester County can coax towns into complying with an affordable housing settlement, a housing expert said. '*There is no stick that I'm aware of*," Housing Action Council Executive Director Rose Noonan said. 'This litigation is against the county. It's not against the municipalities'") (emphasis added).

come in -- all consistent with one another -- about what messages the Monitor has been conveying. Regardless of what the Monitor's intentions may have been, we continued, ev*erybody* in Westchester understands him to have provided assurances that said in effect that "everything is going to be ok," that "no litigation is going to be brought" (either by Westchester or anyone else), and that, in short, no one is going to be forced to do anything (*i.e.*, exactly the opposite of what the Consent Decree contemplates).

24. Certainly the newly elected County Executive got that message. As pointed out to the Government by ADC, he told a meeting of Westchester municipal officers in December 2009 that "he would not force anyone to build anything."[14]

25. On January 27 2010, Westchester Journal News interviewed the County Executive in its "Editorial Spotlight" webcast.[15] The County Executive, contrary to the requirements of the Consent Decree, described an across-the-board policy of not using Westchester's legal authority to force municipalities to eliminate their exclusionary zoning.[16]

26. At the end of January 2010, Westchester submitted a remarkably inadequate Implementation Plan. In Feb. 2010, ADC issued a 44-page report entitled, "Prescription for Failure: A Preliminary Report on Westchester's Attempt to Ignore and Evade the Requirements of the Historic Desegregation Order Entered in *U.S. ex rel. Anti-Discrimination Center v. Westchester County,* a/k/a Westchester's "Implementation Plan," which is annexed hereto as

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[14] Dec. 11, 2009 online news report from site scarsdale10583.com, annexed hereto as Exhibit 18.

[15] The interview is available at http://www.lohud.com/videonetwork/63709673001/Interview-with-Astorino.

[16] The moderator pointed out that "one of the tools at the County Executive's disposal" is "a hammer — you could end up taking municipalities to court." The County Executive replied, "I won't do that. I will not do that." He added that he doesn't want to use a stick, and that "the approach that we're going to be using…is the carrot…"

Exhibit 14.[17]

27. The report said that, "just like putting the label 'Analysis of Impediments' on a document that failed to look at race or municipal resistance did not transform the document into a real Analysis of Impediments, so, too, putting the label 'Implementation Plan' on a series of documents that reprise Westchester's litigation arguments and attempt to avoid the obligations of the [Consent Decree] does not constitute a *real* Implementation Plan."[18]

28. The report continued: "ADC believes that Westchester decided on an approach whereby its initial submissions would serve as a tool of negotiation. That is, Westchester would submit a set of documents that are entirely inadequate with the hope that the Monitor would agree to a 'compromise' position."[19]

29. After a detailed analysis that included, *inter alia,* a discussion of how Westchester continues to purposefully conflate "affordable housing" with "fair housing," ignore fundamental impediments to fair housing choice, ignore the need to achieve residential desegregation, deny its authority over municipalities, encourage the perpetuation of segregation, and ignore its Consent Decree, ¶ 31(a) obligation to use all its housing policies to end segregation throughout Westchester County, the report turned to a problem that, with hindsight, we can see has plagued the process to this date.

30. "Westchester," we wrote, "is banking on an old strategy: adopt an extreme position, and hope that you can negotiate a middle ground ....The risk, of course, is that the Monitor will

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[17] The document is also available online at http://www.antibiaslaw.com/sites/default/files/files/Prescription_for_Failure.pdf.

[18] *Id.* at pp. 5-6.

[19] *Id.* at p. 6.

take the bait…and negotiate."[20]

31. While the Monitor did not accept the first IP, his focus was the document's "vagueness." In a letter of Feb. 23, 2010, close to 100 fair housing organizations and advocates wrote to the Monitor to "express our concern that you have described the 'primary' problem in Westchester's 'Implementation Plan' as being one of vagueness. As the Anti-Discrimination Center ("ADC") has made clear in *Prescription for Failure,* the submission was indeed plagued by vagueness and evasion, but the primary problem is that Westchester's plan – if one could call it a plan – was not directed towards meeting the AFFH obligations" of the Consent Decree. The letter is annexed hereto as Exhibit 15.

32. The letter stated that the signatories "believe that it is essential that you require Westchester to remedy *each and all* of the deficiencies identified by ADC in *Prescription for Failure,"* and went on to state that it was especially important for the Monitor to require that the Implementation Plan: "(1) acknowledge the existence of segregation in Westchester, the fact that a principal goal of the Settlement Order is the end of de facto residential segregation in Westchester County, and the fact that a major impediment to affordable housing development in the whitest communities in Westchester has long been municipal resistance to development that may facilitate racial and ethnic integration; (2) actually *plan* for the County to acquire interests in land on the Census Blocks with the lowest percentages of African-Americans and Latinos; and (3) affirm both Westchester's state-based and its federal-based authority to challenge zoning and other barriers to the development for affordable affirmative furthering of fair housing purposes in connection with the land it will acquire, and affirm Westchester's intention to use that

[20] *Id.* at p. 43.

authority."[21]

33. In March, 2010, Westchester submitted another wholly-inadequate Implementation Plan. To facilitate the Monitor's ability to comply with his Consent Decree, ¶ 20(d) duty to direct additions and modifications to a second, failed submission, we provided him with ADC's Draft Implementation Plan on Mar. 25, 2010. That document is annexed hereto as Exhibit 16.[22]

34. On Apr. 13, 2010, the Westchester Journal News "Editorial Spotlight" carried an interview with a number of people involved with the development of affordable housing, one of whom is a developer named William Balter. In the course of the interview, he describes "leverage" as having the necessary zoning in place. "It's really frankly all about having leverage," Balter said, and compared this "consensus building with leverage" with *faux* consensus building, explaining that "once people really understand that something is going to happen there, they want it to be the best it can be. But when the decision in their mind is 'can I stop the project,' there is really not a lot to be gained from a consensus-building project if people's real goal, underlying goal is to stop the development."

35. Balter observed that in the "31 communities you're talking about [the "eligible communities], the tools are not in the tool kit...[If] the Implementation Plan doesn't create new tools, I don't see us going to those communities."

36. ADC made these independent observations available to the Government and the Monitor. In April of that year, ADC also pointed out to the Monitor the demographic inadequacy of the proposed City of Rye development site that Westchester was putting forward to "count" towards Consent Decree, ¶ 7 allocation purposes.

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[21] Feb. 23, 2010 organization and advocate letter to Monitor (Ex. 15), *supra.*

[22] ADC's March 2010 Draft IP was also shared with the Government, and is available online at http://www.antibiaslaw.com/sites/default/files/files/IP_2010_03_25.pdf.

37. In May 2010, ADC argued to the Government that, because a basic fact about the nature of the Consent Decree had not been adequately communicated to the public and relevant players, "a lot more work needs to be done to make clear that implementation is not a negotiating process, but rather the mandated carrying out of a binding federal court order over which the federal court continues to have oversight and enforcement authority."

38. In June 2010, ADC pointed out to the Government that some municipalities were using the lack of an implementation plan as an excuse to hold off on taking any action.

39. Later that month, the County Executive, in direct violation of his Consent Decree, ¶ 33(g) obligations, vetoed legislation that the County Legislature had passed that would have outlawed discrimination on the basis of lawful source of income.

40. The Monitor sent a letter to the County Executive questioning the veto and, *inter alia,* seeking information about the basis of the veto. The Jun. 28, 2010 letter is attached hereto as Exhibit 9.

41. ADC immediately pointed out to the Monitor that, while we did think that the information requests were "well-articulated and useful within the limited source-of-income context," there was, "unfortunately, nothing in the letter about the deeper pattern of non-compliance (*i.e.,* that [was] reflected in the spectacularly inadequate March 12th implementation submission), an omission that we consider, to put it mildly, another lost opportunity."

42. We had already said to the Justice Department that "the veto is just a symptom, not the underlying disease."

43. On Jun. 29, 2010, we again pressed the Justice Department on the need for action:

> As we've been telling HUD and the Monitor over the months, Astorino hasn't made it a secret that he has no intention of complying with the consent decree, most specifically with the crucial provisions that obligate the County to sue municipalities that are resistant.

> Today's Westchester Journal News carries an editorial that confirms what has long been known behind the scenes: the County Executive "has backed away from another settlement commitment...**telling the Editorial Board some months ago that he would not sue local governments that unlawfully stood in the way of the county's obligations to promote fair housing throughout Westchester;** the settlement required the county to acknowledge its long-settled authority to do just that — sue — if circumstances warrant" (emphasis added).
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> Thus, in the context of the existence of robust, court-backed federal authority and leverage, we have the spectacle of a municipal defendant standing in open defiance of a core provision of a federal court consent decree for months -- and there being no consequences. This in a circumstance where the Monitor has had full authority pursuant to paragraph 20(d) of the consent decree to direct Westchester to make such additions and modifications to its implementation plan that the Monitor believed necessary (no matter how substantial), authority that could have been exercised at any time after March 12th.
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> Westchester implications: Why on earth would any resistant municipality believe that there was any reason to change from a posture of maximum resistance?
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> National implications: these are direct challenges to the legitimacy of federal authority; as you know, such challenges are ignored at great peril.

44. Finally, on Jul. 7, 2010, the Monitor rejected the second IP that Westchester had submitted more than three months earlier, but, as we pointed out promptly thereafter, failed to direct the modifications and additions required by the terms of Consent Decree, ¶ 20(d). We added that, "In the end, the likelihood is extremely high that judicial intervention will be necessary to get this process back on track."

45. On Jul. 9, 2010, ADC pointed out to the Government some fundamental problems with how the process had proceeded to that point, saying that the consultant's report that accompanied the Monitor's Jul. 7, 2010 report "illuminates a fundamental misconception of what consent decree implementation is about. And that misconception is one that has plagued the entire process. . . [What the consultant] and others fail to recognize is that success is not

measured by WHETHER 750 units of housing gets built, but rather by HOW AND WHERE the housing gets built, and, most fundamentally, HAS THE DEVELOPMENT PROCESS MAXIMIZED THE REMEDIAL IMPACT OF THE CONSENT DECREE. In other words, this is *not* a normal planning exercise. The common planner impulse is to try to see if something can work without offending existing zoning. That approach may make sense for an individual developer, but it is entirely contrary to the consent decree goal of breaking down barriers to the potential for desegregation. Ideas like revitalization of downtowns are worthy...but not when trying to achieve this or other general "good planning" goals works in opposition to the need to site housing in the way to maximize desegregation potential."

46. Our communication with the Government continued as follows: "An important part of the misconception comes from a failure to put the specific housing unit goal in context. 750 units in a county of one million people is not a lot. And it's not even a lot in terms of the need that Westchester itself has identified (more than 6,000 units of unmet allocation in the towns and villages that are subject to development under the consent decree)."

47. "Most importantly," we said, "this remedial effort needs to have maximum remedial bang for the desegregation buck. Harvesting low-hanging fruit doesn't open doors for developers who don't have the benefit of a binding federal court order. Let others build that which is 'easy' — this matter is supposed to be all about overcoming *barriers* to fair housing choice."

48. On Jul. 21, 2010, ADC sent a letter to the Monitor. That letter is annexed hereto as Exhibit 8. We noted, *inter alia,* that, "While many observers have chosen to ignore the first two pages of the Consent Decree, those who have read it understand that the County was required to acknowledge that the development of affordable housing for the purpose of affirmatively furthering fair housing was an important County interest, that well-established New York State

law doctrines gave the County ample authority to challenge local exclusionary zoning, and that it was appropriate for the County to take legal action against municipalities to compel compliance."[23]

49. We recalled for the Monitor that it had been our position from that outset that it was crucial "to recognize that, in a County of almost one million people, the task of desegregating Westchester County is a task that extends well beyond the development of 750 units of housing, even if all of those units wind up being placed, as they should be, in locations that maximize their desegregation potential (as defined both by the demographics of the development's Census Block and surrounding Census Blocks and by the challenge that the development places to exclusionary zoning that stymies private developers from building context-sensitive housing). [As such, the] Consent Decree required the County to incorporate the goal of ending *de facto* residential segregation into ALL of its housing programs."[24]

50. On Jul. 22, 2010, the County Executive was interviewed on the "Good Day New York" television program.[25] On Jul. 28, 2010, the County Executive was interviewed on the "Editorial Spotlight" feature of the website of the Westchester Journal News.[26]

51. Promptly after the second interview, ADC contacted the Government and the Monitor to provide the following summary of that interview:

> The County Executive's strategy (at least the rhetorical strategy) is not terribly subtle:

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[23] *Id.* at p. 2.

[24] *Id.*

[25] The interview is available at http://www.myfoxny.com/dpp/good_day_ny/weschester-executive-astorino-on-county-budget-crisis-20100722.

[26] The interview is available at http://www.lohud.com/videonetwork/292403451001/Astorino-s-views-on-housing.

Make a nominal statement of the intention to comply (I opposed it, but of course we will comply), but no substantive moves toward compliance, and every other statement demonstrating resistance and/or lack of understanding of the law and of the Consent Decree and the intention to fight battle after battle to delay or deny genuine implementation. All of which is the worst "tone at the top" that can be imagined.

(1) we need new counsel anticipating differing "interpretations" of what the agreement means (see item 4 for an "interpretation" of one provision; item 5 for an" interpretation" of flexibility versus inflexibility);

(2) we need to protect our authority to run a County the way we see fit (something altogether inconsistent with submitting to the County Decree and the argument previewed by prospective counsel in highlighting *Horne v. Flores* when appearing Monday before the County Legislature Subcommittee on Litigation) ;

(3) no, there isn't segregation -- people are prohibited from moving to different areas...it's all just money (no agreement to Monitor Report statement that overarching goal is to create more integrated Westchester despite interviewer's two attempts to reference that point; zero understanding of what AFFH is);

(4) source of income requirement satisfied by previous County Executive supporting it; I have to have the right to exercise my own judgment;

(5) we need to have flexibility from Monitor and HUD in order to get to 750 (the example of flexibility he gave was changing the negotiated 25% cap on existing units and changing that to 50%);

(6) the Monitor is interested in documenting everything at the get go; we're more interested in building the housing (the *fait accompli* approach;

(7) by way of unintentional demonstration of why it *is* important to get a process in place before making piecemeal siting and funding decisions: it's going to cost a lot more than the $51.6 unless there is flexibility from Monitor and Feds (i.e., easing up on the requirements); and

(8) the IPs have not been rejected (using as a weapon the fact that the Monitor Reports have not used the "R" word).

**This is not the language of a County Executive getting ready to be serious about achieving the overarching goal of creating a more integrated Westchester.**

52. In the course of July 2010, past the extended-deadline that HUD had granted the County, Westchester had submitted to HUD a document that purported to comply with Westchester's Consent Decree, ¶ 32 obligations to produce an Analysis of Impediments.[27]

53. ADC promptly identified a host of fundamental inadequacies in the AI,[28] but it would be five months before HUD acted to reject the submission.

54. On Aug. 4, 2010, the Monitor was interviewed on the "Editorial Spotlight" webcast of the Westchester Journal News:[29] "Part of my task," the Monitor acknowledged in that interview, "is to ensure that all of the provisions, not just the provisions related to the building of, provision of housing, are fulfilled."

55. On Aug. 9, 2010, Westchester submitted a third IP, that, as ADC pointed out promptly thereafter in an analysis of the IP, was still just window-dressing.[30]

56. On Aug. 22, 2010, the Westchester Journal News ran a full-page op-ed that I had submitted under the title "High Stakes Gambling with the Rule of Law."[31]

57. The op-ed reviewed the purposes of the litigation and of the Consent Decree, and set out the basics of Westchester's persistent non-compliance.

58. It said that the County Executive's "lawless attitude must be taken seriously, especially because both the county's latest required 'Analysis of Impediments' to fair housing

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[27] Among the Consent Decree, ¶ 32 obligations were analyzing race-based impediments and those resulting from municipal resistance to affordable housing development.

[28] *Available at* http://www.antibiaslaw.com/westchester-false-claims-case/county-analysis-impediments-woefully-inadequate.

[29] ADC recorded the webcast, and can make it available to the Court.

[30] *Available at* http://www.antibiaslaw.com/westchester-false-claims-case/august-2010-implementation-plan-still-just-windowdressing.

[31] *Available at* http://www.antibiaslaw.com/highstakes.

choice and its latest 'Implementation Plan' still ignore all the basics: segregation, continuing municipal resistance, the importance of location and the need for concrete measures to distinguish between cooperative municipalities (who deserve assistance and incentives) and uncooperative municipalities (who need to understand that housing will be developed in spite of their resistance)."

59. It noted that "the county executive has recently said that the consent decree must be interpreted in a way to give him the leeway to run the county in the manner he sees fit," and asked: "Does he actually not understand that the whole point of having a federal consent decree is that Westchester's wrongdoing was serious enough to cause limits to be placed on local autonomy in order to ensure that the wrong is remedied?"

60. And the op-ed concluded as follows:

> The challenge posed is of national significance. If the principles of federal supremacy and obedience to federal court orders were forfeited, the glue that holds our country together would come undone. Were that to happen, Westchester residents would find that some of the federal protections being chucked overboard by others might well be protections they themselves hold dear. The urge to ignore the law when it is convenient to do so rises powerfully from many quarters, and it cannot be countenanced anywhere at any time.
>
> It is not impossible that the county executive's gambit could pay off in the short term, but he is betting the future of Westchester residents — financially and in terms of reputation and the potential for even tighter federal control — on the following chain of events:
>
> (1) Housing and Urban Development deciding — despite last year's statement from Deputy Secretary Ron Sims that the agency would hold Westchester's "feet to the fire" — that HUD's rights under the consent decree are not worth enforcing;
>
> (2) the Justice Department (including the Department's Civil Rights Division) deciding that a defendant whose noncompliance effectively says "we like our de facto segregation just the way we have it now" merits a response of "no problem"; and

> (3) the monitor concluding it is politically expedient to allow Westchester to present a facade to the world of surface compliance, somehow hoping that no one will notice either the lack of real change or a failure to fulfill the monitor's duty to insist on 100 percent vindication of the consent decree, including the duty of the monitor to modify Westchester's Implementation Plan as necessary.
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> Others can calculate the odds when it comes to the foregoing players, but on one point I am absolutely certain: When the Honorable Denise Cote — the judge overseeing this case who is fiercely committed to the rule of law — is ultimately presented (as she will be) with evidence of Westchester's persistent and pervasive noncompliance, she will not be saying, "That federal court order I signed? I was only kidding. Go ahead and ignore it as you please."
>
> It is time for all concerned to recognize that this is no game.

61. ADC made its AI and IP comments, and the op-ed, available to the Government and the Monitor.

62. The National Fair Housing Alliance submitted its critique of Westchester's third IP to the Monitor in a letter dated Sept. 27, 2010. The letter is annexed hereto as Exhibit 13.

63. The letter noted that, "[i]f Westchester is able to shirk its responsibilities following both decisive litigation and the intervention of the federal government, resistance from municipalities around the country will continue to be emboldened."[32] NFHA continued by saying that, "the County remains unnecessarily deferential to exclusionary zoning practices… and refuses to use established legal principles to overcome these restrictive zoning principles through litigation," and concluded with a plea: "do not let the County's very calculated attempts to evade certain aspects of the Consent Decree go unaddressed. It is important, not just for the future of Westchester, but also the future of our nation, that Westchester be forced to stand up, acknowledge racial discrimination and segregation, and take concrete steps to overcome it."[33]

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[32] *Id.* at p. 1.

[33] *Id.* at pp. 1, 2.

64. While the Monitor, as made clear in his Oct. 25, 2010 report to the Court, was unable to accept any aspect of the third IP save for the "model ordinance" discussed in the next paragraph, he still did not fulfill his Consent Decree, ¶ 20(d) obligation to specify the necessary modifications and additions.

65. The Monitor did purport to accept the so-called model ordinance, annexed hereto as Exhibit 6, even though it left exclusionary zoning intact: if every municipality were to adopt the model, not a single multiple dwelling not permitted as-of-right under *current* zoning would be able to be developed as-of-right *post-adoption*.

66. In a Dec. 21, 2010 letter, annexed hereto as Exhibit 1, HUD rejected Westchester's AI submission. HUD, however, did not advise the Court of Westchester's violation of its Consent Decree, ¶ 32 obligations, but instead told Westchester to come back with a compliant AI by Apr. 1, 2011.

67. The foregoing is simply illustrative of some of the efforts that ADC has made to get the Government and Monitor to enforce the Consent Decree. As is evident, ADC wanted to give the Government and the Monitor every opportunity to carry out their duty to vindicate the terms and objectives of the Consent Decree, as it also worked diligently to bring Westchester's non-compliance to their attention and the attention of the public and to advocate for vindication of the Decree

68. In 2011, ADC has continued to contact the Government and the Justice Department, both providing information and continuing to urge that they seek the Court's assistance to compel Westchester to comply with its obligations.

69. In a letter dated Mar. 31, 2011, annexed hereto as Exhibit 2, HUD rejected Westchester's request for an extension to the deadline for submission of a compliant-AI, and

wrote that, "If an acceptable AI is not received, HUD will request the United States Attorney's Office for the Southern District of New York to enforce the agreement on April 14, 2011."

70. Westchester ultimately did submit an AI on Apr. 13, 2011 (*i.e.*, Westchester's second AI). The only chapter with extensive revised text (reflecting rhetorical changes, not a change in approach) was Chapter 12. That chapter is annexed hereto as Exhibit 3.

71. The AI was submitted along with a letter from Westchester of the same date. The Apr. 13, 2011 Westchester letter is annexed hereto as Exhibit 12. In that letter, Westchester complains of any pushback from HUD, and cites the Monitor as an ally: the Monitor, Westchester reports, has said in HUD's presence that he (the Monitor — not the Government at whose pleasure he serves, and not this Court) "owns the process."

72. In a letter of Apr. 28, 2011, annexed hereto as Exhibit 3, HUD informed Westchester that it had rejected the second AI and had rejected Westchester's Fiscal Year 2011 AFFH certification.

73. Nevertheless, the Government has not commenced any enforcement proceedings. Instead, in a May 13, 2011 letter in which HUD delineated some of the major deficiencies of Westchester's second AI, HUD gave yet more time for Westchester to revise its plan. The letter is annexed hereto as Exhibit 5.

74. Notably, the letter is framed in terms of the AI only — it ignores Westchester's broad defiance of multiple Consent Decree obligations, its violation of its Consent Decree obligations in respect to an AI being only one part.

75. On Apr. 29, 2011, the National Fair Housing Alliance issued its annual "Fair Housing Trend Report."[34] The report provided an update on Westchester: "Unfortunately, since

[34] *Available at* http://www.nationalfairhousing.org/Portals/33/Fair%20Housing%20Trends%20Report%202011.pdf.

the time the Consent Decree was issued, Westchester has demonstrated its unwillingness to comply with the terms of the order and has instead resorted to its pre-litigation posture: it continues to deny the existence of segregation, it continues to deny that it can compel resistant municipalities to build pro-integrative affordable housing as a matter of public interest, and it continues to site its affordable housing in isolated places that perpetuate segregation."[35]

76. The report said that, "The fair housing community calls upon the federal government to demonstrate its commitment to fair housing by seeking an order from federal court that enforces the consent decree."[36]

**Intervention can wait no longer**

77. Despite Westchester's continuing pattern of defiance, the Monitor waited a full six months before issuing his most recent report, on Apr. 25, 2011. The report reflected the Monitor's continuing unwillingness to comply with his Consent Decree, ¶ 20(d) obligations, or to hold Westchester to account.

78. Despite the Government's warning to Westchester that the failure to produce a compliant-AI would result in court action on Apr. 14, 2011, no such action has been forthcoming.

79. ADC is constrained to seek to intervene, especially because the failure by the Government and the Monitor to compel Westchester to live up to its Consent Decree obligations has very real implications. The national implications are clear: more than 1,000 jurisdictions know that the Government — even when it has the force of a federal court order behind it — is

[35] *Id.* at p. 8.

[36] *Id.*

not prepared to hold people's "feet to the fire" when it comes to the need for residential desegregation.

80. And, in Westchester, the developments for which Westchester has received financing—none overcoming obstacles to fair housing choice in the Consent Decree period—reflect the Government's failure to prevent evasion of the Decree.

81. One illustration of just how far we need to go is found on a page of Westchester's website that describes "fair and affordable housing" developments. An included development, shown in Exhibit 7, annexed hereto, is one located at 330 Riverdale Avenue in Yonkers. The development is on a Census block that is 11.4 percent African-American and 70.2 percent Latino and within a Census tract that is 17.8 percent African American and 66.9 percent Latino.[37]

**Exhibits in numerical order**

82. Annexed hereto as Exhibit 1 is HUD's Dec. 21, 2010 letter to Westchester.

83. Annexed hereto as Exhibit 2 is HUD's Mar. 31, 2011 letter to Westchester.

84. Annexed hereto as Exhibit 3 is Chapter 12 of Westchester's second (now-rejected) AI, submitted to HUD on Apr. 13, 2011.

85. Annexed hereto as Exhibit 4 is HUD's Apr. 28, 2011 letter to Westchester.

86. Annexed hereto as Exhibit 5 is HUD's May 13, 2011 letter to Westchester.

87. Annexed hereto as Exhibit 6 is Appendix D-1-(i) to Westchester's third IP, the so-called "model ordinance."

88. Annexed hereto as Exhibit 7 is a portion of the web page on Westchester's website that describes a housing development at 330 Riverdale Avenue in Yonkers as "fair and affordable" housing.

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[37] *See* May 30, 2011 Declaration of Andrew A. Beveridge, ¶ 28, submitted in connection with ADC's Motion to Enforce.

89. Annexed hereto as Exhibit 8 is ADC's Jul. 21, 2010 letter to the Monitor.

90. Annexed hereto as Exhibit 9 is the Monitor's Jun. 28, 2010 letter to Westchester.

91. Annexed hereto as Exhibit 10 is ADC's Aug. 24, 2009 letter to the Monitor.

92. Annexed hereto as Exhibit 11 is ADC's Oct. 7, 2009 letter to the Monitor.

93. Annexed hereto as Exhibit 12 is Westchester's Apr. 13, 2011 letter to HUD.

94. Annexed hereto as Exhibit 13 is the Sept. 27, 2011 letter from the National Fair Housing Alliance to the Monitor.

95. Annexed hereto as Exhibit 14 is ADC's Feb. 2010 "Prescription for Failure" report.

96. Annexed hereto as Exhibit 15 is a Feb. 23, 2010 letter from fair housing organizations and advocates to the Monitor.

97. Annexed hereto as Exhibit 16 is ADC's Mar. 25, 2010 Draft IP.

98. Annexed hereto as Exhibit 17 is a Nov. 22, 2009 Westchester Journal News article, entitled "Yorktown holds forum on impact of county housing deal,"

99. Annexed hereto as Exhibit 18 is a Dec. 11, 2009 scarsdale10538.com article, entitled "Neighborhood Associations Meet to Review Village Business."

WHEREFORE, it is respectfully requested that the Court grant ADC's Motion to Intervene and such other and further relief as the Court deems appropriate.

Executed on May 31, 2011.

Craig Gurian (CG-6405)