UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, INC.,	
Plaintiff,	06 Civ. 2860 (DLC) (GWG)
v.	
WESTCHESTER COUNTY, NEW YORK,	
Defendant.	

MEMORANDUM OF LAW OF THE UNITED STATES IN SUPPORT OF MOTION TO COMPEL WESTCHESTER COUNTY TO COMPLY WITH THE COURT-APPOINTED MONITOR'S REQUESTS FOR INFORMATION AND PROCEDURES FOR FUTURE REQUESTS

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PRELIMINARY STATEMENT

Plaintiff the United States of America (the "Government") respectfully submits this memorandum of law in support of its motion to compel defendant Westchester County (the "County") to comply with both (1) the information requests of the Court-appointed monitor (the "Monitor"), and (2) the Monitor's proposed procedures governing future requests for information pursuant to the August 10, 2009 Stipulation and Order of Settlement and Dismissal (the "Settlement" or "Stipulation and Order").

The County's consistent failure to comply with the Monitor's requests for information is impeding the Monitor's ability to carry out his responsibilities pursuant to the Settlement and preventing the parties from achieving the ultimate goal of the Settlement — the development of fair and affordable housing. Specifically, as a result of the County's delay tactics, the Monitor has been unable to adequately assess the County's compliance with the substantive requirements of the Settlement with respect to evaluating zoning ordinances within the County. Without such assessments, the Monitor cannot make recommendations regarding the actions the County needs to take to develop the fair and affordable housing required by the Settlement. As detailed more fully below, the County has engaged in a pattern of requesting last minute extensions of time to respond to the Monitor's requests and then, after receiving extensions, providing wholly incomplete responses requiring yet another round of requests and extensions. Accordingly, a Court order is necessary to require the County to fully respond to outstanding requests by August 9, 2012, and to comply with the Monitor's proposed procedure to encourage greater compliance with future requests for information. Without such an order, the County will continue to engage in a course of conduct that will make it all but impossible to achieve the results contemplated by the Settlement.

STATEMENT OF FACTS

The background of this case is set forth in the Court's prior decision concluding that although the County was obliged to analyze race in conducting its analysis of impediments to fair housing as a condition of receiving federal funds, it repeatedly failed to do so. *See United States ex rel. Anti-Discrimination Ctr. v. Westchester County*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009). Of particular relevance here is the Monitor's authority, pursuant to the Settlement to, among other things:

> (a) Review all County programs, policies, and procedures to ensure compliance with this Stipulation and Order.
>
> (b) Take reasonable and lawful steps to be fully informed about all aspects of the County's compliance with this Stipulation and Order. Specifically, the Monitor shall have access to all books, records, accounts, correspondence, files and other documents, and electronic records of the County and its officers, agents, and employees concerning the subject matter and implementation of the Stipulation and Order.
>
> (c) Identify, recommend, and monitor implementation of additional actions by the County needed to ensure compliance with this Stipulation and Order.
>
> (d) Make recommendations, if needed, to the County and the Government of any remedies to foster compliance with applicable laws and regulations.

Settlement ¶ 13. Moreover, under paragraph 16 of the Settlement, the County is required to "direct all County officers, employees, agents, and consultants to cooperate fully with the Monitor concerning any matter within the Monitor's jurisdiction as set forth in this Stipulation and Order, including providing any documents requested by the Monitor and submitting to interviews by the Monitor." Periodically, based on the information provided by the County in

response to the Monitor's requests, the Monitor is required to "conduct an assessment of the County's efforts and progress related to the obligations set forth in this Stipulation and Order." *See* Settlement ¶¶ 15, 39-40. Completing these assessments is crucial to the Monitor's responsibility to implement and enforce the Settlement. *See id.*

Unfortunately, the County has repeatedly failed to meet its obligations to cooperate fully with the Monitor's requests for information necessary for the Monitor to complete the assessments required by the Settlement. As detailed in the declaration of James E. Johnson, dated July 20, 2012 (the "Johnson Declaration") filed in support of this motion, the County has engaged in a pattern of delayed and incomplete responses. As the Johnson Declaration indicates, the "County's failure to comply with deadlines, coupled with the incompleteness of some of its responses on critical issues, and non-responses to others, have impeded the Monitor's ability to assess compliance, and therefore recommend remedies, to ensure the County's compliance with its obligations under the Settlement." Johnson Decl. ¶ 30.

The County's record of delay and evasiveness commenced as the first significant deadlines imposed by the Settlement approached. Pursuant to the Settlement, the County has had a duty to identify impediments to fair housing within its jurisdiction, including impediments based on race or municipal resistance to the development of affordable housing, analyze local zoning ordinances, and implement strategies for changes to local zoning ordinances in order to affirmatively further fair housing. *See* Settlement ¶ 32(b). As required by the Settlement, *see* Settlement ¶ 39, on February 11, 2010, the Monitor issued his first report to the Court regarding the County's progress, and in it, directed the County to develop strategies, including both "carrots" and "sticks," to ensure that municipalities identify and remediate specific zoning

practices that may have exclusionary impacts. *See* Monitor's Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal, at 8-9 (ECF No. 328).

As this Court is aware, in July and August of 2011, both the County and the Government asked the Monitor to resolve a dispute concerning the County's duty to identify specific zoning practices that acted as an impediment to affirmatively furthering fair housing and the time within which the County was to analyze the zoning practices and put in place strategies to encourage municipalities to change zoning practices that tended to thwart the purposes of the Settlement. *See* Opinion and Order, filed May 3, 2012 (ECF No. 402), at 6-7 ("May 3 Opinion"); Memorandum Opinion and Order, filed May 17, 2012 (ECF No. 409), at 3-4, and n.1. The timing dispute centered around the County's position that it would not complete its identification and analysis of specific zoning practices until December 31, 2012, more than three years after the entry of the consent decree. Johnson Decl. ¶ 10. Finding such a delay to be unacceptable, in a report issued on November 14, 2011, and amended on November 17, 2011, the Monitor directed the County to file its zoning analysis and to provide a strategy for overcoming zoning practices deemed exclusionary by February 29, 2012. *Id.* ¶ 11. The County filed objections to the Monitor's Report in district court, and on March 16, 2012, Magistrate Judge Gorenstein affirmed the Monitor's authority to make the specific requests on zoning as described above. Decision and Order, dated Mar. 16, 2012, at 16-17 (ECF No. 396). On May 3, 2012, this Court adopted Judge Gorenstein's findings with respect to the zoning issues, and sustained the Government's objection to Judge Gorenstein's decision on the separate issue of whether the County Executive's

veto of source-of-income legislation violated the Settlement.[1] *See* May 3 Opinion, at 27-28.

Although the County provided a response to the Monitor's request for zoning analysis on February 29, 2012 (the "Zoning Submission"), it was wholly inadequate. The Zoning Submission failed to identify any strategy for overcoming exclusionary zoning practices, and lacked facts or analysis that would adequately support its conclusion that exclusionary zoning did not exist anywhere in Westchester County. Johnson Decl. ¶ 15. Accordingly, on May 14, 2012 (the "May 14 request"), the Monitor directed the County to prepare a supplemental zoning analysis, and provided the County with the relevant state and federal legal principles to guide its analysis. Johnson Decl. ¶ 16, Ex. 2. Specifically, the Monitor asked the County to analyze the exclusionary impact of six zoning practices based on socio-economic status and race. *Id.* The Monitor also requested information that would allow an assessment of the adequacy of the County's analysis and conclusions, such as internal County documents, communications and the names of personnel who participated in producing the Zoning Submission. *Id.* ¶ 17, Ex. 2 at 7-9. The Monitor set a response deadline of July 2, 2012, to conduct the supplemental zoning analysis and July 6, 2012, to produce documents, communications, and a list of participants. *Id.*

The County's deficient submission in response to the Monitor's May 14 request is emblematic of the County's general approach to providing information requested by the Monitor. On June 28, 2012, the County contacted the Monitor to request an extension of time to provide the supplemental zoning analysis in order to permit the Deputy County Executive an opportunity

[1] The County has appealed the Court's decision regarding the veto of the source-of-income legislation, (*see* 12-2047 (2d Cir.)), and sought a stay of this Court's order. That application has been set down for consideration by the Second Circuit on July 24, 2012. The County has not appealed the portion of the decision adopting the magistrate's report and recommendation with respect to the zoning analysis. *See* Notice of Appeal (ECF No. 403).

to review the submission. Johnson Decl. ¶ 18, Ex. 3. The Monitor granted the request and the County produced a supplemental zoning submission on July 6, 2012, and a supplement to that submission on July 9, 2012 (collectively, the "Supplemental Zoning Submission"). Johnson Decl. ¶¶ 18-19. Even though the County had not raised any objection or concern about its ability to respond to the May 14 request during the almost two-month period between the request and its response, the County's Supplemental Zoning Submission was — again — utterly deficient and failed to provide basic information requested by the Monitor. Johnson Decl. ¶¶ 19-23, Ex. 4. Specifically, the County (1) failed to state whether each municipality has met its allotted number of affordable housing units under the County's Affordable Housing Allocation Plan; (2) provided a superficial response to the Monitor's question regarding the effect of the six questioned practices on the cost and placement of affordable housing without providing any of the requested analysis; (3) did not respond at all to the Monitor's request for information concerning the percentage of developable land; (4) made no effort to provide, even partially, the requested racial and ethnic composition of each zoning district; (5) provided an obviously incomplete list of personnel involved in preparing the Zoning Submission;[2] and (6) failed to provide a strategy for

[2] This deficient list of personnel was only produced after another attempt to delay matters. On June 29, 2012, the Monitor sent a letter to the County requesting interviews of two persons who have been key to the County's compliance efforts. Johnson Decl. ¶ 39, Ex. 11. The letter also indicated that the specific topics of the interviews would be provided after the Monitor received the County's responses to the requests contained in the May 14, 2012, letter. *Id.* In its July 6, 2012, response to the Monitor's request, the County used the June 29, 2012, request for interviews as an excuse not to respond at all to the May 14, 2012, request for the names of the individuals who participated in the Zoning Submission along with the records and documents related thereto. *Id.* ¶ 40, Ex. 4. Only after the Monitor informed the County in an e-mail that the June 29 letter in no way suggested that the County did not have to respond to the request for names did the County produce an incomplete list of names by letter dated July 9, 2012. *Id.* ¶¶ 22, 40, Exs. 5, 12.

overcoming exclusionary zoning that complies with the Monitor's request, as affirmed by this Court. *Id*. As a result of the County's insufficient response to the Monitor's May 14 request, the Monitor is unable to fully assess the County's compliance and develop specific recommendations for remedial steps. *Id*. ¶ 24. In the absence of such an assessment, the goal of the Settlement, including expanding opportunities, eliminating impediments to integration, affirmatively marketing housing to those least likely to apply, and developing at least 750 units of affordable housing will continued to be thwarted.

The County's refusal to provide a complete response to the May 14 request in a timely manner is only one example of the County's "lack of full cooperation" and "pattern of delay and insufficient responses" undermining not only the Monitor's authority, but also the overall purpose of the Settlement. Johnson Decl. ¶¶ 30-31, 43. The Johnson Declaration provides multiple examples of the County's last-minute requests for extensions, typically granted at least in part by the Monitor, followed by a deficient response from the County. *Id.* ¶¶ 32-42. As the Monitor notes, the County's refusal to comply with deadlines has not been limited to its obligations with respect to zoning submissions, but has also extended to the Settlement's requirement that the County create a public education campaign. *Id.* ¶ 31. For example, in an April 17, 2012, letter to the County, the Monitor requested documents and communications relating to the County's efforts to comply with paragraph 33(c) of the Settlement (requiring the County to create and fund campaigns to broaden support for fair housing) and set a deadline for May 11, 2012. *Id.* ¶ 34, Ex. 7. The County waited until after 5:00 p.m. on May 11, 2012, before formally requesting a two-week extension. *Id*. ¶ 34, Ex. 8. The Monitor granted a one-week extension until May 18, 2012, at which point the County responded with a two-page letter and

did not attach any of the documents or communications requested, but rather invited the Monitor to examine the County's files in White Plains, New York. *Id*. ¶¶ 34-35, Exs. 8 & 9. Prior to May 18, 2012, the County had never indicated that it would not provide the documents with its submissions. Johnson Decl. ¶ 35. Subsequently, the Monitor tried to set up meetings in early July 2012 to discuss the County's lack of compliance with its public campaign obligations, but, despite the Monitor's insistence that County not delay the meeting any further because the County is already "long overdue" on the public education campaign, the County sought to defer meeting with the Monitor until August. *Id.* ¶¶ 36-38.

In sum, the examples of the County's responses to the Monitor's requests, described in the Johnson Declaration demonstrate, in both manner and substance, the County's failure to discharge its obligations to fully cooperate with the Monitor. More significantly, the County's delays substantially reduce the likelihood of the County developing the affordable housing anticipated by the Settlement. Accordingly, the Government (joined by the Monitor) requests that the Court issue an Order compelling the County to comply with the specific requests as originally stated in the May 14 request by August 9, 2012. Johnson Decl. ¶ 26. To avoid these issues going forward, the Government and the Monitor also request that the Court compel the County to comply with his proposed procedure for future requests, as described in paragraph 44 of the Johnson Declaration. Specifically, the Monitor proposes the following procedure:

> (a) The County must object, in writing, to the Monitor's information request (including the deadlines specified by the Monitor) within five business days of the County's receipt of the Monitor's information request.
>
> (b) If the Monitor rejects the County's objection, the County must meet and confer with the Monitor within five business days

> of receiving notice of the Monitor's rejection.
>
> (c) If the Monitor and the County are not able to resolve the dispute within five business days of that meeting, either the County or the Monitor shall have the right to an expedited review of the dispute by a magistrate judge assigned by this Court.
>
> (d) The magistrate judge will have the authority to overrule the matter or order compliance and recommend a finding of contempt.

Johnson Decl. ¶ 44. As the Monitor notes in his declaration, such a procedure is necessary because "there is no evidence that compliance will occur absent this Court's intervention." *Id*. ¶ 43.

ARGUMENT

THE COURT SHOULD ORDER THE COUNTY TO COMPLY WITH THE MONITOR'S REQUESTS AND ADOPT THE MONITOR'S PROPOSED PROCEDURES FOR FUTURE REQUESTS

It is well settled that district courts enjoy inherent authority and considerable discretion to enter reasonable orders designed to ensure compliance with a consent decree. *United States v. Local 359, United Seafood Workers*, 55 F.3d 64, 69 (2d Cir. 1995); *EEOC v. Local 580, Int'l Ass'n of Ironworkers*, 925 F.2d 588, 593 (2d Cir. 1991); *Berger v. Heckler*, 771 F.2d 1556, 1568-69 (2d Cir. 1985); *Picon v. Morris*, 933 F.2d 660, 662 (8th Cir. 1991). A consent decree "is an order of the court and thus, by its very nature, vests the court with equitable discretion to enforce the obligations imposed on the parties." *Local 359*, 55 F.3d at 69. Accordingly, "[c]onsent decrees are subject to continuing supervision and enforcement by the court. A court has an affirmative duty to protect the integrity of its decree. This duty arises where the performance of one party threatens to frustrate the purpose of the decree." *Berger*, 771 F.2d at 1568 (internal

quotation marks and alterations omitted).[3]

In exercising this power and duty to enforce a consent decree, the Court is not limited to the terms negotiated by the litigants. "Although a consent decree embodies the negotiated agreement of the parties, it is also an order of the Court. . . . As such, a consent decree 'contemplates judicial interests apart from those of the litigants.'" *United States v. Dist. Council of N.Y.C. and Vicinity of the United Bd. of Carpenters*, 972 F. Supp. 756, 762 (S.D.N.Y. 1997) (citation omitted) (quoting *Local 580*, 925 F.2d at 593). For that reason, the Second Circuit has held that in implementing the purposes of a decree, a court is not "rigidly confined" to its terms. *Juan F. v. Weicker*, 37 F.3d 874, 878 (2d Cir. 1994). Rather,

> the court has inherent power to enforce consent judgments, beyond the remedial "contractual" terms agreed upon by the parties. Unlike a private agreement, a consent judgment contemplates judicial interests apart from those of the litigants. Until parties to such an instrument have fulfilled their express obligations, the court has continuing authority and discretion—pursuant to its independent, juridical interests—to ensure compliance.

Local 580, 925 F.2d at 593. Thus, "though a court cannot randomly expand or contract the terms agreed upon in a consent decree, judicial discretion in flexing its supervisory and enforcement muscles is broad." *Id.*

As this Court recognized in its May 3 Opinion, pursuant to ¶ 58 of the Settlement, the Court "retain[s] exclusive jurisdiction over [the Settlement], including but not limited to, any application to enforce or interpret its provisions, and over each party to the extent its obligations

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[3] Although the cases cited herein discuss only orders denominated as "consent decrees," the same logic, and the same power and duty of the Court to enforce the orders, applies to the Stipulation and Order in this action, which specifically provides for this Court's continuing jurisdiction to enforce it (¶ 58). *See Ferrell v. HUD*, 186 F.3d 805, 814 (7th Cir. 1999) (court's power to modify decree applied to stipulation); *Jenkins ex rel. Jenkins v. Missouri*, 103 F.3d 731, 741 (8th Cir. 1997) (same).

remain unsatisfied." May 3 Opinion, at 11 (internal quotation marks omitted). The Court's power to enforce the Settlement necessarily includes, at a minimum, the authority to compel compliance with deadlines imposed by the Monitor. *See Juan F.*, 37 F.3d at 879 (holding that an order imposing deadlines recommended by the monitor is not a modification of the Consent Decree, but rather "designed to ensure full compliance with the original decree").

The Court should exercise its authority here because the County's consistent refusal to respond to the Monitor's requests in a timely and complete manner frustrates the purpose of the Settlement — to affirmatively further fair housing ("AFFH") including eliminating impediments to integration, engaging in substantial public education efforts, and developing at least 750 affordable housing units. The Settlement vests the Monitor with the "all powers, rights, and responsibilities necessary to achieve the AFFH purposes" of the Settlement. Settlement ¶ 13. In addition to having access to the County's books and records, the Monitor has the affirmative obligation to conduct assessments of the County's efforts and progress related to the requirements set forth in the Settlement every two years until the expiration of the Settlement. Settlement ¶ 15. In making these assessments, the "Monitor may consider any information appropriate to determine whether the County has taken all possible actions to meet its obligations under this [Settlement] . . . ." *Id*. As the Johnson Declaration explains in great detail, the Monitor is unable to meet his obligation to fully assess the County's compliance and develop specific recommendations for remedial steps because of the County's continued failure to respond to the Monitor's requests for information in a timely and thorough fashion. Johnson Decl. ¶ 24. Moreover, as a result of all of the delays, it is highly unlikely that the County will meet its obligations to affirmatively further fair housing within seven years as required by the

Settlement. *See* Settlement ¶¶ 7, 15.

The Monitor's proposal to remedy this issue in the future is eminently reasonable and furthers the goals of the Settlement. Intrinsic in "all powers, rights, and responsibilities" accorded to the Monitor to obtain relevant information and to take "reasonable and lawful steps to be fully informed about all aspects of the County's Compliance with [the] Stipulation and Order" is the power to craft procedures and deadlines for the County's compliance with the Monitor's requests. *See* Settlement ¶ 13. The Monitor's improved process for responding to the Monitor's requests provides reasonable deadlines and more than sufficiently allows the County to object to any particular request or deadline. The County cannot argue that these procedures — allowing for objections, meetings with the Monitor, and review by a magistrate judge — are too onerous. To the contrary, the new procedure merely formalizes what any reasonable party acting in good faith and cooperating with a court-appointed monitor should have been doing all along on a voluntary basis. Nor do these procedures impose any new obligations on the County. As in *Juan F.*, the Monitor's proposal "merely [makes] more precise and realistic the required performance of obligations that [the County] ha[s] already undertaken." 37 F.3d at 880.

In light of the County's actions, and the inability of the Monitor to fulfill his duties as a result of those actions, this Court has the authority to compel the County to comply with the Monitor's current requests immediately, and future requests according to the reasonable procedure set forth by the Monitor. *See* Johnson Decl. ¶¶ 26, 44. Such an order is well within this Court's enforcement authority to ensure compliance with the Settlement. *See Juan F.*, 37 F.3d at 879; *Berger*, 771 F.2d at 1568. The authority to set deadlines is not only implicit in the Monitor's authority, but also necessary for the Monitor to comply with his obligations of

completing timely assessments of the County's progress. *See Juan F.*, 37 F.3d at 880 (affirming court's authority to adopt monitor's recommendation of imposed deadlines to ensure compliance with consent decree).

Without an order from this Court compelling the production of the requested information by August 9, 2012, and implementing the Monitor's procedures for future requests, the County will undoubtedly continue its delay tactics and will ultimately not meet its obligations under the Settlement. The order requested by the Government here will greatly increase the likelihood that the parties will achieve the goals of the Settlement in a timely manner.

Conclusion

The Government's motion to compel should be granted.

Dated: New York, New York
July 20, 2012

Respectfully submitted,

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