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,

Plaintiff,

-against-

WESTCHESTER COUNTY, NEW YORK,

Defendant.
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Case 1:06-cv-02860 (DLC)
**ORAL ARGUMENT REQUESTED**

# MEMORANDUM OF LAW IN SUPPORT OF ANTI-DISCRIMINATION CENTER'S MOTION TO INTERVENE

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## INTRODUCTION

Review of Westchester's 21-month pattern of Decree-defying conduct,[1] makes clear that the County's conduct only makes sense if its goals are to *avoid* development and other actions that would overcome barriers to fair housing choice, to *avoid* placing new housing on census blocks populated by high percentages of White residents, and, above all, to *ignore* its Consent Decree obligation to eliminate residential segregation throughout the County.

Throughout the period subsequent to the entry of the Decree, the Anti-Discrimination Center (ADC)—the civil rights organization that uncovered Westchester's fraud, whose litigation resulted in this Court's finding that Westchester had "utterly failed" to meet its AFFH obligations, and that has been monitoring the County's non-compliance—has been trying to get the federal government and its Monitor to enforce the terms and objectives of the Decree.

But neither the Government nor its Monitor has been responsive—neither has sought the Court's assistance to vindicate the Decree, and neither is adequately representing the civil rights interest at the heart of the Decree. In that light, ADC has moved to intervene.[2]

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[1] Much of that conduct is discussed in Anti-Discrimination Center's concurrently-filed brief in support of its Motion to Enforce Consent Decree Pursuant to Consent Decree, ¶ 58 ("Motion to Enforce"), which ADC respectfully incorporates herein.

[2] ADC has also noted the appropriateness of treating it as an amicus to assist the Court in resolving current issues of Westchester non-compliance raised by ADC's Motion to Enforce. *See* Memorandum in Support of Motion to Enforce, at p. 1, fn. 1. Regardless of the Court's disposition of that motion, and given ADC's interest in Decree enforcement, the five years remaining on the term of the Consent Decree, and the need for long-term compliance with Decree terms, ADC's Motion to Intervene should be granted.

## POINT I
## DESPITE FULL KNOWLEDGE OF NUMEROUS VIOLATIONS BY WESTCHESTER OF THE COUNTY'S CONSENT DECREE OBLIGATIONS, THE GOVERNMENT AND ITS MONITOR HAVE FAILED TO SEEK APPROPRIATE JUDICIAL RELIEF AND HAVE FAILED TO CARRY OUT CONSENT DECREE RESPONSIBILITIES.

With the Court retaining jurisdiction over Westchester County by the express terms of Consent Decree, ¶ 58, the Government has had the opportunity at any time to seek the Court's assistance in compelling the County to comply with its obligations. In addition to the Monitor's reporting obligations, Consent Decree, ¶ 39, the Monitor also has the authority to apply to the Court for such assistance as may be necessary to the performance of the Monitor's duties. Consent Decree, ¶ 13(g). Despite their own knowledge of Westchester's pattern of Consent Decree non-compliance, and despite being repeatedly urged to act by ADC and others, both the Government and its Monitor have continuously failed to do so.

### A. Non-compliant Implementation Plans

A compliant IP was a core requirement of the Consent Decree, and the Decree explicitly restricted the Monitor (with the consent of the Government) to extending the original December 2009 deadline for the submission of an IP only once. Consent Decree, ¶ 18. The Consent Decree very clearly set up a two-strike rule for Westchester: the submission of a first inadequate IP required a meeting with the Monitor and the Government within 20 calendar days of rejection to discuss deficiencies, Consent Decree, ¶ 20(b), and required the submission of a second IP within 10 business days after that meeting. Consent Decree, ¶ 20(c). The second IP would be submitted "for the Monitor's review and acceptance or rejection." *Id.*

Once a revised IP was submitted (Westchester did so in March 2010), a second failure was not supposed to lead to an open-ended discussion. On the contrary, there was a specific test set out: Was the revised plan sufficient "to accomplish the objectives and terms" set forth in the

Consent Decree? Consent Decree, ¶ 20(d).[3]

In July 2010, the Monitor found that Westchester had failed the test: The second IP "still falls short of a true plan to comply with either the [consent decree's] specific terms or its overarching goal of building a more integrated Westchester."[4]

At that point, the Consent Decree left the Monitor with one choice and one choice alone: the Monitor was obliged to specify revisions and additional items that the County, in turn, was obliged to incorporate into its IP. The provision was phrased in mandatory language: "the Monitor *shall* specify revisions or additional items that the County *shall* incorporate into its implementation plan." Consent Decree, ¶ 20(d) (emphasis added).

The importance of Consent Decree, ¶20(d) is not hard to discern: it was *anticipated* that Westchester—like many civil rights defendants—would attempt to undercut the desegregation promise of the Decree, and thus the Decree established a non-discretionary obligation upon the Monitor. The usage of "shall" was not accidental. Where the Consent Decree contemplates Monitor discretion or permissible modification of the Decree, it says so.[5] Nevertheless, the Monitor has refused to fulfill his duty to specify the necessary revisions and additional items to be incorporated into Westchester's IP.

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[3] The provision could just have used the word "terms," but included the word "objectives" as well. As discussed in ADC's Motion to Enforce Brief, the objective of the Decree is to overcome barriers to fair housing choice, including overcoming residential segregation throughout the County. Of particular concern is eliminating municipally maintained barriers, like exclusionary zoning.

[4] Monitor's Jul. 7, 2010 report to the Court, p. 10.

[5] *See* Consent Decree, ¶ 18 (Monitor "may" extend IP submission deadline once), and Consent Decree, ¶ 38 (Monitor "may" waive or alter late development penalties "in his discretion"). *See also* Consent Decree, ¶ 15(b) (unlike the series of provisions set forth in Consent Decree, ¶ 15(a) that the Monitor has the authority to modify or refine with the consent of the parties, "[t]he Monitor, however, shall have no authority to modify or refine any other provisions"), and Consent Decree, ¶53 (changes to Consent Decree beyond Consent Decree, ¶ 15(a) modifications to be made by parties in writing).

That failure, of course, does not change the fact that it was Westchester who failed to meet its underlying Implementation Plan requirements—those set forth in Consent Decree, ¶¶ 18, 19, 22, 24, and 25—and who operates today without an IP. After it became clear last July that the Monitor would not enforce these obligations, the Government was well within its rights to seek the Court's assistance to secure compliance. And the Government is well aware of how devastating the absence of a compliant IP is to the integrity of the Decree. As HUD put it in a December 2010 letter, a compliant IP and a compliant Analysis of Impediments ("AI") are "interlinked planning tools" that are "fundamental to the County fulfilling the commitments it made" in the Consent Decree.[6]

But the Government has continued to fail to seek the Court's assistance to vindicate this essential element of the Consent Decree, and precious time to plan for and execute a Decree-compliant development strategy has been lost.[7]

**B. Non-compliant Analyses of Impediments**

This Court is already familiar with Westchester's failure to analyze race or municipal resistance in its false claims period AIs. *U.S. ex rel. Anti-Discrimination Center v. Westchester County ("ADC II"),* 668 F.Supp.2d 548 (S.D.N.Y. 2009). The Consent Decree created a set of AI requirements *independent of and supplemental to* requirements imposed on jurisdictions by virtue of their being grant recipients. It became a specific Decree obligation to analyze—and take action to overcome—barriers to fair housing choice based on race and municipal resistance, Consent Decree, ¶ 32(b). Likewise, it was specifically the Decree that required the new AI to be

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[6] *See* Dec. 21, 2010 HUD letter to Westchester, p. 2, Ex. 1 to Declaration of Craig Gurian in Support of Motion to Intervene (Gurian Intervention Decl.).

[7] The Government also had the option of selecting (for the Court's approval) a new Monitor who was prepared to act in accordance with the Decree (pursuant to Consent Decree, ¶ 12, "[t]he Government, in its sole discretion, may remove and terminate the service of the Monitor"). It hasn't done that, either.

acceptable to HUD, Consent Decree, ¶ 32, and required as a matter of Decree performance that Westchester take all the actions set forth in a Decree-compliant AI. *Id.*

The Government has acceded to multiple requests to extend the time for Westchester's AI submission. It was originally due in early December, 2009, and the date was ultimately extended to June 30, 2010. Westchester's (late) submission in July 2010 was profoundly inadequate,[8] and, after five months, HUD rejected it, finding it "substantially incomplete."[9]

HUD made clear that it realized that a compliant AI and a compliant IP are essential to the Decree: "Without these planning tools guiding the County's activities," HUD wrote, "the County has not demonstrated a strategy for how it will overcome barriers to fair housing choice, proactively identify sites and opportunities for affordable housing development, use the [Consent Decree] funds, or reach the desegregative goals" of the Decree.[10]

HUD observed that the AI was particularly weak in addressing exclusionary zoning by noting that the "vague steps" in the AI "do not commit the County to take concrete action that will address [the municipalities'] exclusionary zoning practices."[11] As HUD stated five months later:

> Even more fundamentally, the County claims that it is unable to overcome municipal exclusionary zoning laws, stating "Westchester County is extremely limited in the action it can take to solve the [exclusionary zoning] problems." AI at 131. This statement is inconsistent with both the County's obligation under the Settlement to take appropriate actions to gain municipal cooperation and the

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[8] *See* Jul. 2010 ADC comments—"County 'Analysis of Impediments' Woefully Inadequate"—*available at* http://www.antibiaslaw.com/westchester-false-claims-case/county-analysis-impediments-woefully-inadequate.

[9] *See* Dec. 21, 2010 HUD letter to Westchester, *supra,* at p. 1.

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

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

> County's clear acknowledgement of a number of tools already at its disposal to overcome municipal resistance, including providing financial incentives, enforcing the terms and conditions of the Urban County Cooperative Agreements, and initiating legal action if necessary. *See* Settlement at 2, ¶¶ 7(i)&(j), 25.[12]

Nevertheless—despite the fact that Westchester's non-compliance meant that tools fundamental to the success of the Decree were not available—the Government did *not* seek the Court's assistance to sanction Westchester's violation of its obligations or to compel compliance. Instead, it gave Westchester until April 1, 2011 to produce another AI.[13]

When Westchester sought another extension, HUD turned it down, saying that it would request that the U.S. Attorney seek Court enforcement if a compliant-AI were not in hand by April 14th.[14] But the AI that Westchester submitted on April 13 remained woefully non-compliant. *The AI did not even identify discrimination as an impediment to fair housing choice.*[15]

HUD found the AI to be non-compliant, has rejected Westchester Fiscal Year 2011 "annual action plan," and has rejected Westchester's Fiscal Year 2011 AFFH certification,[16] but

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[12] Dec. 21, 2010 HUD letter to Westchester, *supra,* at p. 4. Five months earlier, in July, 2010, ADC, as it had done previously, called these problems to the attention of HUD and the Monitor, observing that the AI actually tried to *justify* the County's failure to act in respect to exclusionary zoning by insisting "that Westchester essentially has no power in relation to exclusionary zoning [despite] the express language of the Consent Decree." *See* Jul. 2010 ADC Comments, *supra.*

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

[14] Mar. 31, 2011 HUD letter to Westchester, p. 2., Ex. 2 to Gurian Intervention Decl.

[15] Most of the second AI was unchanged from the first. There are differences in Chapter 12; that chapter is attached as Ex. 3 to Gurian Intervention Decl. Among the issues relating to municipal resistance not addressed in the second AI: What municipalities are themselves resisting affordable housing? Which are resisting in whole or in part affordable housing when that housing has maximum desegregation potential? Which are resisting because or race? What techniques are they using to effect their opposition? What impact have those techniques had? How does resident opposition and municipal opposition operate together and separately? How should the zoning of particular municipalities be changed?

[16] *See* Apr. 28, 2011 and May 13, 2011 letters from HUD to Westchester, Exs. 4 and 5, respectively, to Gurian Enforcement Decl.

the Government has again not followed through, and has not commenced proceedings to sanction Westchester's' non-compliance and to compel obedience to the Decree. Neither the Government nor its Monitor, it appears, has even informed the Court of these latest developments.

**C. Conflating "fair housing" and "affordable housing"**

The Court has previously noted "the distinction between AFFH and affordable housing activities," *ADC II, supra,* 668 F.Supp.2d at 554, and found that, "A review of [Westchester's] 2000 and 2004 AIs demonstrates that they were conducted through the lens of affordable housing, rather than *fair* housing and its focus on protected classes such as race." *Id.* at 562.

Nevertheless, even after the entry of the Consent Decree, rather than referring to housing with desegregation potential or to housing that could overcome barriers to fair housing choice, Westchester decided to employ the euphemism "fair and affordable" housing. The term will be familiar to the Court: it had been invented by Westchester in its last-ditch attempt to add testimony on its "commitment" to "fair housing and affordable housing" on the eve of trial.[17]

In July 2010, the Monitor directed Westchester to cease and desist:

> The term 'fair and affordable' conflates fair housing with affordable housing and obscures the County's obligations to AFFH. Going forward, the County should use the precise language of the [consent decree]—'Affordable AFFH Units'—when referring to the housing it is required to develop under the Stipulation. The distinction is not merely semantic. Clarity is vital to the public's understanding of, and confidence in, the County's efforts to meet its obligations under the [Consent Decree]."[18]

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[17] "Despite the clarity of the distinction between the two concepts, Defendant proposes to offer testimony from witnesses on Defendant's 'commitment to *fair and affordable* housing.' While Defendant was unsuccessful in its attempt to get the Court to conflate the two concepts, there is a serious risk that a jury will become confused about the distinction and thereby lose sight of the *fair housing related* falsity that underlies this case..." ADC's Memorandum in Support of Motion in Limine to Exclude Evidence [as to Westchester's] "Commitment to Fair and Affordable Housing," p. 6 [Doc. 176].

[18] Monitor's Jul. 7, 2010 report to the Court, *supra,* at pp. 23-24.

But Westchester has ignored the unambiguous command, persisting in using the "fair and affordable" dodge. Notably, the *only* definition that Westchester provides for an "Affordable AFFH Unit" deals with economic qualification,[19] something it would not have been able to do had an IP—on Westchester's or the Monitor's initiative—included demographic and locational requirements. As it stands, the County even now describes a development in Yonkers that is on a census block group 70 percent Latino and 15 percent non-Latino, African-American as providing "fair and affordable" rental apartments.[20]

Westchester's conduct represents a brazen violation of the Monitor's direction. It mocks a Decree that tried to give force to the Court's insistence that the racial element of the AFFH obligation be taken seriously. Yet neither the Government nor its Monitor has sought to bring Westchester to account.

**D. Ignoring the obligation to use all County housing programs to end residential segregation**

The obligation to use all County housing programs to end residential segregation, as discussed elsewhere,[21] is profoundly important, but has been entirely ignored by Westchester.

The Monitor is obligated to report to the Court on "observed or substantiated lapses in the County's compliance with the [Consent Decree]," Consent Decree, ¶ 39(b).[22] But the Monitor

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[19] *See, e.g.,* the third IP's Appendix D-1-(i) (the so-called "Model Ordinance"), p.1, Ex. 6 to Gurian Intervention Decl. (the first paragraph literally defines "Affordable Affirmatively Further Fair Housing (AFFH) Unit" exclusively in terms of household financial eligibility.

[20] See Gurian Intervention Decl, ¶ 81 and Ex. 7 thereto. *Cf. ADC II, supra,* 668 F.Supp.2d at 564-65 ("As a matter of logic, providing more affordable housing for a low income racial minority will improve its housing stock but may do little to change any pattern of discrimination or segregation. Addressing that pattern would at a minimum necessitate an analysis of where the additional housing is placed"); *see also* Consent Decree, ¶ 31(c) (Westchester required to operate on principle that the "location of affordable housing is central to fulfilling the commitment to AFFH because it determines whether such housing will reduce or perpetuate residential segregation").

[21] *See* ADC's Memorandum in Support of its Motion to Enforce, Point III.

has not reported to the Court—nor sought the Court's assistance—in connection with Westchester's wholesale violations of its Consent Decree, ¶ 31(a) obligation to deploy its housing programs and policies in the service of ending segregation, despite ADC's repeated attempts to get the Monitor address the issue.[23] And the Government has been equally deficient.

**E. Failure to support legislation outlawing discrimination on the basis of source of income**

Westchester was required, through its County Executive, to promote legislation to ban discrimination on the basis of lawful source of income. Consent Decree, ¶ 33(g). But County Executive Astorino did not do so—and, indeed, he vetoed the legislation. He has stated publicly that the fact that his predecessor promoted the legislation satisfied the Consent Decree obligation: "that's certainly our position… And that's all that was required."[24]

HUD objected, and the Monitor sought clarification.[25] The Monitor promised, in July 2010, to provide further information on the issue in future reports.[26] Nevertheless, neither the

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[22] It would appear that the Monitor knows that his obligations extend beyond questions of County compliance with Consent Decree, ¶ 7: "Part of my task," he acknowledged in an interview, "is to ensure that all of the provisions, not just the provisions related to the building of, provision of housing, are fulfilled." Aug. 4, 2010 Westchester Journal News webcast interview with Monitor; *see* Gurian Intervention Decl., ¶ 54.

[23] *See, e.g.,* Jul. 21, 2010 ADC letter to Monitor, pp. 3, 4, Ex. 8 to Gurian Intervention Decl. ("The Consent Decree required the County to incorporate the goal of ending *de facto* residential segregation into ALL of its housing programs…Westchester's "posture sends an unmistakable message that an anti-segregation policy is to be treated as nothing but mere boilerplate…By focusing on the 750 units rather than on taking steps to realize its broader allocation plan, the County is unmistakably telling municipalities that the allocation plan is intended to remain a paper tiger only. That is not how one facilitates the reduction (and ultimate elimination) of *de facto* residential segregation").

[24] Jul. 28, 2010 interview of County Executive Astorino by Westchester Journal News, *available at* http://www.lohud.com/videonetwork/292403451001/Astorino-s-views-on-housing

[25] *See* Jun. 28, 2010 letter from Monitor to Westchester, Ex. 9 to Gurian Intervention Decl.

[26] Monitor's Jul. 10, 2010 report to the Court, p. 24.

Government nor the Monitor has sought the Court's assistance in connection with this most obvious of violations.

## POINT II
## WESTCHESTER'S PATTERN OF POORLY CHOSEN SITES FOR DEVELOPMENT HAS BEEN ENABLED NOT ONLY BY PASSIVITY ON THE PART OF THE GOVERNMENT AND ITS MONITOR, BUT BY THEIR ERRONEOUS PREMISES REGARDING CONSENT DECREE MEANS AND ENDS.

Westchester's strategy to resist the barrier-eliminating, segregation-reducing aims of the Consent Decree could not have been spelled out more clearly than if it had issued a memo saying, "We can minimize local opposition if we minimize the new, non-senior housing being developed on blocks where high concentrations of White residents currently live."[27]

This posture was no surprise. ADC pointed out to the Monitor only two weeks after the Decree was entered that "County officials are already undermining" the Consent Decree.[28] But the Government and its Monitor ignored that and subsequent warnings because they were operating under four related premises that have severely damaged the integrity of the Decree: (1) seek "low-hanging fruit" (*i.e.,* development sites that don't require barriers to be overcome) so that "progress" can be made in terms of units that "count"; (2) permit an across-the-board cooperation strategy before any efforts are required to be made to use the various "sticks" provided for in the Consent Decree; (3) employ a planning approach (as in urban planning) as opposed to a civil rights law enforcement approach; and (4) focus on "keeping Westchester on board" so that there could be "more progress," as though the Consent Decree represented nothing more than a fragile cease fire that the County could walk away from, rather than a binding federal court order.

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[27] Illustrations of the County's methods to accomplish precisely that result are described in ADC's Motion to Enforce Brief, Point VI.

[28] Aug. 24, 2009 ADC letter to Monitor, p. 3, Ex. 10 to Gurian Intervention Decl.

These premises have manifested themselves throughout the last 21 months,[29] and they helped cause and do much to explain the conduct of the Government and its Monitor. A policy to accept "low hanging fruit" is neither effective nor Decree-compliant. As ADC wrote to the Monitor in October 2009, shortly after he made that policy clear:

> 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 Settlement Order, and winds up being less effective than a prompt demonstration that all parties are committed to rewarding cooperation and defeating resistance. [30]

Moreover, the "low-hanging fruit" approach ignored entirely the fact that development is *supposed* to confront and overcome barriers (*i.e.*, AFFH).[31] Nevertheless, the Monitor has purported to "approve" a series of developments that do not do so.[32]

ADC also pointed out early on the folly of believing that one could successfully try a cooperation-first strategy, as opposed to a two-track strategy that simultaneously encourages cooperation and discourages resistance:

> 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

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[29] *See* Gurian Intervention Decl., *passim.*

[30] Oct. 7, 2009 ADC letter to Monitor, p. 3, Ex. 11 to Gurian Intervention Decl.

[31] *See* discussion in ADC's Motion to Enforce Brief, Point I.

[32] Consent Decree obligations, as previously noted, can only be changed by written agreement between the Government and the County, Consent Decree, ¶ 53 (subject, of course, to the consent of the Court). ADC is unaware of any such agreement.

> equivalent result to a municipality regardless of whether that municipality is cooperating or not is naïve and counterproductive.[33]

It is a point readily understood by developers,[34] but the Government and the Monitor have allowed the County to ignore it.

ADC has also highlighted the fallacy of using a standard planning approach. Last July, for example, it stated to HUD that "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."[35]

Westchester has been clear about *not* seeking to overcome zoning barriers—let alone using its Consent Decree, ¶ 7(j) litigation tools to cause such changes—but a standard planning approach, like that apparently embraced by the Monitor, is satisfied with counting *any* affordable units regardless of their broader impact.

The problems of the standard planning approach are well illustrated in the Monitor's latest report to the court. It appears at first that he understands that, "Sites located in an eligible census block but isolated from non-minority residential neighborhood by visual or other

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[33] Aug, 24, 2009 ADC letter to Monitor, *supra,* pp. 8-9 (emphasis supplied). The letter began by stating that, "There will undoubtedly be some who entertain the fantasy that a "patient' and 'compromising' approach holds the promise of change without acrimony. There is no surer path to failed implementation."

[34] As one put it in an interview, "it's really frankly all about having leverage," referring to having the correct (non-exclusionary) zoning in place. He 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." *See* Gurian Intervention Decl., ¶¶ 34-35.

[35] ADC correspondence with HUD, Jul. 9, 2010; *see* Gurian Intervention Decl., ¶¶ 45-47. ADC also pointed out that "... 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."

barriers—such as a highway, railroad or commercial strip—or unusual points of entry are undesirable..."[36] The civil rights law enforcement approach—*i.e.*, the Consent Decree approach—is to include a ban on such development in the Implementation Plan and to disapprove developments that have these flaws (*i.e.*, almost all of the development to date).

But the Monitor purports to allow Westchester a gaping loophole: such sites, it turns out, can be made desirable, or at least acceptable, in his view, if "significant mitigation measures are taken to provide visual and physical access across the barriers."[37] Whether or not the "mitigation approach" is appropriate from a general planning perspective, the point *in the context of this Consent Decree's objectives* should not be "how to get undesirable properties to come up to a minimum standard," but "how to find the *most appropriate* parcels on the more than 100,000 acres in Westchester that have both African-American populations of less than 3.0 percent and Latino populations of less than 7.0 percent."[38] The Monitor's standard actually licenses Westchester to propose undesirable sites so long as there's an argument that "mitigation" is possible.[39]

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[36] Monitor's Apr. 25, 2011 report to the Court, p. 11 [Doc. 336].

[37] *Id.*

[38] There are more than 100,000 such acres, on which almost 200,000 reside. *See* Declaration of Andrew A. Beveridge submitted in connection with ADC's Motion to Enforce, ¶ 21. Parcels capable of mitigation might well be used towards the more than 6,000 units that still need to be built pursuant to the Housing Opportunity Commission's Affordable Housing Allocation Plan, but, as discussed in ADC's Brief in Support of its Motion to Enforce, Westchester is ignoring its Consent Decree, ¶31(a) obligation to use all its housing policies and programs to end segregation in the County.

[39] Just as inappropriately, the "best practices" section states that, "Small development sites (i.e., those containing less than 10 units) should be near existing residential uses and should be comparable in scale relative to current and planned adjacent land uses." Monitor's Apr. 25, 2011 report, *supra,* at p. 12. This may be seem entirely normal from a *planning* perspective, but not from an AFFH perspective. The specification that development should be "comparable in scale relative to current and planned adjacent land uses" *locks in exclusionary zoning,* and ignores the AFFH need to actively push to increase density, including density in single-family neighborhoods.

Finally, the desire to "keep Westchester on board" is misguided. First, Westchester is in no way "on board" with the AFFH goals of the Decree. And the Decree is not something from which Westchester can walk away. It is a binding order of the Court, and it must be obeyed.[40]

In that spirit, after Westchester submitted the third iteration of an IP in August 2010, the National Fair Housing Alliance ("NFHA")—the country's leading national fair housing organization—wrote to the Monitor critiquing the inadequacies of the third IP and noting 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."[41] 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."[42]

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[40] When Westchester recently wrote HUD to push back against HUD's rejection of the County's request for another extension for an AI, it was confident that it had an ally in the Monitor, writing that the Monitor had said in the presence of representatives of HUD and the U.S. Attorney's office that he (the Monitor) "owns the process." *See* Westchester letter to HUD, Apr. 13, 2011, Ex. 12 to Gurian Intervention Decl. ADC respectfully suggests that it is the requirements of the Decree that should be paramount and that, if anyone "owns" the process, it is the Court that retains continuing jurisdiction over the matter in order to ensure compliance.

[41] Sept. 27, 2010 letter from NFHA to Monitor, Ex. 13 to Gurian Intervention Decl.

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

But the Monitor did not do that; rather than (belatedly) meet his Consent Decree, ¶ 20(d) obligations, the Monitor, in his own words, took an approach that "reflects input from the County and municipal leaders about which items are of the highest priority and urgency."[43]

He has failed to act to implement a complete and functioning IP as required by the Consent Decree. At the same time, he has purportedly accepted an inadequate "Model Ordinance"—one that leaves exclusionary zoning fully intact—even though he himself recognized that the ordinance "could be refined to set an even higher standard for municipalities."[44] He did so on grounds remarkably inconsistent with the purpose and architecture of the Consent Decree: "such aspirations [*i.e.,* for an appropriate model ordinance] must be tempered by the recognition that a model ordinance will advance the goals of the [Consent Decree] only if it actually is adopted, in whole or in part, by municipalities."[45]

This rationale is a formula for accepting the status quo—it allows anticipated municipal stonewalling to force a watering down of the obligations appropriately prescribed. It is the opposite of the Consent Decree's intention that appropriate AFFH goals be identified, and then municipalities required to change or face the consequences. *See, e.g.,* Consent Decree, ¶¶ 7(i), 7(j), 25(d)(iii).[46]

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[43] Monitor's Oct. 25, 2010 Monitor report to the Court, p. 6 [Doc. 334].

[44] *Id.* at p. 7.

[45] *Id.*

[46] ADC warned of precisely this problem in its Feb. 2010 *Prescription for Failure* report, p. 43, Ex. 14 to Gurian Intervention Decl.: "Westchester is banking on an old strategy: adopt an extreme position, and hope that you can negotiate a middle ground. In this case, the extreme position is a woefully non-compliant [IP] submission that bears a striking resemblance to Westchester's pre-[Consent Decree] positions. The risk, of course, is that the Monitor will take the bait...and negotiate. The terms of the [Consent Decree], however, are non-negotiable. Negotiating away either portions of the letter or spirit of the [Consent Decree] would be improper and impermissible."

## POINT IV
## ADC MEETS APPLICABLE STANDARDS FOR PARTY STATUS AND THE COURT SHOULD GRANT ITS MOTION FOR INTERVENTION IN THE REMEDY PHASE.

### A. The statutory language

Rule 24(a), Federal Rules of Civil Procedure, provides in material part as follow:

> On timely motion, the court must permit anyone to intervene who:
>
> ...(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

### B. Courts construe rule 24 liberally in favor of applicants for intervention, particularly in cases where the public interest is involved

Courts have recognized four elements to intervention as of right under Rule 24(a): (1) the application must be timely; (2) the movant must have an interest in the transaction that is the subject of the action; (3) the disposition of the action may as a practical matter impair or impede the movant's ability to protect its interest, and (4) existing parties may not adequately represent that interest. *United States* v. *Pitney Bowes, Inc.,* 25 F.3d 66, 70 (2d Cir.1994).

Intervention is a matter committed to the district court's discretion, and the Second Circuit has held that "the district court is entitled to the full range of reasonable discretion" in ruling upon a motion to intervene. *Rios v. Enterprise Ass'n Steamfitters Local Union No. 638 of U A.,* 520 F.2d 352, 355 (2d Cir. 1975).

The Second Circuit also recognizes that the language of Rule 24 is not to be applied separately, but rather, as a whole.

> The various components of the Rule are not bright lines, but ranges—not all "interests" are of equal rank, not all impairments are of the same degree, representation by existing parties may be more or less adequate, and there is no litmus paper test for timeliness. Application of the Rule requires that its components be read not discretely, but

> together. A showing that a very strong interest exists may warrant intervention upon a lesser showing of impairment or inadequacy of representation. Similarly, where representation is clearly inadequate, a lesser interest may suffice as a basis for granting intervention.

*United States v. Hooker Chemicals & Plastic Corp.*, 749 F.2d 968, 983 (2d Cir. 1984).

Moreover, Courts and commentators have recognized that "Rule 24 traditionally has received a liberal construction in favor of applicants for intervention. [citing] 7 A C. Wright & A. Miller, Federal Practice and Procedure § 1904 (1972)." *Washington State Bldg. and Const. Trades Council, AFL-CIO v. Spellman,* 684 F.2d 627, 630 (9th Cir. 1982).

In light of these rules of construction, the Center's motion to intervene should be granted. Applying the components of the test together, not discretely, and construing the requirements liberally in favor of intervention, the Center has shown appropriate grounds for intervention.

**C. ADC's application is timely**

As observed in *Hooker Chemicals,* there is no litmus test for timeliness. Timeliness is "'"evaluated against the totality of the circumstances before the court."'" *D'Amato v. Deutsche Bank,* 236 F.3d 78, 84 (2d Cir. 2001) (quoting *Farmland Dairies v. Comm'r of the NY. State Dep't of Agric. and Markets,* 847 F.2d 1038, 1043-44 (2d Cir. 1988)). The relevant factors to be considered include: "'(1) how long the applicant had notice of the interest before [he] made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness.'" *Id.* (quoting *U.S. v. Pitney Bowes, Inc.,* 25 F.3d 66, 70 (2d Cir.1994)).

Here, the question is whether the ADC has somehow waited too long to bring to the Court's attention Westchester's failures to comply with the Consent Decree. ADC has not. It was appropriately interested in giving the Government and its Monitor every opportunity to carry

out their duties, at the same time working diligently to bring Westchester's non-compliance to their attention and the attention of the public and to advocate for vindication of the Decree.[47]

ADC was entitled to believe that the Government would do its job; indeed, it relied on the prospect of the Government carrying out its responsibilities when it waived its right, pursuant to the False Claims Act, 31 U.S.C. Section 3730(c)(2)(B), to interpose objections to the proposed resolution of the lawsuit. Moreover, on the day the Decree was entered, HUD's Deputy Secretary made a solemn public promise: "Until now, we tended to lay dormant. This is historic, because we are going to hold people's feet to the fire."[48]

Unfortunately, neither the United States nor the Monitor has moved this Court for an order compelling Westchester's compliance. With the Decree scheduled to be in force for at least another five years (even if its term is not extended), ADC's course has been prudent—steering between premature intervention on the one hand, and waiting until the integrity of the Decree were irretrievable on the other.

While there is no arguable prejudice to the existing parties in the ADC filing this motion sooner, there will, however, be prejudice to ADC if the motion to intervene is denied—a central function of ADC is seeking the end of residential segregation.[49]

**D. ADC has a strong interest in the enforcement of the Consent Decree**

ADC has a strong interest in the enforcement of the Consent Decree. ADC was the party that recognized the link between Westchester's failure to AFFH and its false representations to the Government that it had and would do so, the party that conducted the investigation that

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[47] *See* Gurian Intervention Decl., ¶¶ 67-68, 77-81, and *passim.*

[48] "Westchester Adds Housing to Desegregation Pact," New York Times, Aug. 11, 2009, p. A1.

[49] *See* Gurian Intervention Decl., ¶6, fn. 3.

brought Westchester's fraud to light, and the party that filed the Complaint in this action. ADC was the party that litigated the case for well over two years, actively co-counseling the matter through Westchester's motion to dismiss; extensive fact and expert discovery; and its successful motion for partial summary judgment.

The Government declined to intervene in the action in the first instance, and continued to decline to intervene in the service either of vindicating the Government's interest in protecting itself against fraudulent activity, or of vindicating the interest in civil rights enforcement profoundly and centrally implicated in the case.

Even after this Court granted ADC's motion for partial summary judgment in substantial respects, the Government continued to decline to intervene on behalf of the civil rights interest. It was left to ADC and its co-counsel to continue to litigate against a bevy of specious motions from Westchester. Indeed, more than two dozen motions in limine were litigated by ADC as the May 2009 date for trial approached.

Even after the Court during that period ruled again and again in ADC's favor, the Government still would not intervene, and ADC and its co-counsel were obliged to carry the prosecution. Indeed, during the entire course of the negotiations that took place from late-April through early-August in 2009, the Government still did not intervene.

ADC's interest in the vindication of the Consent Decree has continued over these last 21 months. Indeed, though it has been apparent that Westchester clings to its pre-Consent Decree policies and attitudes despite the requirements of the Consent Decree, only ADC has now moved to bring this matter to the Court's attention.

Even had ADC not continued to work diligently on the case since the Decree was entered, applicable law provides that ADC's interest in ending segregation—in Westchester and

elsewhere—is a sufficient interest to meet Rule 24(a) standards. An intervenor need not have an independent cause of action to possess an "interest" sufficient for Rule 24 intervention. The Supreme Court so held in *Trbovich* v. *United Mine Workers,* 404 U.S. 528, 538 (1972), concluding that a union member could properly intervene in an action brought by the United States under the Labor-Management Reporting and Disclosure Act, even though the statute did not authorize a private cause of action. The union member sought intervention in order to advance certain arguments, introduce evidence and to obtain certain specific safeguards with respect to any new election that the Court might order. *Trbovich,* 404 U.S. at 530, 536. The Court held that the union member met the interest requirement of Rule 24(a), relying in part upon the fact that the intervenor in *Trbovich* was the party that had initiated the litigation through his own complaint. *Id.* at 539.

The Second Circuit described the *Trbovich* "interest" standard in *Rios,* 520 F.2d at 357. The Second Circuit recognized that "something less than 'a specific legal or equitable interest in the chose' is sufficient to satisfy the interest requirement of Rule 24(a)(2)." Instead, the Court concluded that "all persons who will be significantly affected by the outcome of the litigation (whether or not they could have been made parties at the outset) should, under *[Trbovich's]* reasoning, be allowed to intervene to protect their interests." Therefore, the fact that the United States is the real party in interest in the underlying False Claims Act lawsuit does not foreclose intervenor status for ADC. Like the intervenor in *Trbovich,* ADC here was the party that initiated the action, and seeks intervention to advance arguments and submit evidence in support of the enforcement of the Consent Decree negotiated by, *inter alia,* ADC.

Other courts have found interests similar to those of ADC sufficient for intervention under Rule 24(a). For example, in *Grutter v. Bollinger,* 188 F.3d 394, 399 (6th Cir. 1999), a case

involving a challenge to the University of Michigan's affirmative action program, the Sixth Circuit reversed the district court's denial of intervention sought by a non-profit organization dedicated to preserving higher educational opportunities for minority students. The Court rejected a narrow view of a Rule 24 "interest," and concluded that the association's interest in preserving access to the University for African-American and Latino/a students was "a substantial legal interest in the subject matter of this case." *Grutter,* 188 F.3d at 399.

Similarly, in *Idaho Farm Bureau Federation* v. *Babbitt,* 58 F.3d 1392, 1397 (9th Cir. 1995), the Ninth Circuit held that "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." The Court in *Idaho Farm Bureau* relied on its earlier decision in *Sagebrush Rebellion, Inc.* v. *Watt,* 713 F.2d 525, 527 (9th Cir.1983). In *Sagebrush,* the Court held that the Audubon Society, which had participated in an underlying administrative proceeding that led to the creation of the conservation area being challenged, had a right to intervene under Rule 24(a). In each of these cases, the Court found that the interests of the non-profit organizations - not greater than that of ADC here—were sufficient for intervention.

**E. The disposition of the action may as a practical matter impair or impede the ADC's ability to protect its interest**

Courts have recognized that applicants for intervention need not show that substantial impairment of their interest will necessarily result from an unfavorable disposition. Rather, they have held that applicants for intervention "need only show that the disposition *'may* ... impair or impede [their] ability to protect [their] interest.' (citing Fed.R.Civ.P. 24(a)(2))." (emphasis in original). *Purnell* v. *City of Akron,* 925 F.2d 941, 948 (6th Cir. 1991).

ADC readily meets this standard. ADC's long-standing interest in the removal of barriers to equal opportunity in housing in the New York City region, including Westchester County, is

impaired or impeded if the Consent Decree is not enforced. The major purpose of the Consent Decree was to remove barriers to fair housing. If the Consent Decree is not enforced, ADC's interest in seeing those barriers removed will be impaired.

**F. Existing parties may not adequately represent ADC's interest**

The interests of the United States and the Department of Housing and Urban Development are not identical to those of ADC, and the HUD and its Monitor have demonstrated that to be the case. In *Mausolf v. Babbitt,* 85 F.3d 1295, 1301 (8th Cir. 1996), the Court relied upon a federal agency's "well-documented history" of a lack of enthusiasm for enforcement of regulations at issue in the case as one of the grounds for intervention.

Here, month after month of extensive Westchester non-compliance has gone by, and despite ADC's pleas, the Government has never once sought a judicial remedy. Moreover, it is plain that the Government's Monitor is not treating civil rights enforcement as paramount here. In February 2009, nearly 100 fair housing advocates (mostly organizations, both national and those operating in localities throughout the country) wrote to the Monitor (and copying HUD) to say that it was "essential that you require Westchester to remedy *each and all* of the deficiencies identified by ADC in *Prescription for Failure,"* including requiring an IP that acknowledged the reality of segregation and took concrete steps to end exclusionary zoning.[50] A later appeal by the National Fair Housing Alliance for decisive action have also gone unmet.[51]

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[50] *See* Feb. 23, 2010 letter to the Monitor, Exb. 15 to Gurian Intervention Decl., *also available at* http://www.antibiaslaw.com/sites/default/files/files/Advocates_2010_02_Letter.pdf. The letter noted that "it is especially important that you 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 authority." The Monitor, and

Just last month, the Monitor acknowledged that "it is vital to the success of the affirmative marketing effort to have the major stakeholders around the table to contribute to the development of the marketing plan."[52] But major stakeholders did not in the Monitor's view include either ADC *or any other civil rights organization,* and the Monitor's consultant, when conducting a roundtable on affirmative marketing, proceeded with the same set of exclusions—not a single organization whose principal mission was civil rights enforcement was included.[53]

In any event, under applicable Rule 24 standards, theoretical or partial overlap (HUD *is* statutorily committed to AFFH) does not constitute adequate representation. For example, the Supreme Court in *Trbovich* recognized that the federal agency in that case (the Department of Labor) had certain interests that were the same as the applicant for intervention, but also had broader interests than those of the intervenor. The Court concluded that the Government's multiple interests "may not always dictate precisely the same approach to the conduct of the litigation," as the interest of the union member. *Trbovich,* at 636-37. On that basis, the Court found intervention appropriate.

Similarly, in *Mausolf v. Babbitt,* 85 F.3d 1295 (8th Cir. 1996), the Court considered a request for intervention in a lawsuit challenging the enforcement of snowmobiling regulations in a national park. A local conservation group sought to intervene, claiming an interest "in the

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the Government, have never caused these changes in IP to be implemented.

[51] *See* Gurian Intervention Decl. ¶¶ 75-76.

[52] Monitor's Apr. 25, 2011 report to the Court, *supra*, p. 2.

[53] *Id.* at pp 7-8; *see also* Exhibit 2 to Monitor's Apr 25 2011 report, pp. 5, fn. 7 and pp. 33-34. It appears that neither a single eligible African-American family from Manhattan, Brooklyn, or Queens—nor a single organization based in those boroughs that represents the interests of African-American or Latinos—participated in the roundtable. This is despite the Consent Decree's focus on affirmative marketing in jurisdictions outside of Westchester (like New York City) with large populations of minorities.

vigorous enforcement of the restrictions" on snowmobiling, and "expressed concern that the Government might settle with the snowmobilers or back away from the rules." *Mausolf,* 85 F.3d at 1296-97. The Court of Appeals reversed the district court's conclusion that the Government adequately represented the conservation group's interest, holding that the government's interest in representing all its citizens precluded it from always representing the interests of the conservation group, and therefore, intervention should have been granted.

Here, while HUD is statutorily obliged to AFFH, it has multiple missions. While its Office of Fair Housing and Equal Opportunity is, as the name implies, focused on fair housing, other components of HUD—like the Office of Community Planning and Development, for example—have traditionally not focused on fair housing, and place a premium on getting along with the jurisdictions they fund. Indeed, Westchester was sufficiently confident in its ability to show that HUD officials had looked the other way at its failure and the failure of other jurisdictions to AFFH that the County sought on the eve of trial to call five witnesses from HUD Headquarters in Washington and from the HUD Regional Office in New York to testify on its behalf.

HUD's failure in Westchester was not an isolated instance. As the HUD Deputy Secretary acknowledged at the time of the entry of the Decree, the agency had "tended to lay dormant" in respect to AFFH. *See also Thompson* v. *US. Dep't of Housing and Urban Development,* 348 F.Supp.2d 398, 408-09 (D. Md. 2005) (concluding that HUD had breached its duty to affirmatively further fair housing in the Baltimore region).

Ultimately, Second Circuit authority provides that the Court should permit intervention unless the interests of existing parties are "so similar to those of [the movant] that adequacy of

representation [is] assured." *Brennan v. New York City Bd. of Educ.*, 260 F.3d 123, 132-33 (2d Cir.2001). Plainly, adequacy of representation of ADC's interest is by no means assured.

## CONCLUSION

Consistent with applicable Second Circuit authority, the Court should view the elements of Rule 24(a) together, not discretely, and liberally in favor of the applicant for intervention. Viewing Rule 24(a) standards in that light, ADC has shown substantial grounds for intervention and the Court should grant ADC's motion to intervene.

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