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.,

Plaintiff, 06 Civ. 2860 (DLC) (GWG)

v.

WESTCHESTER COUNTY, NEW YORK,

Defendant.
.....x

RESPONSE OF THE UNITED STATES TO THE COURT'S ORDER OF MAY 13, 2016 AND THE RECOMMENDATIONS IN THE MONITOR'S THIRD BIENNIAL ASSESSMENT

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TABLE OF CONTENTS

Plaintiff the United States of America (the "Government") respectfully submits this response to the Court's May 13, 2016 Order (the "Order"), which posed three questions relating to the recommendations in the Monitor's Third Biennial Assessment (the "Assessment").

PRELIMINARY STATEMENT

First, the Monitor's Assessment provides important recommendations that should be adopted by the Court to help ensure that the County complies with its obligations under the Consent Decree. The submission by the former relator in this case, the Anti-Discrimination Center of Metro New York, Inc. ("ADC"), however, provides little more than indiscriminate invective uninformed by the issues raised by the Monitor, decided by the Court, and extensively litigated by the Government and the County. The answer to the Court's second question, therefore, is that the Court should reject ADC's letter submission. The brief submitted by a variety of *amici* on June 14, 2016 ("*Amici* Brief"), relies heavily upon ADC's uninformed and inaccurate views of this matter, particularly ADC's mischaracterization of the Government's litigation position. Consequently, and to answer the Court's third question, the demands for relief made by ADC should be granted only insofar as they are consistent with the relief sought by the Monitor and the Government.

STATEMENT OF FACTS

The background facts of this case are set forth in *United States ex rel. ADC v. Westchester County*, 06 Civ. 2860 (DLC), 2016 WL 3004662 (S.D.N.Y. May 24, 2016) ("*Westchester V*"); *County of Westchester v. Dep't of Housing & Urban Dev.*, 802 F.3d 413 (2d Cir. 2015) ("*Westchester IV*"); *County of Westchester v. Dep't of Housing & Urban Dev.*, 778 F.3d 412 (2d Cir. 2015) ("*Westchester III*"); *United States ex rel. ADC v. Westchester County*, 712 F.3d 761 (2d Cir. 2013) ("*Westchester II*"); and *County of Westchester v. Dep't of Housing*

& Urban Dev., 06 Civ. 2860 (DLC), 2015 WL 4388294 (S.D.N.Y. July 17, 2015), and *United States ex rel. ADC v. Westchester County*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007); 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (together, "*Westchester I*"). The Government sets forth a more detailed statement of facts herein not because the Court needs any reminding, but because the submissions filed by ADC and *amici* evince a lack of familiarity with prior proceedings.

A. The False Claims Act Action and Settlement ("*Westchester I*")

From April 1, 2000, through April 1, 2006, the County had applied for, and received, about $52 million in funds from HUD, a condition of which was that the County "affirmatively further fair housing," 42 U.S.C. §§ 5304(b)(2) and 12705(b)(15), and certify to HUD that it would do so. As this Court eventually held, these certifications were false. *Westchester I*, 495 F. Supp. 2d at 387-88; 668 F. Supp. 2d at 565. This Court reserved for trial whether the County's false certifications were presented knowingly. 668 F. Supp. 2d at 567-68.

On August 10, 2009, the Government elected to proceed with the action, filing a complaint in intervention alleging violations by the County of the False Claims Act and the Housing and Community Development Act. Simultaneously, the parties agreed to, and this Court soon approved, the Consent Decree, in which the County agreed to extensive injunctive relief instead of paying over $150 million in damages. (A copy of the Consent Decree is attached as Exhibit A to the Declaration of David J. Kennedy, June 24, 2016 ("Kennedy Decl.").)[1]

B. The Government's Enforcement of the "Source of Income" Provision of the Consent Decree ("*Westchester II*")

The first major enforcement action by the Government following entry of the Consent Decree arose from the requirement that the County "promote, through the County Executive,

[1] The County's monetary obligations under the Consent Decree equal $51.6 million, comparable to the $52 million in alleged fraud. *See Westchester V*, 2016 WL 3004662, at *2.

legislation currently before the Board of Legislators to ban 'source-of-income' discrimination in housing." (Consent Decree ¶ 33(g)). On June 25, 2010, however, instead of "promoting" the source-of-income legislation passed by the Westchester County Board of Legislators, County Executive Robert Astorino vetoed the legislation. Ruling on the Government's application, the Monitor found on November 14, 2011, first, that the County breached its obligation to promote the "source of income" legislation; and second, that "the County should analyze zoning ordinances in connection with the AI." *Westchester II*, 2011 WL 7563042, at *1 (Monitor's report). The County appealed the determination on "source of income" to the Magistrate Judge, which reversed the Monitor, but this Court reversed the Magistrate Judge and concluded that the County had indeed breached the Consent Decree by failing to promote the legislation. *See Westchester II*, 2012 WL 1574819, at *11. On April 5, 2013, the Second Circuit affirmed. *See Westchester II*, 712 F.3d at 771. Because the County Executive continued to delay signing the legislation, the Government wrote to the County by letter dated April 19, 2013, demanding that the County take the necessary steps for the County Executive to sign the legislation, or the Government would seek to hold the County in contempt. (Kennedy Decl. Exh. B.) The County Executive finally signed the legislation on June 26, 2013. (Kennedy Decl. Exh. C.)

Neither ADC nor any of the *amici* played any role in the litigation of the "source of income" issue. Although an *amicus* brief was filed in the Circuit, it was filed by the Building and Realty Institute of Westchester in support of the County. (12-2047 (2d Cir.), dkt. no. 96-1.)

C. The Government's Enforcement of the "Analysis of Impediments" Provisions of the Consent Decree ("*Westchester III*" and "*Westchester IV*")

The second major enforcement action by the Government arose from the County's obligation to submit the required analysis of impediments to fair housing ("AI"), which must be

"deemed acceptable by HUD." (Consent Decree ¶ 32.) Because this enforcement action originated with HUD, which the County then sued, these matters were litigated not in this case (06 Civ. 2860), but rather two district court actions filed by the County (13 Civ. 2741; 15 Civ. 1992) which in turn led to three appeals to the Second Circuit (13-3087; 15-979; 15-2294). Neither ADC nor *amici* address these cases.

The AI was one of the essential requirements for the receipt of funds. *See Westchester I*, 495 F. Supp. 2d at 387-88.[2] From 2000 through 2006, however, the County's AIs lacked analysis of race-based impediments to fair housing, which led this Court to conclude that the County's certifications had been false. *See* 668 F. Supp. 2d at 561-62. The Consent Decree sought to remedy these years of false filings by requiring the County to include an identification and analysis of "impediments based on race or municipal resistance to the development of affordable housing," and actions the County would take to address the effects of those impediments. *Id.* Although the Consent Decree required the County to submit an adequate AI within 120 days, by December 2009, the County has still not done so. The effect of the County's continued failure to produce an AI acceptable to HUD jeopardized the availability of funds for other jurisdictions, so HUD sought to reallocate the funds. The County nevertheless waited until April 2013 to bring suit regarding FY2011 funds (*Westchester III*), and waited until March 2015 to bring suit regarding the funds for FY2012, FY2013, and FY2014 (*Westchester IV*).

The County finally submitted a revised AI on April 24, 2013, the day it filed *Westchester*

[2] On July 16, 2015, HUD published the final Affirmatively Furthering Fair Housing rule. *See* 80 Fed. Reg. 42,272 (July 16, 2016). On December 31, 2015, HUD published a Notice in the Federal Register announcing the availability of the Assessment Tool for use by local governments to conduct an Assessment of Fair Housing—a planning tool to assist HUD program participants in conducting an assessment of fair housing issues, which is ultimately expected to help them meet their obligations to affirmatively further fair housing. *See* 80 Fed. Reg. 81,840 (Kennedy Decl. Exh. D).

III. The County's exclusionary zoning analysis, however, remained in HUD's view deficient. The County filed an application for a preliminary injunction, which this Court denied. *See Westchester III*, 2013 WL 4400843, at *2. The Government then moved to dismiss the complaint on the ground that the Court lacked subject matter jurisdiction, and the Court granted that motion on August 14, 2013. *See id.* at *5. The County appealed, and sought a stay and a temporary restraining order from the Circuit on August 20, 2013. The Second Circuit eventually denied the County's application for a stay on September 25, 2013. *See Westchester III*, 531 Fed. App'x 178 (2d Cir. 2013). Following the Second Circuit's orders, HUD reallocated the bulk of the FY2011 funds before the appropriation expired on September 30, 2013. *See Westchester III*, 778 F.3d at 416-17. By Opinion dated February 18, 2015, however, the Second Circuit affirmed this Court in part, vacated its ruling in part, and remanded. *See id.* Between the time of the Circuit's 2013 and 2015 rulings, the FY2012 funds were completely reallocated and obligated as of September 30, 2014, without any legal action by the County.

On March 17, 2015, the County filed a second suit over the FY2013 and FY2014 funds. This Court immediately requested responsive briefing and heard argument on March 27, 2015. After this Court denied the application for a preliminary injunction and ordered an expedited briefing schedule, the County appealed and filed an application for emergency injunctive relief pending appeal. On April 10, 2015, the Second Circuit denied the County's application for an emergency stay, but on April 20, 2015, the Circuit granted the same application. The Circuit heard argument on April 28, 2015, and issued an order on May 1, 2015, enjoining HUD from obligating any of the FY2013 or FY2014 funds at issue, during the pendency of the County's appeal from the denial of the preliminary injunction.

In an 87-page opinion and order dated July 17, 2015, this Court considered and rejected all of the County's arguments, and granted the Government's motions to dismiss the complaints in both 13 Civ. 2741 (regarding the remaining FY2011 funds), and 15 Civ. 1992 (regarding the FY2013 and FY2014 funds). *See Westchester IV*, 116 F. Supp. 3d 251. The Second Circuit ordered expedited briefing, held expedited oral argument on September 22, 2015, and affirmed this Court again, in a 52-page opinion issued on September 25, 2015. *See Westchester IV*, 802 F.3d 413. The Circuit affirmed the efforts of the Government to insure that the County addressed exclusionary zoning, reasoning that, "[b]ecause exclusionary zoning can violate the [Fair Housing Act], and because HUD is required to further the policies of that statute, it was reasonable for HUD to require the County to include in its AI an analysis of its municipalities' zoning laws." *Id.* at 432. The consequence of the Government's enforcement action was that the County lost approximately $25 million in federal funds for FY2011 through FY2014 for its failure to adequately analyze or take action regarding exclusionary zoning.

Notwithstanding their asserted interest in addressing exclusionary zoning, neither ADC nor any of the *amici* took any action, by way of *amicus* filings or otherwise, in any of the two district court actions, three appeals to the Second Circuit, or seven oral arguments before this Court and the Circuit in connection with the Government's enforcement action against the County based on its failure to analyze and address exclusionary zoning.

D. The Government's Enforcement of the "All Available Means" Provisions of the Consent Decree ("*Westchester V*")

The third major enforcement action by the Government to vindicate the goals of the Consent Decree arose from the Monitor's determination on May 8, 2015, that the County had failed to adequately address opposition to the Chappaqua Station project from the Town of New

Castle. The County objected to the Monitor's conclusions, and filed objections with the Magistrate Judge. Opposing the County, the Government argued in its brief filed on July 21, 2015, that the Chappaqua Station units did not meet the benchmarks of Consent Decree ¶ 7, which requires that the County "ensure the development of at least 750 new affordable housing units," consistent with the timeline in Consent Decree ¶ 23. The Government also argued that the County failed in its duties to "use all available means" to meet the benchmarks (citing Consent Decree ¶ 7(i)) and to address municipal inaction or resistance to the development of AFFH units (citing Consent Decree ¶ 7(j)). Finally, the Government argued that the County should be penalized and held in contempt for its violations of paragraphs 23, 7(i), and 7(j), unless the County took remedial action. (ECF No. 529, at 28-35.)

The Magistrate Judge, however, disagreed with the Government's arguments and, in a Report and Recommendation dated November 19, 2015, concluded that the County had not violated either the benchmark provisions of Consent Decree ¶ 23, nor the "all available means" provisions of Consent Decree ¶¶ 7(i) and 7(j), and rejected the Government's applications for contempt. The Government appealed the Magistrate's determination to this Court, renewing its application for penalties and contempt in a filing dated January 22, 2016 (ECF No. 552, at 18-19, 23-25.) In a thorough 61-page opinion on May 24, 2016, this Court affirmed the Magistrate Judge in rejecting the Government's argument that the County had missed certain benchmarks under Consent Decree ¶ 23, *Westchester V*, 2016 WL 3004662, at *14-15, but reversed the Magistrate Judge and agreed with the Monitor and the Government that the County had violated its obligations to, first, "use all available means" to promote the units under Consent Decree ¶ 7(i), and, second, "use all available means" to address municipal resistance or inaction under Consent Decree ¶ 7(j), *see id.* at *16-18. The Court reserved decision on the Government's

contempt application. *See id.* at *21. As a result of the Government's enforcement action, Chappaqua Station is closer to completion.

Neither ADC nor any of the *amici* engaged in any efforts in the litigation of this issue before the Magistrate Judge, and, while their papers address this dispute in part, ADC and *amici* filed their papers only after the dispute was fully submitted before this Court.

E. The Government's Enforcement of the Public Education Provisions of the Consent Decree

The fourth major enforcement action by the Government to vindicate the goals of the Consent Decree arose from the Monitor's determination on March 17, 2016, that the County Executive had repeatedly made misleading statements concerning the Consent Decree, in breach of his public education obligations under Consent Decree ¶ 33(c). In support of the Monitor's determination, the Government, in its brief filed May 9, 2016, sought a variety of remedial relief from the Court. (ECF No. 585, at 22-25.) The Court heard argument on May 23, 2016, and this issue is *sub judice*. Neither ADC nor any of the *amici* played any role in litigation of this issue.

ARGUMENT

POINT I

THE MONITOR'S REQUESTS FOR RELIEF SHOULD BE GRANTED

A. The Legal Standard

Where, as here, the evidence establishes that the County is in breach of its obligations under the Consent Decree, the Court should order the County to comply. *See, e.g.*, *Frew v. Hawkins*, 540 U.S. 431, 440 (2004) ("Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced."); *Spallone v. United States*, 493 U.S. 265, 276 (1990) (courts have inherent power to enforce compliance

with their consent decrees); *see also United States v. Local 359, United Seafood Workers*, 55 F.3d 64, 69 (2d Cir. 1995) ("[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."). Protecting the integrity of a judicially approved consent decree "justifies any reasonable action taken by the court to secure compliance." *Davis v. N.Y.C. Housing Auth.*, 278 F.3d 64, 79 (2d Cir. 2002) (citing *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985)).[3]

B. The Monitor's Requests Are Reasonable and Appropriate

The Monitor's specific requests are set forth in his supplemental filing of May 25, 2016. (ECF No. 609.) Briefly, the Monitor requests that:

(a) the County should be required to propose a consultant qualified to prepare an AI;

(b) the Monitor may review the County's selection and propose an alternative;

(c) the consultant shall provide an AI to HUD and the Court within 120 days;

(d) the AI shall contain a determination of affordable housing need, an analysis of local zoning under *Berenson* and *Huntington*, and a strategy for the County to overcome the identified impediments to fair and affordable housing;

(e) the County shall have 7 days to review the proposed AI;

(f) the County shall have an opportunity to respond to the AI within 30 days;

(g) the County should be ordered to implement the strategy identified by the AI;

(h) the County should be required to pay all oversight costs, under Consent Decree ¶ 17(b).

[3] Although the cases cited here 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 (Consent Decree ¶ 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).

(Monitor's Submission of May 25, 2016, ECF No. 609.) These requests are reasonable and should be "so ordered" by the Court. *See, e.g.*, *NLRB v. Local 3, Int'l Bhd. of Elec. Workers*, 471 F.3d 399, 403 (2d Cir. 2006) (affirming Special Master's findings, conclusions, and fines as not "clearly erroneous"); *Wilder v. Bernstein*, No. 78 CIV. 957 (RJW), 1998 WL 355413, at *2 (S.D.N.Y. July 1, 1998) (adopting recommendations of the three-member settlement panel).

The County has still failed to produce an AI "deemed acceptable by HUD" and thus remains in breach of the Consent Decree. (Consent Decree ¶ 32.) The Second Circuit has upheld the reasonableness and propriety of HUD's rejection of the County's previous efforts at an AI:

> HUD required the County to assess and analyze whether certain zoning laws in the jurisdiction impeded fair housing and, if so, to identify a plan to overcome the effects of such impediments. As the Supreme Court recently stated, challenges to zoning laws and other housing restrictions "that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification . . . reside at the heartland of disparate-impact [fair housing] liability."

Westchester IV, 802 F.3d at 433 (quoting *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2521-22 (2015)).

It is well within the Court's power to order the County to comply with its obligations under the Consent Decree. "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." *EEOC v. Local 580, International Ass'n of Bridge, Structural & Ornamental Ironworkers*, 925 F.2d 588, 593 (2d Cir. 1991); *Westchester II*, 2012 WL 1574819, at *7 (quoting *Local 580*). The Monitor's recommendations, moreover, are within the scope of the Court's remedial powers. The County should be required to propose a consultant to prepare the AI (recommendation (a)) because the County has proven incapable of, or unwilling to, prepare an AI on its own. For similar reasons, the Court ordered the County to

propose a consultant to carry out the County's comparably stalled obligations in preparing a public information program under Consent Decree ¶ 33(c). (*See* Order of May 23, 2016, ECF No. 607.) And just as the Court ordered with respect to the public information consultant (*see id.*), review and approval by the Monitor (recommendation (b)) is essential to ensure adequate performance of the County's responsibilities. Recommendation (c) does no more than carry over the obligation of the County under Consent Decree ¶ 32, which the County is now over six years late in meeting, and recommendation (d) merely implements the determination of this Court and the Second Circuit that HUD's requirements as to the contents of the AI were reasonable. Recommendations (e) and (f) provide the County with notice and opportunity to comment. Recommendation (g) would require the County to finally comply with the Consent Decree's requirements regarding the implementation plan ("IP") in Consent Decree ¶¶ 18-22. Finally, recommendation (h) is reasonable because the County assumed the financial burden of preparing an AI in the Consent Decree, yet has unjustifiably failed to meet its obligations.

C. The County's Objections Are Meritless

1. *The County's Objections to the Monitor's Recommendations Are Meritless*

The County raises several objections to the Monitor's requests, all without merit. The County first claims that, contrary to the rulings of this Court and the Second Circuit, "the County has completed the AI required by the Settlement." (County Br. at 3-9, 9.) The County's argument ignores the last three years of litigation. The Consent Decree requires an AI "deemed acceptable by HUD" (Consent Decree ¶ 32). HUD has repeatedly found the AI unacceptable. *See Westchester IV*, 116 F. Supp. 3d at 262 ("The County has never provided an AI to HUD that HUD deemed acceptable, despite its explicit commitment in the Settlement to do so.") This Court and the Second Circuit have upheld HUD's right to reject the AI, finding it neither

arbitrary nor capricious. As the Second Circuit explained:

> Whenever HUD rejected an AI submitted by the County, it provided a written explanation grounded in the evidentiary record, and it gave the County multiple opportunities to make changes and to resubmit a revised AI. We therefore conclude that HUD's decision to withhold and then reallocate the County's CPD funds was neither arbitrary nor capricious within the meaning of the APA.

Westchester IV, 802 F.3d at 432. The County has already lost this issue, and its refusal to abide by the rulings of the Court verges upon vexatious. "[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Zdanok v. Glidden Co., Durkee Famous Foods Div.*, 327 F.2d 944, 953 (2d Cir. 1964) (Friendly, C.J.). The County "need[s] to accept that they have lost, and move on." *O'Mara v. Town of Wappingers*, No. 03 CIV. 9814 (CM), 2009 WL 73116, at *2 (S.D.N.Y.), *aff'd sub nom. O'Mara v. Town of Wappingers*, 330 F. App'x 292 (2d Cir. 2009). The County's effort to relitigate a point that it has lost is not merely wasteful of the resources of the litigants, not to mention taxpayer dollars, but is disrespectful to the courts that have already decided this issue.

Second, the County objects that it cannot be required to hire a consultant to complete the AI because the Consent Decree does not mention the word "consultant." (County Br. at 10-11.) The Court is entitled to assume, after a delay of six years, that the County is either unable or unwilling to prepare a satisfactory AI on its own. Moreover, compelling the County to complete the work, through a consultant, is an appropriate exercise of the Court's discretion. In *Wilder*, for example, the court enforced stipulations that "require[d] that the City hire a consultant to categorize and rate the quality of foster care programs." *Wilder*, 1998 WL 355413, at *2.

Third, the County objects to the Monitor's recommendation that it address fair and affordable housing under both the *Berenson* and *Huntington* line of cases. (County Br. at 12-14.) This is yet another issue already resolved adversely to the County. In a March 2012 ruling by the

Magistrate Judge, which the County never appealed, the Magistrate Judge affirmed the reasonableness of the Monitor's analysis, and "reject[ed] the County's objection that the Monitor could not require it to 'specify' a strategy that it intends to employ to overcome exclusionary zoning practices." *Westchester II*, 2012 WL 917367, at *9 (S.D.N.Y. Mar. 16, 2012). The Magistrate Judge further concluded that, "As to the question of whether the Monitor could properly require the County to identify the types of municipal zoning practices that would, if not remedied by the municipality, cause the County to pursue legal action, we similarly find that requiring the County to provide this information is within the Monitor's power." *Id.*; *see also Westchester IV*, 802 F.3d at 424-27 (describing HUD's reliance on Monitor's *Berenson* and *Huntington* analysis). The County's unwillingness to apply settled law, under *Berenson* and *Huntington*, underscores the need for a consultant to undertake the analysis.

Finally, the County complains that the Monitor's funding recommendation "is essentially asking for a blank check." (County Br. at 18.) Inasmuch as the Monitor has sustained uncompensated costs and fees in the amount of over $4 million related to the County's extraordinary intransigence in complying with court orders (ECF No. 576, at 50), the County is in no position to suggest that the Monitor is seeking to turn this case to his economic advantage. In any event, the Monitor did not recommend that "this Court approve, sight unseen, additional fees under Paragraph 17(b)." (County Br. at 18.) To the contrary, the Monitor expressly recommend that any additional fees be paid "[p]ursuant to Paragraph 17(b) of the Settlement," (recommendation (h)), which incorporates the safeguards the County claims to need.

2. *The County's Assertion That There Has Been a "Change in Circumstances," Such That It May Ignore Its Obligations, Is Meritless*

The County maintains that its obligation to complete an AI is now "academic," asserting

that the change in the nature of the mechanism for qualifying for federal funds, coupled with the fact that the County is no longer seeking funds in the future, frees it of its obligation to comply with Paragraph 32 of the Consent Decree. (County Br. at 18-21.)

As a preliminary matter, the change in HUD program requirements does not constitute a "change in circumstances," *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992) (County Br. at 19, 21, 30, 32), in light of the posture of this case.[4] It is true that in the future, HUD will require grantees to prepare an Assessment of Fair Housing ("AFH"), not an AI. *See* 80 Fed. Reg. 81,840 (Dec. 31, 2015) (Kennedy Decl. Exh. D). The difference is immaterial for purposes of this application, however, as the only remaining piece of the County's AI that has not been accepted by HUD is the County's analysis of local zoning, which would be included in any event in an AFH. In describing the sort of analysis that an AFH would include, HUD has explained:

> [z]oning and land use laws that are barriers to fair housing choice and access to opportunity can be quite varied and often depend on the factual circumstances in specific cases, including zoning and land use laws that were intended to limit affordable housing in certain areas in order to restrict access by low-income minorities or persons with disabilities.

80 Fed. Reg. 42,272, at 42,310 (July 16, 2015). As HUD continues to require grantees in general to analyze the potentially discriminatory impact of local zoning, there has not been the requisite "change in circumstances."

In any event, the County's obligation to prepare an AI acceptable to HUD was not merely prospective relief, but also a remedy for the County's past violations of the law. In this context, any alleged "change in circumstances" is irrelevant: the County, from 2000 to 2006, submitted fraudulent AIs, *see Westchester I*, 668 F. Supp. 2d at 565 ("[T]he County has not demonstrated

[4] The County's argument is also procedurally deficient, in that *Rufo* concerned a Fed. R. Civ. P. 60(b) motion to alter or amend the judgment. The County has failed to make such a motion, or meet the burden it imposes.

an issue of material fact as to whether it appropriately analyzed race in conducting its AI and recorded that analysis, and as such, its certifications to HUD that it would AFFH were false."). The purpose of Consent Decree ¶ 32 is, in part, to require the County to remedy its past mistakes, by preparing an AI "deemed acceptable to HUD." *Rufo*, upon which the County relies so heavily, makes plain that: "Ordinarily, however, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." *Rufo*, 502 U.S. at 385; *see also U.S. v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making."). There was nothing unanticipated about preparing an AI that was not false, and the County's contention that it need not do something now that it agreed to do in 2009 has already been rejected by the Circuit. *See Westchester II*, 712 F.3d at 772 ("[F]or the County to now claim that it was without power to do what it expressly represented was in its power as it sought to avoid hundreds of millions of dollars in liability is all the more problematic."). The County's latest effort to shirk this Court's order should be rejected.

POINT II

THE COURT SHOULD NOT ACCEPT ADC'S LETTER AS AN AMICUS BRIEF

A. The Legal Standard

As this Court noted in its Order of May 5, 2016, rejecting the filing of an amicus brief from the Center for Individual Rights, "[t]here is no governing standard, rule or statute prescribing the procedure for obtaining leave to file an *amicus* brief in the district court." *C&A Carbone, Inc. v. Cty. of Rockland, NY*, 08 Civ. 6459 (ER), 2014 WL 1202699, at *3 (S.D.N.Y. Mar. 24, 2014). Instead, courts in this district often rely upon the articulation of factors set forth

by the Seventh Circuit:

> An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case . . . , or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an amicus curiae brief should be denied.

Ryan v. Commodities Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (citation omitted). ADC does not meet this standard.

B. ADC's Letter Should Be Rejected

1. *ADC's Letter Rehashes the Same Arguments It Lost in 2012 and 2014*

This is now the third time ADC has sought to intervene or otherwise participate in this action following entry of the Consent Decree. The reasons that the Court rejected ADC's intervention motion in 2012, and the reasons that the Court did not confer any sort of official status upon ADC in 2014, remain applicable.

In its decision denying ADC's intervention application on January 4, 2012, this Court noted that erstwhile relators such as ADC are merely " 'partial-assignees of the United States' claim to recovery.' " *United States ex rel. ADC v. Westchester County*, 06 Civ. 2860 (DLC), 2012 WL 13777, at *5 (S.D.N.Y. Jan. 4, 2012) (quoting *United States ex rel. Eisenstein v. City of New York*, 540 F.3d 94, 101 (2d Cir. 2008) (citing *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000))). The Government remains the real party in interest. *See Westchester*, 2012 WL 13777, at *5 (citing *United States ex rel. Mergent Serv. v. Flaherty*, 540 F.3d 89, 93 (2d Cir. 2008)). Although *amici* argue that "ADC, of course, is no stranger to this litigation" (*Amici* Br. at 7), *amici* are wrong as a matter of law: this Court

expressly ruled in 2012 that "ADC has no greater status than any other stranger to this litigation." *Westchester*, 2012 WL 13777, at *6.

Similarly, at the hearing on May 2, 2014, the Court did not "effectively confer[ ] *amicus* status on ADC." (*Amici* Br. at 7.) The Court permitted ADC to present at the conference but cautioned against drawing precisely the inference that ADC and *amici* now draw:

> But I want to make clear that letting [ADC] be heard does not change my analysis at all about their right to intervene and does not suggest at all — and I'll describe this in more detail later when I speak — that I believe that the government has failed to act responsibly here such that ADC must step up to the plate to bring to this Court's attention issues of importance with respect to contempt.

(Kennedy Decl. Exh. E, at 3:17–24.) In concluding the conference, moreover, the Court noted that disputes are "better dealt with in an issue by issue way" (*id.* at 27:23–24), explaining that "I don't think general characterizations are going to be helpful to anyone here with respect to the county's compliance or lack of compliance" (*id.* at 27:25–28:2.) Yet ADC continues to offer general characterizations untethered to specific disputes.

As the Court's prior rulings make clear, ADC does not satisfy the first ground for accepting its brief as an *amicus*. Because the Government is the real party in interest in a *qui tam*, ADC cannot show that it "is not represented competently or is not represented at all." *Ryan*, 125 F.3d at 1063. Nor does ADC or *amici* contend that ADC has "an interest in some other case that may be affected by the decision in the present case," *Ryan*, 125 F.3d at 1063, although the description of the activities of *amici* suggest that *amici* may have such an interest (*Amici* Brief at 6-11), had they filed on their own behalf instead of in support of ADC. The only ground for accepting ADC's submission, therefore, would be that ADC "has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan*, 125 F.3d at 1063. ADC appears to intend to satisfy this prong of the test,

contending that its submission "contain[s] information and perspective not otherwise being provided to the Court by any of the parties." (ADC Letter at 1.) A review of ADC's submission, however, demonstrates that its arguments are uninformed by any particular expertise.

2. *The Government Already Provides the Perspective ADC Claims to Advance*

To the extent that a purpose can be discerned amidst ADC's denigrations, that perspective is that the Consent Decree should be vigorously enforced. The Government fully shares that perspective, as its multiple enforcement efforts attest. ADC's contention that there is a "record of inadequate implementation of the decree by the Government and the Monitor" (ADC Letter at 2) reveals an ignorance of the record.

First, ADC contends that what the Government "should have been doing all along was informing the public that," *inter alia*, the Consent Decree "affirmatively intends that exclusionary zoning — all of it — be dismantled." (ADC Letter at 2.) The Government has, of course, repeatedly made clear its demand that the County address exclusionary zoning practices:

> • "Despite these commitments that the County made in the Settlement, the County's proposed AI persistently failed to develop a strategy for addressing exclusionary zoning." (Memo of Law in Support of Motion to Dismiss, 13-2741, ECF No. 16, June 21, 2013, at 16); *see also id.*at 17 ("the County has remained noncompliant with the Court's orders regarding its obligation to develop a plan to address exclusionary zoning").)
>
> • "HUD asked the County to acknowledge its obligation under the Consent Decree to address impediments to fair housing, such as exclusionary zoning, that would identify problematic zoning codes, develop a process to amend those codes, and identify circumstances in which the County might resort to litigation to require municipalities to address zoning issues." (Second Circuit Brief, 13-3087, filed May 12, 2014, at 40; *see also id*. at 49 ("[T]he County has indeed been shirking its obligations, both under the Consent Decree and the applicable statutes and regulations.")).
>
> • "HUD did demand that the County develop a strategy to overcome exclusionary zoning policies, including through litigation where appropriate as provided in the consent decree" (Second Circuit Brief, 15-2294, filed September 4, 2015, at 27.)

ADC attacks HUD's statement that "HUD has never suggested that the County must 'dismantle' zoning in any neighborhood." (ADC Letter at 2-3.) But neither the Consent Decree nor applicable law require wholesale dismantling of zoning codes; rather, the Fair Housing Act requires addressing and resolving exclusionary zoning.[5]

ADC further complains that "there is little public understanding that the County . . . is persistently violating a binding federal court civil rights order," but there has been extensive reporting regarding the Government's successes in proving the County's breaches. *See, e.g.*, Tom Auchterlonie, *Appeals Court Rules Against County on Housing Settlement*, patch.com, May 7, 2013) (describing ruling on County's breach) (Kennedy Decl. Exh. F); Jane Lerner, *Appellate Court Sides With HUD in Westchester Block-Grant Fight*, lohud.com, Sept. 26, 2015 (describing ruling on County's breach) (Kennedy Decl. Exh. G); Mark Lungariello, *Judge: Chappaqua Units Can Count in Housing Deal; Westchester County violated terms of affordable housing settlement by not taking a stand against local opposition, court rules*, lohud.com, May 24, 2016 (describing ruling on County's partial breach) (Kennedy Decl. Exh. H). Viewed in the light of years of litigation in this case, it cannot be more obvious that the Government believes the County's assessment of exclusionary zoning, for example, to be inadequate in breach of its Consent Decree obligations — that was, among other things, the dispute that lead to two district court lawsuits, three Circuit appeals, and seven oral arguments before this Court or the Circuit, none of which appeared to warrant the attention of ADC or *amici*.

[5] ADC further betrays its lack of familiarity with the record by complaining about a statement by the HUD Regional Administrator that, "What is being asked of Westchester is what is asked of every place in the country that received federal funds." (ADC Letter at 3 n.8.) The Regional Administrator was discussing the preparation of an AI — which is indeed required — not compliance with the Consent Decree, which includes an AI requirement.

Second, ADC complains that Consent Decree ¶ 7(j) "continues to be ignored." (ADC Letter at 6.) It is not clear how a provision of the Consent Decree "continues" to be "ignored" when it has been the subject of litigation for over one year: this provision was the subject of the Monitor's report regarding Chappaqua Station on May 8, 2015 (ECF No. 507, at 19-23), a basis for the Government's arguments to find the County in contempt in filings with the Court on July 21, 2015 (ECF No. 529, at 26-38), again on January 22, 2016 (ECF No. 552, at 22-28), and again on March 25, 2016 (ECF No. 568, at 18-28.) The Court's decision of May 24, 2016, devoted extensive attention to this point in part because it has been heavily litigated over the past year, not "ignored." *See Westchester V*, 2016 WL 3004662, at *16-18.

More pernicious, however, is ADC's broader misrepresentation of the Government's position regarding the scope of the County's obligation to use "all available means" to promote AFFH units and overcome municipal resistance under Consent Decree ¶¶ 7(i),(j). ADC complains that at the hearing on May 2, 2014, undersigned counsel noted that, "[B]ecause the county says that none of the municipalities within its area have exclusionary zoning the obligation to [file] any lawsuit is not triggered." (ADC Letter at 7.) ADC then devotes several pages to condemn the "breathtaking principle" that the obligation to take action under Consent Decree ¶ 7(j) would depend upon the County's subjective view. (ADC Letter at 7-9.)

The Government, of course, never said any such thing, and the extensive litigation over the County's failure to adequately analyze exclusionary zoning demonstrates that the Government has consistently rejected the County's argument that its subjective assessments are entitled to deference. As the use of the phrase "the County says," would indicate, the Government was describing the County's argument, not agreeing with it:

What we've seen is the county really failing to come to grips with the law of

> exclusionary zoning. And what we've seen however is that because the county says that none of the municipalities within its area have exclusionary zoning the obligation to [file] any lawsuit is not triggered.

(Kennedy Decl. Exh. E (Trans.) at 17:25–18:4.) As the transcript then demonstrates, the Government argued not that the County's conclusions regarding exclusionary zoning were entitled to any deference, but rather that the County's analysis was inadequate. For the same reasons, *amici* are wrong to argue that only ADC has adopted the proper view of the triggering requirements of Consent Decree ¶ 7(j). (*Amici* Brief at 11-16.) Indeed, two years ago the Government set the record straight with *amici* on this exact point.[6] To the extent that there is any misperception regarding the Government's litigation position, therefore, this misperception stems from ADC's misrepresentations.[7]

Third, ADC claims that insufficient attention has been paid to eliminating *de facto* residential segregation. (ADC Letter at 9-10.) Yet again, ADC has ignored the Government's repeated emphasis on *de facto* segregation:

> • "In addition, the County fails to ask why the minority population of each of these municipalities is so low. Analyzing the potentially exclusionary effect of local zoning on residential patterns in Westchester is particularly appropriate where, as here, there is evidence that Westchester is segregated." (Second Circuit Brief, 15-979, July 2, 2015, at 35.)
>
> • "According to the 2010 Census, while one quarter of Westchester's entire population lives in Yonkers and Mount Vernon, over one half of Westchester's black population lives in those two cities. . . . The County made no effort to

[6] On or about August 11, 2014, certain *amici* wrote to the Government to complain about the Government's alleged litigation position, relying on ADC's misrepresentations. By letter dated September 4, 2014, Government counsel explained that ADC's characterization was incorrect (Kennedy Decl. Exh. I, at 2-3), and received no response.

[7] The Government expressly argued in its filing on March 25, 2016 that: "The County's primary argument is that it cannot be held in contempt because paragraphs 7(i) and 7(j) of the Consent Decree impose purely discretionary duties. The County maintains that the phrase 'as appropriate' confers discretion upon the County in how to address municipal inaction . . . . The County's argument is frivolous." (ECF No. 568, at 19-20.)

> determine why this was the case." (Memo of Law in Support of Summary Judgment, 15-1992, ECF No. 29, filed Apr. 17, 2015, at 21.)
>
> • "The disparity is stark in the seven municipalities cited in the Monitor's reports for having exclusionary practices: as compared to the County's 14.6% black population, the black population in those seven municipalities are 1.3%, 1.5%, 1.5%, 1.6%, 2.1%, 2.4%, and 2.9%." (Second Circuit Brief, 15-2294, filed September 4, 2015, at 23; *see also id.* at 33-34 ("The County made no effort to determine whether exclusionary zoning policies caused or perpetuated this segregation.").)

In sum, ADC's complaints have shed more heat than light upon the issues before the Court. At no point since the entry of the Consent Decree has ADC played any constructive role in this case.

3. *The Government Has No Objection to the Beveridge Report*

Although ADC's letter brief distorts more than helps to resolve the issues in this case, the report by demographer Professor Andrew Beveridge, dated May 11, 2016, and docketed as ECF No. 592-1, offers a useful view of the evidence that warrants consideration. The Government has no objection to the Beveridge Report.

4. *Whether or Not the Court Accepts ADC's Submission as an Amicus, ADC Should Be Enjoined from Correcting or Altering Court Transcripts Without Notice*

Regardless of how the Court rules upon ADC's application, the Court should enjoin ADC from correcting or altering Court transcripts without notice to the parties. Following the last court conference at which ADC appeared, on May 2, 2014, the undersigned requested the transcript and eventually received a disk from the court reporter. Enclosed in the envelope with the disk were printouts of emails from Craig Gurian of ADC, containing his proposed edits to the transcript, many of which were made. (Kennedy Decl. Exh. J.) Some of ADC's proposed edits were not adopted by the court reporter, including an unusual request that the court reporter insert "a notation that counsel for Anti-Discrimination Center rose to speak" because "that is what the judge is responding to." (*See id.* (correction to page 27, after line 11).) The Government has

confirmed with both the Monitor and the County that no party was aware of ADC's proposed corrections to the transcript. As far as the Government can tell, ADC's unilateral alterations to the transcript did not result in any misstatements or prejudice to any party, and, acting upon the belief that ADC would not be making future appearances in this case, the Government did not make any application to the Court at the time.

As ADC will apparently speak at the next conference, however, it should be ordered not to repeat its unilateral amendment of the transcript. "Courts do not have power to alter transcripts in camera and to conceal the alterations from the parties." *United States v. Zichettello*, 208 F.3d 72, 97 (2d Cir. 2000). This Court has proceeded upon notice and opportunity for all parties to be heard, issuing for example an Order on June 9, 2016 (ECF No. 613), that directed the court reporter to correct certain transcription errors, and afforded the parties an opportunity to make further corrections. ADC, which is not even a party to this matter, does not enjoy greater liberties than the Court to alter the transcript, and should be enjoined from doing so.

POINT III

THE COURT SHOULD NOT GRANT ADC'S REQUESTS FOR RELIEF UNLESS THESE REQUESTS ARE CONSISTENT WITH THE REQUESTS BY THE MONITOR AND THE GOVERNMENT

ADC's requests for relief are not, by themselves, capable of implementation. To the extent that ADC seeks relief that differs from that sought by the Monitor and the Government, as detailed Point I, *supra*, these requests should be denied.

First, ADC's demands are vague. ADC's first demand is that the Court "issue an order reemphasizing the obligations discussed earlier in this letter," which would be fifteen single-spaced pages (ADC Letter at 16; remedy (a)). Apart from the vagueness of this demand, the Consent Decree is already a Court order, and does not need any "reemphasizing" to remain in

force. And as the Court has already advised, disputes under the Consent Decree are "better dealt with in an issue by issue way." (Kennedy Decl. Exh. E, at 27:23–24.)

Second, ADC's requests for contempt are procedurally defective. The Government has, of course, previously sought to hold the County in contempt, and agrees with the general view that the County's conduct has warranted contempt. ADC, however, fails to present the appropriate basis for contempt. To establish contempt, a party must show that "(1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner." *Latino Officers Ass'n of the City of New York v. City of New York*, 558 F.3d 159, 164 (2d Cir. 2009). ADC does not attempt to make this showing. Because civil contempt is intended to change behavior prospectively, moreover, a demand that the Court "find that Westchester *has been in contempt* of its obligations throughout the decree period (2009-2016)" (ADC Letter at 16; remedy (b) (emphasis added)), does not appear tenable. *See Spotnana Inc. v. Am. Talent Agency, Inc.*, 09 Civ. 3698 (LAP), 2014 WL 7191400, at *6 (S.D.N.Y. Dec. 3, 2014) ("Civil contempt is a coercive measure that is intended to spur action, rather than penalize.") (citation omitted).

Third, many of ADC's demands require outright changes to the Consent Decree. (ADC Letter at 16-19; remedies (c), (f), (g), (i).) None of these proposals follow Fed. R. Civ. P. 60(b) on the modification of orders and judgments, and changes to consent decrees should not be made as casually as ADC would like, regardless of merit. None of these proposals, moreover, include any analysis or explanation as to the impact of the proposed change. For example, ADC's insistence that the Court order 2010 Census data to be used instead of 2000 Census data (which was the data available at the time of the Consent Decree) may have merit (remedy (f)), but ADC

does not analyze what practical impact the proposed change would have, particularly where many of the units are already in development, or have already been built. ADC's demand that the Court order that the County "pursue [its] obligations over the course of the next seven years" (ADC Letter at 16) makes little sense; the Consent Decree does not have a specific term, but ends when the County meets its obligations, and it should meet those obligations now, not between 2016 and 2023.

Finally, to the extent that ADC's demands are similar to those sought by the Monitor, the Court should follow the Monitor's more careful and thoughtful recommendations, which comply with applicable law and comport with the Consent Decree. (*See, e.g.*, ADC Letter at 16-20; remedies (d), (e), (h).)

CONCLUSION

The Court should order the remedial relief requested by the Monitor in his Assessment and May 25 submission; reject ADC's May 11 submission as an amicus but accept the Beveridge Report; and grant the relief requested by ADC only to the extent that such relief is also requested by the Monitor and the Government.

Dated: New York, New York
June 24, 2016

Respectfully submitted,

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