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.
----------X

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

REPLY MEMORANDUM OF LAW OF THE ANTI-DISCRIMINATION CENTER REGARDING MOTION TO INTERVENE

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TABLE OF ABBREVIATIONS

Throughout this memorandum of law, the Anti-Discrimination Center uses the following abbreviations to refer to documents filed with the Court:

GED	Gurian Declaration in Support of Motion to Enforce (Dkt. # 351)
GID	Gurian Declaration in Support of ADC Motion to Intervene (Dkt. # 350)
GRD	Gurian Reply Declaration in Support of Motion to Intervene
MSME	Anti-Discrimination Center's Memorandum in Support of Motion to Enforce (Dkt. # 345)
MSMI	Anti-Discrimination Center's Memorandum in Support of its Motion to Intervene (Dkt. # 349)
USMO	United States' Memorandum in Opposition to Motion to Intervene (Dkt. # 371)
WCMO	Westchester County's Memorandum of Law in Opposition to Anti-Discrimination Center's Motion to Intervene (Dkt. # 364)

> Unfortunately, since the time the Consent Decree was issued, Westchester has demonstrated its unwillingness to comply with the terms of the order and has instead resorted to its pre-litigation posture: it continues to deny the existence of segregation, it continues to deny that it can compel resistant municipalities to build pro-integrative affordable housing as a matter of public interest, and it continues to site its affordable housing in isolated places that perpetuate segregation.
>
> The fair housing community calls upon the federal government to demonstrate its commitment to fair housing by seeking an order from federal court that enforces the consent decree.
>
> – *National Fair Housing Alliance, 2011 Fair Housing Trends Report*[1]

Introduction

During the liability phase of this litigation, Westchester sought to convince the Court that the underlying dispute represented nothing more than strategy and policy differences between the County's approach to affirmatively furthering fair housing (AFFH) and the desired alternative approach of the Anti-Discrimination Center (ADC). The Court concluded otherwise, recognizing that the conflict was between Westchester's approach on the one hand and the requirements of the Fair Housing Act and implementing regulations on the other.

Now, after more than two years of Westchester's persistent and thoroughgoing failure to comply with the requirements of the Consent Decree entered by the Court on August 10, 2009, the Government and its Monitor are trying a similar approach: trivializing ADC's motion to intervene by suggesting to the Court that ADC is merely a "dissatisfied observer" of strategy decisions.[2] In fact, the current conflict is between the course the Consent Decree commands and the wholly incompatible course the Government and its Monitor have chosen to pursue.

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[1] April 29, 2011 report at 7, *available at* http://bit.ly/nhrg2e.

[2] United States' Memorandum in Opposition to Motion to Intervene (hereafter, "USMO") at 1.

The Consent Decree was not agnostic about ends or means. Firmly rejecting the premises and practices under which Westchester and its municipalities had operated until its entry, the Decree sought removal of structural barriers to fair housing choice (AFFH), focused particularly on issues of race and municipal resistance (exclusionary zoning), and identified location of affordable housing—down to the Census Block level—as crucial to whether segregation would be perpetuated or reduced.

All of Westchester's housing programs were to be deployed with a goal of ending *de facto* residential segregation. The longstanding "carrots-only" approach was emphatically rejected. Instead, change in all municipalities was demanded, and Westchester was commanded to use all means available—including the longstanding litigation authority the County was forced to acknowledge it possessed—to insure that every municipality was taking the steps needed both to accomplish the unit-specific goals of the Decree and the broader purpose of the Decree to AFFH.

In short, the Consent Decree view was that Westchester and its municipalities need to accommodate themselves to the requirements of the Decree, not that the requirements of the Decree are to be accommodated to the desire of Westchester and its municipalities to maintain the status quo.

But accommodating themselves to continuing resistance is precisely what the Government and Monitor have done in respect to the Decree.[3] There is no Implementation Plan ("IP") in place, resulting in powerfully negative consequences: helter-skelter development that has been fiscally imprudent and incompatible with AFFH and Decree standards. There is no

[3] To take but one example, the Monitor has specifically justified the approval of a "Model Ordinance" so inadequate that universal adoption would not permit the as-of-right construction of a single additional multiple dwelling beyond that permitted today on the basis that only something that was watered down would be adopted by municipalities. *See* Gurian Declaration in Support of ADC Motion to Intervene (hereafter, GID), Ex. 6 [Doc. 350-6].

Analysis of Impediments ("AI") in place, no exclusionary zoning removed, and nothing the County has done to use its housing programs to seek to end *de facto* residential segregation. There is a County Executive who has repeatedly vowed never under any circumstances to comply with the crucial provisions of Consent Decree, ¶7(j) to force municipalities to modify their exclusionary zoning, and who still denies the reality that Westchester is characterized by residential segregation.

Most troubling (beyond the County's continuing recalcitrance), the opposition papers reveal that the Government and the Monitor, rather than admitting a failure of enforcement, have presented a false picture of unit-specific "progress" to justify their conduct. The papers reveal a failure to acknowledge or to vindicate core provisions of the Consent Decree; a failure to engage in an independent assessment of the facts on the ground or utilize evidence provided to the Government that demonstrates municipal and County resistance; a failure to give the Court an accurate assessment of the announced intention of the County to continue to violate the Consent Decree; and a failure to acknowledge the full scope of ADC's interest in this matter.

In these circumstances, there is no reasonable prospect that the Consent Decree will be enforced unless ADC is permitted to intervene.

Argument

POINT I.
CLAIMS OF UNIT-SPECIFIC PROGRESS ARE FALSE AND MISLEADING

Seeking to excuse their failure to have taken the initiative to seek Court assistance to yield Westchester's compliance, the Government points to "progress," citing the Monitor's approval of housing units in excess of "interim benchmarks," and comments that "the

construction of affordable housing in segregated areas for the purpose of affirmatively further fair housing is proceeding."[4]

But the fact that proposed Decree-housing is located in an "eligible jurisdiction" is just the beginning of the inquiry as to whether the development is in fact Decree-appropriate. For example, the housing must overcome barriers to fair housing choice (AFFH), not attempt to avoid the need to overcome barriers. The housing must comport with the basic 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." Consent Decree, ¶ 31(c). And the housing must be designed to be on the Census Blocks with the "lowest concentrations of African American and Hispanic residents." Consent Decree, ¶ 22(f).

For the Decree's desegregation purposes, location is not simply important in terms of avoiding Census Blocks that are themselves already significantly populated by minority residents. Locating affordable housing close to existing areas of minority concentration leaves the segregated white residential core of the most segregated towns and villages intact (and risks exacerbating geographical disparities).[5] Locating affordable housing close to undesirable features (like superhighways and railroad tracks) sends a message that the housing (and its residents) are either not desirable or, at best, are not truly part of the community.[6] Locating housing on vacant blocks likewise can be isolating and, in any event, is inconsistent with the intention of the Decree to maximize development on Census Blocks with the lowest *concentrations* of African-American and Latino residents (Westchester prefers to build where there are no people so as to avoid AFFH development on blocks with high concentrations of

[4] USMO, at 9.

[5] *See* Declaration of Kevin D. Walsh, Sept. 15, 2011 (hereafter, "Walsh Decl."), ¶ 4.

[6] *Id.* at ¶ 6.

white residents, but that is not the point of the Decree). In sum, location matters not just as between municipalities but within municipalities. *Cf.* 24 C.F.R. 100.70(c)(4) (even assigning a person to a particular section of a *building* violates the prohibition on tending to perpetuate segregated housing patterns).

The overwhelming percentage of "approved" units create fundamental AFFH problems in terms of their location. The unit progress being referred to by the Government includes, for example, 18 units nominally in the City of Rye (though separated from most of Rye by the junction of I-95 and the Cross-Westchester Expressway). The housing abuts the highly Latino jurisdiction of Port Chester, and is itself is on a Census Block that is 50 percent Latino and African-American. That is not housing that AFFH; if anything it is housing that perpetuates segregation.[7]

The Cortlandt development—83 units—was already permitted prior to the entry of the Consent Decree, so its development under the Decree represents no zoning barrier being overcome. It abuts a major Veterans Administration psychiatric and substance abuse facility, a major road and railroad tracks.[8] Other than VA facility residents, Census data shows, the census block is unpopulated[9] *(i.e.,* there are no white residents not in group quarters to object).

The Larchmont development—46 units—was already permitted prior to the entry of the Consent Decree so its development under the Consent Decree represents no zoning barrier being overcome. The development is on the site of a former moving company; its Census Block is

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[7] *See* aerial photo of site, Gurian Reply Declaration in Support of Motion to Intervene (hereafter, "GRD), Ex. E. *See also* supporting documentation referenced in ADC's Memorandum in Support of Motion to Enforce (hereafter, "MSME"), denominated GRD Ex. C and originally filed as ECF Doc. 345, at 23.

[8] See aerial photo of site, GRD, Ex. F. *See also* supporting documentation referenced in MSME at 21-22.

[9] *See* Declaration of Andrew Beveridge in support of Motion to Enforce (hereafter, "Beveridge Decl.") at ¶ 25, denominated GRD Ex. D [ECF Doc. 346].

separated from I-95 only by the railroad tracks that directly abut the block, and extends to within 500 feet of the New Rochelle line.[10]

These three developments comprise 147 of 155 "approved" units with financing in place.[11] To put it another way, when one excludes these improper units, one finds that, after more than two years, financing is in place for *fewer than 10* other units.[12]

Even on the municipal level, problems abound, with most eligible municipalities thus far contributing not a single unit. Tier B and Tier C developments (those in less-white jurisdictions) constitute 74.2 percent of *all* the Tiers B and C development that is permitted throughout the life of the Consent Decree, whereas the Tier A development (that in the most-white jurisdictions) constitutes only 10.2 percent of the *minimum* Tier A units required.[13]

Significantly, despite the statement that the units "appear to comply" with the requirements of the Consent Decree,[14] nowhere in his declaration does the Monitor describe how these units would overcome barriers to fair housing choice; that is, affirmatively further fair housing.

The unit-specific record is simply insufficient to demonstrate real "progress"—even if it were not the case that Westchester is systematically violating all the other material provisions of the Decree.

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[10] See aerial photo of site, GRD, Ex. G. *See also* supporting documentation referenced in MSME at 22. The site's location is actually worse than ADC had originally realized, as shown in the photo. *See* GRD, ¶ 32; GRD, Ex. G.

[11] Westchester reports 155 units with financing in place through June 30, 2011, the latest period for which information is available. *See* excerpt of County 2Q 2011 report (p. 2 of report), GRD, Ex. H.

[12] Because of space limitations, ADC can't delineate the problems that exists with the other units, but even assuming, *arguendo,* that such units were appropriate, having eight units with financing at this stage that are properly "counted" is not fairly described as "progress."

[13] *See* discussion and documentation in MSME at 20-21.

[14] Declaration of James A. Johnson, Jul, 29, 2011, at ¶ 33.

POINT II.
THE GOVERNMENT AND MONITOR CONTINUE TO CLOSE THEIR EYES TO KEY ELEMENTS OF THE DECREE

In their opposition to the instant motion, the Government and Monitor continue to ignore the fundamental premises and requirements of the Consent Decree that are spelled out in the first two paragraphs of page 1 of the Decree, and in the first paragraph of page two of the Decree. Indeed, though the Government summarizes its view of the requirements of the Decree,[15] nowhere in the opposition papers are these particular premises and requirements discussed. The omissions are important, because otherwise its becomes immediately apparent that the Decree contemplates Westchester acquiring interests in property so as to be in a position to use long-established legal remedies against municipalities that maintain exclusionary zoning.[16]

Indeed, aware of the County's long history of denying authority to act in respect to resistant municipalities (and likewise aware, in any event, that Westchester's policy was to take a "hands off" approach to municipalities), ADC insisted that Westchester in the Decree specifically acknowledge the existence of this authority and that "it is appropriate for the County to take legal action to compel compliance if municipalities hinder or impede the County in the performance" of such duties as developing affordable housing in a way to AFFH and furthering the terms of the Consent Decree. *See* Consent Decree, p. 2, ¶ 1.[17]

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[15] USMO, at 3-5. The full Consent Decree is provided as GRD, Ex. I.

[16] See discussion in MSME 8-10. Under New York State law, a County may challenge a municipality's restrictive zoning on the grounds that the County's public interests in proceeding with development outweigh the municipality's interests in restricting such development. *Matter of County of Monroe (City of Rochester)*, 72 N.Y.2d 338, 341, 343; 533 N.Y.S.2d 702, 703-04 (N.Y. 1988). Under the *Berenson* doctrine, any party that owns or controls land may challenge a municipality's restrictive zoning on the grounds that such zoning does not take sufficient account of regional housing needs for multi-family housing. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S.2d 672 (N.Y. 1975). The formulation of the first two pages of the Decree reflects these doctrines in particular.

[17] Those terms of the Decree, of course, include AFFH and seeking through all housing programs to end residential segregation throughout the County. *See* discussion in MSME at 2-4, 5-7. The full Decree is appended to GRE as Ex. I.

So it is the Decree itself that is framed to require Westchester to confront municipal resistance, including, most notably, exclusionary zoning.[18] But the Government and the Monitor have not held Westchester to its obligations, and use a variety of stratagems to justify their failure to act. One notable method involves the Government misleading the Court as to the full scope and purpose of Consent Decree, ¶ 7(j).

According to the United States, the litigate-against-municipalities requirement set out in Consent Decree, ¶ 7(j) only involves municipalities that hinder or fail to promote the objectives of the "housing-development paragraph."[19] That is certainly one requirement of the Consent Decree, ¶ 7(j), although, contrary to the way the Government and the Monitor have proceeded, it is not a requirement that can be deferred merely because some units are being built somewhere in Westchester County. Instead, the provision clearly means that *each* municipality's actions and failures to act must be examined. *Each* municipality should be taking action to promote the unit-specific objectives of the paragraph, *each* municipality should be refraining from taking actions that hinder the unit-specific objectives of the paragraph, and Westchester must take action against all who fail to comply (something that County has utterly failed to do).[20]

But there is another requirement as well, one that the Government seeks to read out of the Decree. That separate requirement states: "The County shall initiate such legal action appropriate to accomplish the purpose of this [Consent Decree] to AFFH." Consent Decree, ¶ 7(j).

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[18] *See* Declaration of Michael L. Hanley, Sept. 14, 2011 (hereafter, "Hanley Decl."), ¶¶ 11-12 (noting, *inter alia,* that "the importance of the Consent Decree's reliance of using its authority under New York state law to counter local resistance ot development cannot be overstated. It is contrary to my experience and contrary to the experience of every civil rights attorney I know, to expect that municipalities that have long maintained exclusionary will elect to change that zoning as long as maintenance of the status quo remains an option").

[19] USMO, at 3.

[20] There is not, for example, any "hold harmless" clause that would exempt any *one* municipality from the required conduct if some *other* municipalities were performing as required.

Thus, in stark contrast to the paragraph-specific (that is, unit-specific) first command of subparagraph 7(j), the subparagraph's second command requires Westchester to litigate to vindicate the broad AFFH purposes of the entire Decree.[21] One example of the broader AFFH purposes of the Decree is found in Consent Decree, ¶ 31(a). That obligation—to try to end residential segregation throughout the County in language that is not limited by time or by unit—cannot be accomplished if the County fails to litigate to overcome barriers to fair housing choice (such as exclusionary zoning) that undergird the continuation of residential segregation.

That the Government would choose not to refer to this second obligation in its opposition is unfortunate but not surprising: the Government and Monitor take the position that purported progress as to unit-specific obligations in a limited number of municipalities excuses their failure to hold Westchester to its obligations to make all municipalities AFFH.

In their opposition to the instant motion, the Government and Monitor also ignore the fact that Westchester continues to conflate the concepts of "fair housing" and "affordable housing," with the use of the term "fair and affordable housing," in violation of the Monitor's July 2010 command to cease in light of his finding that the term "obscures the County's obligations to AFFH."[22]

The Government and Monitor remain just as indifferent to the fact that Westchester has done nothing to use all of its housing policies and programs towards the goal of eliminating *de facto* residential segregation, as the County is required to do by Consent Decree, ¶ 31(a). This is despite the fact that the "unmet allocation" of the Affordable Housing Allocation Plan of the County's Housing Opportunity Commission in "eligible communities" is over 6,500 units, more

[21] It violates all rules of construction to treat the scope of two commands identically when one is explicitly limited to deal with one paragraph and the other is explicitly encompasses the purposes of the Decree as a whole and omits the limitation.

[22] *See* ADC's Memorandum in Support of its Motion to Intervene (hereafter, "MSMI") at 7-8.

than eight times the number of housing units that are involved in the Consent Decree's unit-specific obligations.[23]

In its opposition, Government only recites the fact that Westchester had to adopt such a policy,[24] as though the nominal adoption of the policy marked the end of the County's obligations. The parallel with treating boilerplate certifications of AFFH compliance as adequate while the jurisdiction actually does nothing to comply is uncanny. It defies belief that Westchester's stating, "We're adopting the policy, but we won't follow it" could be considered compliant with the obligations of Consent Decree, ¶ 31, yet that is what Westchester—through lack of action and through its announced refusal to tackle exclusionary zoning—has effectively done.

In summary, then: even now, after Westchester has brought the question of the adequacy of its AI to the Monitor for resolution,[25] and even after a series of new public statements from the County Executive announcing wide-ranging defiance of the Decree,[26] the Government continues to ignore the basic reality of Westchester's conduct. The County is not simply on the other side of routine, operational disputes over day-to-day Decree implementation, but rather is completely rejecting the basic terms, premises, and objectives of the Decree. The Government has never sought the Court's assistance pursuant to Consent Decree, ¶ 58 in order to remedy the County's systematic contempt of and for the Decree in any respect, and hasn't brought any of the issues

[23] *See* discussion and documentation in MSME at 5-7.

[24] USMO, at 5.

[25] The AI was originally intended to be in place before the end of 2009. The County's AI submissions have been inadequate for a variety of reasons, including those set out in MSMI at 4-6. One of the peculiar things about how long the problem has gone without resolution is that Consent Decree, ¶ 32 not only set forth substantive requirements for the AI—it must, *inter alia*, be compliant with the Fair Housing Guide and identify and take the actions needed to overcome impediments based on race or municipal resistance to the development of affordable housing—it also makes HUD approval an additional requirement. By definition, therefore, an AI that HUD has disapproved automatically means an AI that violates Westchester's obligations.

[26] *See* discussion at Point V, *infra*.

focused on in this brief to the Monitor for resolution.[27] Likewise, the Monitor has chosen not to raise any issue to the Court for pursuant to Consent Decree, ¶¶ 13(g), 39(b), or 39(d), or resolve them himself pursuant to his obligations arising from Consent Decree, ¶ 20(d).

POINT III.
THE MONITOR'S FAILURE TO SPECIFY REVISIONS AND ADDITIONS TO THE COUNTY'S NONCOMPLIANT IMPLEMENTATION PLANS VIOLATED THE CONSENT DECREE AND HAS SERIOUSLY COMPROMISED THE LIKELIHOOD THAT THE TERMS AND OBJECTIVES OF THE CONSENT DECREE WILL EVER BE VINDICATED

In its initial papers, ADC identified both the centrality of the Implementation Plan (IP) to the proper functioning of the Decree, and the fact that the Decree contemplated prompt adoption of a compliant IP.[28]

The Government's response—that Consent Decree, ¶ 20(d) does not list a date for the Monitor to act[29]—is wholly disingenuous. The Government and the Monitor know both that the document was originally due late in 2009, and that each of the steps of Consent Decree, ¶ 20 are measured in days, not months or years. Most importantly, the Government knows that the Decree was meant to work with an IP in place throughout its operational period. As HUD wrote in Dec. 2010, a compliant IP is "fundamental to the County fulfilling the commitments in made" in the Consent Decree.[30]

The Decree's specific two-strike rule before Monitor action is not consistent with the Monitor's decision to tell the County, in July 2009, to try for a third time, nor is it consistent with

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[27] The Monitor's office confirms that the only issues currently before the Monitor for resolution are the adequacy of the AI and the County Executive's veto of the source of income legislation. The former is, as mentioned, an issue referred to the Monitor by the County; the latter is an issue on which the Government subsequently asked for the Monitor's views. *See* GRD, ¶ 19.

[28] *See* discussion at MSMI at 2-4.

[29] USMO at 7, fn. 1.

[30] *See* Dec. 21, 2010 HUD letter to Westchester, GID, Ex. 1 at 2.

arriving at a point in time nearly 30 percent through the anticipated duration of the Decree without the IP's basic features in place.

And, it is clear that when the Decree uses the phrase "the Monitor shall specify revisions or additional items that the County shall incorporate into its implementation plan," Consent Decree, ¶ 20(d), it was not stating "shall specify revisions or additional items...at some indeterminate point in the future, perhaps years hence."

Despite assurances of progress,[31] there is still no IP in place. And the Monitor's next planned IP action deals only with an affirmative marketing plan,[32] leaving numerous fundamental issues unresolved.[33] (As for the marketing that is proceeding on the Cortlandt development, it is clear that the requirement that units be marketed to jurisdictions outside Westchester—like New York City—with high percentages of minority residents[34] is not being taken seriously.)[35]

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[31] At the June 7, 2011 scheduling conference, the Government noted that "the premise of much of ADC's papers are essentially that the County has failed to meet certain obligations [and] the government and monitor together has failed to enforce that." Conference Transcript at 9, GRD, Ex. J. [*See* ECF Doc. 362]. The Government said it anticipated progress by the middle of July in the form of acceptance of Westchester's Analysis of Impediments ("AI") and progress on the Implementation Plan ("IP"), and, thus, ADC's "premises may be undercut." *Id.* Unfortunately, ADC'S premises remain fully intact.

[32] In response to ADC's inquiry, the Monitor's office confirmed this. *See* GRD, ¶ 19.

[33] *See* each and all of the points raised in ADC's "August 2010 Implementation Plan: Still Just Window-Dressing," *available at* http://bit.ly/osCQRN, and *see* ADC's Feb. 2010 *Prescription for Failure,* GID, Ex. 14. *See also* each element of relief that ADC proposed in its Motion to Enforce [Doc. 343], denominated GRD, Ex. A.

[34] The failure to take New York City marketing seriously profoundly compromises the Decree. Not even counting some of the households with income below 50 percent of "Adjusted Median Income" (AMI) who would be eligible and qualified for housing, there are 215,379 African-American and Latino households in New York City with AMI between 50 percent and 80 percent of AMI (the lowest and highest of the eligibility ceilings in the Decree), far in excess of the number in Westchester or other county adjoining Westchester. *See* Reply Declaration of Andrew A. Beveridge, Sept. 14, 2011, ¶¶ 12-13.

[35] The application deadline for Cortlandt units is Sept. 30th. But testimony from the "co-developer" of the Cortlandt site (the Monitor's former assistant in this case) at a Sept. 7th Westchester legislative committee meeting made clear that, while workshops relating to the development had been and would be held in Westchester, none had been held outside Westchester. That co-developer gave no indication that there was any plan to hold such workshops outside of Westchester, and described only very limited advertising that had been done to that time (including an advertisement in the Amsterdam News on the Friday of Labor Day weekend). That is the classic form of "checking the box" rather than engaging in real and sustained affirmative marketing designed to succeed. *See* GRD, ¶¶ 20-23.

Indeed, if one examines the relief that ADC would seek if permitted to intervene,[36] the broad scope of what has not been dealt with becomes clear: location of units, demographically and otherwise; real requirements in terms of zoning change, site acquisition by the County, prevention of substandard sites (and greater financial leverage) by requiring mixed-income developments, to name just some.

As to the last, the harm of proceeding without an IP is clear. Take one example: the County Executive notes that the subsidies are running in excess of $100,000 per unit.[37] In fact, however, that problem (costs in excess of the average of $68,800 per unit contemplated by the Decree) is in significant measure the County's own creation. One basic form of leverage to make Decree dollars go further is the cross-subsidy created by market-rate units. That is, in a mixed-income development, the market-rate units help subsidize the affordable units.[38] But Westchester was happy *not* to have this subsidy: the County chose to sacrifice financial prudence for the ability to squeeze the maximum number of units to "count" without having to make zoning change. And the Monitor failed to require such a mixed-income approach in the IP pursuant to Consent Decree, ¶ 20(d), despite the Decree's insistence that Westchester explore all opportunities to leverage funds. Consent Decree, ¶ 15.[39]

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[36] *See* Motion to Enforce, *supra,* and Gurian Declaration in Support of Motion to Enforce [Doc. 351] (hereafter, "GED"), the latter denominated GRD B.

[37] *See* videotape of press conference held by the County Executive on Jul. 15, 2011, *available at* http://vimeo.com/2648591 (starting at approximately the 8:00 mark).

[38] *See,* Walsh Decl., ¶¶ 7-10.

[39] If there is no premium for market-rate units at a chosen development site, that is a very good signal of a site that is not desirable—and certainly not one that will be integrated into overwhelmingly market-rate towns and villages. Setting forth a safeguard like having a specified percentage of market-rate units in each development is precisely the kind of specificity to which Consent Decree, ¶ 18 speaks, and is precisely the sort of safeguard that the Monitor ought to have required so that the IP would meet the objectives of the Decree pursuant to Consent Decree, ¶ 20(d). That is why ADC would seek that kind of safeguard if permitted to intervene. *See* Motion to Enforce, relief paragraph (n).

Nowhere in the opposition submitted by the Government or by the Monitor is there any explanation of why the prompt exercise of authority under Consent Decree, ¶ 20(d)—such as rules defining locational requirements in demographic terms, requiring developments to be mixed-income, and imposing specific requirements for the County to acquire appropriate parcels to challenge exclusionary zoning[40]—would not have obviated most or all of the problems ADC has identified.

POINT IV.
THE GOVERNMENT'S CHARACTERIZATION OF THE STATE OF MUNICIPAL RESISTANCE TO DEVELOPMENT DEMONSTRATES ITS UNWILLINGNESS TO FULFILL ITS ROLE AS DEFENDER OF THE INTEGRITY OF THE DECREE

Either the Government has not done an independent assessment of the extent to which each municipality is or is not taking the requisite steps to promote both unit-specific development and the Decree's broader AFFH goals, or the Government has decided to withhold that assessment from the Court.

Instead, it relies entirely on a representative of the defendant—a County Legislator—to say that the County is "actively pursuing" housing projects "in many municipalities," and that the legislator submits that "to his knowledge" there is "no municipality "that has sought to obstruct the development" of Decree housing.[41]

This same legislator has recently stated "I have pledged to vote against bringing any lawsuits" to overturn zoning.[42] That is, the Legislator whose *bona fides* the Government

[40] In other words, IP provisions like much of the relief that ADC has sought and would seek in a motion to enforce. *See* Motion to Enforce, relief provisions, and GED.

[41] USMO at 9.

[42] *See* Pleasantville-Briarcliff Mano Patch, "Smith/Noona Both Seek Independence Party Votes," Aug. 12, 2011, *available at* http://pleasantville.patch.com/articles/smithnonna-both-seek-independence-party-votes.

seeks to promote as a "supporter" of the Consent Decree[43] has taken a position that is completely at odds with the requirement that Westchester initiate such litigation as is appropriate against municipalities. Consent Decree, ¶ 7(j). A determination of "appropriateness" requires a willingness to examine individual circumstances, not an *a priori*, across-the-board, regardless-of-circumstance rejection of the tool.

Adequate enforcement of the Decree requires the Government to look at facts on the ground—like the fact that there has been no zoning change, and the fact that municipal cooperation could only be tested if Westchester tried to foster the development of prime sites through rezoning—something the Government knows the County has steadfastly refused to do.

ADC tried (prior to the making of its motions) to catalyze the Government into action not only through analysis and advocacy, but through bringing specific evidence of lack of municipal cooperation with ADC's own interest in pursuing AFFH development in Westchester. ADC wanted and wants to invest in Westchester to develop housing units that most directly meet the goals and objectives of the Decree, and made relevant inquiries of the County and of numerous municipalities.[44] But both Westchester and those municipalities were strikingly unresponsive, and gave obvious indicia of failing to take steps to comply with Decree requirements.[45]

In truth, continuing municipal resistance in Westchester is common knowledge.[46] Despite all this, the Government continues to ignore the fact that lack of municipal receptivity—

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[43] USMO at 9.

[44] *See* GRD, ¶¶ 2-15;

[45] *Id.*; see also discussion, infra, at Point VII (C).

[46] *See* Declaration of Jerrold M. Levy, Sept. 13, 2011 (hereafter, "Levy Decl."), ¶¶ 9-11 ("I monitor developments in terms of barriers and opportunities to affordable housing in Westchester very closely, and there is simply no evidence that overwhelmingly white municipalities have changed their traditional resistance to 'outsiders' or to affordable housing, and no evidence that profoundly exclusionary zoning is being dismantled in material ways…let alone that there is a groundswell of municipal 'cooperation' in working to end segregation in the county….No one in Westchester County believes that there is cooperation towards meeting the housing desegregation goals of the Decree: it is well understood that the idea is to cooperate to try to avoid making change. In other words, to hope that

historically the heart of what needs to be addressed if there is to be any hope of AFFH[47]—is hindering the Decree's implementation.

POINT V.
A "STRATEGY" OF "COLLABORATION AND CONSENSUS BUILDING" UNDERMINES THE DECREE IN THE FACE OF A COUNTY EXECUTIVE WHO HAS REPEATEDLY ANNOUNCED UNEQUIVOCALLY THAT HE WILL NOT COMPLY WITH THE DECREE, AND WHO REJECTS THE FUNDAMENTAL PREMISES OF THE DECREE

In Jan. 2010, the County Executive said in connection with the possibility of taking municipalities to Court: "I won't do that. I will not do that."[48] Shortly before the Government filed its opposition papers, the County Executive said, "I'm not going to sue municipalities and demand they rip up their zoning codes."[49] Just last week, the County Executive said on national television in connection with the need to change local zoning: "We're not going to stand for that. And if this is the test case for the rest of America, we're going to hold firm and make sure they don't succeed."[50]

This is not a context where "collaboration and consensus building"[51] has made any headway except to the extent that there is, effectively, a consensus on not enforcing critical elements of the Decree. As noted in connection with County Legislator Noona, an absolute

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the Monitor will continue to allow Westchester to 'count' units on parcels where no one else would choose to live").

[47] *See* Hanley Decl., ¶¶ 1-5; Walsh Decl., ¶ 2.

[48] Westchester Journal News interview with County Executive Rob Astorino, Jan. 27, 2010, *available at* http://www.lohud.com/videonetwork/63709673001/Interview-with-Astorino (slightly over 32 minutes into the video).

[49] Rye Patch, "County Executive: HUD Has a "Utopian Vision" for Westchester,"Jul. 27, 2011, *available at* http://bit.ly/q85FjF.

[50] Sean Hannity video interview of County Executive Astorino on Fox News, Sept. 7, 2011, *available at http://bit.ly/nSnxFr,* at approximately the 7:00 mark. In the same interview, deriding the idea that the County would have to identify ways to deal with local opposition to affordable housing development, he jokes, "What are you going to do to combat *opposition*? so that's like tear gas? I don't know…when people are against it [laughing]. All these crazy things…" (at approximately the 5:10 mark). In the Monitor's Jul. 2010 report to the Court, at p. 9 [Doc. 329], the Monitor noted that "a critical factor in compliance" is "tone at the top," explaining that, "Employees take their cues from their leaders' messages, how they spend their time, and how they employ their resources," and promising reviews of tone—reviews that have not been forthcoming.

[51] USMO, at 10.

refusal to utilize a tool commanded to be used in each of the two material provisions of Consent Decree, ¶ 7(j)—a tool identified as appropriate in the opening clauses of the Decree[52]—violates the obligation to use all tools where appropriate, assessing appropriateness on a case-by-case basis.

Moreover, the County Executive's continuing insistence that Westchester is not segregated "in any way"[53] means: (1) that the County refuses to understand how the term "segregation" is used in the AFFH context; and (2) that County programs and policies are not being used, as required by Consent Decree, ¶31(a), to end the segregation that so clearly does exist, including high levels of "dissimilarity" and "isolation," 75.97 percent of populated census blocks groups with non-Latino African-American population of less than 3.0 percent, and 25 towns and villages with non-Latino, African-American population of less than 3.0 when adjusting for "groups quarters" population.[54]

Indeed, the County Executive insists that "what was agreed to" in the Consent Decree was "an affordable housing settlement" and "not an integration order,"[55] rejecting the fundamental purpose of the Decree. He claims that, "In large measure the housing patterns of our country have been built around the clustering of ethnic groups who came together to form

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[52] *See* Consent Decree at p.2, ¶ 1.

[53] *See* News12, "Astorino fights changes to affordable housing settlement," Jul. 28, 2011, http://www.news12.com/articleDetail.jsp?regionId=1&region_name=WC&articleId=288014&position=1&news_type=news at approximately the 55 second mark.

[54] *See* MSME at 4-5 and Declaration of Andrew A. Beveridge in Support of Motion to Enforce, May 30, 2011 [Dkt. # 346], denominated GRD Ex. D, *passim,* for documentation of the scope of continuing segregation. *See* Reply Declaration of Andrew Beveridge in Support of Motion to Intervene, Sept. 14, 2011 (hereafter "BRD"), *passim,* for a discussion of the disingenuousness of Westchester's claims of "diversity" and lack of segregation. Westchester tries to discount Dr. Beveridge's initial declaration by suggesting a contractual conflict-of-interest. In fact, the claims of conflict (Westchester Brief at 22-24) are fanciful, *see* BRD at ¶¶ 15-17, and ignore two fundamental facts: Census data are public data and the County is entirely unable to rebut the substance of Dr. Beveridge's findings in any respect.

[55] *See* News 12, "Exec. Astorino goes to Washington," Jul. 27, 2011, *available at* http://bit.ly/rtmwKW at approximately the 1:40 mark.

support systems, maintain cultural traditions and accumulate political power."[56] It is difficult to imagine a historically less accurate view of the role of discrimination and segregation in the creation of housing patterns in the United States.

To try to find a needle of compliance or "progress" in a haystack of resistance to any meaningful change demonstrates an unwillingness to vindicate the Decree, and, as discussed *infra* Point VIII (B), an unwillingness to protect ADC's interest.

POINT VI.
CONTRARY TO THE CLAIMS OF THE GOVERNMENT AND THE MONITOR, THE ENFORCEMENT PROCESS HAS FAILED TO HEED CIVIL RIGHTS CONCERNS

The Government and Monitor describe a consultative process regarding the Government and the Monitor's oversight that simply has not existed. The Monitor's practice has been to embrace ongoing and substantive participation only from those who are prepared to work with Westchester's refusal to accept the premises and broader objectives of the Decree, and not those who look to have critical Decree provisions enforced. Thus, for example, the head of the "Housing Action Council" continues to participate fully despite publicly undermining the Decree ("There is no stick that I'm aware of" that can be used against municipalities, she has said).[57] Further, the Monitor and HUD have failed to work with the head of the Enhanced Section 8 Outreach Program, despite his vast experience in achieving desegregative moves for families in Westchester.[58] And, when close to 100 civil rights groups urged the Monitor to heed ADC's *Prescription for Failure* report and, *inter alia,* require that the IP include a plan for the County to acquire interests in land and to affirm the County's authority (and intention) to overcome

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[56] *See* County Executive's op-ed in Westchester Journal News, Jul. 27, 2011, *reprinted at* http://www3.westchestergov.com/images/stories/pdfs/opedhud.pdf.

[57] *See* Westchester Journal News, "Yorktown holds forum on impact of County housing deal," Nov. 22, 2009, GID, Ex. 17.

[58] *See* Levy Decl., ¶¶ 2-8.

municipal resistance,[59] the Monitor ignored that broad-based civil rights counsel.[60] Thus, for whatever nominal contacts there have been, the reality is that civil rights voices seeking to further the goals and premises of the Decree have consistently been stymied.[61]

The consequences of non-enforcement are enormous. This Decree was widely seen as the circumstance where the Government had maximum leverage to achieve desegregation in housing, and to demonstrate to jurisdictions throughout the country that AFFH was being taken seriously. Unfortunately, the signal that has been sent is that resistance to a lawful civil rights order—resistance to desegregation—will be tolerated.[62]

POINT VII.
ADC HAS A "SIGNIFICANTLY PROTECTIBLE INTEREST" SUFFICIENT TO MEET RULE 24 STANDARDS

A. BOTH THE UNITED STATES AND WESTCHESTER COUNTY IGNORE APPLICABLE LAW WITH RESPECT TO RULE 24 STANDARDS

Both the United States and Westchester County either ignore, or seek to narrowly construe, applicable case law respecting Rule 24 generally, and the interest component more specifically. The United States, for example, makes no mention of the rule, recognized by the

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[59] Feb. 23, 2010 letter from civil rights groups to James A. Johnson, GID Ex. 15.

[60] *See* GID at ¶¶ 31-32. *See also,* Walsh Decl., ¶¶ 11-12.

[61] As pointed out in MSMI at 23, the Monitor's views that it was important for "major stakeholders" to contribute to the development of the affirmative marketing plan, did not lead to the inclusion of civil rights stakeholders—either ADC or any other civil rights organization.

[62] See Hanley Decl., ¶¶ 8-9 ("Decree enforcement was seen as being able to send a message to jurisdictions across the country that AFFH would hereafter need to be taken seriously. In the absence of such enforcement, unfortunatetly, exactly the opposite message has been sent); Declaration of V. Elaine Gross, Sept. 14, 2011 (hereafter, "Gross Decl."), ¶¶ 6-7 (noting that an insistence that change be made is necessary in civil rights and that "I have seen the cost" of the absence of such insistence: "opportunities to overcome segregation stymied because of an unwillingness of the part of people of good will to recognize that the first order of business is to change the facts on the ground even before 'hearts and minds' are changed"); Levy Decl., ¶¶ 20-21 ("I remember the hope engendered by the entry of the Decree, and remember a high-ranking HUD official being quoted as promising to hold Westchester's feet to the fire. More than two years later, Westchester continues to openly defy the Decree. Notably, it has been ADC—not the Government or the Monitor—who has consistently and accurately been ringing the alarm"); Walsh Decl, ¶ 11-13 (pointing out that Fair Share Housing Cener and more than 90 other civil rights groups and advocates from across the country had written to the Monitor in Feb. 2010 to say, *inter alia,* that "[T]his case has national significance. Proper implementation of the desgregation goals of the Decree 'is critical to the future of fair housing, integration, and regional equity…'").

Supreme Court in *Diamond v. Charles*, 476 U.S. 54, 68 (1986) that "certain public concerns may constitute an adequate "interest" within the meaning of [Rule 24(a)(2)]." *Diamond* describes ADC's burden, in the context of this matter of substantial public concern, as one of showing "a significantly protectable interest," and ADC meets that standard.

B. THE ADC'S PAST PARTICIPATION IN THIS LAWSUIT, AND ONGOING MISSION TO COMBAT RACIAL DISCRIMINATION IN HOUSING, ARE SUFFICIENT INTERESTS TO PERMIT INTERVENTION UNDER RULE 24

Case law cited by ADC in its initial brief, *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972) and *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983), supports the view that the ADC's continuing civil rights interest in enforcement of relief in this case is sufficient to permit intervention. The United States views both cases from an improperly narrow perspective, and also mischaracterizes the factual posture of the latter. The point of *Trbovich* is that the Supreme Court permitted intervention, even though the intervenors did not, under the applicable statutory scheme, have independent grounds to bring their own action. *Trbovich*, at 538. Their past participation in the underlying administrative action, plus their interest in union democracy, were sufficient despite their inability to bring their own lawsuit.

Similarly, under *Sagebrush*, the Court found sufficient the intervenors' prior participation in the underlying administrative action, taken together with its overriding interest in the environmental issues involved. *Sagebrush*, at 527. Contrary to the United States' characterization,[63] *Sagebrush* was not a case where the intervenors' interest was based upon a legislative initiative the intervenors had supported. Rather, it rested upon the intervenors' participation in the underlying administrative proceeding that resulted in creation of the conservation area under challenge. Finally, while the United States argues that *Sagebrush* was

[63] USMO, at 17.

"a special case" and may no longer be "in effect,"[64] as recently as January, 2011, the Ninth Circuit treated *Sagebrush* as controlling authority for basic Rule 24 principles. *Wilderness Society v. United States Forest Service*, 630 F.3d 1173, 1179-80 (9th Cir. 2011).

The United States cites *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n Inc.*, 471 F.3d 377, at 390 (2d Cir. 2006) as authority for its position that ADC does not have a protectable interest under Rule 24.[65] However, *MasterCard* supports the ADC, not the United States. ADC's absence from this litigation does result in harm to its interests and its presence will allow it to protect those interests. That is what Visa failed to show in *MasterCard*, and was the grounds for denial of intervention there. *MasterCard*, 471 F.3d at 390 ("Visa's ability to protect its interest will not be impaired or impeded *because* it is denied intervention in this case. As we have discussed, any harm to Visa's interests would result from FIFA's alleged conduct in breaching its contract with MasterCard and granting the sponsorship rights to Visa. And Visa cannot change this fact through intervention here since it is a stranger to the contractual dispute between MasterCard and FIFA"). Just as the intervenors in *Trbovich* and *Sagebrush* had a demonstrated interest in the public issues involved in those cases (union democracy and environmental protection, respectively), so the ADC has a demonstrated interest in the civil rights issues involved in this case. And, just as the intervenors in *Trbovich* and *Sagebrush* had participated in the prior administrative proceedings leading up to the litigation in those cases, here the ADC has participated in the liability phase of this litigation resulting in the relief now at issue. Such are sufficient grounds to meet the "interest" prong of the Rule 24 standards.

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[64] *Id.*, at 18

[65] *Id.*, at 12.

C. ADC'S CIVIL RIGHTS INTEREST IS NOT AS NARROWLY DRAWN AS THE UNITED STATES AND WESTCHESTER PORTRAY

The ADC's interest is not, in any event, as narrowly cabined as the United States portrays. Both the US and Westchester are fully aware, not just of ADC's interest in the enforcement of the Court's Order as an outgrowth of its litigation efforts and its pursuit of its overall civil rights goals, but they are also aware of ADC's interest in investing in the development of housing in Westchester jurisdictions that will actually reduce segregation there. As part of its civil rights activities, the Anti-Discrimination Center has sought to identify opportunities whereby it can invest in the development of housing in Westchester that would require the elimination of exclusionary zoning barriers—exactly the housing provided for by the Consent Decree in this case.[66] That type of investment is supposed to be facilitated both by the County and by each of the municipalities, but was not. The Government's failure to hold the County to its obligations (1) to promote AFFH housing, and (2) to insist that municipalities promote such housing means that ADC's interest in development is more difficult to realize than it would otherwise be.[67]

Thus, while the ADC has shown a significantly protectable interest arising from (1) its past participation in this lawsuit, and (2) its civil rights mission to combat racial discrimination,[68] it also meets the "direct/substantial/legally protectable" interest standard through its particular efforts to invest in housing in Westchester County that affirmatively furthers fair housing. The reception given to those efforts by the County itself and the various municipalities shows the

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[66] *See* GRD, ¶¶ 2-15.

[67] *Id.* Surely there are a few parcels of land within the most segregated of the eligible municipalities that are currently zoned for single-family purposes but could be reasonably upzoned, but neither Westchester nor its most segregated municipalities are identifying any.

[68] *See* MSMI, ¶¶ 18-21.

direct injury threatened by the lack of enforcement of the Consent Decree and therefore, ADC meets applicable "interest" standards for intervention.

Westchester County's related arguments that the injunctive relief obtained in the case was based solely upon the Housing And Community Development Act ("HCDA") claims raised by the United States,[69] and that ADC is unable to bring a private action under the HCDA[70] are either incorrect or ignore applicable Supreme Court authority. The first argument is incorrect because it was ADC's False Claims Act action that provided the monetary basis for the injunctive relief ordered. Further, ADC's interest in achieving non-monetary relief and the potential FCA liability of more than $150 million plainly contributed to obtaining the overall relief. It was, then, both the FCA and HCDA claims that formed the basis for the injunctive relief. Further, the Supreme Court's decision in *Trbovich*, 404 U.S. at 531-32, makes clear that the absence of a private remedy is not grounds to deny intervention.

The argument of the United States[71] that the relief phase of this lawsuit "does not involve the regulation of ADC's conduct" is also an overstatement. The ADC's conduct is both limited and directed by the relief phase of this litigation. Were the Consent Decree being implemented, barriers to ADC's investment in desegregative housing in Westchester would be removed; the absence of compliance leaves ADC without those opportunities as a private investor. Were the Consent Decree being implemented, ADC's broader civil rights interest would be furthered, not frustrated, as well.

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[69] Westchester County's Memorandum of Law in Opposition to Anti-Discrimination Center's Motion to Intervene ("WCMO"), at 3. The United States makes a similar argument (USMO, at 15).

[70] WCMO, at 2, 7.

[71] USMO, at 16.

The United States also argues that ADC's interest in this lawsuit ended with the settlement[72] and that, effectively, the ADC has no interest in the remedial phase of the litigation. This narrow interpretation of when litigation ends is reflective of the overall approach of the United States to this Rule 24 question. There is no reason to treat the litigation as ending with the settlement, especially when a seven-year remedy phase is provided. Courts have recognized that an intervenor may have sufficient grounds to intervene in the post-judgment phase of a case, even for the sole purpose of monitoring performance under Court-ordered relief. *Liddell v. Caldwell,* 546 F.2d 768, 771 (8th Cir.1976), (allowing for intervention in the remedy stage of school desegregation case); *Hodgson v. United Mine Workers,* 473 F.2d 118, 129 (D.C.Cir.1972) (reversing denial of intervention where purpose was to monitor implementation of relief).

That the False Claims Act usually terminates a relator's role at the award of relief actually points to the appropriateness of ADC's intervention in this particular case. Normally, a False Claims Act case ends with the recovery of fraudulently obtained funds by the government, and an award of a share of those monetary proceeds to the relator. Injunctive relief—relief that no one can deny was generated by the eve-of-trial posture of the False Claims Act litigation that ADC was still prosecuting without the assistance of the Government—is extraordinary. But this extraordinary relief is precisely what was sought by ADC from the outset in this case.[73] It speaks powerfully to the fact that the *nature of ADC's interest was itself extraordinary in the False Claims context,* including but extending well beyond the formal role of a relator who combats fraud on the Government's behalf.

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[72] *Id.*, at 14.

[73] Asked at his Jan. 2008 deposition what ADC was hoping to achieve from the litigation, ADC's Executive Director answered, "A change in the conduct of Westchester County and a change in the conduct of other federal grant recipients who have not taken the obligation to affirmatively further fair housing seriously," and explained further, "[W]e're interested in a resolution where most of the money could go to fund affordable housing in Westchester County in areas that have been traditionally exclusionary with a substantially lower amount of money going to the center as relator." *See* GRD, ¶¶ 16-18.

There is no reason why this relator's watchdog role—which it has continued to play on an informal but intensive and continuing basis—should not be formalized now that it is clear that the Government and Monitor continue to sacrifice major portions of the Decree.

Here, ADC's interest in advancing the its civil rights interest, including its related interest in investing in the development of housing in communities where the goal of affirmatively furthering fair housing will be furthered are both being frustrated by its not participating as a litigant here, and will be furthered by participating to advance positions that the United States, given its different perspective and interests, has chosen not to advance.

POINT VIII.
ADC'S INTEREST WILL BE FURTHER IMPAIRED WITHOUT INTERVENTION, AS THE UNITED STATES DOES NOT SEEK TO REPRESENT ADC'S INTERESTS

A. *RIOS* IS NOT CONTROLLING ON THE ISSUE OF IMPAIRMENT

The United States argues that "*Rios* [*v. Enterprise Association Steamfitters Local Union*, 520 F.2d 352 (2d Cir. 1975)] compels the conclusion" that, even if ADC does have a protectable interest, denial of intervention would not impair that interest and its interest would be adequately represented by the "government and the Monitor."[74] In making that argument, the United States relies upon a single sentence in the *Rios* decision—that the intervenors there had failed to make a "showing that the Administrator, who as the agent of the district court is responsible for administration of the [affirmative action] plan, would refuse to enforce any rights" the proposed intervenors have under the Court's order.[75] Unlike the applicants for intervention in *Rios*, ADC has shown that neither the United States nor the Monitor are enforcing the Consent Decree in a

[74] USMO, at 20.

[75] *Id.*, at 357.

fashion that vindicates the Decree's AFFH goals – goals that have been a demonstrable interest of the ADC throughout both the liability and remedy phase of this litigation.

Rios was also substantially different from this case, in that the putative intervenors there were "essentially strangers to Title VII and to the aims of this lawsuit, and if not adverse, are at least in a neutral position with regard to the goals of Title VII." *Rios*, 520 F.2d at 357. In light of the demonstrated failure of the United States and the Monitor to enforce this Court's Order, *Rios* does not compel the conclusion that ADC's interests are adequately protected, thereby foreclosing intervention.

B. ADC HAS SHOWN THAT THE EXISTING PARTIES ARE NOT ADEQUATELY REPRESENTING ITS INTERESTS

Both the United States and Westchester County are notably silent regarding ADC's argument that it has made the requisite showing of inadequacy in light of the "well-documented history" of HUD's lax enforcement of the affirmatively-furthering regulations at issue in this case, and HUD's failure to move to enforce the Court's Consent Decree.[76]

ADC has shown that HUD has failed to assure compliance with the Consent Decree in this case.[77] Moreover, that failure is part of a long history of lax enforcement of its statutory obligation to affirmatively further fair housing.[78] Indeed, in his January 20, 2010 statement before the House Subcommittee on Housing and Community Opportunity, HUD's own Assistant Secretary for Fair Housing and Equal Opportunity has acknowledged that, "HUD has not always

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[76] MSMI, at 22-24.

[77] *Id.*, at 4-7.

[78] *See, e.g., Walker v. U.S. Dept. of Housing and Urban Development*, Civil Action 85-cv-1210-R (N.D. Tex. June 12, 1996) (unpublished order), GRD, Ex. L ("HUD has also admitted liability for 'claims arising under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3608 et seq., insofar as those claims are based on HUD's failure to affirmatively further the goals of fair housing in relationships with the DHA and the City in the period 1968 up to January 20, 1987."); *Thompson v. HUD*, 348 F.Supp.2d 398, 424-25, 463-64 (D. Md. 2005) (concluding that HUD violated its duty to affirmatively further fair housing in the Baltimore housing market during the period from January 31, 1989 through January 31, 1995).

fulfilled its obligation to insure that our money is spent in ways that affirmatively further fair housing."[79]

HUD's current-day failure is not limited to Westchester. These problems continue to arise elsewhere, including, for example, Nassau County, and New York State as a whole.[80]

While both the United States and Westchester County refer to *Mausolf v. Babbitt*, 85 F.3d 1292, 1301 (8th Cir. 1996), where the Court found that the presumption of adequacy had been rebutted in light of the history of lax enforcement by the governmental agency involved, neither the United States nor Westchester County address why HUD's history of lax enforcement does not rebut that presumption here.

1. ADC Has Shown More Than Differences in Strategy

The United States argues that the ADC has only raised "differences in strategy," and that any differences that are merely differences in strategy . . . are not enough to justify intervention as a matter of right." [citing *United States v. City of Los Angeles*, 288 F.3d 391, 402 (9th Cir. 2002).[81] However, the differences here are more than differences in litigation strategy. A key part of the issues that separate the parties to this motion is what ADC understands to be the Government's and the Monitor's substantial disregard of the terms of the Consent Decree that ADC relied on to agree to the termination of the litigation phase, and what the Government characterizes as ADC misconstruing the Consent Decree.[82]

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[79] Statement of John D. Trasviña to Subcommittee on Housing and Community Opportunity of House Financial Services Committee, Jan. 20, 2010 at 1. GRD Ex. K.

[80] *See* Gross Decl., ¶¶ 2-5 (describing HUD's historic failure to enforce AFFH regulations in the context of Long Island, the inadequacy of Nassau's most recent (post-Consent Decree) Analysis of Impediments, and HUD's failure to sanction Nassau for that failure); Hanley Decl., ¶¶ 6-7, 10 (describing the historic and current failure of New York State or the upstate municipalities with which Hanley works to AFFH, and HUD's historic and current failure to take steps to compel compliance).

[81] USMO, at 21.

[82] *Id.*, at 1.

Where parties have adopted differences in the interpretation of the governing legal authority in the case, those differences are "far more than differences in litigation strategy." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 444 (9th Cir. 2006) (concluding that the presumption of adequate representation was overcome where the United States adopted a more narrow interpretation of the governing statute at issue in the case in contrast to the interpretation of the intervenors). While *Lockyer* involved interpretation of a Congressional Amendment and this case involves interpretation of a consent order, the underlying principle nonetheless applies.

Finally, nowhere in its brief does the United States argue that it will adequately represent the ADC on the grounds that the United States itself is capable and willing to make all of the intervenor's arguments and that the ADC will not offer any necessary element to the proceedings that the other parties would neglect. On the contrary, the Government has shown that it will not. Under a line of Ninth Circuit cases, that disparity demonstrates that the indicia of adequate representation are lacking. *Fresno County v. Andrus*, 622 F.2d 426, 438-39 (9th Cir. 1980) (citing *Blake v. Pallan*, 554 F.2d 947, 954-55 (9th Cir. 1977). *Accord*, *Sagebrush*, 713 F.2d at 528.

In light of the foregoing, ADC has made the requisite showing that its interests are not being adequately represented.

POINT IX.
THE REQUEST FOR INTERVENTION IS TIMELY

Both the United States and Westchester County argue that intervention should be denied because ADC's application is untimely.[83] Both argue that ADC should have sought intervention

[83] USMO, at 22-23; WCMO, at 11-13. Westchester also argues that ADC's motion is defective because it did not include a pleading. However, the motion to enforce is, in this case, sufficient to meet the pleading requirement.

before the Consent Decree was signed. But of course, the ADC was a party to the lawsuit at that stage of the case, and there was no basis to move to intervene to seek enforcement of the Consent Decree until the pattern of lack of compliance and enforcement became sufficient to seek the Court's assistance. The position of the United States that ADC should have intervened sooner is inconsistent with the failure of the United States itself to seek the Court's assistance.

It is well settled that a post-judgment application to intervene may be timely. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394, (1977) (allowing post-judgment intervention where purpose was to appeal denial of class certification in light of change of position of class representatives respecting appeal). Here, as in *McDonald*, the intervention request is timely as ADC has moved for intervention as soon as it became clear that its interests were not being protected by the United States and that Westchester was in significant non-compliance. While Westchester relies upon the Second Circuit's decision in *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593 (2d Cir. 1986) to argue that ADC's request is untimely,[84] that case is significantly different from the facts here. Notably, the Yonkers applicants for intervention sought to intervene to oppose the relief measures being implemented in the case, and the Court denied relief in light of the risk of loss of HUD funding and the need to provide expeditious relief. *Yonkers*, 801 F.2d at 595. That is the opposite of ADC's position here, where it seeks to intervene to assure effective and expeditious relief.

Other cases have authorized intervention solely for the purpose of monitoring or participating in the relief phase alone. *Liddell v. Caldwell,* 546 F.2d 768, 771 (8th Cir.1976) (treating an application for intervention in the remedy stage as timely in large measure because

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Fleming v. Citizens for Albemarle, Inc., 577 F.2d 236, 237-38 (4th Cir.1978) (concluding that a motion to set aside order and for new trial were sufficient for pleadings under Rule 24).

[84] WCMO, at 11.

the desegregation plan required by the consent decree had not yet been adopted); *Hodgson v. United Mine Workers*, 473 F.2d 118, 129 (D.C.Cir.1972) (reversing denial of intervention where purpose was to monitor implementation of relief). Similarly here, ADC seeks intervention at the remedy phase of the litigation, and the application to intervene, therefore, should be deemed timely.

Conclusion

On the basis of the foregoing, the Court should grant the motion to intervene of the Anti-Discrimination Center.

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