ANTI-DISCRIMINATION CENTER, INC.

"ONE COMMUNITY, NO EXCLUSION "

May 6, 2014

VIA EMAIL

David J. Kennedy, Esq.
Chief, Civil Rights Unit
United States Attorney for the Southern District of New York
86 Chambers Street, 3rd Floor
New York, New York 10007

Re: U.S. ex rel. Anti-Discrimination Center v. Westchester County

Dear David:

I write to ask you to contact the court to retract the astonishing misinterpretation of the core provision of the consent decree, paragraph 7(j), which you advanced at the status conference on May 2nd. It's a construction that neuters the decree and rewards maximum intransigence. Beyond this case itself, your stated position would set a very dangerous precedent.

You told the court that the county is only obliged to take legal action "when *it* sees barriers [to] fair housing" (emphasis added) and that "because the county says that none of the municipalities within its areas have exclusionary zoning the obligation to file a lawsuit is not triggered" (Transcript, pp. 17-18). These propositions falsely limit the scope of the order.

The obligation to act pursuant to paragraph 7(j) does not depend on defendant's *subjective* view of the circumstances. The first obligation of paragraph 7(j) states:

> In the event that a municipality does not take actions needed to promote the objectives of this paragraph, or undertakes actions that hinder the objectives of this paragraph, the County shall use all available means as appropriate to address such action or inaction…

The County's mandatory obligation ("the County shall use all available means…") is very clearly triggered by the occurrence of the event described in the preceding subordinate clause ("In the event that a municipality does not take actions…").

Either those events have or have not happened. Despite the fact that neither the Government nor the Monitor has asked the court to hold Westchester accountable for its failure to use "all available means as appropriate to address such action or inaction," both the Government and the Monitor cannot deny that barriers to fair housing choice (both in the form of

exclusionary and otherwise restrictive zoning) *do* exist and that many municipalities have not acted to remedy those barriers.

The idea that a defendant who has, as you put it at the conference, "fail[ed] to come to grips with the law of exclusionary zoning" (Transcript, p. 18) would by virtue of an obstinate, head-in-the-sand approach earn itself an exemption from a mandatory obligation under a court order is absurd. A defendant cannot avoid a duty by pretending that the conditions giving rise to that duty do not exist.

The second obligation of paragraph 7(j) -- which you chose not to address at the conference -- states:

> The County shall initiate such legal action as appropriate to accomplish the purpose of this Stipulation and Order to AFFH.

Here, again, the question for the court (were the U.S. Attorney to seek to hold Westchester accountable) would be, "Did Westchester initiate such legal action as appropriate or not?" In theory, there could be borderline situations where a defendant has initiated some legal action and where it argues that such legal action was sufficient. But in this case, as you know, Westchester does not have that kind of argument available because it has made clear its refusal, across the board and regardless of circumstance to undertake such legal action.

In a similar vein to the remarks I quoted earlier, you also suggested to the court that a lawsuit brought by Westchester would be ineffectual:

> [O]nce we get the county to agree that there are those towns that have exclusionary zoning then the county is well suited to bring litigation against those. But as it stands now, if I am one of those towns the county is ordered to file suit against me, if I am defense counsel for one of those towns I am going to like my chances. That's not a good approach (Transcript, p. 18).

This comment, of course, is in the first instance diversionary: the integrity of court orders would suffer immeasurably if courts couldn't be asked to address the threshold question of a whether an order has been violated until a defendant *agrees* that its obligation to act has arisen.

Beyond that, it is bizarre to suggest that a mandatory obligation should be ignored or deferred for purposes of court intervention because a defendant has taken steps to sabotage its ability to pursue such an obligation. If such a policy were followed more broadly, there is nothing to deter others subject to court orders from pursuing a strategy of rejection and denial.

If the U.S. Attorney were truly concerned that Westchester would be foiled in performing its duty because of the resistant and recalcitrant steps it has taken, the answer would not be to hope that the defendant will have a come-to-Jesus moment. Instead, the U.S. Attorney would have first established to the court that Westchester had violated its paragraph 7(j) obligations and

then have asked the court, as part of a remedial order, to appoint a Special Master to stand in the place and stead of the County to litigate the required claims in the name of the County.

You can tell the court that the problems that have arisen in enforcement of the consent decree are just "bumps in the road" or that you have a "successful strategy" (Transcript, p. 15), but the fact remains that, back in 2011, your office filed a brief with the Magistrate Judge stating the following:

> The County Executive's publicly announced refusals to engage in litigation, combined with the County's failure to specify appropriate circumstances for legal action, gravely undermine paragraph 7(j)…which expressly requires that the County "shall use all available means as appropriate," including "legal action," to address a municipality's failure to promote the objectives of the Settlement. No one can expect that the County will ever use legal action to obtain compliance – as it is required to do – if the County Executive is hostile to complying, and the County is evasive in complying, with a court-ordered Settlement.[1]

Despite that statement, the U.S. Attorney didn't then seek to hold Westchester to account for its failure to *act.* Now, more than two years later, the U.S. Attorney's "successful strategy" has yielded more defiance from the county executive and no action from the county. And the U.S. Attorney won't even now adhere to the position that the County has "gravely undermine[d] paragraph 7(j)."

That's not progress.

Very truly yours,

Craig Gurian

Digitally signed by Craig Gurian
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Craig Gurian

[1] Response of the United States to Westchester County's Objection to Monitor's Report and Recommendation, pp.21-22 (Dkt. 387).