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,

v.

WESTCHESTER COUNTY, NEW YORK,

Defendant.
----------x

Case No. 06 Civ. 2860 (DLC)

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

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PRELIMINARY STATEMENT

The Motion to Intervene made by the Anti-Discrimination Center of Metro New York, Inc. (the "Relator" or "ADC") is procedurally and substantively deficient, and should be dismissed in its entirety.

ADC is barred from intervening in this closed action for any purpose by: (1) the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* ("FCA"), (2) the settlement of the Government's claims under the Housing and Community Development Act ("HCDA"), 42 U.S.C. § 5311(b), (3) the Settlements of the FCA claims in the underlying matter, (4) *res judicata* and collateral estoppel, and (5) the requirements under Rule 24 of the Federal Rules of Civil Procedure.

Moreover, ADC does not provide any factual support to justify intervention. Indeed, the declarations and the exhibits that ADC has provided to this Honorable Court amount to nothing more than an improper attempt to interject its opinions, interpretations, and preferred terms into the two-year-old Stipulation and Order of Settlement and Dismissal that was "So-Ordered" by this Honorable Court on August 10, 2009 (the "Government Settlement"). Furthermore, ADC inappropriately relies on an expert under contract with the County at the time of filing the instant motion. Such attempts to circumvent the express terms of the Government Settlement, and by extension, the power of the Court-appointed Monitor, should not be permitted.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

In 2006, ADC filed a civil action as a relator under the *qui tam* provisions of the FCA against Westchester County, New York (the "County") for a share of the monetary damages allegedly sustained by the United States of America (the "Government") as a result of the County's alleged violations of the FCA. On or about August 10, 2009, the Government submitted a notice of intervention pursuant to 31 U.S.C. § 3730(b)(4) and filed a complaint-in-intervention (the "Government's Complaint"). In addition to the claims raised by ADC under

the FCA, the Government's Complaint included claims under the HCDA, seeking mandatory and injunctive relief to which ADC was not entitled. Indeed, the HCDA does not provide for a private right of action. This Court granted the Government's request to intervene on August 10, 2009, and adopted its Complaint. *See* Docket Entry No. 319. Following substantial negotiations, the case was fully resolved between the County and the Government by the execution of the Government Settlement. *See* Docket Entry No. 320. Simultaneously, ADC waived and released all claims on behalf of itself, its successors, and its assigns, with respect to "all claims, causes or rights of action, demands, or liabilities of any kind or nature whatsoever that the Relator had, has, or may have, arising out of or relating in any way to (a) the allegations contained in the Original Complaint, (b) the allegations contained in the Government's Complaint, or (c) claims for a share of the Settlement Proceeds . . . ." *See* Stipulation and Order of Settlement between ADC and the Government ("Relator Settlement"),[1] Docket Entry No. 322 at pp. 2-3, ¶ 4.

The monetary settlement of the Government's FCA claims, initially raised by ADC, entitled ADC to compensation as relator and the payment of its attorneys' fees. 31 U.S.C. § 3730(d)(1). In the Government Settlement, the County agreed, among other things, to: (1) make an administrative payment to the Department of Housing and Urban Development ("HUD"); (2) pay the Government, in full compromise and satisfaction of the FCA allegation in this action, the sum of thirty million dollars ($30,000,000.00), seven and one-half million dollars ($7,500,000.00) of which was paid to ADC; and (3) pay ADC's attorneys' fees of two and one-half million dollars ($2,500,000.00). Upon receipt of the settlement amount, the Relator's

[1] Hereinafter, the Relator Settlement and the Government Settlement will be collectively referred to as the "Settlements" or the "So-Ordered Settlements."

Complaint and the Government's Complaint were "dismissed with prejudice."[2] Throughout the settlement negotiations, ADC proffered the same "wish list" it now seeks, yet ADC explicitly agreed in its own settlement that the Government Settlement was "fair, adequate and reasonable." *See* Relator Settlement, p. 2, ¶ 1; 31 U.S.C. § 3730(c)(2)(B); and ADC Letter dated August 24, 2009, attached to the Gurian Decl. as Ex. 10. In fact, the Relator Settlement provided for payment of "expenses, attorneys' fees and costs in *settlement of the Relator's claims against the County*." Relator Settlement, p. 3, ¶ 6 (emphasis supplied).

In addition to addressing the settlement of the FCA claims, the Government Settlement incorporates implementation and enforcement provisions not available to ADC including, but not limited to: (1) the appointment of a Court-approved Monitor; (2) the establishment of penalties for non-payment and non-compliance with the obligations set forth therein; (3) the requirement of regular reports from the Monitor to the Court with copies to the Government and the County, no less than every six months for the first two years and annually thereafter; and (4) the retention by this Court of exclusive jurisdiction to enforce or interpret the terms of the Government Settlement.

The Government Settlement, to which ADC was neither a signatory nor a party, was "intended to be for the benefit of the parties to this Stipulation and Order only." *See* Government Settlement, p. 34, ¶ 47. The ability to supplement, modify, cancel, waive, or otherwise alter the terms of the Government Settlement are limited as follows:

> 53. With the exception of modifications made by the Monitor pursuant to paragraph 15, this Stipulation and order may not be supplemented, modified,

[2] The dismissal with prejudice was subject only to the reservation of the Government's rights, with regard to "any obligations created by this Stipulation and Order." *See* Government Settlement, p. 34,¶ 46. Notably, there was no limitation to the dismissal with prejudice with respect to ADC. Any rights to be asserted or relief to be recovered by ADC were completely extinguished upon its receipt of its multi-million-dollar settlement.

> canceled, or waived or otherwise altered in any way, in whole or in part, except in writing, by the United States and the County.

Government Settlement, p. 36, ¶ 53.

The Monitor also has the limited ability, with the written consent of the Government and the County, to modify or refine certain provisions of the Government Settlement. *See* Government Settlement, p. 15, ¶ 15(a).

Since the Settlements were finalized, the County has consistently worked with the Government and the Court-appointed Monitor to effectuate the terms of the Government Settlement. The Monitor has filed multiple reports to the Court outlining the progress and activities that have taken place as well as where improvement needed to be made. Despite the agreed upon and Court-approved methods of handling disputes set forth in the Government Settlement, ADC now seeks to re-open this case under the auspice of intervention, vacate the So-Ordered Settlements, and change their provisions.

On or about May 31, 2011, ADC filed a motion to intervene[3] seeking to re-write the terms of the Government Stipulation, to which ADC was not a signatory. ADC has already received the sole benefit to which it was entitled, monetary relief under the FCA. Now, in complete disregard of the FCA limitations and the Relator Settlement releasing all claims, ADC seeks to interject itself into the mandatory and injunctive relief process available exclusively to the Government under the HCDA.

[3] ADC also filed a Motion to Enforce, which the Court denied by Order dated June 7, 2011. *See* Docket Entry No. 360.

ARGUMENT

I. INTERVENTION IS SPECIFICALLY BARRED

ADC's attempt to intervene in a closed matter violates the express language of the FCA and HCDA, contravenes the So-Ordered Settlements entered in the underlying case, and fails to meet the requirements of Rule 24 of the Federal Rules of Civil Procedure.

a. The False Claims Act Bars ADC's Attempt At Intervention

The FCA prohibits any entity other than the Government from moving to intervene. 31 U.S.C. § 3730(b)(5). Notably, the FCA only permits an individual or entity to bring a *qui tam* action as a relator *on the government's behalf* to enforce Section 3729 thereof. 31 U.S.C. § 3730(b)(1). The Government may intervene in and prosecute such actions if it chooses. 31 U.S.C. § 3730(b)(2), (4). However, the FCA is clear that once an action has been filed, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). As noted in *United States, ex rel. Barajas v. Northrop Corporation,* 147 F.3d 905 (9th Cir. 1998):

> there is one claim, the government's, pursuable either by the qui tam relator on behalf of the government, or by the government on its own behalf. Once the government recovers the money it paid on a false invoice, plus penalties, or releases its claim, *there is no more to be recovered by anyone, because only the government can have a claim for a false claim made upon the government. . . . In a qui tam case, only the government has a dog in the fight.*

Id. at 910 (emphasis supplied); *see also United States ex rel. Resnick v. Weill Med. Coll. of Cornell Univ.*, 04-cv-3088, 2010 WL 476707, at *5-6 (S.D.N.Y. Jan. 21, 2010). Consequently, ADC is prohibited from intervening in the Government Settlement by the express provisions of the FCA.

By drafting the FCA in such unequivocal language, "Congress made the strongest possible statement against private party intervention in qui tam suits." *United States ex rel.*

LaCorte v. Wagner, 185 F.3d 188, 191 (4th Cir. 1999); *see also United States ex rel. Smith v. Yale-New Haven Hosp., Inc.*, 411 F. Supp. 2d 64, 75 (D.Conn. 2005). In *LaCorte*, relators in one settled *qui tam* action moved to intervene in a separate FCA *qui tam* action. The Court relied on the plain language of 31 U.S.C. § 3730(b)(5) to deny intervention, and held that:

> Prohibiting intervention in this case is fully consistent with Congress' purposes in enacting sections 3730(b)(5) and 3730(c)(5). Settlements in qui tam actions can draw intervenors like moths to the flame. Congress therefore struck a careful balance between encouraging citizens to report fraud and stifling parasitic lawsuits. *United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine,* 24 F.3d 320, 326 (1st Cir. 1994). The only way to preserve the balance that Congress struck is to apply the unqualified congressional mandate of section 3730(b)(5) to bar all would-be intervenors other than the government.

LaCorte, 185 F.3d at 191-92.

Moreover, citing *LaCorte* and the FCA's statutory prohibition against intervention by private parties, the Fourth Circuit denied intervention to a relator in the government's action based upon the same underlying facts as the relator's previously dismissed suit. *Webster v. United States*, 217 F.3d 843 (4th Cir. 2000). Webster filed a *qui tam* suit under the FCA alleging that Finance Liaison Group ("FLG"), Bowman, and thirteen John Doe defendants fraudulently obtained money from the Drug Enforcement Agency by submitting false invoices and vouchers. With the government's consent, Webster voluntarily dismissed her *qui tam* action without prejudice.

Three months later, the government filed its own civil action against FLG, Bowman, and a number of Bowman's family members, alleging claims substantially similar to those in Webster's previous suit. In support of her motion to intervene, Webster argued that the prohibitions against intervention by a party other than the government contained in § 3730(b)(5) did not apply to her because: (a) § 3730(b)(5) prohibits private persons from intervening in FCA suits brought by other private persons, but not in FCA suits brought by the government; and (b)

that she was merely seeking to resume participation in her own action. The Court flatly rejected both arguments and held that the "statute plainly and absolutely prohibits intervention by private parties" and that her "assertion that her voluntarily dismissed complaint confers on her a continuing right to participate in the government's subsequently filed FCA suit is simply wrong." *Id.* at *2.

Similarly, ADC's previous *qui tam* FCA suit was terminated by the Government's intervention and the subsequent Relator Settlement and Release. Consequently, ADC, like Webster, has no right, continuing or otherwise, to participate in the enforcement of the Government Settlement. As such, ADC has no right to intervene.

b. The HCDA Bars ADC's Attempt At Intervention

Intervention is also prohibited by the HCDA, as it is undisputed that ADC has no legal right to assert claims arising under the HCDA. *See* 42 U.S.C. § 5311(b). Consequently, ADC could not seek the mandatory and injunctive relief exclusively available to the Government. Indeed, the Government, in support of its motion to intervene in the underlying action, argued that ADC "would have been limited to seeking financial remedies, while the Government can pursue both pecuniary remedies under the False Claims Act and mandatory and injunctive relief under the Housing and Community Development Act. . . . [and that, absent] Government intervention, those commitments [from the County to undertake activities designed to affirmatively further fair housing ("AFFH")] will be lost." *See* Govt's Mem. of Law, Docket Entry No. 318; *see also* Complaint-in-Intervention, Docket Entry Nos. 11, 324.

Moreover, any relief to which ADC was entitled as *qui tam* relator has already been completely satisfied. The Government Settlement provided mandatory and injunctive relief only available to the Government under the HCDA. Now, after obtaining its substantial monetary

relief under the FCA, ADC seeks to circumvent the restrictions of the FCA and the HCDA in order to impose its own version of mandatory and injunctive relief against the County and the Government. The HCDA does not permit such relief to a private party and, as such, ADC has no right to intervene.

c. The Existing So-Ordered Settlements Bar ADC's Attempt At Intervention

This Court in *Marisol A. ex rel. Forbes v. Giuliani,* 157 F. Supp. 2d 303, 306 (S.D.N.Y. 2001), set forth the following with respect to settlements:

> "Settlement agreements are contracts and must therefore be construed according to general principles of contract law." *Red Ball Interior Demolition Corp. v. Palmadessa,* 173 F.3d 481, 484 (2d Cir.1999). "[A] party cannot create an ambiguity in an otherwise plain agreement merely by 'urg[ing] different interpretations in the litigation.'" *Id.* (citations omitted). If the agreement is clear, "courts must take care not to alter or go beyond the express terms of the agreement, or to impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself."

The Government Settlement expressly states that the "Stipulation and Order is intended to be for the benefit of the parties to this Stipulation and Order only . . . ." Government Settlement, p. 34, ¶ 47. Therefore, ADC, who is not a signatory to the Government Settlement, is expressly precluded from claiming an entitlement to intervene as a beneficiary of the Government Settlement. The Government Settlement should not be interpreted to go beyond its express terms, or to impose additional obligations on the parties thereto that were never mandated by the settlement itself.

Similarly, the plain language of the Relator Settlement expressly provides that there would be no further involvement by ADC, its successors, or assigns in connection with, arising out of, or relating in any way to the claims brought under the FCA:

> the Relator, for itself and on behalf of its successors and assigns, hereby releases and discharges *the United States and all departments, agencies* (including, without limitation, the Department of Justice ("DOJ") and the Department of

> Housing and Urban Development ("HUD")), subdivisions, agents, officers, employees, or representatives of the United States from *all claims, causes or rights of action, demands, or liabilities of any kind or nature whatsoever that the Relator had, has, or may have, arising out of or relating in any way to (a) the allegations contained in the Original Complaint, (b) the allegations contained in the Government's Complaint, or (c) claims for a share of the Settlement Proceeds, pursuant to 31 U.S.C. § 3730(d)(1).*

Relator Settlement, pp. 2-3, ¶ 4 (emphasis supplied). As such, the Settlements specifically bar any further involvement by ADC, or any other party.

d. *Res Judicata* & Collateral Estoppel Bar ADC's Attempt At Intervention

Even if intervention were not barred by the FCA, the HCDA, and the So-Ordered Settlements, ADC's intervention is barred by the doctrines of *res judicata* and collateral estoppel. "Under the doctrine of res judicata, a subsequent action is barred where: (1) the prior action concluded with a final adjudication on the merits; (2) the prior claims and the current claims involve the same parties or those in privity with them; and (3) the claims asserted in the present action were, or could have been, asserted in the prior action because they arise from a common nucleus of operative fact." *United States ex rel. Resnick v. Weill Med. Coll. of Cornell Univ.*, 04-cv-3088, 2010 WL 476707, at *5 (S.D.N.Y. Jan. 21, 2010) (citation omitted). It is well settled that a:

> stipulation dismissing an action with prejudice can have the preclusive effect of *res judicata*. A dismissal with prejudice has the effect of a final adjudication on the merits favorable to defendant and bars future suits brought by plaintiff upon the same cause of action. A dismissal with prejudice is *res judicata* not only as to the matters actually litigated in the previous action, but as to all relevant issues which could have been but were not raised and litigated in the suit.

Samuels v. Northern Telecom, Inc., 942 F.2d 834, 836 (2d Cir. 1991) (internal citations and quotations omitted); *see also Resnick*, 2010 WL 476707, at *5-6 (claims of the relator barred by *res judicata* because of settlement between the government and defendant).

Furthermore, the doctrine of collateral estoppel bars relitigation of an issue that was decided in a prior action, provided that the party had a full and fair opportunity to litigate the issue in the prior action.

First, the So-Ordered Settlements and resulting dismissals with prejudice constitute a final judgment on the merits. Docket Entry Nos. 320, 322, 326. Second, ADC was a party to the dismissed action as *qui tam* relator. Lastly, ADC's current concerns could have been raised at a hearing two years ago, but ADC chose not to object to the Government Settlement and *expressly admitted* in the Relator Settlement that the Government Settlement was "fair, adequate, and reasonable." Relator Settlement, p. 2, ¶ 1. Consequently, ADC's attempt at intervention, based solely upon its current dissatisfaction with the implementation of the Government Settlement, is barred by *res judicata* and collateral estoppel.

II. RULE 24 DOES NOT PERMIT INTERVENTION BY ADC

In addition to being specifically prohibited from intervening by the statutory language of the FCA, the HCDA, the So-Ordered Settlements, and the doctrines of *res judicata* and collateral estoppel, ADC fails to meet the requirements for intervention under Rule 24,[4] either as of right or by permission of the Court. Intervention as of right under Rule 24(a)(2) is only appropriate where an applicant:

> (1) files a timely motion; (2) asserts an interest relating to the property or transaction that is the subject of the action; (3) is so situated that without intervention the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) has an interest not adequately represented by the other parties. . . . The intervention application will be denied unless all four requirements are met.

[4] ADC's motion must also be denied for its failure to file "a pleading that sets out the claim or defense for which intervention is sought." FED. R. CIV. P. 24(c); *see also United States v. L&M 93rd St. LLC*, 10-cv-7495, 2011 WL 1346994, at *2 (S.D.N.Y. Apr. 5, 2011) (non-compliance with Rule 24(c) warrants denial of intervention under Rule 24(a) and (b)).

United States v. Pitney Bowes, Inc., 25 F.3d 66, 70 (2d Cir. 1994) (citations omitted).[5]

Permissive intervention under Rule 24(b)(1) may be permitted where a timely motion is made by an applicant who: "(A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." Rule 24(b)(1). ADC does not qualify to intervene under either section of the Rule.

a. ADC's Motion for Intervention is Untimely

The determination as to whether a motion for intervention is timely is left to the discretion of the Court. *See Bank of New York Deriv. Litig. v. Bacot*, 320 F.3d 291, 300 (2d Cir. 2003). In addressing whether a motion to intervene is timely, the Court considers:

> (1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness.

Id. (quoting *Pitney Bowes, Inc.*, 25 F.3d at 70). Where a motion to intervene "is untimely, intervention must be denied. . . . The district court is not given free rein: it must not consider merely the length of time the litigation or proceeding has been pending, but should base its decision upon all of the circumstances of the case." *United States v. Yonkers Board of Educ.*, 801 F.2d 593, 594-95 (2d Cir. 1986) ("*Yonkers*") (quoting *NAACP v. New York*, 413 U.S. 345, 365-366 (1973)); *see also* Rule 24(b)(3) ("In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."). Moreover, "post-judgment intervention is particularly disfavored, 'because it fosters delay and prejudice to the parties.'" *Ferenc v. Buchanan Marine, Inc.*, 213 F.3d 626(U) (2d Cir. 2000), quoting *Farmland Dairies v. Comm. NYS Dep't Agriculture & Markets*, 847 F.2d 1038,

[5] Although ADC cites the *Pitney Bowes* case, it conveniently omits the most relevant part of the test - that all four requirements must be met in order for intervention to be granted.

1044 (2d Cir. 1988); *see also NY News v. Kheel*, 972 F.2d 482, 487 (2d Cir. 1992); and *Yonkers*, 801 F.2d at 596. "Intervention for the purpose of derailing [s]ettlement...[and t]he certain prejudice that such delay would cause . . . outweighs any potential prejudice [to the proposed intervenor] . . . ." *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 172 (S.D.N.Y. 2000)(denying a motion to intervene made three months after a settlement had been submitted to the court, but not yet approved, where the proposed intervenor sought to object to the settlement terms).

In *Yonkers*, the parties entered into a "Housing Remedy Order," settling the matter and requiring Yonkers to submit sites for development of public housing. *Yonkers*, 801 F.2d at 594. Homeowners located near the identified sites moved to intervene. The lower court noted, in denying the Homeowners' motion, that:

> The remedy proceeding has been going forward for several months. It is imperative that the remedy go forward and go forward within particular time constraints which have been set forth in the court's trial orders. It simply would result in nothing other than delay to permit intervention . . . .

Id. at 596. Here, as in *Yonkers*, "it has been years, literally years [during] which there has been discussion" about the terms of the Government Settlement. *Id.* Indeed, two years ago ADC was fully aware of the content and circumstances of the Government Settlement.

However, ADC did not object to the content the Government Settlement at the time of its execution, or seek a hearing to challenge its terms. *See* 31 U.S.C. § 3730(c)(2)(B), (c)(1)(B). Rather, ADC released all claims by entering into the Relator Settlement, which states that the Government Settlement "is fair, adequate, and reasonable under all the circumstances," and further "releases and discharges . . . all claims, causes or rights of action, demands, or liabilities of any kind or nature whatsoever that the Relator had, has, or may have, arising out of, or relating in any way to" the allegations raised in this action or the settlement proceeds agreed to

by the parties. Relator Settlement, p. 2, ¶¶ 1, 4. Thus, ADC had notice of its purported interest years before it filed its motion to intervene. ADC now seeks to intervene and re-write the Government Settlement that it previously agreed was "fair, adequate, and reasonable" and that has been in effect for almost two (2) years.[6] Relator Settlement, at pg. 2, ¶ 1. Allowing intervention under such circumstances would cause significant prejudice to the County and Government by derailing years of work and progress toward the implementation of the Government Settlement.

However, denying intervention would cause no prejudice to ADC because, as discussed below, it has no viable interest in the Government Settlement. As such, ADC's Motion to Intervene is untimely and should be denied.

b. ADC Has No Viable Interest In This Closed Action

The second prong necessary for a valid claim for intervention involves an assertion of "an interest relating to the property or transaction that is the subject of the action." *Pitney Bowes,* 25 F.3d at 70. Although ADC alleges that it has an interest in the "enforcement" and the "vindication" of the Consent Decree,[7] its mere assertion does not demonstrate "an interest relating to the property or transaction that is the subject of the action" as required by Rule 24.

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[6] To the extent that ADC seeks to re-write the settlement in this matter, they would be required to disgorge any benefit received from the settlement, *i.e.*, the sum of seven and one-half million dollars ($7,500,000.00) payable to ADC and two and one-half million dollars ($2,500,000.00) for "expenses, attorneys' fees and costs in *settlement of the Relator's claims against the County.*" Relator Settlement, p. 3, ¶ 6 (emphasis supplied). *See Nance v. NYPD*, 31 Fed.Appx. 30, 33, 2002 WL 390367 (2d Cir. 2002)("[L]itigants seeking to vacate settlement agreements must disgorge any monetary benefits gained as a result of the agreement.") (citing *Murphy v. Board of Educ. of Rochester City School Dist.*, 79 F.Supp.2d 239, 241 (W.D.N.Y. 1999), and *Lucille v. Chicago*, 31 F.3d 546 (7th Cir. 1994)).

[7] *See* Mem. in Supp. of Mot. to Intervene, pp. 18-19.

It is well settled in the Second Circuit that:

> for an interest to be cognizable under Rule 24(a)(2), it must be direct, substantial, and legally protectable. An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule.

Brennan v. N.Y.C. Bd. of Educ., 260 F.3d 123, 129 (2d Cir. 2001)(internal citations and quotations omitted). ADC's alleged interest in the Government Settlement does not establish an interest that is direct, substantial, or legally protectable.

ADC's purported interest in the enforcement of the Government Settlement does not bear a sufficiently direct relationship to the subject matter of an open action. This matter was closed on September 24, 2009. *See* Docket Entry No. 326. To date, no court intervention has been sought by the Monitor or the parties in connection with the implementation of the Government Settlement.[8] Notably, all of the cases cited by ADC in support of its assertion of an interest involved motions for intervention made during open litigation. The reason for that is simple. Intervention was designed to prevent the multiplicity of lawsuits, not the re-opening or creation of new suits to challenge matters already decided by a court. ADC's attempt at intervention under these circumstances is completely inconsistent with the purpose of intervention. *See Kruse v. Wells Fargo Home Mortgage, Inc.*, No. 02-CV-3089, 2006 WL 1212512, at *9 (E.D.N.Y. May 3, 2006) (intervention denied where motion was brought to "breathe life into a non-existent lawsuit"); *see also L&M 93rd St. LLC*, 2011 WL 1346994, at *3 (proposed intervenor identified "no 'direct' interest in any of the (property or other) rights implicated in the [Settlement] Agreements").

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[8] In order to prevent needless court intervention and a waste of judicial resources, the Government Settlement contains various dispute resolution mechanisms. Indeed, the Monitor is currently in the process of utilizing the dispute resolution mechanisms to resolve a dispute between HUD and the County regarding the Analysis of Impediments. *See* Letter dated July 21, 2011, annexed to the Declaration of Robert F. Meehan as Exhibit A.

Additionally, ADC's purported interest in the enforcement of the Government Settlement is not legally protectable. As discussed *supra*, the only interest ADC had as *qui tam* relator was extinguished by the Relator Settlement in August 2009. ADC was not a party to the Government Settlement, and the mandatory and injunctive relief that makes up the Government Settlement was exclusively available to the Government under the HCDA. ADC's preposterous proposition that it has a sufficient interest to intervene herein, if accepted by this Court, would permit virtually any individual, entity, or municipality the right to intervene in the implementation of the Government Settlement and make demands, no matter how outrageous or generalized their grievances. As cautioned in *LaCorte,* Congress specifically prohibited intervention by the public under the FCA because "settlements in qui tam actions can draw intervenors like moths to the flame." 185 F.3d at 191.

In an attempt to twist its alleged interest to meet the Rule 24 requirements, ADC completely misrepresents the holdings of the cases it cites. To start, ADC asserts that *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 538 (1972) speaks to some sort of an "interest" standard. However, the *Trbovich* Court addressed whether the proposed intervenor's interests were adequately represented by existing parties, and expressly noted that: "[t]he Secretary does not contend that petitioner's interest in this litigation is insufficient, he argues, rather, that any interest petitioner has is adequately represented by the Secretary." *Id.*; *see also* Rule 24 (a)(2). Thus, ADC's reliance on *Trbovich* to support its interests to allow intervention is completely misplaced because it has no enforceable interest.

Moreover, ADC claims that the Second Circuit "described the *Trbovich* 'interest' standard in *Rios*, 520 F.2d at 357" and wrongly asserts that the Court recognized that "something less than 'a specific legal or equitable interest . . .' is sufficient to satisfy the interest requirement

of Rule 24(a)(2)."[9] However, no such "holding" exists in *Rios*. Instead, this quotation is taken from a discussion wherein the Court was *distinguishing* cases cited by the applicants for intervention and finding that said cases were "equally of no avail." *Rios v. Enter. Assoc. Steamfitters Local Union # 638 of U.A.*, 520 F.2d 352, 357 (2d Cir. 1975). ADC continues to distort the holding in *Trbovich* by asserting that the Second Circuit "concluded that 'all persons who will be significantly affected by the outcome of the litigation (whether or not they could have been made parties at the outset) should, under [*Trbovich's*] reasoning, be allowed to intervene to protect their interests.'"[10] However, the Second Circuit was not referring to the reasoning of the *Trbovich* Court, but to the cases that it just distinguished, which were cited by the applicant in *Rios*.

ADC also cites[11] to Ninth Circuit cases in attempting to expand its alleged "interest" into an acceptable basis for intervention, by asserting that a "public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Federation v. Babbitt,* 58 F.3d 1392, 1397 (9th Cir. 1995) (citations omitted); *see also Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983) (holding same). It is the County's position that ADC is not a public interest group in this context. Furthermore, such a determination does not in and of itself give ADC the right to intervene. The Ninth Circuit in *Idaho Farm and Sagebrush* addressed all four criteria necessary for granting intervention and found "no serious dispute . . . concerning either the timeliness of the motion to intervene or of the existence of a protectable interest on the part of the applicant . . ." *See Sagebrush,* 713 F.2d at 528. Here, ADC's motion to intervene was untimely and the

[9] *See* Mem. in Supp. of Mot. to Intervene, p. 20.
[10] *See* Mem. in Supp. of Mot. to Intervene, p. 20.
[11] *See* Mem. in Supp. of Mot. to Intervene, p. 21.

Government adequately protects its alleged interest. Additionally, unlike the Audubon Society in *Sagebrush,* ADC does not have any special expertise or perspective that differs materially from the parties to the Government Settlement.

More importantly, ADC seeks to intervene in the Government Settlement, not in an active case challenging the legality of a measure it has supported. Consequently, ADC cannot establish an interest sufficient to establish intervention and its motion should be denied in its entirety.

c. The Government Adequately Represents the Alleged Interest Asserted by ADC

In order to meet the final prong for intervention under Rule 24(a)(2), ADC must show that it "has an interest not adequately represented by the other parties" and, therefore, "without intervention the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest." *Pitney Bowes,* 25 F.3d at 70 (citations omitted).

ADC fails to establish a protectable interest under this prong of Rule 24(a)(2). Moreover, the underlying action has already been disposed and ADC has already received the only remedy to which it was statutorily entitled as a *qui tam* relator—seven and one-half million dollars($7,500,000.00) paid to ADC and two and one-half million dollars ($2,500,000.00) to pay ADC's attorneys' fees. Therefore, no interest for ADC remains viable.

The Second Circuit has held that "intervention as of right requires a showing that disposition of the proceeding without the involvement of the putative intervenor would impair the intervenor's ability to protect its interest." *Washington Elec. Co-op., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 98 (2d Cir. 1990). Again, as the case is closed, there is no "disposition" that "may" impede ADC's alleged interests. ADC has made no showing that proceeding without ADC would impair its ability to protect its alleged "interests."

ADC erroneously claims that its purported interest "may" not be adequately represented by the Government. Clearly, this claim is completely unsubstantiated and specious and should be denied.

It is well established in the Second Circuit that:

> [w]hile the burden to demonstrate inadequacy of representation is generally speaking "minimal," we have demanded a more rigorous showing of inadequacy in cases where the putative intervenor and a named party have the same ultimate objective. Where there is an identity of interest, as here, the movant to intervene must rebut the presumption of adequate representation by the party already in the action.

Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 179-80 (2d Cir. 2001) (citations omitted); *see also, United States v. L&M 93rd St. LLC,* 2011 WL 1346994, at *4. In fact, none of the alleged interests identified by ADC are separate and apart from those already represented by the Government. Nor has ADC made a showing that there is an adversity of interest, non-feasance, or incompetence in order to overcome the presumption of adequacy. *Butler, Fitzgerald & Potter*, 250 F.3d at 180.

Significantly, the "proponent of intervention must make a particularly strong showing of inadequacy in a case where the government is acting as *parens patriae.*" *United States v. City of New York,* 198 F.3d 360, 367 (2d Cir. 1999) (citing *Hooker Chem.*, 749 F.2d at 984 ("it is significant to the analysis required by Rule 24(a)(2) that the plaintiffs are governmental entities suing on behalf of their citizens. In such actions, the state or the United States presents itself 'in the attitude of *parens patriae,* trustee, guardian or representative of all her citizens.'") (citations omitted)). In the instant matter, the Government is clearly acting as *parens patriae.*

Indeed, even the case cited by ADC recognizes that "when one of the parties is an arm or agency of the government, and the case concerns a matter of 'sovereign interest,' the bar is raised, because *in such cases* the government is 'presumed to represent the interests of all its

citizens.'" *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996) (citations omitted). In those cases, there is a presumption of adequate representation that may only be rebutted when a would-be intervenor makes a strong showing of inadequate representation. *Id.* However, ADC cannot rebut the strong presumption of the adequacy of the Government's representation of the public, which also includes ADC. Finally, as there is a presumption of adequate representation because of the Government's role as *parens patriae* herein, ADC's reliance on *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 133 (2d Cir. 2001) is completely unavailing, as there was no *parens patriae* issue therein. As such, ADC's motion for intervention must be denied.

d. ADC Does Not Meet the Requirements of Rule 24(b)

ADC does not specifically address Rule 24(b), but should the Court consider permissive intervention, ADC fails to meet the requirements therefore[12]. Permissive intervention under Rule 24(b) requires an applicant to file a timely motion based upon either a conditional right to intervene by a federal statute, or a claim or defense that shares with the main action a common question of law or fact. *See* FED R. CIV. P. 24(b).

As discussed in Point II(a) above, ADC cannot meet the timeliness prong for intervention, and cites no statutory authority that gives ADC a conditional right to intervene. In fact, as discussed extensively *supra*, the FCA specifically precludes ADC from intervening. *See* 31 U.S.C. § 3730(b)(5); *LaCorte,* 188 F.3d at 191-92; *see also Webster,* 217 F.3d at *2. Finally, this is not an instance where commonality needs to be determined, because the underlying action is closed and ADC's interest has been extinguished as it received seven and one-half million dollars ($7,500,000.00) and two and one-half million dollars ($2,500,000.00) to pay its

[12] "[S]ubstantially the same factors are considered in determining whether to grant an application for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2)." *Bank of New York,* 320 F.3d at 300, n.5.

attorneys' fees. ADC is attempting to re-open a case it initiated, vacate the settlements, and usurp the powers of the Government and the Monitor, in violation of the Relator's Settlement. *See* 31 U.S.C. § 3730(c) ("the Government [] shall have the primary responsibility for prosecuting the action, and shall not be bound by [the Relator].); Relator Settlement p. 2, ¶ 4. Therefore, to the extent requested, permissive intervention should be denied.

e. Indiscriminate Intervention Is Inappropriate

The case that ADC cites as support for the proposition that intervention is a holistic determination, *United States v. Hooker Chems. & Plastics Corp.,* 749 F.2d 968, 983 (2d Cir. 1984), actually undercuts its position. The Second Circuit, in *Hooker Chemicals,* held that "[t]he requirements for intervention embodied in Rule 24(a)(2) must be read also in the context of the particular statutory scheme that is the basis for the litigation and with an eye to the posture of the litigation at the time the motion is decided." As such, although the "various components" of the Rule are not bright lines, the Rule 24(a)(2) elements must be analyzed in the context of the underlying statutes at issue in this litigation that, as discussed in points I(a)-(b), *supra*, prohibit intervention by ADC.

In order to support its overly broad statement regarding the construction of Rule 24(a)(2), ADC cites only one 29-year-old case—*Washington State Bldg. and Const. Trades Council, AFL-CIO v. Spellman,* 684 F.2d 627, 630 (9th Cir. 1982) ("Rule 24 traditionally has received a liberal construction in favor of applicants for intervention.")(citing 7A C. Wright & A. Miller, Federal Practice and Procedure § 1904 (1972)). However, the cited section of Wright & Miller continues as follows:

> These statements should not be understood, however, as meaning that every possible doubt is to be resolved in favor of allowing intervention whenever it is sought. Liberality "does not equate with rights of indiscriminate intervention" [footnote omitted] and the rule continues to set bounds that must be observed.

> [footnote omitted] The original parties have an interest in the prompt disposition of their controversy and the public also has an interest in efficient disposition of court business. These other interests must be taken into account in deciding whether intervention in a particular case is authorized by Rule 24. [footnote omitted] As one court rightly said, the rule "is a valuable and useful rule but it should not be construed out of all recognition to its laudable purpose." [citation omitted].

In short, a proper determination under Rule 24(a)(2) requires a comprehensive analysis of all its elements in the context of the litigation before the court. As discussed above, such an application weighs strongly against intervention. Thus, ADC's motion to intervene should be denied.

III. PURPORTED ISSUES REGARDING THE COUNTY'S COMPLIANCE WITH THE TERMS OF THE GOVERNMENT SETTLEMENT ARE COMPLETELY IRRELEVANT TO THE MOTION FOR INTERVENTION

Although it is evident from ADC's papers that it would prefer to supplant the Monitor with respect to the implementation of the Government Settlement, its unsolicited opinions about the manner in which the Government Settlement should be enforced are just not relevant to the instant Motion to Intervene. A review of the Declaration of Craig Gurian demonstrates that the sole purpose of the instant motion is to bombard this Court with ADC's biased timeline of the implementation to date. However, nowhere in the twenty-three (23) page declaration is there a legal basis to support ADC's attempted intervention. Instead, ADC is improperly attempting to put its enforcement arguments before this Court without having been granted the right to intervene. Such an egregious disregard of proper procedure should not be countenanced. As such, since it has been shown *supra*, that there is no legal basis for ADC to intervene, it is respectfully submitted that all information contained in ADC's papers which is irrelevant to a legal basis for intervention should be disregarded in its entirety.

IV. INFORMATION OBTAINED BY ADC FROM ANDREW A. BEVERIDGE SHOULD BE DISREGARDED

As set forth above, ADC's unsolicited opinions about the manner in which the Government Settlement should be enforced are not relevant to the instant Motion to Intervene. Indeed, ADC's motion to enforce the Government Settlement has been "denied without prejudice to ADC refilling the motion after the Court has decided the May 31 motion to intervene." Order, Docket Entry No. 360. Similarly, ADC should not be allowed to incorporate its opinions in the instant motion by reference thereto. *See* Mem. In Supp. Of Mot. To Intervene, p. 1, n. 1. Accordingly, no consideration should be given to any portion of the Declaration of Andrew A. Beveridge executed on May 30, 2011 and offered by ADC in support of the denied motion to enforce ("Beveridge Declaration"), that ADC attempts to incorporate by reference in footnotes to its Memorandum and Gurian Declaration. *See* ADC Mem. In Supp. Of Mot. To Intervene, p. 13, n.38, Gurian Decl. p. 22, n. 37.

Not only is the Beveridge Declaration irrelevant to the instant motion, it is based upon his manipulation of documents and information obtained by Mr. Beveridge while he was under contract with the County. In his Declaration, Mr. Beveridge relies on the 2010 Census data and his own interpretation of the data to support his ultimate conclusion that Westchester County continues to be "highly segregated". Mr. Beveridge specifically notes that the Census Bureau had not yet released the "*compositional* breakdown that specifies non-Hispanic, single-race African-Americans" but that he was purportedly able to utilize the Census Bureau data to estimate the composition. *See* Beveridge Declaration, Footnote 4.

Notably, the census data that Mr. Beveridge engineered to estimate population composition and utilized in his May 30th declaration was the subject of a redistricting consultant's contract between Andrew A. Beveridge, Inc. and the County that was executed on

or about March 11, 2011, and which did not expire until June 30, 2011. *See* Exhibit A attached to Declaration of Kenneth W. Jenkins, hereinafter referred to as the "Beveridge Agreement" or "Agreement". This Agreement required Mr. Beveridge, among other things, to utilize the 2010 census data to "begin the redistricting process by creating a report that assess [*sic*] the demographic change in each district in terms of population, voting age population *by race and Hispanic status,* and citizens of voting age population *by race and Hispanic status"* and to "conduct *racial block voting analyses and analyze districts*, where warranted, with respect to their ability to elect the minority community's candidate of choice . . . ." (emphasis supplied). *See* Beveridge Agreement, Schedule "A".

With respect to Mr. Beveridge's utilization of the 2010 Census data and the creation of the aforementioned reports, the Beveridge Agreement states, in pertinent part, that:

> All records, recorded data or reports of any kind compiled or prepared by the Consultant in completing the services described in this Agreement, including but not limited to written reports, studies, computer discs, computer printouts, graphs, charts and all other similar recorded data, *shall become and remain the property of the County. The Consultant may retain copies of such records for its own use and shall not disclose any such information without the express written consent of the Chairman*. The County shall have the full rights to reproduce and publish such records, if it so desires, at no additional cost to the County. (emphasis supplied).

Finally, the Beveridge Agreement contains an express provision that specifically requires Mr. Beveridge "to use all reasonable means to *avoid any conflict of interest with the County"* and mandates that Mr. Beveridge "*immediately notify the County in the event of a conflict of interest"* and to "*use all reasonable means to avoid any appearance of impropriety". See* Beveridge Agreement, p. 8, ¶ Twenty-Second.

Mr. Beveridge's execution of a Declaration dated May 30, 2011, on behalf of ADC and against the County, which appears to be based upon the work Beveridge did while under contract with the County, clearly violates the express terms of the Beveridge Agreement and is completely irrelevant to the instant motion to intervene. Thus, this immaterial information, obtained by ADC from Andrew A. Beveridge *while under contract with the County*, should not be considered by this Honorable Court with respect to the appropriateness of intervention.

CONCLUSION

ADC should not be permitted to circumvent the Government's exclusive authority, re-open a case under the guise of intervention, and attempt to modify terms of a So-Ordered Government Settlement to which it was not a party and which it was statutorily prohibited from seeking in the underlying case. For the foregoing reasons, it is respectfully requested that the Motion to Intervene brought by ADC be denied in its entirety.

In the event that the Court grants ADC's motion to intervene, the County respectfully requests that such intervention be deemed a violation of Paragraph 4 of the Relator's Settlement requiring vacatur of the Relator's Settlement and disgorgement of any benefit received from the settlement, *i.e.*, the sum of seven and one-half million dollars ($7,500,000.00) payable to ADC and two and one-half million dollars ($2,500,000.00) for "expenses, attorneys' fees and costs in settlement of the Relator's claims against the County."

Dated: July 28, 2011
White Plains, New York

/s/_____
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