UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, INC.,

Plaintiff,

v.

WESTCHESTER COUNTY, NEW YORK,

Defendant.

No. 06 Civ. 2860 (DLC)

Government's Memorandum of Law in Opposition to Anti-Discrimination Center's Motion to Intervene

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Preliminary Statement

Plaintiff the United States respectfully submits this memorandum of law in opposition to the motion to intervene by the Anti-Discrimination Center ("ADC").

In its motion, ADC presents its disagreements with the government's stewardship of the stipulation and order that settled this matter in 2009. In some cases, ADC misconstrues the stipulation; in others, it mischaracterizes the actions of the government and the Court-appointed Monitor; in still others, it simply urges a strategy that the government and Monitor have not chosen. But regardless of those issues, ADC cannot intervene here, as a dissatisfied observer of a settlement agreement lacks the right to force the parties to act in the ways it would prefer. ADC has fallen far short of showing that it is entitled to intervene in this action and to seek enforcement by the Court. Accordingly, its motion should be denied.

Background

A. The False Claims Act Action and Settlement

This action was brought in 2006 in the name of the United States by ADC, as a *qui tam* relator under the False Claims Act, 31 U.S.C. § 3729 *et seq.* The complaint alleged that Westchester County had applied for, and received, Community Development Block Grants ("CDBG") and other funds from the Department of Housing and Urban Development ("HUD"), a condition of which was that the County affirmatively further fair housing as set forth in 42 U.S.C. §§ 5304(b)(2) and 12705(b), and certify to HUD that it was doing so. As part of that obligation, the County was required to conduct an analysis of the impediments to fair housing choice within its jurisdiction, and to take appropriate actions to overcome the effects of any impediments identified through that analysis. 24 C.F.R. § 91.425(a)(1)(i). ADC's relator complaint alleged that the County had falsely certified that it had complied with these conditions

on funding, as its analysis of impediments had failed to evaluate impediments to "fair housing"—i.e., as defined in HUD's Fair Housing Planning Guide (1996), "actions, omissions or decisions" that restrict housing choices or have the effect of doing so based on "race, color, religion, sex, disability, familial status, or national origin," including "[p]olicies, practices, or procedures that appear neutral on their face"—by disregarding racial or ethnic discrimination or segregation.

In February 2009, this Court partially granted summary judgment to ADC. 668 F. Supp. 2d 548 (S.D.N.Y. 2009). The Court held (among other things) that according to the undisputed evidence, the County had not analyzed race in conducting its analysis of impediments, but instead did so "through the lens of affordable housing, rather than *fair* housing and its focus on protected classes such as race." *Id.* at 561–62. Thus the County's certifications, required for CDBG and other funding, were false. *Id.* at 565. The Court reserved for trial the question of whether the County's false certifications were presented knowingly. *Id.* at 567–68.

Following the Court's decision, the government interceded with the parties in an attempt to reach a settlement. On August 10, 2009, the government intervened and elected to proceed with the action, pursuant to 31 U.S.C. § 3730(c)(3), and filed a complaint in intervention alleging violations of the False Claims Act by the County. The government's complaint also alleged violations of the Housing and Community Development Act, 42 U.S.C. § 5311, and sought mandatory and injunctive relief under that statute. Simultaneously, the government submitted a Stipulation and Order of Settlement and Dismissal (the "Settlement Stipulation" or "Stipulation") between the government and the County, which (among other things described below) dismissed both the government's and ADC's complaints. Settlement Stipulation ¶ 57. Also, the government submitted a Stipulation and Order of Settlement of Relator's Share and Release ("Relator's Stipulation") between ADC and the government, in which ADC agreed that the Settlement

Stipulation was "fair, adequate, and reasonable," accepted a payment of $7.5 million pursuant to 31 U.S.C. § 3730(d)(1) as the relator's award, and released and discharged the government from "all claims, causes or rights of action, demands, or liabilities of any kind or nature" arising out of the allegations in the complaints. Relator's Stipulation ¶ 4.

B. Provisions of the Settlement Stipulation

The Settlement Stipulation provides for both monetary and injunctive relief in settlement of the government's complaint. As relevant here, the County paid the government $30 million, with $21.6 million of that amount credited to the County's account with HUD, to be made available back to the County for development of housing in accordance with the Stipulation. Settlement Stipulation ¶¶ 2–3. The County also committed to secure an additional $30 million over six years for such housing development. *Id.* ¶ 5.

As specific relief under the Housing and Community Development Act, the County agreed to ensure the development over seven years of 750 new affordable housing units, to be located in areas with low black and Hispanic populations. *Id.* ¶ 7. Besides specific locational criteria, the Stipulation provides that the County must "use all available means as appropriate to achieve the objectives" of the housing-development paragraph, including providing financial and other incentives for other entities to promote those objectives, and conditioning County funds on actions that promote those objectives. *Id.* ¶ 7(i). In particular, if "a municipality does not take actions needed to promote," or hinders, such objectives, the County is required to "use all available means as appropriate to address such action or inaction," including legal action. *Id.* ¶ 7(j).

The Settlement Stipulation also appoints a Monitor with the powers necessary to achieve the Stipulation's purposes of affirmatively further fair housing. *Id.* ¶¶ 9–13. Those powers

include the authority to review County actions and recommend additional actions needed to ensure compliance with the Stipulation. *Id.* ¶ 13. The Monitor also has authority to resolve disputes between the government and the County. *Id.* ¶ 14. And the Monitor is required to assess the County's efforts and progress every two years beginning at the end of 2011, considering whether the County "has taken all possible actions to meet its obligations," including "promoting inclusionary and other appropriate zoning by municipalities by offering incentives, and, if necessary, taking legal action." *Id.* ¶ 15.

The Stipulation also requires the County to develop an implementation plan concerning the development of the required housing, and take other actions in furtherance of the County's obligation to affirmatively further fair housing, subject to the Monitor's approval. *Id.* ¶¶ 18–19. In developing the plan, the County agreed to assess the availability of vacant land; meet with developers and property owners, municipal officials, and state officials; explore mechanisms for revolving funds; and assess means for maximizing the required housing development in the areas specified by the Stipulation. *Id.* ¶ 22. The plan must also specify how the County will meet mandated benchmarks. *Id.* ¶¶ 23–24. It must also include a model ordinance that the County will promote to municipalities to advance fair housing, with provisions regarding affordable housing in new developments, standards for affirmative marketing of new housing to a racially and ethnically diverse population, streamlined approval of affordable housing projects, and legal mechanisms to ensure continued affordability of new affordable units. *Id.* ¶ 25. The plan is required to specify a CDBG allocation process to promote actions that affirmatively further fair housing, including incentives for municipalities, and to condition CDBG and other public funds on municipalities' agreement to take specified actions to affirmatively further fair housing, including using land use regulations to assist development of affordable housing. *Id.*

The County also agreed to adopt a policy statement specifying that "the elimination of discrimination, including the present effects of past discrimination, and the elimination of de facto residential segregation are official goals" of the County's policies, and the location of affordable housing is "central" to affirmatively further fair housing. *Id.* ¶ 31.

Finally, the County agreed to conduct an analysis of impediments—the HUD requirement, prior versions of which lacked analysis of race-based impediments to fair housing, leading this Court to conclude that the County's certifications had been false. The Stipulation provides that the analysis must be "deemed acceptable by HUD." *Id.* ¶ 32. The County agreed to include an identification and analysis of "impediments based on race or municipal resistance to the development of affordable housing," actions the County would take to address the effects of those impediments, and the need for mobility counseling. *Id.* Also to be incorporated into the analysis of impediments were the County's "additional obligations" to affirmatively further fair housing under the Stipulation, which included campaigns to "broaden support for fair housing and to promote the fair and equitable distribution of affordable housing," affirmative marketing of affordable housing within and without the County, and the "promot[ion], through the County Executive, [of] legislation currently before the Board of Legislators to ban 'source-of-income' discrimination in housing." *Id.* ¶ 33.

C. The Parties' Actions Following the Settlement

As detailed in the Monitor's declaration accompanying this memorandum, implementation of the Settlement Stipulation has been mixed in the two years since it was entered. The Monitor has actively engaged in his role of ensuring the County is achieving the terms and objectives of the Stipulation. From the start, the Monitor has engaged with the County government (both top-level officials and essential staff), municipalities, the Board of Legislators, and HUD. Declaration

of James E. Johnson dated July 29, 2011 ("Johnson Decl.") ¶¶ 4–7. He has also obtained input from people outside of government, including the housing advisors and consultants he has retained, *id.* ¶¶ 10–13, developers, *id.* ¶ 24, 44, affordable-housing organizations, *id.* ¶ 24, and groups focused on civil rights and fair housing, *id.* ¶ 43. In this broad outreach, the Monitor has demonstrated his commitment not only to satisfy the strict letter of his responsibility under the Stipulation, but to ensure that the Stipulation's goal of affirmatively further fair housing is achieved to the maximum extent possible with broad, lasting, and sustainable effect. *See id.* ¶¶ 20–21. To that end, the Monitor has emphasized "the overarching goal of building a more integrated Westchester," worked to incorporate the views and interests of "major stakeholders in the Stipulation, not just the parties," *id.* ¶¶ 18, 20, and pushed the County to take actions to satisfy the Stipulation that are close to the "ideal" rather than merely "technically" or "marginal[ly]" compliant, *id.* ¶¶ 35, 37. In that regard, the Monitor has emphasized to the County that his authority includes a comprehensive biennial assessment of the County's progress and whether it has "taken all possible actions to meet its obligations." *Id.* ¶ 36.

While the Monitor has been unstinting in his efforts, the County's efforts have been wanting. Three issues in particular stand out. First, the implementation plan, described above, was due within 120 days of the Stipulation's entry; that term was extended by the Monitor as provided in the Stipulation, but even with the additional time the County's plan was, according to the Monitor, so unspecific as to be unacceptable. *Id.* ¶¶ 14–16. Even after being given the opportunity to revise the plan, the County still failed to produce a "true plan" to comply with the terms and objectives of the Stipulation. *Id.* ¶ 18. Exercising his authority to "specify revisions and additional items that the County shall incorporate," Settlement Stipulation ¶ 20(d), the Monitor required the County to submit another revised plan, and yet the County still produced

only a partially acceptable implementation plan, Johnson Decl. ¶ 19. In light of these facts, the Monitor has chosen to initiate a process to develop an acceptable implementation plan, again utilizing his authority to "specify revisions," by soliciting input from a broad range of interested persons and organizations.[1] To date, that approach has resulted in an affirmative marketing plan (a component of the broader implementation plan), *id.* ¶¶ 20–26, and the Monitor expects the completed implementation plan shortly, *id.* ¶¶ 27–28.

Second, the County was obligated, through its Executive, to "'promote . . . legislation currently pending before the Board of Legislators to ban "source-of-income" discrimination in housing.'" *Id.* ¶ 38 (quoting Settlement Stipulation ¶ 33(g)). But as the Monitor notes, other than letters from the former County Executive (in office only about four and a half months while the settlement was in effect), the County Executive's office has apparently taken no steps to promote this legislation. *Id.* Indeed, the current Executive vetoed a version of that legislation, passed by the Board, on June 25, 2010. *Id.* ¶¶ 38–42.

Third, the County's analysis of impediments, which the Stipulation required to be "deemed acceptable by HUD," has been unacceptable to HUD, despite the agency's repeated and detailed guidance and assistance. The County initially asked for, and was given, an extension of the 120-day deadline from the date of the Stipulation. HUD first identified deficiencies in the analysis document by letter of December 21, 2010, noting that "although the AI provides data and identifies many issues central to furthering fair housing choice, it fails to make any material link

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[1] Although ADC criticizes this choice, ADC's Mem. of Law in Support of Motion to Intervene 3, as the Monitor accurately notes the Stipulation does not specify the means by which the Monitor is to specify revisions or the time in which he is to do so, and it was within his discretion to seek an array of views and to take the time to build an implementation plan that satisfied his concerns. Johnson Decl. ¶ 20; Stipulation ¶ 20(d).

between those impediments and the actions the County will take to overcome them." Declaration of Benjamin H. Torrance dated July 29, 2011 ("Torrance Decl.") Ex. 1. Among other issues, HUD identified the veto of the source-of-income legislation and required an explanation of what the County would do to promote such legislation,[2] and noted that the County had identified issues related to exclusionary zoning but had not (and must) specify actions it would take to overcome those impediments. A revised analysis of impediments was due to HUD by April 1, 2011; the County missed that deadline by twelve days but was still deficient. By letter dated April 28, 2011 (Torrance Decl. Ex. 2), HUD disapproved the County's analysis, and, as further specified in a follow-up letter of May 13 (*id.* Ex. 3), described shortcomings in the analysis and the necessary corrective actions. Again, among other things, HUD noted the County's failure to abide by its commitment to promote legislation against source-of-income discrimination and failure to specify how it would satisfy that commitment going forward; and its lack of a legal strategy for overcoming exclusionary zoning practices, including identification of zoning issues the County will challenge and a process for notifying municipalities of needed changes and the consequences of not making them. *Id.*

The County submitted a newly revised analysis of impediments on June 13, 2011, with revisions made July 11. By letter dated July 13, 2011, HUD again concluded that the revised analysis "does not meet the Settlement's requirements," as it did not incorporate the needed corrective actions, specified in the May 13 letter, regarding source-of-income legislation or exclusionary zoning. *Id.* Ex. 4. Accordingly, HUD rejected the County's certification that it will

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[2] The obligation to promote that legislation was required to be incorporated into the analysis of impediments. Settlement Stipulation ¶ 33(i).

affirmatively further fair housing, and consequently disapproved the County's 2011 application for CDBG and other funding.

In a letter dated July 20, 2011, to the Monitor, the County invoked the dispute-resolution procedures of paragraph 14 of the Settlement Stipulation. *Id.* Ex. 5. The government has not yet responded, pending further discussions with the County, in particular ongoing discussions between the Westchester County Executive and the HUD Secretary.

These shortcomings are significant, and, as demonstrated by HUD's repeated rejection of the County's analysis of impediments and its recent disapproval of the County's application for CDBG and other funding, they have not been and will not be ignored by the government. Nevertheless, in other areas the progress made under the Settlement Stipulation has been substantial and important. As noted, the Monitor's efforts regarding affirmative marketing, which the Monitor has emphasized as central to the key settlement goal of affirmatively furthering fair housing and achieving a more integrated County, has resulted in a robust plan. Johnson Decl. ¶¶ 20–26. Also, the County has obtained approval from the Monitor for a number of housing developments in excess of the Stipulation's interim benchmarks. *Id.* ¶¶ 31–34. As financing and building permits are being put in place, the construction of affordable housing in segregated areas for the purpose of affirmatively further fair housing is proceeding. As noted by a member of the County's Board of Legislators (and a supporter of the Stipulation at the time it was approved by the Board), the County is "actively pursuing" the Stipulation's housing projects "in many municipalities," and to his knowledge "no municipality has sought to obstruct the development" of the Stipulation's housing. Declaration of John Nonna dated July 29, 2011 ("Nonna Decl.") ¶ 6.

While these instances of progress do not excuse or compensate for the County's shortfalls in other areas, as a matter of strategy the government and the Monitor have elected to consider

them in determining the best way to address the County's failures. Further, the Monitor has been cognizant of the broad effect of the settlement and the efforts needed to obtain support from non-parties, and to ensure transparency, community input, and accountability; thus, to achieve "ultimate success," the Monitor and the government have in some cases chosen collaboration and consensus-building over confrontation and litigation. Johnson Decl. ¶¶ 20–21, 42, 47; Nonna Decl. ¶ 8.

D. ADC's Motions

On May 31, 2011, ADC submitted two motions to the Court: to intervene as of right pursuant to Fed. R. Civ. P. 24(a), and, upon intervention, to "enforce" the Settlement Stipulation. These motions accuse the government and the Monitor of failing to "seek appropriate judicial relief" and, more broadly, failing to "carry out consent decree responsibilities." ADC's Mem. of Law in Support of Motion to Intervene ("Br.") 2. In its papers, ADC presents its view of the obligations imposed on the parties by the Settlement Stipulation, and, relying heavily on its own public and private communications of its views regarding the best way forward, seeks to have the Court impose those views upon the government, the County, and the Monitor through enforcement of the Stipulation. With respect to its application to intervene as of right, ADC asserts that it should be permitted to do so as it has a sufficient interest in the subject of this action to allow it to intervene, specifically its history as the False Claims Act *qui tam* relator and its "interest in ending segregation." Br. 16–25.

By order dated June 9, 2011, the Court denied ADC's motion to enforce the Settlement Stipulation without prejudice to refiling after the motion to intervene has been decided. The government now opposes that latter motion.

Argument

ADC Is Not Entitled to Intervene in This Action

Intervention should be denied. ADC asserts that the government and Monitor have failed to live up to the Settlement Stipulation's requirements—a view the government disputes, based on both what the Stipulation says and as a matter of enforcement strategy. But those issues need not be decided here: ADC has not met the requirements for an intervenor as of right, as it lacks a legally protectable interest in this action, whatever interest it has will be respected, and its motion is untimely.

"Intervention as of right under Rule 24(a)(2) is granted when all four of the following conditions are met: (1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties." *MasterCard Int'l v. Visa Int'l Service Ass'n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006).

A. ADC Lacks a Legally Protectable Interest

ADC cannot intervene in this matter as a matter of right, because it has not asserted a sufficient interest under Rule 24(a).[3]

The "interest" asserted by a proposed intervenor must be "direct, substantial, and legally protectable." *Brennan v. NYC Board of Education*, 260 F.3d 123, 129 (2d Cir. 2001). " '[R]emote or contingent' " interests will not suffice. *Id.* (quoting *Restor-A-Dent Dental Labs., Inc. v.*

[3] ADC does not move under Rule 24(b), and accordingly, although the government would oppose permissive intervention, this brief does not address that standard.

Certified Alloy Prods., Inc., 725 F.2d 871, 874 (2d Cir. 1984)). The requirements of Rule 24 mirror those under Rule 19 for joinder of a necessary party: "if a party is not 'necessary' under Rule 19(a), then it cannot satisfy the test for intervention as of right under Rule 24(a)(2)." *MasterCard*, 471 F.3d at 389. A "key element of the definition of 'necessary' party" is that it is "not enough . . . for a third party to have an interest, even a very strong interest, in the litigation. Nor is it enough for a third party to be adversely affected by the outcome of the litigation. Rather, necessary parties . . . are only those parties whose ability to protect their interests would be impaired *because of* that party's absence from the litigation," as opposed to a harm caused by a party's action outside the litigation. *Id.* at 387 (emphasis in original).

Moreover, the "interest" requirement of Rule 24 is bounded by the constitutional doctrine of standing, as an intervenor must make an adequate showing of its stake in the outcome to become a party to a case. *Schulz v. Williams*, 44 F.3d 48, 52 (2d Cir. 1994) ("To maintain standing, the intervenor must satisfy the well-established requisites of Article III."); *see Financial Institutions Retirement Fund v. Office of Thrift Supervision*, 964 F.2d 142, 146–49 (2d Cir. 1992) (considering intervenors' standing); *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1349 (2d Cir. 1989); *Association of Contracting Plumbers v. Local No. 2, United Association of Plumbers*, 841 F.2d 461, 466–67 (2d Cir. 1988);[4] *Jones v. Prince George's*

[4] Dicta in an earlier Second Circuit case stated that once an Article III case or controversy exists between the parties, there is "no need to impose the standing requirement upon the proposed intervenor." *U.S. Postal Service v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978). But that conclusion should not be followed for several reasons. First, it is plainly dicta, as the court denied intervention on an unrelated ground, making its consideration of standing unnecessary to the outcome. *Id.* Second, the cases the court cited in support of its conclusion do not mention standing. *Id.* (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 536–39 (1972) (considering possible statutory bar to intervention and application of Rule 24), and *Hodgson v. United Mine Workers*, 473 F.2d 118, 127–30 (1972) (same)). Third, it is undercut by the later Supreme Court

(continued...)

County, 348 F.3d 1014, 1017 (D.C. Cir. 2003); *Mausolf v. Babbitt*, 85 F.3d 1295, 1299–301 (8th Cir. 1996) (discussing views of various circuits and concluding "those wishing to intervene in federal court must have Article III standing"); *Solid Waste Agency v. U.S. Army Corps of Engineers*, 101 F.3d 503, 507 (7th Cir. 1996).

ADC cannot meet those standards. The organization has no cognizable interest in the enforcement of the settlement between the government and the County. ADC offers only two possible interests: its former role in this matter as a *qui tam* relator, and its "interest in ending segregation." Br. 18–21. But neither is remotely sufficient: nothing in its papers asserts or even suggests that ADC will itself be injured—that ADC itself has a legally protectable right that will be affected—by excluding it from post-judgment proceedings in this action.

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[4] (...continued)
decision of *Diamond v. Charles*, which, while expressly not deciding whether an intervenor in district court must have standing, held that "an intervenor's right to continue a suit [on appeal] in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art[icle] III," 476 U.S. 54, 68 (1986) (considering standing to appeal); *accord Schulz*, 44 F.3d at 52. And fourth, as noted above, the Second Circuit has repeatedly considered whether intervenors have standing in later cases.

"[C]ircuit courts addressing this issue have reached different results." *San Juan County v. United States*, 420 F.3d 1197, 1204 (10th Cir. 2005), *panel reasoning adopted in relevant part*, 503 F.3d 1163, 1171–72 (10th Cir. 2007) (en banc). But even courts that have not always required standing have only forgone the requirement " 'so long as another party with constitutional standing *on the same side as the intervenor*' " is in the case. 503 F.3d at 1172 (quoting panel decision, 420 F.3d at 1206) (emphasis added). As ADC does not appear to be on either side, but instead seeks to introduce an entirely new judicial proceeding, there is no existing "case or controversy" and no "side" that ADC can join. *See Diamond*, 476 U.S. at 64 ("ability to 'piggyback' on [another party's] undoubted standing" depends on existing party's participation in case; otherwise "there is no [Article III] case for [proposed intervenor] to join"). Thus standing must be established.

Regardless, if the Court were to conclude that standing is not necessary to intervene, the arguments presented here separately establish that ADC has not asserted a sufficient interest under Rule 24 standing alone.

First, ADC relies on its former participation in this lawsuit as a relator under the False Claims Act. Br. 18–21 (ADC "recognized the link," "conducted the investigation," "filed the Complaint," "litigated the case"). But that cannot suffice to give ADC a legally protectable interest in the enforcement of the settlement. The False Claims Act gives relators an interest in a matter by partially assigning the United States' interest to them. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 772–77 (2000). But a *qui tam* relator, despite the monetary bounty it is due to receive if the original action is successful, has suffered no injury in fact, and "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Id.* at 772. A relator's only "interest" in a False Claims Act matter is the bounty, which by itself is only a "byproduct of the suit itself" insufficient to confer standing. *Id.* at 773 (internal quotation marks omitted). A relator's standing to bring the suit—and thus its right to participate—results only from the statutory assignment of the government's interest. *Id.* But that statutory assignment does not survive the end of the statutory action and the resultant payment of the False Claims Act bounty to reward the relator for its efforts (a bounty that ADC has received). Having received its monetary share, ADC no longer has any legally protectable interest in this matter. *See* 31 U.S.C. § 3730(d).

The case as it now stands involves enforcement of a stipulation between the government and the County and ordered by the Court—a stipulation that ADC did not sign or otherwise join.[5]

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[5] ADC suggests it had a significant role in negotiating the Settlement Stipulation, and vaguely relies on that in support of its claim of an "interest." Br. 20; Decl. of Craig Gurian in Support of Motion to Intervene ¶ 3. The government disputes that implication—the negotiations were conducted so exclusively by the government's attorneys that, to the best recollection of the undersigned (who was personally involved), no representative of ADC was even in the room or present by telephone on a single occasion while the government negotiated the terms of compromise with the County. But the point is not worth litigating: it cannot be disputed that (continued...)

There has been no assignment of the government's interest in that Stipulation, by statute or otherwise, and the Stipulation gives ADC no rights. *See Mt. Hawley Ins. Co. v. Sandy Lake Properties, Inc.*, 425 F.3d 1308, 1311 (11th Cir. 2005) ("a legally protectable interest is an interest that derives from a legal right"); *Brennan*, 260 F.3d at 131 (describing sufficient Rule 24 interest as "legally cognizable"); *New York News, Inc. v. Kheel*, 972 F.2d 482, 486 (2d Cir. 1992) (no right to intervention absent substantive right). Moreover, as noted above, ADC also executed a broad release of its claims, in consideration of its *qui tam* payment. Relator's Stipulation ¶ 4. And, the injunctive provisions of the Settlement Stipulation—the only provisions ADC seeks to enforce—were achieved under the Housing and Community Development Act pursuant to claims brought exclusively by the government in its complaint in intervention. Settlement Stipulation ¶ 5. Thus whatever prior role ADC had in participating in the False Claims Act action is irrelevant to its current attempt to intervene. ADC thus cannot revive its relator status, and the standing and the legally protectable interest that status gave it until the action was resolved, to attempt to enforce the Stipulation.

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[5] (...continued)
ADC did not sign, is not a party to, is not bound by, and therefore has no legal interest in the Stipulation.

Along similar lines, ADC faults the government for declining to formally intervene in the action until the time the Settlement Stipulation was entered. Br. 19. But the law is clear that in deciding to decline to intervene against a *qui tam* defendant, the government "may have a host of reasons for not pursuing a claim," *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 n.17 (11th Cir. 2006): "non-intervention does not necessarily signal governmental disinterest in an action," *United States ex rel. DeCarlo v. Kiewit/AFC Enters.*, 937 F. Supp. 1039, 1047 (S.D.N.Y. 1996), and "the plain language of the [False Claims] Act clearly anticipates that even after the Attorney General has 'diligently' investigated a violation . . . , the Government will not necessarily pursue all meritorious claims; otherwise there is little purpose to the *qui tam* provision permitting private attorneys general," *United States ex rel. Berge v. Bd. of Trustees*, 104 F.3d 1453, 1458 (4th Cir. 1997). And, as noted above, the government was actively engaged in the case from the time of this Court's summary judgment decision, even before intervening.

Second, ADC's assertion of its "interest in ending segregation," Br. 19, is plainly insufficient. Litigation "is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests." *Diamond v. Charles*, 476 U.S. 54, 62 (1986). Such interests cannot be said to be "legally protectable": no law creates any right to enforce such a policy- or value-based goal, no matter how laudable; if it were otherwise, any person or organization could intervene in any case simply by stating that it wishes to advance a relevant policy. Thus, "[w]here . . . an organization has only a general ideological interest in the lawsuit . . . and the lawsuit does not involve the regulation of the organization's conduct, without more, such an organization's interest in the lawsuit cannot be deemed substantial"—"a generic interest shared by the entire . . . citizenry [is] so generalized [that it] will not support a claim for intervention as of right." *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 781–83 (6th Cir. 2007). "Without these sorts of limitations of the legal interest required for intervention, Rule 24 would be abused as a mechanism for the over-politicization of the judicial process." *Id.*

ADC relies on *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), which held that a union member can intervene in an action by the Secretary of Labor even though the relevant statute provided that the same union member has no private right of action. But ADC fails to recognize that while a private right of action is not necessary to intervene in a properly brought action, a legally protectable interest is—and the intervenor in *Trbovich*, a member of the defendant union who had filed the administrative complaint that led the Secretary to sue, had such an interest. ADC does not. Notably, too, the *Trbovich* Court prohibited even that intervenor from expanding the action to add grounds to the complaint and thus to require the government to take unwanted enforcement action, *id.* at 537—precisely what ADC seeks to do here.

Rios v. Enterprise Ass'n Steamfitters Local No. 638, 520 F.3d 352 (2d Cir. 1975), cited by ADC, demonstrates that intervention is not appropriate here. ADC mischaracterizes the case as "conclud[ing]" that "all persons who will be significantly affected by the outcome of the litigation . . . should . . . be allowed to intervene to protect their interests"—and further mischaracterizes the case as ascribing that conclusion to *Trbovich*. In fact, the circuit was describing a more "liberal interpretation of Rule 24(a)(2)" (and did not cite *Trbovich* as supporting it), and, without adopting that standard, held that the proposed intervenors in that case still "have no case." *Id.* at 357. The proposed intervenors in *Rios* were union members asserting a right under a judgment to admission to preferential job status; despite having such an employment interest on the line, they were still denied intervention, even under the liberal "significantly affected" standard. ADC, on the other hand, while apparently displeased with the parties' actions, is not legally "affected" by this litigation, much less significantly so.

There is no merit either to ADC's reliance on *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983), and *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995).[6] Those cases permitted public interest groups to intervene as of right in actions "challenging the legality of a measure which [they] had supported." *Sagebrush*, 713 F.2d at 527; *Idaho Farm*, 58 F.3d at 1397. To begin with, the viability of the Ninth Circuit's doctrine in those cases is at best questionable after the later decision of *Arizonans for Official English v. Arizona*, where the Supreme Court described "grave doubts" about the standing of the non-governmental proponent of a law to maintain an action defending that law. 520 U.S. 43, 64–67 (1997).[7] And

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[6] The latter case has little analysis, essentially repeating the standard of *Sagebrush*.

[7] Although the Court expressed such doubt, it did not "definitively resolve the issue," as the case was dismissed on the separate jurisdictional issue of mootness. *Id.* at 66.

even if *Sagebrush* is still in effect, it does not apply here: ADC does not seek to defend the "legality of a measure which it had supported," as no one is challenging the legality of any measure (or even the legality of the Stipulation). Nor is there at issue a legislative or quasi-legislative (e.g., rulemaking, as in *Idaho Farm Bureau*) process, such that a person in a position similar to a legislator would have a legal interest in defending an enactment. *See Arizonans*, 520 U.S. at 65. The case here involves a stipulation between two parties settling a litigated matter. ADC simply seeks to interject itself into this case to force its preferred strategy for enforcement of that stipulation, which no precedent permits.

In addition, the logic of *Sagebrush* does not apply: as the Ninth Circuit itself has explained, "*Sagebrush Rebellion* turns on the lack of any real adversarial relationship between the plaintiffs and the defendants." *Gonzalez v. Arizona*, 485 F.3d 1041, 1052 (9th Cir. 2007). For instance, in *Sagebrush*—which was a "special case," *United States v. City of Los Angeles*, 288 F.3d 391, 403 (9th Cir. 2002)—the governmental proponent of the law had an apparent conflict of interest, as the departmental secretary ostensibly defending the law had recently, while in private life, led the opposition to that law. *Id.*; *Sagebrush*, 713 F.2d at 528. In states with ballot initiatives, the Ninth Circuit has also permitted intervention by initiative sponsors in light of doubts about the states' willingness to enforce and defend such laws, enacted in circumvention of the legislative process. *See Yniguez v. Arizona*, 939 F.2d 727, 733 (9th Cir. 1991), *vacated sub nom. Arizonans*, 520 U.S. 43; *cf. Perry v. Schwarzenegger*, 628 F.3d 1191, 1197 (9th Cir. 2011) (questioning state governor's ability to "achieve through a refusal to litigate what he may not do directly: effectively veto the initiative"). In contrast, "[w]here the government is acting on behalf of a constituency it represents," courts presume "that the government will adequately represent that constituency"; thus "the would-be intervenor must make a very compelling showing that the

government will not adequately represent its interest." *Gonzalez*, 485 F.3d at 1052 (internal quotation marks omitted).[8]

Here, the government and the County are very much in an adversarial relationship—there is no similar conflict of interest as in *Sagebrush*, nor any reason to infer tacit but inherent unwillingness to represent the public will as in a ballot-initiative case. Indeed, as described above, the government has acted to disapprove the County's application for CDBG funding due to its failure to comply with the Stipulation. Whatever dissatisfaction ADC may express amounts to "merely differences in strategy, which are not enough to justify intervention as a matter of right," nor enough to overcome the presumption (further explained below) that the government and the Monitor, as the Court's agent, act in the public interest. *Los Angeles*, 288 F.3d at 402–03. ADC has made no showing at all, much less a "very compelling" one, *Gonzalez*, 485 F.3d at 1052, that the government will not represent the public such that ADC's intervention is appropriate.

In short, as the Sixth Circuit has explained, under *Sagebrush* or its own decision in *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999)—also cited by ADC—"an organization involved in the process leading to the adoption of a challenged law, does not have a substantial legal interest in the subject matter of a lawsuit challenging the legality of that already-enacted law, unless the challenged law regulates the organization or its members." *Granholm*, 501 F.3d at 781. In

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[8] ADC attempts to undermine this strong presumption by portraying HUD as at war with itself, conjecturing an internal division between HUD's Office of Fair Housing and Equal Opportunity (which ADC admits focuses on fair housing) and its Office of Community Planning and Development (which ADC believes "place[s] a premium on getting along with the jurisdictions they fund" at the expense of fair housing). Br. 24. Besides the utter lack of support for this theory, it is undermined by the fact that the various letters rejecting the analysis of impediments were signed either by both offices or by Community Planning and Development alone. Torrance Decl. Exs. 1–4.

Grutter and similar cases, the court explained, the intervenors (potential applicants to the defendant school whose admission policies were challenged, and a coalition organization representing similar interests) were "regulated by the new law" or their "members are affected by the law," giving them a legal interest. *Id.* at 782 (internal quotation marks omitted). ADC is neither regulated by the Settlement Stipulation, nor does it assert it has members affected by it (in fact, it alleges no members at all, but to the extent it has members it asserts no interest except generalized opposition to segregation).

B. Any Interest ADC Has Will Not Be Impaired by Denial of Intervention, and ADC's Interests Will Be Adequately Represented

Even if ADC had anything close to a legally protectable interest, such an interest would not be impaired by denying intervention, and its interest would be adequately represented by the government and the Monitor.

Rios compels that conclusion. That case involved a remediation plan approved by the district court, which also appointed an administrator to oversee its implementation. The Second Circuit held that because the administrator was "the agent of the district court" and thus "responsible for the administration of the plan," the proposed intervenors were required to make a showing that the administrator "would refuse to respect and enforce any rights" of the proposed intervenors. *Id.* at 357. Thus, whatever interest the proposed intervenor had, it could not show that its interest would be impaired by its lack of participation in the lawsuit. *Id.* Absent such a showing and to the extent the proposed intervenors sought to assert new rights, allowing intervention would only "disrupt the litigation, promote confusion and impose an excessive burden" on the parties. *Id.* at 358. The same logic applies here, where a Court-appointed Monitor oversees the Stipulation's implementation.

Similarly, the government's role here in enforcing the Stipulation, and more broadly representing the public interest, stands against ADC's motion to intervene. There is a "presumption that the United States, as a government litigant, is adequately protecting" the interests of its constituents. *City of Los Angeles*, 288 F.3d at 402. Thus, as noted above, "the proponent of intervention must make a particularly strong showing of inadequacy [of representation] 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); *accord Gonzalez*, 485 F.3d at 1052 ("very compelling" showing needed). And the presumption that the government adequately protects the public's interest cannot be overcome by a party who, like ADC, "seek[s] to intervene merely to ensure that [a consent decree] is strictly enforced." *Los Angeles*, 288 F.3d at 402. Such a proposed intervenor "share[s] the same objective as the United States," and "[a]ny differences they have are merely differences in strategy, which are not enough to justify intervention as a matter of right." *Id.* at 402–03. The proposed intervenors in *Los Angeles*—like ADC, organizations advocating reform; unlike ADC, organizations that had members who actually lived in the affected areas—thus were unable to show that their interests would be impaired by denial of intervention. *Id.* at 397, 403.

Although ADC has made it clear that it disagrees with the government's strategy and choices in enforcing the Stipulation, it offers nothing more than that disagreement. The government's, and the Monitor's, objectives are the same: to achieve the terms and objectives of the Settlement Stipulation. If ADC were responsible for the enforcement of the Stipulation, or for the public interest, it may have proceeded differently.[9] But that is well short of a sufficient

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[9] On the other hand, if ADC had the same broader responsibility and sources of (continued...)

ground for intervention. ADC's interests will not be impaired by lack of intervention—no harm will come to it "because of" its non-presence in post-judgment proceedings here, *MasterCard*, 471 F.3d at 387—and the government and Monitor will adequately represent whatever legally protectable interests ADC has.

C. ADC's Motion Is Untimely

Intervention should also be denied because ADC's motion is untimely. Timeliness is "evaluated against the totality of the circumstances before the court," and may depend on "(1) how long the applicant had notice of the interest before [he] made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (internal quotation marks omitted). In *D'Amato*, intervention was denied because the applicant moved "more than a year after the complaint was filed, approximately three months following the district court's order that notice be sent to class members, and three days prior to the Fairness Hearing scheduled by the district court." *Id.* Here, ADC waited even longer, and similarly did not make its motion until the verge of a critical moment in the case: HUD's recent step disapproving the County's application for CDBG funding in the long-pending consideration of the analysis of impediments. And as in *D'Amato*, ADC offers no real explanation, except its own self-described "pruden[ce]," Br. 18, for the delay. There can be no doubt that ADC was on notice of its ostensible interest since well before the Settlement Stipulation was signed, nearly two years ago. And ADC's explanations that

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[9] (...continued)
knowledge as the government and Monitor have, it may well have proceeded in the same manner.

it was waiting for the government to adopt ADC's preferred strategy is insufficient, for, as the Second Circuit has explained, an intervention motion was available to it in the meantime. *In re Holocaust Victim Assets Litigation*, 225 F.3d 191, 198 (2d Cir. 2000); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994). ADC thus fails to meet its burden of showing timeliness on the first factor.

In addition, there is prejudice to the government from the late motion. The Monitor has chosen a course of action and worked diligently to follow it and cement its gains; were ADC's entirely different approach to implementation of the settlement to be imposed at this time, those efforts would be disrupted, perhaps even wasted. *See Holocaust Victim Assets*, 225 F.3d at 198 (prejudice from intervention results from possibility of "jeopardiz[ing] a settlement"). Specifically, as described above and in his declaration, the Monitor has expended great effort in approving housing sites, constructing a marketing plan, making financing arrangements, and more broadly reaching out to both the parties and non-parties to build a lasting resolution. In contrast, there is no prejudice to ADC from denial of intervention: whether or not it joins this case, ADC remains in the same position as an organization asserting an anti-segregation mission. Indeed, in its papers ADC offers no reason to believe there would be prejudice to it from a denial of its motion except to conclusorily state that its "central function . . . is seeking the end of residential segregation."

Conclusion

For all of these reasons, ADC has failed to show it is entitled to intervene as of right. Accordingly, its motion should be denied.

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Respectfully submitted,

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