UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, INC., Plaintiffs, – against – WESTCHESTER COUNTY, NEW YORK, Defendant.	**ECF CASE** 06 CV 2860 (DLC)

DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

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In its opening brief, the defendant, the County of Westchester, New York (the "County"), demonstrated that the complaint of the *qui tam* relator ("relator" or "ADC") failed to describe a "false claim," and otherwise did not pass muster under the federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, and Fed. R. Civ. P. 9(b). Rather than alleging that the County made any "false" representation to get federal reimbursement, relator merely argues that the County did not satisfy a policy preference for race consciousness in public housing that is neither within the compass of the County's certification nor the law. Relator's opposition brief proved our point; it certainly did not rebut it. It also may explain the government's decision not to intervene in this action.

Relator lambastes the County for focusing on ensuring that the poorest individuals benefit from federal housing funds. Relator, which believes that race should be a prime determinant, ignores the fact that – in sharp contrast to the absence of regulations requiring that the County identify race discrimination as an impediment – the County's emphasis on income is *required* by HUD's own regulations. 24 C.F.R. § 91.225(b)(4); 24 C.F.R. § 570.208.[1]

Relator also runs afoul of the FCA's public disclosure/original source jurisdictional bar. The Second Circuit's FCA jurisprudence suggests that it would follow the vast majority of courts that have held that Freedom of Information Act ("FOIA") responses represent public disclosures. Thus, the administrative reports disclosed here, and the investigation prompted by relator's Freedom of Information Law ("FOIL") request, should qualify as public disclosures, irrespective of relator's vain attempts to thwart the bar by

[1] Indeed, income is arguably a better proxy for determining need than race when distributing housing funds. *See* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 53 (1976) ("Race is, at best, a weak proxy for need; there are more direct and accurate ways of identifying needy people."). *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989); *Walker v. City of Mesquite*, 169 F.3d 973, 986 (5th Cir. 1999); *U.S. v. Starrett City Assocs.*, 840 F.2d 1096, 1100-03 (2d Cir. 1988) (recognizing the tension between the policies of the Fair Housing Act, 42 U.S.C. §§ 3608 *et seq.* ("FHA") that promote integration and the FHA's

selectively recounting, misstating, and taking out of context discussions between it and the County at a meeting on July 7, 2005.[2] Finally, the declaration submitted with relator's Opposition Brief only compounds its failure to satisfy the heightened pleading requirements of Rule 9(b). Relator's anomalous recounting of how it learned of the actions about which it complained in no way explains how the actions themselves were somehow fraudulent. For all of the foregoing reasons, the complaint should be dismissed.

ARGUMENT

POINT I

RELATOR FAILS TO STATE A FALSE CLAIM

Relator attempts to create the illusion that the County knowingly failed to do certain things allegedly required of it by its certifications. Its lengthy and emotional arguments aside, ADC skillfully manages to avoid any citation to these purported requirements. *That is because they do not exist.* For example, relator argues that "[t]he regulations give Defendant absolutely no discretion to limit the AI to just some of the protected classes, but Defendant did so anyway and falsely certified to HUD that it was in compliance with the AFFH regulations." Plaintiff/Relator ADC's Mem. in Opp'n to Mot. to Dismiss ("Opp'n Br.") 16. Yet relator cites to nothing that states that the County *lacked* such discretion. Elsewhere, relator states that "Congress and HUD have established clear and objective specifications for the AFFH obligation [and the County's] obligation is to comply with them." Opp'n Br. 21 n.25. *But see* "Proposed Rules on Determining Accuracy of Certification that Fair Housing is Furthered," 63 Fed. Reg.

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antidiscrimination provisions); Eboni S. Nelson, *What Price Grutter?*, 32 J.C. & U.L. 1, 9-10 (2005); John Marquez-Lundin, *The Call for a Color-Blind Law*, 30 Colum. J.L. & Soc. Probs. 407, 447 (1997).

[2] ADC's effort to create a factual dispute with its dubious declaration is unavailing. Our motion is based entirely upon the legal futility of the complaint itself. We do note that ADC's apparent theory that the County disclosed its "knowing" fraud at a meeting over relator's FOIL request defies logic.

57882-01, 57882-83 (HUD Oct. 28, 1998) ("Proposed Rules").[3] Once again, the relator offers no citation to those allegedly "clear and objective specifications."

ADC cannot have it both ways. If its interpretation of the certifications is correct, then the certifications are not clear because they in no way encapsulate the requirements relator seeks to impose on the County (including the obligation to find race discrimination as an impediment,[4] to list impediments by protected class, to not rely exclusively on extra-County sources to identify impediments,[5] to take appropriate steps to overcome impediments *not* identified by the County, and to adopt an adversarial relationship with municipalities in the Consortium). If the certifications really are "clear and objective," then the County indisputably complied with them in that it undertook an analysis of impediments and took steps to overcome the impediments it identified, as explicitly required by the certifications. In any event, ADC has no claim that the County's certification of compliance was fraudulent.

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[3] Although the failure of the rulemaking is of no current moment, Opp'n Br. 16 n.19, HUD's explanation accompanying the Proposed Rules substantially bolsters the County's contention concerning the lack of regulatory clarity – admitted by HUD – and the impossibility of the County's *falsely* certifying its compliance with this ambiguous language when, at a minimum, the County indisputably conducted an analysis of impediments and took steps to remedy the impediments that it identified.

[4] In fact, the Westchester Urban County Consortium's Consolidated Plan Covering Fiscal Years 2004-2008 ("2004 Cosolidated Plan") – incorporated by relator's complaint – addresses issues of race and national origin throughout. *See* Reply Aff. of Michael A. Kalish in Further Supp. of Def.'s Mot. to Dismiss the Compl., dated June 15, 2007 ("Reply Aff."), Ex. 1 (excerpts of 2004 Consolidated Plan) (*found at* http://www.westchestergov.com/planningdocs/ConsolidatedPlan/ConsolidatedPlan04/WEB%20SITE/IntroPageHTML/conplan04.html), 31, 45, 50-53 59-61, 84, 345-46, App. 3, 6, 12; *see Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991); Aff. of Michael A. Kalish in Supp. of Def.'s Mot. to Dismiss the Compl., dated April 16, 2007 ("Kalish Aff."), Ex. A (Compl.) ¶ 3. The absence of these factors from the specific impediments identified by the County can only mean that the County had concluded that they were not among the most challenging impediments. The impediments identified by the County constituted impediments to fair housing choice for all protected classes and other needy persons requiring affordable housing. Contrary to ADC's argument that the County refused to analyze community resistance, Opp'n Br. 15, the County in fact identified "NIMBY" (an acronym for "Not In My Backyard") as an impediment. Reply Aff., Ex. 1 (2004 Consolidated Plan) 315, 322, 331-333.

[5] In arguing that the County "was entirely passive and reactive" in considering impediments, Opp'n Br. 15, relator ignores that HUD's Fair Housing Planning Guide, Vol. 1 specifically encourages municipalities to "Use Existing Studies" and counsels that "Jurisdictions should not waste effort restudying and reanalyzing problems for which good information already exists." Reply Aff., Ex. 2 (Fair Housing Guide) 2-18. The 2004 Consolidated Plan, for example contains numerous attendance sheets showing the breadth of consultation and reflects the County's commissioning a study by Rutgers University to analyze housing needs. *Id.* Ex. 1 (excerpts of 2004 Consolidated

In support of its argument that the certifications require a race-conscious analysis of impediments, relator misleadingly quotes from a 1988 version of 24 C.F.R. § 570.904(c)(1), that defines "fair housing choice" with reference to "race, color, religion, sex or national origin." Opp'n Br. 9 (*citing* Final Rule, 53 Fed. Reg. 34416, 34468 (Sept. 6, 1988)). ADC fails to note, however, that this definition was superseded in 1995 and § 570.904 *no longer contains this language*. *See* Final Rule, "Consolidated Submission for Community Planning and Development Programs," 60 Fed. Reg. 1878-01, 1917 (Jan. 5, 1995). Not only did this 1995 amendment delete the language about "race, color, religion, sex or national origin," it explicitly recognized that the new rule contained only "minimal requirements for compliance with the certification that a jurisdiction will affirmatively further fair housing [and lacked] performance standards for affirmatively furthering fair housing." *Id.* at 1895. "The requirements include conducting an analysis of impediments [and] taking actions to address the impediments[.]" *Id.* at 1890; 24 C.F.R. § 570.904(c) (incorporating by reference 24 C.F.R. § 570.601(a)). As demonstrated by the documents that are encompassed by relator's complaint, the County clearly met these "minimum requirements." In the same Final Rule, HUD also recognized that "[a] number of low-income advocates stated that racial impact should be addressed in the needs assessment" and/or "in every element of the consolidated plan," but HUD nonetheless declined to address these issues at that time. *Id.* at 1890. Plainly, the County was not obligated to interpret the certifications in light of this superseded regulatory language or, for that matter, in light of the other non-existent requirements that ADC seeks to impose with no support other than the dictionary. *See* Opp'n Br. 10, 11, 17. The *law*, on the other hand, commands judgment in favor of the County.

Plan) 42, sign-in sheets. In short, rather than skirt its obligations to "conduct an analysis of impediments to fair housing choice," the County went above and beyond the regulatory requirements.

Relator relies upon several decades-old cases decided under the FHA, which, save for one that is inapposite, are not FCA cases[6] and do not consider the scope of certifications with regard to housing impediments and remedies. They certainly do not support ADC's unprecedented attempt to force the County to adhere to its particular interpretation of these certifications, on pain of a fraud claim.[7] This lawsuit, which seeks to compel the County to adopt several of ADC's preferred policy choices – and hold the County liable for fraud for not having followed these policies retrospectively – finds no basis in FHA or FCA jurisprudence.

POINT II

THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE RELATOR WAS NOT AN ORIGINAL SOURCE OF PUBLICLY DISCLOSED INFORMATION

As set forth in the County's opening brief, the Court lacks subject matter jurisdiction over this matter because it is "based upon the public disclosure of allegations or transactions in a[n] . . . administrative . . . report . . . or investigation, or from the news media" and because ADC is not "an original source of the information." 31 U.S.C. § 3730(e)(4)(A).

A. FOIL Responses, Including Related Meetings, Constitute Public Disclosures.

Relator argues that a FOIL response does not constitute a public disclosure. Opp'n Br. 24-25. The majority of courts have concluded otherwise. *See* Opening Br. 16-17. Further, the Second Circuit has expansively interpreted the public disclosure bar to foreclose subject matter jurisdiction wherever "strangers to the fraud" have a legal right to the information

[6] None of relator's authorities concerns a purported duty affirmatively to further fair housing that is enforceable under the FCA. *U. S. v. Incorporated Village of Island Park*, 888 F. Supp. 419 (E.D.N.Y. 1995), a case brought by the federal government in which the Village engaged in a course of conduct designed to exclude minority applicants from an affordable housing development – in violation of contrary representations it made to the government – is a far cry from the facts of this case. *Id.* 440.

[7] ADC acknowledged that this lawsuit stands alone as a matter of "first impression." Reply Aff., Ex. 3 (Letter from M. Allen to Court, dated May 25, 2007). Its plea belongs, if anywhere, in the legislature, not here.

at issue, *U.S. ex. rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322-23 (2d Cir. 1992), or when information is in the "public domain," *U.S. ex rel. Dick v. Long Island Lighting Co*., 912 F.2d 13, 18 (2d Cir. 1990). The very nature of a FOIL request, providing a legal right for public access of documents and information, falls easily within the Second Circuit's understanding of public disclosures.

Relator asserts that the FCA's public disclosure bar "most certainly does not define information derived from private meetings with county officials as constituting such a public disclosure." Opp'n Br. 7 n.6. Relator's confidence is not warranted. The July 7, 2005 meeting concerning relator's FOIL request was part and parcel of the County's response to that request. Thus, as with the documents produced in the County's FOIL response, this meeting should be construed as an "administrative . . . report" or otherwise as occurring during an "administrative . . . investigation." *U.S. ex rel Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 383 (3d Cir. 1999); *cf. John Doe Corp.*, 960 F.2d at 323.

B. <u>Administrative Reports and Investigations Need Not Be Federal.</u>

Relator further contends that only *federal* administrative reports and investigations may qualify as public disclosures. Opp'n Br. 25 n.28 (*citing U.S. ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 744-46 (3d Cir. 1997)). While there is a split of authority on this point, we submit that the better-reasoned decisions view non-federal administrative reports as satisfying the public disclosure bar.

The public disclosure bar deprives courts of jurisdiction over an action:

> based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

See 31 U.S.C. 3730(e)(4)(A).

The Third Circuit's *Dunleavy* decision limited the jurisdictional bar to federal administrative "report[s], . . . audit[s], or investigation[s]." 123 F.3d at 744-46. *Dunleavy* reached this conclusion from a textual analysis stemming from the placement of the word "administrative" between "congressional" and "Government Accounting Office," which refer to federal bodies. 123 F.3d at 745. Other courts have disagreed with this textual analysis and concluded, we think correctly, that it would not make sense to interpret administrative reports, investigations, and audits differently from "administrative hearing[s]," which have been construed to encompass federal, state, and local hearings. *See U.S. ex rel Bly-Magee v. Premo*, 470 F.3d 914, 918 (9th Cir. 2006) ("Indeed, the statute would seem to be inconsistent if it included state and local administrative hearings as sources of public disclosures and then, in the next breath, excluded state administrative reports as sources."); *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1143-44 (D. Wy. 2006) ("There is no reason to conclude that Congress intended to limit administrative reports, audits, and investigations to *federal* actions, while simultaneously allowing all *state* and *local* civil litigation, *state* and *local* administrative hearings, and *state* and *local* news media to be treated as public disclosures.") (emphasis in original); *id.* 1142-43 (noting that *Dunleavy*'s interpretation undermined the statute's purpose of precluding parasitic lawsuits); *cf. U.S. ex rel. Phipps v. 470 Comprehensive Cmty. Dev. Corp.*, 152 F. Supp. 2d 443, 454 (S.D.N.Y. 2001) (state audit triggered public disclosure bar).

Furthermore, the County is a delegatee of the federal government in administering the CDBG and HOME programs. Where local governments act in an area of "'significant Federal regulation and involvement,'" it makes no sense to distinguish between federal and local administrative materials. *See Hays v. Hoffman*, 325 F.3d 982, 988-89 (8th Cir. 2003) (noting that courts have held that audits of congressional delegates such as insurance companies "could

trigger the jurisdictional bar"); *Bly-Magee*, 470 F.3d at 918-19. Thus, the County's administrative reports and investigation satisfy the public disclosure bar.

C. Relator Cannot Prove That It Is an Original Source.

Relator admits that at least some of its allegations derived from public sources. *See* Opp'n Br. 22. The public disclosure bar is triggered when an action is based "*in any part* upon publicly disclosed allegations or transactions." *U.S. ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1158 (2d Cir. 1993) (internal quotation and citation omitted) (emphasis added) (*following U.S. ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992)). *See also U.S. ex rel. Huangyan Import & Export Corp. v. Nature's Farm Prods., Inc.*, No. 00 Civ. 6593 (SHS), 2004 WL 74310, at *5 (S.D.N.Y. Jan. 15, 2004), *aff'd*, No. 04-0825-CV, 2007 WL 32020 (2d Cir. Jan. 4, 2007). ADC's asserted experience, its independent investigation, and its July 7, 2007 meeting do not satisfy the original source exception to the public disclosure bar.

First, ADC's "own experience," Opp'n Br. 26, does not furnish original source standing. *Kreindler & Kreindler*, 985 F.2d at 1158 (if experience "were enough . . . then a cryptographer who translated a ciphered document in a public court record would be an 'original source,' an unlikely interpretation of the phrase") (citation omitted); *U.S. ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d 458, 463 (S.D.N.Y. 2002), *aff'd*, No. 02-6097, 53 Fed. Appx. 153 (2d Cir. Dec. 13, 2002) (rejecting that relator's asserted expertise satisfies original source exemption to public disclosure bar).

Second, the "fact that [ADC] conducted some collateral research and investigations . . . , as would be customary in such litigation, does not establish 'direct and independent knowledge of the information on which the allegations are based' within the

meaning of § 3730(e)(4)(B)." *Kreindler & Kreindler*, 985 F.2d at 1159; *Alcohol Found., Inc.*, 186 F. Supp. 2d at 463.

Finally, ADC's artful attempt to qualify as an original source by recasting certain allegations so that they might appear to originate at a meeting with the County (instead of in administrative reports) should likewise fail. Even if the Court rejects the County's argument that the meeting should be construed as part of the investigation of the County's FOIL response to ADC, much of what ADC claims to have learned at this meeting was "self-evident" from a review of the administrative reports that relator obtained via its FOIL request. *Alcohol Found., Inc*, 186 F. Supp. 2d at 463. Relator claims the meeting confirmed its suspicions that the County was "knowingly" failing to comply with its certifications, Opp'n Br. 24; Gurian Decl. ¶ 10, but the core of its claims was evident from the administrative reports, which manifested that: (1) the County had not identified racial discrimination or segregation as impediments;[8] and (2) the County had adopted a cooperative approach with the municipalities in the Consortium. *See, e.g.*, Reply Aff., Ex. 4 (Westchester Urban County Consortium, Fiscal Year 2005 Consolidated Annual Performance and Evaluation Report) 8-9. If such conduct could be construed as fraud, all of the information relator needed to bring its complaint was apparent from, *inter alia*, publicly disclosed administrative reports.

[8] Paragraphs 32-36 of the Complaint, which relator admits derived from "public records requests and general research," Opp'n Br. 22, demonstrate that relator did not rely on the July 7, 2005 meeting for information concerning the County's impediments analysis. Among other things, these paragraphs allege that: "[t]he "Fair Housing Plan" . . . illustrates and confirms Westchester's stark failure to conduct anything resembling an actual fair housing impediments analysis," Kalish Aff., Ex. A (Compl.) ¶ 32; "[n]either the phrase 'housing discrimination' nor the phrase 'housing segregation' even appears in the 'analysis of impediments,' and Westchester provided literally no analysis of the role - current or historical - of either phenomenon in relation to existing impediments to fair housing," *id.* ¶ 33; "[t]hese material omissions were made in the face of the fact that Westchester knew or should have known of the current and historic role of housing discrimination – public and private - and housing segregation in creating and perpetuating impediments to fair housing," *id.* ¶ 34; "Westchester made absolutely no reference to its 'analysis of impediments' being an evaluation of anything having to do with the housing needs of different racial or ethnic groups," *id.* ¶ 36. *See also* Opp'n Br. 16 n.20.

Because relator "had no significant direct knowledge [that was] independent of the disclosures made to [relator by the County]," *Kriendler & Kriendler*, 985 F.2d at 1159, the original source exception does not apply and this Court lacks subject matter jurisdiction.

POINT III

RELATOR FAILS TO SATISFY FED. R. CIV. P. 9(B)

Relator's Opposition Brief does not remedy its complaint's pleading deficiencies. Among other insufficiencies, ADC has not explained why the County's certifications were fraudulent and, in its attempt to provide more details about the alleged fraud, it erroneously focuses on relator's *discover*y of the alleged fraud, rather than the alleged fraud itself. Opp'n Br. 28-29. Thus, for the reasons stated in our opening brief, relator's complaint should be dismissed.

CONCLUSION

For the foregoing reasons, the County respectfully requests that the Court dismiss relator's complaint and award the County its costs and expenses in defending this action, including its reasonable attorneys' fees, along with such other and further relief that the Court deems just and appropriate.

Dated: New York, New York
June 15, 2007

Respectfully submitted,

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