

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CORRECTED

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

ECF CASE

06 CV 2860 (DLC)

Plaintiff/Relator, :

-v- :

WESTCHESTER COUNTY, NEW YORK, :

Defendant. :

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**PLAINTIFF/RELATOR ANTI-DISCRIMINATION CENTER OF METRO NEW
YORK, INC.'s MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT**

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INTRODUCTION

This lawsuit, brought under the Federal False Claims Act (“FCA”), alleges that Defendant Westchester County (“Westchester” or the “County”), a racially segregated county bordering New York City, knowingly made a series of false claims and certifications to the U.S. Department of Housing and Urban Development (“HUD”) between April 2000 and April 2006 (the “false claims period”) in order to secure more than \$52 million in federal housing and community development (“HCD”) funds for the Westchester Urban County Consortium (“Consortium”). The false certifications concerned its compliance with the obligation imposed upon it by federal law to “affirmatively further fair housing” (“AFFH”) as a precondition for receiving HCD funds.

Congress made compliance with AFFH obligations a precondition for eligibility for CDBG and other HCD funds in several laws, including the Fair Housing Act, 42 U.S.C. §§3608, and the Housing and Community Development Act of 1974, 42 U.S.C. §5304(b)(2). The fundamental components of every AFFH program are clearly set forth in implementing regulations. They include: (1) conducting an analysis to identify impediments to fair housing choice (an “analysis of impediments” or “AI”); (2) taking appropriate actions to overcome any impediments identified; and (3) maintaining records reflecting the analysis and actions taken. 24 C.F.R. §§ 91.225; 570.601.

During the false claims period, Westchester repeatedly assured the federal government that it would meet and that it had met these regulatory AFFH obligations. These certifications were false, and the key facts establishing this falsity were revealed to the Relator, Anti-Discrimination Center (“ADC”) by Deputy Planning Commissioner Norma Drummond in a meeting on July 7, 2005, and in subsequent follow-up disclosures to ADC, and then confirmed in discovery herein.

Westchester failed to carry out its AFFH obligations, even though:

- Westchester had data and maps clearly demonstrating that the County is residentially

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racially segregated (a fact starkly depicted in the map that appears at page 4).¹

- Westchester knew through HUD's *Fair Housing Planning Guide*, correspondence and training workshops that it had to comprehensively analyze *all* impediments to fair housing, including all public and private policies and practices having a race-based impact on fair housing choice, and knew that it had to take effective, measurable actions to overcome impediments.

- Westchester knew that the geographic location of affordable housing crucially influences whether that housing perpetuates or reduces segregation, and that simply providing affordable housing without considering fair housing principles would not satisfy those obligations.²

- Westchester was aware that municipal resistance was a critical impediment to the construction of affordable housing, and knew that it had the legal authority to overcome such resistance and other local restrictions on the building of affordable housing.³

- Westchester knew—from the HUD-required Cooperation Agreements that it had entered into with 40 towns, villages and cities in Westchester (“Consortium Municipalities” or “CMs”)—that it was forbidden from disbursing HCD funds to any CM that failed to AFFH or that interfered with Westchester’s own efforts to do so.

Despite all this, Westchester did nothing to analyze race-based impediments to fair housing choice. Neither its 2000 “AI” nor its 2004 “AI” ever mentioned race, racial discrimination, or racial segregation, neither was even approached with those considerations in mind, and neither was even

¹ The Planning Department prepared a similar map, but neither included it in nor referred to it in any of Westchester’s AIs. See Initial Report of Professor Andrew Beveridge (“Beveridge Report”) [Appendix II, Tab 21] pp. 5-6 and Exhibit B.

² In a June 1996 memo, for example, Westchester’s own Planning Department had reminded itself about what was expected in an AI: “Remember: This is not a report on affordable housing, but FAIR HOUSING!!!” (emphasis in original). See Drummond deposition Vol. II [App. III, Tab 28] Exhibit 18. Hereafter, references to deposition transcripts will appear in the format (Drummond __ - __).

³ *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S.2d 672 (N.Y. 1975); *In re County of Monroe*, 72 N.Y.2d 338, 533 N.Y.S.2d 702 (N.Y. 1988). See also *Huntington Branch, NAACP v. The Town of Huntington*, 844 F.2d 926 (2nd Cir. 1988).

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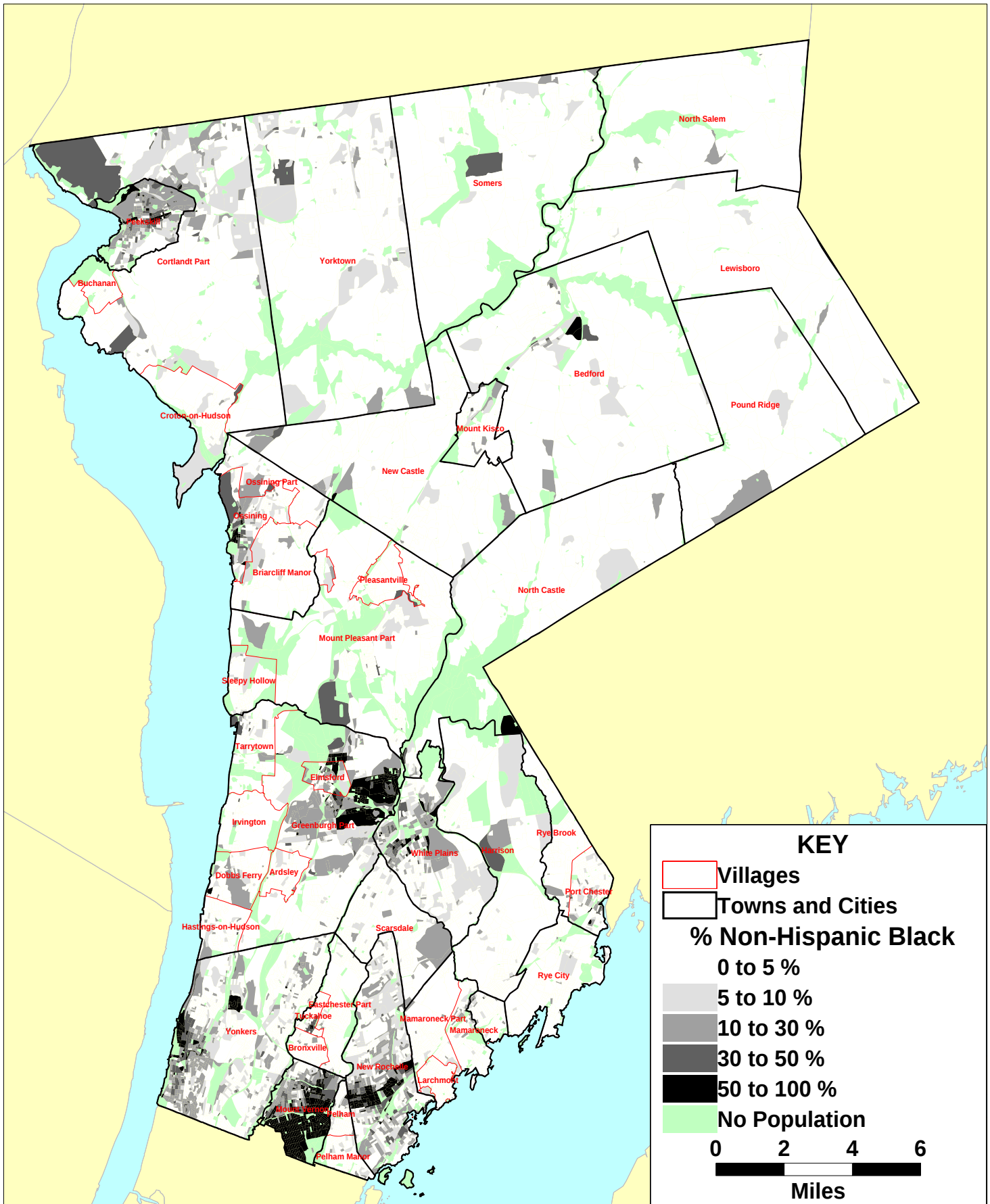
characterized as an analysis of impediments *to fair housing*. Westchester never performed a review of local laws, policies and practices to assess their impact on fair housing choice, and the County avoided any mention of municipal resistance to the building of affordable housing or to AFFH.

Westchester was just as cavalier in respect to the “action” part of its AFFH obligations. Throughout the false claims period, it refused to ameliorate the extensive racial segregation that existed in Westchester, and that continues to the present day. As Drummond revealed to ADC, Westchester closed its eyes to municipal resistance and refused to enforce AFFH or affordable housing obligations on the CMs because Westchester would not “interfere in local municipalities’ [zoning and land use decisions].” (Drummond,311:5-11). Westchester would not even monitor the planning, analysis, and performance of CMs, nor take any action specifically directed at AFFH.

The County pretended to be in compliance—by signing AFFH certifications and entering into Cooperation Agreements with CMs—and represented to HUD that it was in full compliance with its AFFH obligations. In fact, though, the County had made a decision ahead of time *not* to address issues like race-based impediments to fair housing or municipal resistance to affordable housing because identifying such impediments or taking effective actions to counter them might be politically difficult. Westchester’s representations to HUD were material, and they were false. At best, they were made in reckless disregard of their truth or falsity. As County Executive Spano admitted at his deposition: “I signed whatever I have to in order to get the money from HUD” (Spano 41:4-5). Such representations constitute false claims.

The County’s failures to comply with the AFFH and other civil rights obligations, while certifying to HUD that it was in compliance, violate the FCA because the County “made [claims] to the United States government that [were] false or fraudulent, knowing of [their] falsity, and seeking payment from the federal treasury.” *Mikes v. Straus*, 274 F.3d 687, 695 (2nd Cir. 2001).

Exhibit J -- % Non-Hispanic Black by Census Block and Municipal Boundaries, 2000



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II. PROCEDURAL BACKGROUND

Relator filed this action on April 12, 2006. The complaint was unsealed on December 18, 2006, and was served on the County on January 8, 2007. The Court denied the County's motion to dismiss on July 13, 2007, *United States ex rel. Anti-Discrimination Center v. Westchester County*, 495 F.Supp.2d 375 (S.D.N.Y. 2007), rejecting the County's primary defense—that the HUD regulations did not require it to consider race—and holding that “an analysis of impediments that purposefully and explicitly, ‘as a matter of policy,’ avoids consideration of race in analyzing fair housing needs fails to satisfy the duty affirmatively to further fair housing.” *Id.* at 388.

The Court having established that “the only issue is whether Westchester considered race,” *id.* at 399, the central question on summary judgment is whether there is any evidence the County did so. After taking ten fact depositions of County officials and three expert depositions, and after an exhaustive review of nearly 500,000 pages produced in discovery, Relator can detect no genuine issue of material fact concerning the County's noncompliance with its AFFH obligations, or with respect to its knowing false claims made to HUD that it was complying.

III. AFFIRMATIVELY FURTHERING: STATUTES, REGULATIONS, GUIDANCE

The County could not receive HCD funds unless it made its AFFH certifications.⁴ The AFFH certification is the County's promise that it will do three things: (1) “conduct an analysis to identify impediments to fair housing choice within the area”; (2) “take appropriate actions to overcome the

⁴ See 42 U.S.C. §§3608(d) and 3608(e)(5)(requiring that HUD administer funding programs in a manner “affirmatively to further” the policies of the Fair Housing Act). The CDBG authorizing statute expressly conditions CDBG grants: “Any grant ... *shall be made only if* the grantee certifies to the satisfaction of the Secretary that— (2) the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 [42 U.S.C. 2000a et seq.] and the Fair Housing Act [42 U.S.C. 3601 et seq.], and the grantee will affirmatively further fair housing...” 42 U.S.C. §5304(b)(2). 24 C.F.R. §§91.225 (Consortium certifications); 570.601 (incorporating the requirements of Title VI of the Civil Rights Act of 1964 and the Fair Housing Act); 570.602 (incorporating non-discrimination requirements of the Housing and Community Development Act of 1974, as amended); 24 C.F.R. §570.601(a)(2)(“In accordance with the Fair Housing Act, the Secretary requires that grantees administer all programs and activities related to housing and community development in a manner to affirmatively further the policies of the Fair Housing Act.

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effects of any impediments identified through that analysis”; and (3) “maintain records reflecting the analysis and actions in this regard.” 24 C.F.R. §§ 91.225; 570.601.

As early as 1988, HUD’s CDBG regulations defined these terms as follows:

“Fair housing choice” means the ability of persons regardless of race, color, religion, sex or national origin of similar income levels to have available to them the same housing choices.

“Impediments to such housing choices” are any actions, omissions or decisions taken because of race, color, religion, sex or national origin which restrict housing choices or the availability of housing choices.

Final Rule, 53 Fed. Reg. 34416, 34468 (Sept. 6, 1988)(promulgating 24 C.F.R. §570.904 (c)(1)).

In HUD’s 1996 *Planning Guide*, a document this Court has already found to be “persuasive,” *Anti-Discrimination Center*, 495 F.Supp.2d at 387, the agency reminded Westchester that “the scope of the AI is broad. It covers the *full array* of public and private policies, practices, and procedures affecting housing choice.” *Planning Guide*, at 2-8 (emphasis supplied).⁵ The AI should describe: “the *degree of segregation* and restricted housing by race, ethnicity, disability status, and families with children; *how segregation and restricted housing occurred*; and *relate this information by neighborhood and cost of housing*.” *Id.* at 2-28 (emphasis supplied).

The *Planning Guide* explains what is required in an AI:

- *A comprehensive review* of a State or Entitlement jurisdiction’s laws, regulations, and administrative policies, procedures, and practices
- An assessment of how those laws, etc. affect the location, availability, and accessibility of housing
- *An assessment of conditions, both public and private, affecting fair housing choice for all protected classes.*⁶

⁵ See The Fair Housing Planning Guide (“Planning Guide”) [Appendix I, Tab 2].

⁶ The term “protected classes” references Fair Housing Act (“FHA”) prohibition of discrimination on the basis of race, color, religion, sex, national origin, familial status and disability.

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Id. at 2-7 (emphasis supplied). To do its job, a jurisdiction “must become *fully aware* of the existence, nature, extent and causes of *all fair housing problems and the resources available to solve them.*” *Id.* at 2-8 (emphasis supplied).

As defined by HUD, “impediments to fair housing choice” are not limited to a subset of fair housing problems, are not limited to intentional discrimination, and, indeed, are not limited to actions. On the contrary, HUD defines “impediments to fair housing choice” as broadly as can be:

- Any actions, omissions, or decisions taken *because of race, color, religion, sex, disability, familial status, or national origin* which restrict housing choices or the availability of housing choices
- Any actions, omissions, or decisions which have the effect of restricting housing choices or the availability of housing choices on the basis of race, color, religion, sex, disability, familial status, or national origin.

Id. (emphasis supplied).

Federal regulations also require a grantee to “take appropriate actions to overcome the effects of any impediments...” 24 C.F.R. §§ 91.425, 570.601. The purpose of the requirement is to have actions tailored to the particular problems that exist in each community. *Planning Guide, supra*, at 2-22. The need for constant evaluation and reevaluation is made clear by the importance that HUD attaches to each fair housing plan having a “self-assessment program” that monitors progress and evaluates the effectiveness of the fair housing plan. *Id.* at 2-23.

A grantee must also monitor the planning, analysis and performance of municipalities in its funding consortium. 24 C.F.R. §570.307. A grantee that knows of municipalities that have erected substantial impediments to fair housing choice, and have repeatedly failed or refused to take appropriate steps to overcome these impediments, must consider a range of actions suitable to the circumstances, including a decision to withhold funds to induce AFFH compliance. 24 C.F.R. §§570.501, 570.503. The County is held “accountable for the actions or failures to act” of those municipalities. 24 C.F.R. §570.906.

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Finally, the County, throughout the false claims period, was under an obligation to “establish and maintain sufficient records to enable the [HUD] Secretary to determine whether the recipient has met the [regulatory] requirements,” including, “at a minimum,” “fair housing and equal opportunity records” containing:

Documentation of the analysis of impediments and the actions the recipient has carried out with its [HCD] *and other resources* to remedy or ameliorate *any impediments* to fair housing choice in the *recipient's community*.

24 C.F.R. §570.506(g)(1) (emphasis supplied). In other words, the County must document the planning and execution of its AI, and the actions taken to overcome impediments, in a manner sufficiently robust to permit a determination of whether “the recipient has met the requirements...” *Id.* HUD’s regulation forecloses the argument that a jurisdiction can limit its analysis and actions to “significant” or “challenging” fair housing problems, or to problems experienced by only one or two of the protected classes.

IV. STATEMENT OF FACTS⁷

A. Public Posture Before ADC Intervention

During each year of the false claims period, Westchester applied for HCD funds on behalf of itself and the CMs. Answer ¶10. Each of the applications contained a certification by the County Executive that the County “will comply with the attached assurances if the assistance is awarded.”⁸ In each such application, Westchester certified that it would affirmatively further fair housing by conducting an AI, taking appropriate actions to overcome the effects of any fair housing impediments, and maintaining records reflecting that analysis and those actions, Answer ¶22, ¶24. The County was also required to submit a Consolidated Annual Performance Report (“CAPER”) to

⁷ Relator incorporates by reference each and all of the undisputed facts in its FRCP 56.1 statement, and each and all of the opinions of its experts, the reports and rebuttal reports of whom are contained in App. II, Tabs 21 - 27.

⁸ See Application for Federal Assistance, a representative sample of which appears at App. I, Tab. 5. Such applications are incorporated into each of the County’s Annual Action Plans for FY 2000 through FY 2006, at App. I, Tab. 9.

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HUD which included “a description of the ...actions taken to affirmatively further fair housing.” 24 CFR §91.520(a).

Throughout the false claims period, Westchester repeatedly sought and received payments from HUD premised upon the notion that it had fulfilled its obligations to the federal government, ultimately receiving more than \$52 million.⁹ Westchester entered into Cooperation Agreements¹⁰ with each CM that contained HUD-prescribed language reaffirming that Westchester understood and took seriously its AFFH responsibilities:

The County and Cooperating Municipality will take all required action to comply with the provisions of Title VI of the Civil Rights Act of 1964, the Fair Housing Act of 1968 and the Americans with Disabilities Act of 1990 to assure compliance with the certification required by Section 104(b) and 109 of Title I of the Housing and Community Development Act of 1974 as amended, and other applicable laws....Further, **the County is prohibited from expending Urban County funding for activities in or in support of any local government that does not affirmatively further fair housing within its own jurisdiction or that impedes the County’s action to comply with its fair housing certifications.**

Sample Cooperation Agreement, excerpts from paragraph 6(a) (emphasis supplied).

The County Executive and the Planning Department were responsible for administration of the CDBG program and compliance with the AFFH certifications, but the Board of Legislators (“the County Legislature”) was a full partner with the executive branch, passing legislation authorizing the submission of every application for HCD funds, every related HUD report, and every Cooperation Agreement entered into with the 40 CMs. (Drummond 191:21-24; 57:18-22).

⁹ HUD Funding Approval/Agreement forms, FY 2001-2006 [App. I, Tab 6].

¹⁰ Sample cooperation agreements are appended to Drummond deposition [App. III, Tab 31] Ex. 12, ¶6(a).

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B. The Information Gained by ADC Was the Catalyst For Exposing Westchester's Fraud

From 1994 to the present, including the entire false claims period, Norma Drummond has had program responsibility in the Planning Department for administration of the CDBG program and the County's AFFH certifications. (Drummond 44:15 - 56:8). Planning Commissioner Gerald Mulligan confirmed that Drummond carries out the policies that he asked her to carry out and that she would not take action that he advised her not to take (Mulligan Deposition [App. III, Tab 30] 29:23-25 and 29:20-22). It would be entirely uncharacteristic of Drummond to act without authority (Mulligan 29:16-19). The County Executive confirmed in his deposition that Drummond is responsible for making sure that Westchester's AFFH obligations are carried out (Spano 24:7-20).¹¹

Drummond invited Craig Gurian, ADC's Executive Director, to a meeting in her office on July 7, 2005 (Drummond 305:24 – 305:5). ADC had previously submitted a Freedom of Information Law ("FOIL") request to Westchester that raised a variety of issues in connection with the County's AFFH obligations.¹² After the meeting, Gurian promptly memorialized the meeting ("Contemporaneous Memo").¹³ The Contemporaneous Memo's accuracy in identifying admissions made by Drummond has been confirmed in deposition by Gurian and his ADC colleague Richard Bellman,¹⁴ who attended the meeting; and has been independently confirmed through the

¹¹ Spano and Mulligan both ratified Drummond's actions with respect to the AFFH certifications (Spano 27:8-20; 117:6-14; Mulligan 29:11-25). Spano himself signed those certifications and, with the concurrence of the County Legislature, authorized the Planning Department to enter into contracts with CMs, to disburse funds and to submit requests for payment to HUD. Even without such ratification, the County is bound by Drummond's actions and admissions. See *United States v. Incorporated Village of Island Park*, 888 F.Supp. 419, 438 (E.D.N.Y. 1995) ("Respondeat superior applies to violations of the False Claims Act committed by an employee of a corporation who is acting within the scope of his authority and, at least in part, for the employer's benefit."). A corporation is also liable for violations of the False Claims Act committed by an employee who acted with apparent authority, even if the acts do not benefit the corporation at all. *United States v. O'Connell*, 890 F.2d 563, 567-68 (1st Cir.1989).

¹² The FOIL request is an exhibit to the Gurian deposition [App. III, Tab 40] Ex. E.

¹³ "Contemporaneous Memo" Gurian deposition [App. III, Tab 40] Ex. D.

¹⁴ See, generally, Gurian Deposition [App. III, Tab 40] and Bellman Deposition [App. III, Tab 41].

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depositions of Westchester officials, or by admissions by Westchester in response to requests for admissions, or by documentary proof of the limits of Westchester's analysis and actions.¹⁵

During that meeting, Drummond revealed that Westchester did not analyze impediments to fair housing from the point of view of race (either in terms of demographics or in terms of discrimination), and that Westchester did not treat as an impediment anything that was not brought to the County's attention by a CM or other non-County entity. As a matter of policy, Westchester would not monitor a CM's efforts to AFFH because that would be seen as "interference" with the municipalities, and the County's policy "has never been to chastise municipalities," either with respect to their performance or lack of performance concerning either affordable housing or AFFH. Drummond revealed that the County would not, as a matter of policy, withhold or threaten to withhold HCD funds from a CM in the face of a failure to AFFH: "[W]e wouldn't tell a municipality what to do."¹⁶ Among other things, Westchester did not require CMs to document that they had affirmatively furthered fair housing, did not require CMs to take specific steps to AFFH as a condition of receiving federal funding; and did not require CMs to identify land suitable for affordable housing development. Westchester's message to those municipalities was: "You know your municipalities best, look to the needs of your residents."¹⁷

C. The Absence of Documents Confirms Westchester's Failure to Analyze or to Take Actions

Drummond's statements to ADC were confirmed by the fact that there were no documents produced pursuant to ADC's FOIL request (other than a sample Cooperation Agreement) that evidenced any requirement imposed by Westchester on a municipality, any corrective action taken

¹⁵ See generally, Drummond Deposition [App. III, Tab 31]; Defendant's Responses & Objections to Plaintiff/Relator's First Requests for Admission ("Responses to First Requests for Admission") [App. I, Tab 1]; Defendant's Responses & Objections to Plaintiff/Relator's Revised Second Requests for Admission. ("Response to Second Requests for Admission") [App. I, Tab 3].

¹⁶ See Contemporaneous Memo for each of the admissions referenced in this paragraph.

¹⁷ See Contemporaneous Memo for each of the admissions referenced in this paragraph.

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or threatened to be taken by Westchester, any AFFH monitoring or analysis by Westchester, or any records concerning *any* consideration of housing discrimination or housing segregation as an impediment to fair housing. If Westchester had conducted an actual AI or had taken appropriate actions to overcome impediments to fair housing, there would be documents to prove it.¹⁸

The absence of documents was confirmed in the course of discovery in this action. Outside of the bounds of the purported “AIs” themselves (which have no mention of race whatsoever),¹⁹ and outside the bounds of Westchester’s Annual Action Plans (which, throughout the false claims period never identify actions targeted to overcome impediments to fair housing),²⁰ there are simply no documents – zero out of more than 500,000 pieces of paper turned over– that reflect any analysis or action by Westchester in any of the areas that ADC initially identified.

D. Racial Segregation in Westchester County

Westchester knew that it was residentially segregated on the basis of race, and has admitted that it was aware of the racial composition of each of its municipalities during the preparation of the 2000 and 2004 purported “AIs.”²¹ It knew that more than three-quarters of Westchester’s municipalities had very large or very small African-American populations,²² and has now conceded that more than half of CMs had African-American populations of 3% or less, and that 15 CMs had a Black population of 1% or less.²³ Despite Westchester’s extensive efforts to claim that these data

¹⁸ See 24 CFR §570.506(g)(1).

¹⁹ See 1996, 2000, and 2004 Analyses of Impediments (“AIs”) [App. I, Tabs 7, 8], and [App. III, Tab 28], respectively. The similarity of the documents is consistent only with “cutting-and-pasting,” not analysis.

²⁰ Westchester County’s 2000-2006 Annual Action Plans [App. I, Tab 9].

²¹ See Responses to Second Request for Admissions [App. I, Tab 3] Nos. 30 and 31.

²² See Response to Second Request for Admissions [App. I, Tab 3] No. 29.

²³ See Response to First Request for Admissions [App. I, Tab 1] Nos. 9, 10, and 13.

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do not reflect racial segregation, Westchester officials, when unguarded, have admitted the existence of racial segregation.²⁴

Professor Andrew Beveridge confirms that the fact of segregation in Westchester is unmistakable if one simply takes a moment to look at any demographic map, including the map prepared by Westchester's Planning Department (but never referenced in the "AIs").²⁵ He also confirmed that the Planning Department had ready access to the data and methodologies necessary to assess whether the County is segregated. Beveridge found that a high level of segregation for African-Americans existed and had existed over time in Westchester, whether measured by the dissimilarity index or by the isolation index.²⁶ Indeed, the *increase* in the isolation index for African-Americans, measured from 1950 to 2000, "*represents more than a doubling of the concentration experienced in the tract where the average black lived.*"²⁷ The "data person" of the Westchester Planning Department during the false claims period, Michael Lipkin, admits both having access to and to utilizing 2000 Census Data (Lipkin Deposition [App. III, Tab 33] 31:16 – 22 and 68:3 – 71:11); indeed, at his deposition, Lipkin was easily able to identify areas of African-American concentration "off the top of his head" because "this was my job, this what I did every day." (Lipkin 71:6-17). Westchester's experts agreed that the County was segregated.²⁸

²⁴ Dolores Braithwaite, the Executive Director of Westchester's Human Rights Commission, someone whose views were not solicited in connection with the preparation of the 2004 "AI," testified that "there are quite a few segregated areas in Westchester" (Braithwaite Deposition [App. III, Tab 32] 71:18-19). Norma Drummond admitted that, "Whether [communities] are in fact segregated, I agree is based on data" (Drummond 84:20-21). She testified that between 24 and 50 Westchester Census tracts were "hypersegregated," indicating that they were above 40% minority population. (Drummond 231:17 - 232:24).

²⁵ Initial expert report of Andrew Beveridge, Ph. D ("Beveridge Report") [App. II, Tab 21] pp. 5-7.

²⁶ *Id.* at pp. 7-10.

²⁷ *Id.* at p. 9.

²⁸ Westchester's purported expert, Gary Lacefield, agreed: "[A]bsolutely there are segregated communities in Westchester" (Lacefield Deposition [App. III, Tab 34] 117:14 – 118:4) Westchester's other experts agree. Dr. Finis Welch testified, "[O]f course there are 'racial clusters' in Westchester: I've seen these [segregation] indices and they do show differential patterns" (Welch Deposition [App. III, Tab 35] 81:11-18). And Professor William Clark: "No one denies the fact that there is racial concentration in Westchester County" (Clark Deposition [App. III, Tab 36] 102:2-5).

CORRECTED

Faced with the plain facts about racial segregation, the County ignored the issue in its 2000 or 2004 “AIs,” and subsequent Annual Action Plans and CAPERS submitted to HUD.

E. Municipal Resistance and its Consequences

Throughout the false claims period, Westchester was aware that municipal resistance to affordable housing and to racial integration was operating in many parts of Westchester. The County’s Housing Opportunity Commission (“HOC”) identified such resistance in at least three of its reports.²⁹ HOC’s Affordable Housing Action Plan, known to the Planning Department as it developed the 2004 “AI” (Drummond 207:6 – 210:11), explicitly reiterated the fact that progress in taking steps to facilitate the production of affordable housing “has been minimal in most municipalities,” and that “*it is the municipalities who will determine whether the affordable housing crisis will be eased or whether it will continue to worsen for another decade.*”³⁰

In 1996, Westchester Residential Opportunities warned Westchester in a letter that strict zoning by municipalities limits equal housing opportunities and sends a “Stay Out” message to minorities.³¹ It also advised that “Westchester residents consider ‘low-income’ to be a synonym with ‘minority,’” resist participation in Section 8 programs, and thereby create or maintain residential racial segregation.³² Drummond agreed with each of these assessments (Drummond 425:25 – 426:25), but “from a county policy perspective” thinks that there is no obligation on the part of municipalities to see that affordable housing gets built (Drummond 429:2-8). The fact of continuing municipal resistance to affordable housing could not change the County’s pre-determined “cooperative approach” during the false claims period. As the County Executive revealingly

²⁹ See *Housing Opportunities for Westchester: A Guide to Affordable Housing Development* (“Guide to Affordable Housing Development”) [App. I, Tab 10], End of Decade Report [App. I, Tab 11] and the Affordable Housing Action Plan [App. I, Tab 12].

³⁰ Affordable Housing Action Plan [App. I, Tab 12] pp. 10 and 15 (emphasis supplied).

³¹ August 5, 1996 letter from Westchester Residential Opportunities to Kim Holland of the Westchester Planning Department, Drummond Deposition Vol. II [Appendix III, Tab 28] Ex. 23.

³² *Id.*

CORRECTED

testified: “I’m a very successful politician, I won by three landslides. And I’ve won by operating the way I’m talking to you about...” (Spano Deposition [App. III, Tab 29] 106:15-18).

F. The Significance of Location of Affordable Housing Units

The County knew that 20 overwhelmingly White CMs did not build a single unit of affordable housing between 1993 and 2006.³³ Consequently, the County knew that its affordable housing program was not expanding fair housing choice for African-Americans into white communities, but further concentrating affordable housing in segregated neighborhoods.³⁴ The County Executive himself, reflecting on the Yonkers litigation, understood that *where* affordable housing is and is not built has important racial dimensions.³⁵

Drummond testified that putting more affordable housing in places that already have a lot of affordable housing may have the effect of perpetuating segregation in those communities (Drummond 177:11-19). Jerrold Levy, general counsel of the Enhanced Section 8 Outreach Program, an independent nonprofit without County funding, testified that “there’s been a history in Westchester County of both local and county government not taking any affirmative steps in any manner” to “integrat[e] the county,” but rather of “doing the opposite, actually funding groups that actually perpetuated segregation in the county” (Levy 11:18-25).

G. Other Impediments to Fair Housing

Despite the County Legislature’s own finding in just a year before the start of the false claims period that “there have been repeated instances of intolerance and discrimination committed in Westchester County,” County Code §700.01, neither AI mentioned these issues. Nor did they

³³ See End of Decade Report [App. I, Tab 11] pp. 1-2; *Affordable Housing Allocation Plan* [App. I, Tab 13] Tables A, C; Rebuttal Report of Andrew Beveridge, Ph.D. (“Beveridge Rebuttal Report”) [App. II, Tab 22] Ex. R-1, Ex. R-2.

³⁴ Beveridge Rebuttal Report [App. II, Tab 22] 1-2, Exhibits R-1, R-2.

³⁵ First observing that affordable housing was initially only being built on the West side of the city (but not on the east side), he characterized the case as being about “segregating the one group and putting them to one side of the city and not putting them to the other side of the city” (Spano 15:17 - 17:5).

CORRECTED

mention, as the County's own experts and officials acknowledge, that the that lack of transportation and jobs could be barriers for African-Americans moving to parts of Westchester County.

(Mulligan 48:7 – 49:13; 51:17 – 53:14). Another impediment to fair housing stems from the operation of affordable housing “preferences,” particularly for seniors or for existing local residents. (Drummond 324:20 – 325:17; 101:20 – 102:9; Spano 81:5 – 83:11). This housing has been understood to be “less controversial” than housing open to all comers (Spano 80:15-22; Drummond 335:16-20) but has the potential to perpetuate patterns of segregation.³⁶

County officials were aware that some opposition to affordable housing was expressed in terms of a feared impact on the public schools. (Drummond 334:24 – 335:20). The HOC concluded that some municipalities had “generate[d] constitutionally prohibited zoning ordinance[s]” and that opposition to affordable housing on the basis of “school burden” was “a pretext for a fundamentally unacceptable use of the land use powers delegated ... to local municipalities....”³⁷ Drummond claimed not to know whether some African-American families might be inhibited from moving into a community that had a very small African-American population (Drummond 94:2-9),³⁸ but did share her view that “African-Americans feel more comfortable living among other African-Americans and that White people feel more comfortable living among other White people.” (Drummond 337:7-17).

In the course of their depositions, high-ranking County officials also revealed their knowledge of a several fair housing impediments that were never included in the “AIs,” never analyzed, and never addressed by County action. Among the impediments the “County ... chose not to list,” (Drummond 222:23-24) were (1) “blockbusting by realtors,” (Drummond 222:8 –

³⁶ See *Huntington Branch, NAACP*, 844 F.2d at 937 (blocking affordable housing perpetuated segregation).

³⁷ See End of Decade Report [App. I, Tab 11] p. 5.

³⁸ Cf. testimony of defendant's expert Clark: for African-Americans, lack of integrated neighborhoods “certainly has a constraint on the extent to which they can exercise their choice” (Clark 94:8-17).

CORRECTED

224:18); (2) racial steering by real estate agents (Mulligan 84:2 – 86:9);³⁹ (3) adoption and enforcement of a zoning ordinance in Mount Kisco that the County believed had a disparate impact on the basis of national origin and familial status (Drummond 225:6 – 228:12); and (4) opposition to affordable housing planning boards in three CMs (Drummond 151:19-25; 193:18 – 194:12).

H. Westchester’s Authority to Overcome Local Zoning

Westchester believed throughout the false claims period that the building of affordable housing serves an important and valid County purpose (Spano 42:23 – 43:2). Westchester knew exactly how to do it: “the way we normally operate is we get the land, and we get a developer to come in, we offset the costs so they can be affordable, and let them put it up” (Spano 50:6-9).

Prior to 2000, Westchester already knew that it had authority, pursuant to the *County of Monroe* and *Berenson* doctrines enunciated by New York State’s highest court, to overcome local restrictions on the building of affordable housing. The HOC repeatedly referred to the *Berenson* doctrine (a municipality’s obligation to zone for regional housing need) in its reports.⁴⁰ In 1991, the County itself successfully invoked the *County of Monroe* “public interest” doctrine to override municipal ordinances in Elmsford when the County determined that a transitional housing program for formerly homeless people should be established there. *See Westhab, et al v. Village of Elmsford*, 151 Misc.2d 1071, 574 N.Y.S.2d 888 (N.Y. Supreme Court, Westchester Co., July 23, 1991). The County’s brief argued, and the *Westhab* court agreed, that:

It is clear that under either the *Nehrbas* standard...or under the new [*County of Monroe* standard, neither the County nor Westhab as its agent are subject to the Village building code requirement. Westhab is performing an essential governmental function as an agent of Westchester County, as well as fulfilling the expressed intent of the legislature to aid the homeless in the public interest.

³⁹ *See Do Real Estate Agents Treat Minorities Differently Than Whites?*, [App. I, Tab 14] and (Brathwaite 61:14 – 62:5) (indicating she “would not have contacted the Planning Department” concerning such matters, and did not participate in the e 2004 AI process).

⁴⁰ *See, e.g.*, Guide to Affordable Housing Development [App. I, Tab 10] at 12-13 (referring to “affordable housing as a mandated municipal obligation,” and Affordable Housing Action Plan [App. I, Tab 12] at 3.

CORRECTED

Neither Westhab nor the County are [sic], therefore, bound by local law.

Westchester County's Memorandum of Law in Response to Plaintiff's Motion for a Preliminary Injunction, filed in *Westhab, Inc. v. The Village of Elmsford, et al.* [App. I, Tab 15] pp. 24-25.⁴¹

I. Westchester's Knowledge of its AFFH Obligations

By 1996, the County was well apprised of its AFFH obligations.⁴² It knew it was prohibited from funding CMs that did not AFFH, 24 C.F.R. §570.904, and the County knew it. *See, e.g., Cooperation Agreement, ¶16(a) and HUD's Instructions for Urban County Qualification for Participation in the CDBG Program for Fiscal Years (FYs) 2006-2008* (April 6, 2005), D0368484-518 (providing that County "must submit [to HUD]...copies of fully executed cooperation agreements ... between the county and its [Consortium Municipalities]..."). In other words, the Cooperation Agreements were a precondition to the County receiving federal funding for the Consortium, and the submission of those agreements was a representation to HUD that the County would neither act in ways contrary to the agreements nor fail to enforce the terms of the agreements vis-à-vis the CMs. HUD was entitled to rely on this representation.

Westchester had the *Planning Guide* even before 2000, but it also had internal Planning Department memos to draw on.⁴³ One 1996 memo was entitled "Westchester County Fair Housing Plan Outline," written to a Drummond subordinate; the other, written in the same year by that

⁴¹ This authority existed in addition to the authority to challenge municipal restrictions on housing pursuant to the Fair Housing Act. *See, e.g., Huntington Branch, NAACP v. The Town of Huntington*, 844 F.2d 926 (2nd Cir. 1988) (local zoning illegally disparate impact on the basis of race). *See* (Spano 118:23-24) ("Any policy that we develop is vetted through the Law Department").

⁴² *See, e.g., Response to Requests for Admission* [App. I, Tab 1] No. 4 and Chapter 2 of the Planning Guide [App. I, Tab 2]. *See also* a July 17, 1996 HUD letter to the County advising that the "[County's 1996] AI should contain a description of the degree of segregation and restricted housing by race, ethnicity, disability status and families with children; explain how segregation and restricted housing supply occurred; and relate this information by neighborhood and cost of housing...Records should also be kept which pertain to specific actions taken to affirmatively further fair housing." [App. I, Tab 4]

⁴³ *See Response to Requests for Admission* [App. I, Tab 1] No. 4, and see discussion of Planning Guide, *supra*, at pp. 7-8. Norma Drummond specifically recalls having reviewed the Planning Guide prior to preparing the 2004 "AI" (Drummond 266:15-18). Either she also reviewed it prior to the 2000 "AI," or she recklessly failed to do so.

CORRECTED

Drummond subordinate had the subject heading “Fair Housing Plan,” and Drummond was a recipient.⁴⁴ The memos set out the substance of Westchester’s AFFH responsibilities, including the fact that demographic patterns should be looked at; that “segregation” is a type of impediment; and that any action, omission, or decision that has the effect of restricting the available of housing choice on the basis of race constituted an impediment to fair housing choice.

With the exception of the recommendation in the Fair Housing Plan memo to create a centralized database of all assisted housing programs in order, *inter alia*, to “integrate waiting lists, thereby broadening housing choices and encouraging applicants to consider racially non-impacted areas”⁴⁵ – a recommendation with which Drummond did not agree (Drummond 402:24 – 404:2) – there was no part of that memo’s summary of AFFH requirements with which Drummond came to disagree in the period from 1996-2008 (Drummond 398:14-19). With respect to the “Fair Housing Plan Outline,” there was nothing in it which Drummond disagreed with (Drummond 367:5-14 and 369:9-14). Drummond also confirmed that she knew that Westchester’s AFFH obligations encompassed the obligation to maintain records that reflect its analysis of impediments to fair housing and that reflect the actions it took to overcome impediments (Drummond 368:4-7).

Westchester’s knowledge of its obligations was supplemented by a 2002 HUD training attended by Drummond, Westchester’s point person for AFFH compliance. The extensive training materials, which she kept in her office, repeatedly highlighted the importance of identifying the scope and causes of racial segregation, and taking actions to overcome that segregation.⁴⁶ One section identified the need to speak to all categories of impediments to fair housing “even though there may be a particular area free, in the grantee’s view, of significant barriers.”⁴⁷

⁴⁴ The former is Drummond Vol. II [App. III, Tab 28] Exh. 18; the latter is Exhibit 19 to that deposition.

⁴⁵ See Drummond Deposition Vol. II [App. III, Tab 28] Ex. 19, p. 3.

⁴⁶ The materials are included as an exhibit to the Drummond deposition [App. III, Tab 31] Ex. 10.

⁴⁷ *Id.* at Bates D0124508.

CORRECTED

Despite significant effort to evade the fact of racial segregation in Westchester, the County Executive explained that AFFH means “having a proactive policy to make sure that you have a appropriate mixture of racial integration,” something he believes Westchester has achieved “in the City of Yonkers” (Spano 94:10-22). He recognized that even non-systemic impediments to fair housing must be addressed (Spano 96:24 – 97:8).

Westchester knew that simply writing about affordable housing would not meet its obligation to analyze and act pursuant to its AFFH obligations. On more than one occasion, including in a 1996 letter from the Planning Department to Westchester Residential Opportunities (copied to Drummond), the County noted that “the Planning Department has prepared several reports that address affordable housing *which should not be confused with the Fair Housing Plan.*”⁴⁸

J. Westchester’s Failure to Meet its AFFH Obligation to Analyze Impediments to Fair Housing

In the face of its knowledge both of relevant conditions and of its AFFH obligations, Westchester did not conduct an AI process at any time during the false claims period that bore any relation to what it was required to do. Indeed, the “AIs” are not even characterized as analyses of impediments to fair housing choice. Ignoring HUD training and guidance, and the County Executive’s admission of that AFFH imposes an obligation to work toward racial integration, the “AIs” make no reference to race, race discrimination, or racial segregation.⁴⁹ This absence is *not* explained by any process of “analysis” – *Westchester concedes that there are no documents other than the Consolidated Plans themselves that reflect or underlay any conclusion that “there were no*

⁴⁸ See Drummond Deposition Vol. II [App. III, Tab 28] Exh. 22 (emphasis supplied).

⁴⁹ See generally, 1996 AI, 2000 AI, 2004 AI [App. I, Tabs 7,8] and [App. III, Tab 28].

CORRECTED

significant race-based impediments to fair housing choice in Westchester County, and the Consolidated Plans offer no support for that proposition.”⁵⁰

Despite receiving warnings that an AI was supposed to be a study of impediment to fair housing, not simply a report on affordable housing, and despite Drummond knowing that this was true (Drummond 424:5-21), Westchester *only* examined affordable housing, and did so in a way entirely unrelated to the ways that the quantity and location of affordable housing has an impact on the fair housing choices of African-Americans. Westchester never even conducted any analysis of whether the production of affordable housing between 1992 and 2006, had the effect of increasing or decreasing racial diversity in the neighborhood in which it was built.⁵¹ Where the HOC placed municipal resistance at the forefront of the affordable housing crisis, the “AIs” are conspicuously silent on this issue, just as they are silent as to all other impediments discussed herein.

K. Westchester’s Failure to Take Appropriate Action to Overcome Impediments to Fair Housing

In terms of action to fulfill its AFFH responsibilities, Westchester did nothing. No monitoring; no requirements; no inclusion of fair housing issues in its master plan (*Patterns for Westchester*). Westchester never adopted as a goal or objective a reduction of large inter-municipal variations in racial composition.⁵² It did not use its *County of Monroe* authority (as it had done in the *Westhab* case) or its *Berenson* authority (which it also knew existed) to get housing built in resistant municipalities. Municipalities were not even required to consider whether their zoning and land use ordinances had the effect of limiting housing choice on the basis of race.⁵³

⁵⁰ Response to Second Revised Request for Documents [App. I, Tab 18a] No. 17.

⁵¹ Response to Second Requests for Admission [App. I, Tab 3] No. 37.

⁵² Response to Second Requests for Admission [App. I, Tab 3] No. 32.

⁵³ Response to Second Requests for Admission [App. I, Tab 3] No. 36.

CORRECTED

Ignoring its obligation – set forth, *inter alia*, in its own Cooperation Agreements with CMs – Westchester did not de-fund or threaten to de-fund municipalities that were failing to AFFH or that were interfering with Westchester’s own efforts to AFFH.

Putting the County in the best possible light, Westchester was indifferent to the location of County-funded affordable housing. The predictable result was that the development of County-funded affordable housing perpetuated rather than ameliorated segregation.⁵⁴ Westchester was so reckless about its AFFH obligations that it did not bother to train either Michael Lipkin (its Planning Department “data person”) or Dana Sanchez (the Planning Department person responsible for CDBG grant administration) or Mark Massari (the Department’s accountant who submitted requests for payment to HUD) on Westchester’s AFFH responsibilities. (Lipkin 45:2 – 46:6; Sanchez Deposition [App. III, Tab 38] 48:3-22; Massari Deposition [App. III, Tab 39] 20:15 – 22:8).

Legislatively, Westchester actively increased barriers to fair housing choice by giving municipalities a “right of first refusal” device by which to increase the leverage municipalities could exert against the construction of affordable housing.⁵⁵ The same legislative body has declined to pass legislation prohibiting discrimination against Section 8 tenants, legislation that would facilitate freer fair housing choice throughout Westchester. (Levy 12:13 – 13:15).⁵⁶

⁵⁴ Beveridge Rebuttal Report [App. II, Tab 22] pp. 1-2.

⁵⁵ Though Norma Drummond acknowledged that the legislation created an impediment to affordable housing construction (Drummond 163:2-7), this impediment was never mentioned in an AI or an update to an AI).

⁵⁶ In terms of an area where legislative action had been taken prior to the false claims period – the creation of a Human Rights Commission – effective implementation did not follow. In 1999, the County Legislature found that there was no greater danger to the public welfare than prejudice based, *inter alia*, on race, and that, notwithstanding federal and state law, “there have been repeated instances of intolerance and discrimination committed in Westchester County.” Westchester County Code §700.01. Yet in 2008, the Human Rights Commissioner testified that “we’re just in the embryonic stage of doing [housing],” that “[w]e are just getting involved more in the housing discrimination area,” and that exploring the demographics of the county to determine their relationship with discrimination or other housing problems “is one of the things that’s on our list to look at,” as “we now begin to get more involved in the fair housing.” (Braithwaite 88:9-11, 92:24-25, and 74:12-22, respectively).

CORRECTED

L. Westchester's Failures to AFFH Were Driven by its *a priori* Policy Determinations

Westchester's failures to analyze or to act were matters of *a priori* Westchester policy, as originally revealed in the ADC-Drummond meeting. See Contemporaneous Memo. Because of limitations on the size of this brief, three additional illustrations will have to suffice. The County Executive himself testified that he effectively gave municipalities a veto over where Westchester would and would not buy land for the construction of affordable housing.⁵⁷ Where a municipality does not want affordable housing, the County Executive lets the municipality have its way (Spano 45:17 - 46:5), even though the County was warned of (and Norma Drummond now acknowledges) the segregating consequences (Drummond 424:23 – 426:17).

Despite Westchester's insistence that the greatest impediment to fair housing is the absence of affordable housing, 2000 AI at 259; 2004 AI at Slide 302, and despite the clear language of the Consortium Agreements barring expenditure of funds in or for municipalities that fail to AFFH or interfere with Westchester's efforts to AFFH, Westchester never took any action to exclude any of the 20 municipalities that met 0% of its affordable housing allocation (Mulligan 63:8-14).

Planning Commissioner Mulligan did acknowledge at his deposition the possibility of race-based impediments to fair housing existing in Westchester (Mulligan 79:14-23),⁵⁸ though he was unable to say where they fell on a continuum of all impediments to fair housing (Mulligan 81:2-11). Nevertheless – even though County Executive Spano acknowledged at his deposition that the County's AFFH obligation meant that even those impediments to fair housing not perceived to by

⁵⁷ “I will never buy it unless I ask the town, hey, if I buy this land and sell it to this guy, what are you guys going to do about the housing, are you going to approve it or not approve it, because sometimes the land's zoned one way and it has to be rezoned” (Spano 44:24 – 45:5) (emphasis supplied).

⁵⁸ Cf. testimony of Human Rights Commissioner Braithwaite (Braithwaite 31:20-21) (“I’m sure there is housing discrimination in Westchester County, yes”).

CORRECTED

“systemic” must be addressed⁵⁹ – Westchester had *decided* in the false claims period not to mention race-based impediments *at all*: “[W]e talked and decided to approach it the way we did” (Mulligan 81:19-20). This disconnect is only understandable in light of the County Executive’s acknowledgment that a willingness to work towards racial integration had to be tempered by what he called “political reality” (Spano 97:12-15), a limitation not contemplated by the County’s absolute obligations to AFFH.⁶⁰

ARGUMENT

POINT I

THE LEGAL FRAMEWORK FOR ASSESSING FALSE CLAIMS ACT LIABILITY

In violation of the False Claims Act (“FCA”), Westchester: (1) made claims (2) to the United States government, (3) that were false or fraudulent, (4) knowing of their falsity,⁶¹ and (5) seeking payment from the federal treasury. *See Mikes v. Straus*, 274 F.3d 687, 695 (2d Cir.2001). In multiple submissions to HUD, Westchester certified compliance with the Fair Housing Act, 42 U.S.C. §3601 *et seq.*, the Housing and Community Development Act, 42 U.S.C. §5304; and related regulations, including the AFFH regulations, as a “condition to governmental payment” of Housing and Community Development (“HCD”) funds in the amount of more than \$52 million during the false claims period. The County does not contest the first, second, and fifth elements of the *Mikes*

⁵⁹ “[W]e have an obligation...to try to do the best we can to make sure ...that this world is as diverse and as integrated...as it can be, and we try that” (Spano 97:24 – 97:8).

⁶⁰ There has been and continues to be a widespread perception that efforts to expand housing opportunity are politically difficult. *See, e.g.*, Elsa Brenner, “Housing Goals Remain Elusive,” NEW YORK TIMES, August 31, 2008 (quoting Richard Hyman, a consultant to HOC remarking: “What’s more, a lot of good politicians who supported the cause [of affordable housing] have lost their jobs over the issue.”)

⁶¹ FCA liability can be established by showing that the County “knowingly present[ed], or cause[d] to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval,” or that such person has “knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.” 31 U.S.C. §3729(a).

CORRECTED

test, and the balance of this brief addresses the third and fourth elements only.⁶² As the following sections of the brief and Relator's Rule 56.1 Statement document, there is no genuine issue of material fact with respect to the remaining elements.⁶³

A. The FCA's Definition of "Falsity"

Relator relies principally on the "legally false" certification theory, which is "predicated upon a false representation of compliance with a federal statute or regulation ... as a condition to governmental payment." *Mikes*, 274 F.3d at 696, 697.⁶⁴ In the Second Circuit, a claim can be "legally false" where there has either been an *express* false certification or an *implied* false certification. *Id.* at 697-99. With respect to the express certification claim, Westchester's repeated certifications throughout the false claim period that it would analyze impediments to fair housing and take appropriate actions to overcome impediments to fair housing were both pre-requisites to participation in and funding under federal housing programs, and, as shall be discussed below, were irreconcilable with Westchester's *a priori* decisions – as reflected both by admissions and by a pattern of conduct – *not* to analyze and *not* to act, especially with regard to race-based impediments or impediments dealing with municipal resistance to the placement of affordable housing.

The "implied" certification theory in *Mikes* was adopted from *Ab-Tech Constr., Inc. v. United States*, 31 Fed.Cl. 429 (Fed.Cl.1994), *aff'd w/o opinion*, 57 F.3d 1084 (Fed.Cir.1995). In *Ab-Tech*, the court found defendant's "payment vouchers represented an implied certification by ...

⁶² Relator satisfies the first and second prongs by way of the County's admission that it made claims for payment of grant funds from the U.S. Government throughout the false claims period. Answer ¶26. This admission also implicitly supports the fifth prong, along with explicit support from the deposition testimony of Mark Massari, who has served as an accountant in the County's Planning Department since 1984, and was the person primarily responsible for submitting payment requests to HUD. Massari testified that throughout his tenure, he submitted roughly 25 requests for payment to HUD each month, and that HUD thereafter wired funds to the County's bank account. (Massari 55:23 – 57:14).

⁶³ FCA liability can be established by showing that the County "knowingly present[ed], or cause[d] to be presented, to...the United States Government...a false or fraudulent claim for payment or approval," or that the County has "knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a).

⁶⁴ Relator also claims that Westchester made "factually false" certifications, certifications that involve "an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided," *Mikes* at 697, one variation of which has been characterized as a "worthless services claim." *Id.* at 702.

CORRECTED

of its continuing adherence to the requirements for participation in the [government's] 8(a) program.” *Id.* at 434. The court held that the “Government was duped by [defendant's] active concealment of a fact vital to the integrity of the program,” *id.*, and “[paid] out funds in the mistaken belief that [defendant] was furthering the aims of the ...program.” *Id.* See also *U.S. ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 382 (5th Cir. 2003) (“‘Implied certification’ amounts to nothing more than an alternative expression of the well-accepted idea that billing the government for something not delivered may constitute a false claim. If the government defines its bargain in a manner that requires adherence to a statute or regulation, compliance with that statute or regulation is implied by virtue of a request for payment.” [citations omitted]).⁶⁵

B. The FCA’s “Knowing” Prong Imposes No Requirement That a Defendant Have Had “Specific Intent” to Defraud The Government

For FCA purposes, knowledge may be demonstrated, *inter alia*, by a showing that a grantee made certifications or sought payment in reckless disregard of the truth or falsity of its express or implied representations, or acted in deliberate ignorance of the falsity of its representation. 31

U.S.C. §3729(b). The FCA imposes a standard of care with respect to governmental certifications:

One who signs a certification cannot choose to remain unaware of the veracity of that certification like the proverbial ostrich who buried its head in the sand so as to see no evil, hear no evil, and speak no evil. Thus, a failure to conduct a proper investigation before making a false statement may be sufficiently reckless to yield False Claims Act liability.

⁶⁵ Because the County’s initial certifications were false, each subsequent request for payment based on those earlier false certifications was, itself, a knowing false claim made to the U.S. government for the purpose of seeking payment from the federal treasury. *U.S. ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157 (2d Cir.), *cert. denied*, 508 U.S. 973, 113 S.Ct. 2962 (1993) (holding that “the number of assertable FCA claims is not measured by the number of contracts, but rather by the number of fraudulent acts committed by the defendant,” and citing to *United States v. Ehrlich*, 643 F.2d 634, 638 (9th Cir.), *cert. denied*, 454 U.S. 940, 102 S.Ct. 474 (1981) for the proposition that “if a person knowingly causes a specific number of false claims to be filed, he is liable for an equal number of forfeitures”); see also *United States v. Incorporated Village of Island Park*, 888 F.Supp. 419, 441 (E.D.N.Y. 1995) (where federal mortgage commitments were secured fraudulently, “a separate claim for liability under the False Claims Act exists [against the defendant municipality] with respect to *each* monthly mortgage subsidy claim” submitted by the lender to HUD).

CORRECTED

U.S. v. Raymond & Whitcomb Co., 53 F.Supp.2d 436, 447 (S.D.N.Y. 1999). Therefore, Relator can prevail by proving “reckless or ‘willful blindness to the existence of a fact.’” *Id.*, quoting from *United States v. Inc. Village of Island Park*, 888 F.Supp. 419, 439 (E.D.N.Y.1995). In this case, Westchester failed entirely in its duty to reasonably ensure that its certifications and its claims for payment were truthful.

POINT II

WESTCHESTER SUBMITTED EXPRESS AND IMPLIED AFFH CERTIFICATIONS IN RECKLESS DISREGARD OF THEIR TRUTH OR FALSITY

At the start of the false claims period, Westchester was aware that both analysis and action must address impediments comprehensively, including race-based impediments, and included the obligation to try to move the County towards racial integration.⁶⁶ Yet, as initially revealed to ADC by Drummond on July 7, 2005 (and confirmed through the absence of documents responsive to ADC’s FOIL request), Westchester had made *a priori* policy decisions not to analyze race-based impediments to fair housing choice, not to withhold or threaten to withhold federal funds from non-compliant Consortium Municipalities, not to treat as a fair housing impediment anything that was not brought to the County’s attention by a CM or other non-County entity, not to consider the County’s own policies or those of municipalities that may affect equal housing opportunity for members of protected classes, not to criticize CMs for their failure to meet their AFFH or affordable housing responsibilities, and not to require CMs to do anything to AFFH.

Discovery in this litigation has confirmed what ADC’s intervention initially brought to light: in short, anything having to do with race-based impediments or with acting to overcome municipal resistance was off-the-table. As damning as are the various admissions made by Westchester

⁶⁶ See, e.g., the testimony of County Executive Spano, acknowledging that AFFH means “having a proactive policy to make sure that you have a appropriate mixture of racial integration” (Spano 94:10-22).

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officials—for example, that the County simply did not conduct its 2000 and 2004 AIs through the lens of race discrimination and segregation, (Drummond 309:15-22), or that Westchester never adopted as an objective or goal the reduction of large inter-municipal variations in racial composition⁶⁷ – it is the absence of any documents that reflect either actual analysis or appropriate actions that is most extraordinary. Consistent with ADC’s original discoveries and with the fact that Westchester was under an obligation to maintain records that documented the development of its “AI” and any “appropriate actions” it took,⁶⁸ Westchester did not analyze or act on impediments to fair housing choice.

A. Express Certifications

The timing and the interrelationship of Westchester’s knowledge of its obligations and its knowledge of a variety of impediments is especially significant in respect to Westchester’s express certifications that it would AFFH. Side-by-side with its knowledge of its AFFH obligations at the start of the false claims period, the County knew (or would have known if it had not willfully closed its eyes) that: the County was segregated, that numerous CMs were resisting the placement of affordable housing, and that the placement of affordable housing determined whether its construction would have a segregation-perpetuating or segregation-reducing impact.

Nevertheless, Westchester ignored race-based and “municipal resistance” impediments and planned no action to overcome these types of impediments. Westchester did not even take seriously the warning in its own Cooperation Agreements with CMs that it was prohibited from funding municipalities that did not AFFH or that interfered with Westchester’s own efforts to AFFH. Westchester did not even take the basic step of analyzing whether the production of affordable

⁶⁷ Response to Second Requests for Admissions [App. I, Tab 3] No. 36.

⁶⁸ 42 U.S.C. §5304(b)(2); 24 CFR §§91.225, 570.601.

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housing between January 1, 1992 and April 1, 2006, had the effect of increasing or decreasing racial diversity in the neighborhood in which it was built.⁶⁹

Even giving the County every benefit of the doubt, where the evidence demonstrates that there was an unmistakable disjunction between what Westchester was promising on the one hand, and what it was delivering on the other, there is only one conclusion to be reached: Westchester made its express AFFH certifications in reckless disregard of their truth or falsity.

B. Implied Certifications

The federal government was undoubtedly bargaining for AFFH performance. Express statutory language makes clear that Westchester would not have been given a grant of HCD funds in the first instance without certifying “to the satisfaction of the [HUD] Secretary that ...(2) the grant will be conducted and administered in conformity with the ... Fair Housing Act [42 U.S.C. 3601 et seq.], and the grantee will affirmatively further fair housing.” 42 USC §5304(b)(2)⁷⁰ By its applications and certifications, the County made itself “responsible for ensuring that CDBG funds are used in accordance with *all* program requirements,” 24 CFR § 570.501(b). The AFFH obligations are clearly “program requirements.”⁷¹

The obligation to perform is reinforced by the applications for funding the County signed each year, which provide that “the applicant will comply with the attached assurances if the

⁶⁹ See Response to Second Requests for Admission [App. I, Tab 3] No. 37.

⁷⁰ See also 24 CFR § 91.225(b)(6)(“The jurisdiction must submit a certification that the grant will be conducted and administered in conformity with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), the Fair Housing Act (42 U.S.C. 3601–3619), and implementing regulations.”)

⁷¹ 24 CFR §§91.225, 570.601 (mandating a certification that a grantee conducts an analysis of impediments, takes appropriate actions and maintains records); 24 CFR §570.307 (obligating a grantee to monitor the planning, analysis and performance of its participating jurisdictions); 24 CFR §§570.501 (obligating a grantee to ensure that funds used in accordance with all program requirements and to determine adequacy of performance under subrecipient agreements and for taking appropriate action when performance problems arise); 24 CFR §570.503 (requiring urban county consortia to enter into cooperation agreements with the subrecipient municipalities, and to take appropriate actions, including suspension or termination if the subrecipient “materially fails to comply with *any* term of the award); 24 CFR §570.506 (requiring grantee to “establish and maintain sufficient records to enable the [HUD] Secretary to determine whether the recipient has met the requirements of [the CDBG program]”).

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assistance is awarded,” Application for Assistance, and by the Cooperation Agreements, which, pursuant to HUD-required language, 24 CFR §570.503, call upon the County and the CMs to “take all required action to assure compliance with the certification.” Cooperation Agreement, ¶6(a).⁷²

As one federal court recently held in a case involving an AFFH challenge to “local residence preferences” in the Housing Choice Voucher program which had the effect of excluding African-Americans, “[t]hese regulations unambiguously impose mandatory requirements on the [public housing authorities] not only to *certify* their compliance with fair housing laws, but actually to *comply*.” *Langlois v. Abington Housing Authority*, 234 F.Supp.2d 33, 75 (D.Mass. 2002).⁷³

In the face of this statutory and regulatory framework, Westchester’s repeated requests for payments under its federal HCD grants necessarily constituted implied certifications that Westchester had performed its AFFH obligations. If the County had been honest with HUD about what it was actually doing, as it was submitting twenty-five requests for payment each month,⁷⁴ HUD surely would not have authorized the payments. Westchester surely would not have gotten \$52 million in federal funds if it had said forthrightly, “We did not comply with our certifications, but pay us anyway.”

The County Executive has admitted that, by requesting payments from the government, Westchester was impliedly certifying that it had performed as it had promised, and was therefore eligible for payment. (Spano 108:16-22). As in *Ab-Tech*, Westchester withheld from HUD the fact

⁷² See also Initial Expert Report of Sara Pratt (“Sara Pratt Report”) [App. II, Tab 23] p. 6 (“...the County has the authority, and the obligation, not to fund, or to cease funding, subrecipients that violate any of these civil rights certifications and it must actually use that power. Finally, Westchester County retains the right, and the responsibility, not to include a jurisdiction that discriminates in the Consortium.”).

⁷³ The *Langlois* Court struck down the preferences, in part because the authorities had failed to analyze fair housing impediments and failed to keep records to reflect that analysis and its actions in relation thereto. It concluded that “[t]he deposition testimony cited by the plaintiffs, in which housing authority directors could not even articulate precisely how their organizations affirmatively furthered fair housing, supports an implication of “naked certification.” *Id.* at 78.

⁷⁴ Westchester requested payment from the federal government more than 1,000 times during the false claims period. Drawdown Report, Westchester County (Massari 63:7 – 75:6) [App. III, Tab 39] Ex. 1.

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that it had *not* actually performed as it had promised. Permitting HCD funds to be disbursed in the face of AFFH non-performance would defeat the purposes of the False Claims Act, just as permitting an analysis of impediments to ignore race would defeat the purposes of the FHA.

C. Westchester's Failure to Take Appropriate Actions was Foreordained

The Statement of Facts, Relator's 56.1 statement, and Relator's Expert Reports have set forth a vast array of analysis not conducted and actions not taken. Indeed, Westchester's failure to analyze race-based impediments to fair housing is sufficient to render it liable for making knowingly false explicit and implied certifications. But it is important to recognize more broadly that Westchester's policy posture was antithetical to its obligation to take appropriate actions.

"Appropriate" actions to overcome impediments to fair housing are only reasonably understood as those appropriate to particular circumstances. This implies both continuing analysis of the facts on the ground, and a willingness to allow policy to develop from and be governed by the circumstances. The evidence shows that Westchester had rigid policies based on concerns about political popularity, not flexible policies designed, as required by its AFFH obligations, to get to the heart of the fair housing choice problems. If a potential action consisted of anything more than a polite request to a CM, Westchester would not consider it (let alone implement it), and, in the context of race-based impediments, wouldn't even make such a polite request. Year after year, Action Plan after Action Plan, neither the fundamental facts of segregation and other race-based impediments nor the fundamental fact of municipal resistance to affordable housing and non-compliance with AFFH obligations were addressed.⁷⁵

⁷⁵ 24 CFR §§570.501 and 570.503 requires the County to monitor the AFFH performance of the CMs, and 24 CFR §570.906 provides that the County is held "accountable for the actions or failures to act" of those CMs. Furthermore, the Cooperation Agreements empowered and required the County to take "all required action to comply with [the AFFH obligations]." Cooperation Agreement, ¶6(a).

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D. Westchester Effectively Hindered Fair Housing Choice

In service of its decisions not to consider politically difficult issues related to race and affordable housing, Westchester *hindered* rather than *furthered* fair housing choice. For example, instead of using its authority to require affordable housing to be built in a segregation-reducing manner,⁷⁶ Westchester permitted its two most significant affordable housing initiatives—the Allocation Plan and the Housing Choice Voucher (rent subsidy) Program—to operate in a manner that further concentrated affordable units and minorities in racially segregated areas.⁷⁷ (Levy 10:23 – 11:25, 104:16-20). It identified neither senior citizen nor local resident preferences as impediments to fair housing (even though Westchester knew they could be),⁷⁸ and permitted CMs to develop housing with those restrictions and continued to fund those municipalities.

Despite HUD’s warning that the mere production of affordable housing might *not* affirmatively further fair housing, *Planning Guide*, 5-4, the County pushed forward with its Allocation Plan and Voucher programs without applying fair housing considerations.⁷⁹ Far from constituting “appropriate actions” to overcome segregation, these policies perpetuated it.

Westchester took other actions that hindered fair housing choice. Even as it was making its AFFH certifications, the County Legislature was passing, and County Executive Spano was signing, a municipal “first right of refusal law” in 2001 (Spano 57:10 – 58:3). Drummond saw this law as an

⁷⁶ *In re County of Monroe*, 72 N.Y.2d 338, 533 N.Y.S.2d 702 (N.Y. 1988); *Westhab, et al v. Village of Elmsford*, 151 Misc.2d 1071, 574 N.Y.S.2d 888 (N.Y. Supreme Court, Westchester Co., July 23, 1991).

⁷⁷ According to Professor Andrew Beveridge, for example, 71.8% of new affordable units were concentrated in six municipalities with large African-American populations, with 54.2% of all such units built in the 1990s located in Yonkers and Mount Vernon. Beveridge Initial Report [App. II, Tab 21] p. 12-16. A similar pattern held with respect to the placement of County-funded affordable housing units through 2007. Beveridge Rebuttal Report, [App. III, Tab 22] Exh. R-1 And R-2. When the locations of County funded affordable housing units are mapped, it is clear that such units are generally located in census tracts of Yonkers and Mount Vernon (and, for that matter, census tracts in Peekskill, Ossining, New Rochelle, White Plains and Greenburgh) with substantial African-American populations. *Id.* Similarly, a majority of participants in the County’s Housing Choice Voucher (rent subsidy) Program are under lease in poor and minority areas, (Levy 15:17 – 19:9), many of which are characterized as “hypersegregated.” (Drummond 232:17-24).

⁷⁸ (Drummond 101:20 – 102:9).

⁷⁹ In deposition testimony, the County has admitted that it did not review data on race to determine whether Voucher recipients are able to live in any part of the county they desire to live. (Drummond 21:13-22:4).

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impediment to fair housing, (Drummond 163:2-7), but the County never incorporated this impediment into an AI or any related report it submitted to HUD, and, throughout the false claims period, never repealed the measure (Spano 62:5-25; Drummond 163:13-14).

In light of the facts that 20 CMs with predominantly white populations had not contributed a single unit of affordable housing, and that the vast majority of affordable housing units were located in neighborhoods with large minority populations, the County never mentioned these facts in its “AIs” or any related report it submitted to HUD. Despite the “no AFFH means no funding” language of the Cooperation Agreements with CMs, the County continued to fund many of the 20 CMs that built no affordable housing, to the tune of nearly \$7.5 million during the false claims period (Massari 63:7 – 75:6; Massari [App. III, Tab 39] Exh. 2).

POINT III

WESTCHESTER’S POST-HOC RATIONALIZATIONS FOR ITS ACTIONS AND FAILURES TO ACT ARE NOT PROBATIVE OF THE EXISTENCE OF “JUSTIFIABLE” OR “INNOCENT” MOTIVATIONS DURING THE FALSE CLAIMS PERIOD, BUT THE FALSITY OF THOSE RATIONALIZATIONS PROVIDES POWERFUL AFFIRMATIVE EVIDENCE OF GUILT

By definition *post hoc* rationalizations for conduct cannot have been contemporaneously important, and cannot be a *bona fide* reason relied on to justify that conduct. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 940 (2nd Cir. 1988). Westchester has advanced a variety of these *post hoc* rationalizations in the course of this litigation, the first of which was the contention that an AI did not have to consider race-based impediments. The Court has already concluded that accepting such a proposition would lead to an “absurd” result. *Anti-Discrimination Center*, 495 F.Supp.2d at 387-88.

Undeterred, Westchester has tried to excuse its failure to analyze impediments to fair housing or to take actions appropriate to the circumstances by:

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- denying that residential racial segregation exists in the County;⁸⁰
- asserting that income is a proxy for race, even though, *inter alia*, Norma Drummond testified that Westchester did not consider income an impediment to fair housing, even though Westchester has no documentation of having studied the issue, and even though Census data demonstrate that racial segregation cannot be accounted for by black-white differences in income;⁸¹
- claiming that it has no authority to act to overcome barriers erected by municipalities, despite having successfully argued the opposite in court;⁸² and
- arguing that race-based impediments were not “significant” and thus did not have to be addressed by analysis or action, despite this view being contrary to the purpose of the FHA, the applicable regulations, the HUD training materials Westchester received, despite Norma Drummond’s admission that she had *not* concluded that there was no segregation in Westchester when she prepared the 2004 “AI,” and despite the County Executive’s own admission that pursuing racial integration is part and parcel of the AFFH obligation.⁸³

Westchester, primarily through its experts, has also advanced other excuses:

- that segregation may not be due to discrimination, a *non sequitur* and something, in any event, that Westchester did not study;
- that residential patterns are explained by preference, even though Westchester’s own expert opined that most of Westchester has a racial composition that operates as a “constraint” on the residential choices of African-Americans;⁸⁴
- that integrative action would not be effective, a form of “harmless error” analysis contrary to the goal of the Fair Housing Act and the AFFH regulations that formed no part of Westchester’s consciousness in the false claim period; and,
- that other grantees do not do a good job in carrying out their AFFH responsibilities, something that is neither a cognizable defense nor a comparison that Westchester would necessarily like to make.⁸⁵

The striking thing about all of Westchester’s excuses is that any reference to them is entirely absent from Westchester’s records, a particularly probative absence in view of

⁸⁰ See, e.g., (Drummond 69:5-12); (Spano 86:23 – 87:19)

⁸¹ See, e.g., Beveridge Initial Report [App. III, Tab 21] pp. 10-12.

⁸² See discussion, *supra*, at p. 17.

⁸³ See discussion, *supra*, at pp. 20-21; (Drummond 389:12-19); (Spano 96:24 – 97:8).

⁸⁴ (Clark 94: 8-17).

⁸⁵ For example, Rockland County, right next door to Westchester, did not seem to have any difficulty in discussing racial discrimination and racial segregation, nor in discussing the “mythical notions” that clustering of minority population either is adequately explained by either “preference” or “low income.” See Rockland County’s Analysis of Impediments [App. I, Tab 20] pp. 1-7.

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Westchester's obligation to maintain all records reflecting its analysis of impediments and the actions taken to overcome impediments. 24 C.F.R. §§570.601, 91.225. The absence of documents has been a consistent theme since Relator began its pre-suit investigation. In response to several requests for documents evidencing the County's efforts to require CMs to comply with AFFH obligations or affordable housing goals, no documents were produced.

Post hoc rationalizations, however, are not irrelevant to a case. On the contrary, it is a "general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "'affirmative evidence of guilt.'" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (U.S. 2000) (internal citations omitted). Westchester's various rationalizations—each clearly invented after the fact, and one more implausible than the next—are evidence that Westchester knew that its certifications and implied certifications of AFFH compliance were false.

CONCLUSION

Relator is entitled to judgment that Westchester violated the False Claims Act on each occasion during the false claims period that it certified or assured the federal government, either expressly or impliedly, that it had or would affirmatively further fair housing.

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Respectfully submitted,

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