UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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# DEFENDANT WESTCHESTER COUNTY, NEW YORK'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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The County of Westchester, New York (the "County"), is entitled to summary judgment pursuant to Fed. R. Civ. P. 56(c) because discovery shows beyond material question that the County never made any false statement to the United States, never mind an intentionally false statement.[1] Rather, the evidence shows that the County, in its role as an administrator of federal housing and community development funds, truthfully certified to the federal government that it would affirmatively further fair housing ("AFFH"), meaning it would conduct an analysis of impediments to fair housing ("AI") and take appropriate actions to overcome identified impediments.

Relator believes that the County should have done more, or done it differently, with respect to its fulfillment of its AFFH certifications. But, at the end of the day, whatever Relator argues concerning the analytic and policy practices that it believes are best, no evidence contradicts the County's reasonable conclusion that it satisfied federal housing policy requirements, let alone reflects that it had the intention to violate those requirements. No statute, regulation, or case law clearly required the County to do more than it did in connection with its AIs. And even if, as Relator argues, the County might not have followed every *recommendation* set forth in the U.S. Department of Housing and Urban Development's ("HUD") guidance materials, HUD nonetheless repeatedly accepted the County's submissions, leading the County reasonably to believe it had complied with applicable requirements. Given both the County's and HUD's actions, Relator, as a matter of law, cannot satisfy the intent element of the False Claims Act.

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[1] The County also renews its argument, originally made in its earlier motion to dismiss, that the Court lacks subject matter jurisdiction over Relator's claim because the claim is based on information that was publicly disclosed and as to which Relator is not the original source. Discovery now having been concluded, it is clear as a matter of fact that Relator cannot satisfy its jurisdictional burden on this point.

More basically, Relator cannot even show that the County violated its AFFH obligations. The evidence substantiates that the County at least satisfied the minimum requirements set forth in the governing laws and regulations, and satisfied HUD to boot. Relator, however, argues that the County simply ignored race in its fair housing analysis and claims that historical racial segregation in housing exists in some, but not all, of the municipalities of the large and diverse County. Contrary to Relator's fundamental allegation, the County did not ignore race. Rather, its repeated inquiries demonstrated that race, *per se*, was not an impediment to fair housing. Racial discrimination was not cited as an obstacle by racial minorities or anyone else. Instead, the impediments to fair housing consistently identified to the County relate to economics, which are not unrelated to race. Relator's emphasis on the County's historical population patterns ignores the reality that such patterns develop as a result of many factors unrelated to discrimination. Housing costs in Westchester County are among the highest in the country, and many areas where racial minorities are scarce do not have plentiful public transportation or employment options. In short, the central issue faced by minorities in the County concerns whether they possess sufficient funds to lease or buy housing, not discrimination.

In any event, it is clear beyond cavil that the County satisfied its AFFH obligation by, among other things, analyzing census data, soliciting and considering the views of a diverse body of stakeholders in the County, including minority group members, operating an organization highly capable of addressing and remedying racial discrimination, and tirelessly promoting affordable housing in the County. In sum, Relator's contention that the County did not satisfy best practices is not even evidence that the County's certifications were false, and is certainly not evidence that they were intentionally false, within the meaning of the False Claims

Act. Thus, this case remains, as it always has been, a dispute over policy best left to administrative or legislative fora, and Judgment should be awarded to the County.

## BACKGROUND

The County administers federal housing and community development grants on behalf of the Westchester Urban County Consortium (the "Consortium"). The Consortium consists of forty independent municipalities that have signed cooperation agreements with the County. [*See* County's Rule 56.1 Statement of Undisputed Material Facts ("Stmt.") ¶ 1]; 42 U.S.C. § 5302(a)(6)(A)(ii)(I)(b); 24 C.F.R. § 570.307(b)(1). The "overall goal" of the federal programs administered by the County "is to develop viable urban communities by providing decent housing and a suitable living environment and expanding economic opportunities principally for low and moderate income persons. The primary means towards this end is to extend and strengthen partnerships . . . *in the production and operation of affordable housing*." 24 C.F.R. § 91.1(a)(1) (emphasis added).[2]

The majority of the funds administered by the County derive from the Community Development Block Grant program ("CDBG"). [Stmt. ¶ 2.] CDBG provides funds to communities for neighborhood revitalization and improvement. 42 U.S.C. § 5301(c).[3] It exists "principally for persons of low and moderate income." *Id.*; 24 C.F.R. § 570.207; *see also* 24 C.F.R. § 570.200(a)(2); [Stmt. ¶ 3 ("[M]unicipalities with the greatest populations of low and

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[2] The regulations clarify that "decent housing includes . . . increasing the availability of permanent housing in standard condition and affordable cost to low-income and moderate-income families, particularly to members of disadvantaged minorities, without discrimination on the basis of race, color, religion, sex, national origin, familial status, or disability." 24 C.F.R. § 91.1(a)(1)(i). Because minorities constituted a disproportionate share of the County's low- and moderate-income population, the County's focus on the provision of affordable housing disproportionately assisted disadvantaged minorities. *See infra.*

[3] The County also administers HOME Investment Partnership ("HOME"), Emergency Shelter Grant ("ESG"), Housing Opportunities for Persons with Aids ("HOPWA"), and American Dream Initiative ("ADI") program funds. [Stmt. ¶ 2.]

moderate income households are given the most consideration" for CDBG grants)]. Except in very limited circumstances, CDBG funds may not be used for the construction of housing or apartments.[4] 24 C.F.R. § 570.207(b)(3). HUD allocates CDBG funds to the Consortium pursuant to a formula, which takes into account its population and the age of its housing stock. *See* 42 U.S.C. § 5306(b)(2)(B)(iii). Many communities in the Consortium, because of their population size and the age of their housing stock, bring into the Consortium considerably more money than they receive in turn. [Stmt. ¶ 3.] In order to obtain continued federal funding, consortia periodically must submit to HUD a consolidated plan (a "Plan") that serves as both an application and a planning document. 24 C.F.R. §§ 91.1(b), 91.15, § 91.400 *et seq*., & 570.302. A Plan must be grounded in a broad base of community input, and "describe[] needs, resources, priorities and proposed activities to be undertaken with respect to HUD programs," present a strategy for the consortium's HUD programs, and provide a benchmark for performance assessment. 24 C.F.R. §§ 91.1(b), 91.400 *et seq*., & 570.3.

Consortia must submit various certifications in conjunction with their HUD grant applications. *See, e.g.*, [Stmt. ¶ 4]; 24 C.F.R. § 91.425. Thus, the County certified that it "will affirmatively further fair housing, which means it will conduct an analysis of impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting that analysis and actions in this regard." [Stmt. ¶ 4]; 24 C.F.R. § 91.425(a)(1)(i). Over the course of the relevant period, the County made seven such certifications, each signed by County Executive Andrew Spano after the County Planning Department advised him with respect to compliance. [Stmt. ¶

[4] In contrast, HOME funds – which comprise a much smaller portion of the funds administered by the County – may be used to construct housing. 24 C.F.R. § 92.1 ("HUD allocates funds . . . to expand the supply of decent, safe, sanitary, and affordable housing . . . for very low-income and low-income families.").

5.] None of the relevant statutes or regulations specify what an AI or "appropriate actions" must entail. [Stmt. ¶ 6.] Relator contends that the County's AFFH certifications violated the False Claims Act because the County allegedly did not consider race appropriately in conducting its AI and because the County's cooperative relationship with Consortium municipalities precluded it from taking "appropriate actions" to overcome the impediments it identified. The uncontroverted evidence reflects otherwise, showing that the County undertook an AI, and took appropriate actions to overcome the impediments to fair housing that its analysis identified. However, any dispute about the sufficiency of these activities is legally unimportant. Given what the County actually did and considered, Relator cannot, as a matter of law, show that the County acted with unlawful intent. Hence its claims must fail under the False Claims Act.

### A. The County Conducted Two AIs During The Limitations Period, and, in Doing So, Appropriately Considered Race.

Since 2000, the County has conducted two AIs. [Stmt. ¶ 7.] It submitted the first AI to HUD as Chapter 8 of its Consolidated Plan Covering Fiscal Years 2000-2004 ("2000 Plan")2000 Plan and it submitted the second AI as Chapter 9 of its Consolidated Plan Covering Fiscal Years 2004 - 2008 ("2004 Plan")).[5] [*Id.*] Although the County only denominated one chapter of each of the Plans as the AI, the County identified the impediments to fair housing through its analysis of the information and data contained in the Plans as a whole. [*Id.*] The Court, in its decision denying the County's Motion to Dismiss, held that the AFFH obligation required the County to consider race when conducting its AI. [*See* Affirmation of Michael A. Kalish in Support of Defendant Westchester County, New York's Motion for Summary

[5] As part of a special HUD pilot program in which the County participated, the 2004 Plan is presented in PowerPoint format in order to be more user-friendly. [Stmt. ¶ 8]

Judgment ("Kalish Aff.") Ex. 16 (Op. & Order denying County's motion to dismiss ("Op.")) at 28-32.] The County plainly carried out its AIs with sufficient race consciousness.

In looking to what the County actually did with respect to its two AIs, we note that it was done against a background of racial sensitivity and concern. The County acknowledges that minority group members face obstacles that white persons do not experience, including individual cases of racial prejudice. [Stmt. ¶ 9] However, it has determined that the fundamental housing issue that minorities face in the County is economic. [*Id.*] The County has grappled with that impediment and its certifications were accurate.

Thus, the 2000 AI concluded that "the greatest impediment to fair housing is the lack of affordable housing." [Stmt. ¶ 10.] Although the County recognized "other restrictions to housing choice," affordability ranked first because the County's "housing stock is expensive relative to income and this significantly limits one's housing options."[6] [*Id.*] In addition to affordability, the 2000 AI identified ten other obstacles with which the Consortium "most contends . . . in addressing the housing needs of its residents." [Stmt. ¶ 12.] These included public and private conditions, policies, procedures and practices that limited housing choice such as lack of vacant land, the high cost of land, limited funds, limited Section 8 vouchers and certificates, local opposition, limited not-for-profit capacity, high construction costs, lengthy review processes, few high-density zones, and higher rents for certain recipients of public assistance. [*Id.*]

Although the County did not specifically find that any race-based impediments were among the most significant barriers to fair housing, the 2000 AI does not ignore race. [Stmt. ¶ 13.] "Local opposition" includes local opposition on racial grounds. [*Id.*] Furthermore,

[6] HUD itself has recognized the preeminence of income-related issues to an individual's ability to access affordable housing. [Stmt. ¶ 11 (HUD report to Congress, stating that "the importance of income for households seeking affordable housing cannot be overstated").]

the 2000 AI specifically notes that fair housing issues are encompassed by the County's housing initiative, that the 2000 Plan "includes objectives and long term goals to eliminate housing discrimination," that the County funds fair housing counseling services, and that the County provides a variety of resources to citizens wishing to make discrimination complaints. [*Id.; see also id.* (Westchester Hispanic Coalition thanking County for supporting its goal "to provide services designed to facilitate greater community integration . . . ."). The 2000 AI also reports that "there are not scores of discrimination complaints on file" and states that the County's initial review of mortgage loan data "does not identify any restrictive lending patterns." [*Id.*]

The 2004 AI likewise determined that the "[g]reatest impediment to fair housing is the lack of affordable housing throughout the New York region" and identified twelve additional impediments. [Stmt. ¶ 14.] These included public and private conditions, policies, procedures and practices that limited housing choice such as lack of vacant land and its high cost, limited funds, limited Section 8 vouchers and other rental assistance, local opposition, limited non-profit capacity, high construction costs, lengthy review processes, few high-density zones, high prevalence of lead paint, and limited interest by landlords and developers. [*Id.*] Although race-based impediments did not specifically make the County's list, the County again found "local opposition" to be an impediment. [Stmt. ¶ 15.] Moreover, the AI specifically notes that the County funds Westchester Residential Opportunities' ("WRO") fair housing counseling activities. [*Id.; see also id* .(grant to the WRO Consortium-wide project to "educate low/moderate income households in fair housing laws, first time homebuyers, predatory lending"); *id.* (grant to Westchester Hispanic Coalition, Inc.); *id.* (categorizing "Fair Housing Assistance" as an aspect of its top CDBG priority to increase the supply of affordable housing).] It also reports that the County established a Human Rights Commission "to process and

investigate discrimination complaints." [*Id.*] Additionally, the AI directs the reader to home mortgage loan data. [*Id.*]

Relator's untenable claim that the County did not analyze race in conducting its AIs is further belied by the abundant data and analysis related to race throughout the 2000 and 2004 Plans. [Stmt. ¶ 16; *see also id.* (reporting racial make-up of persons comprising the waiting lists for Section 8 housing vouchers and certificates); *id.* (identifying "Discrimination in Housing Opportunities" as a barrier to affordable housing); *id.* (reporting housing discrimination complaint data).] For example, the Plans identify areas of minority concentration within the Consortium. [Stmt. ¶ 17.] The County also assessed whether racial or ethnic groups had disproportionately greater housing needs at various income levels. [*Id.; see also id.* (listing as a "key finding[]" that "72% of Consortium households own their own home; yet only 46% of Black households and 35% of Hispanic households own their own home").]

All of the work and activities of the County Planning Department informed the AIs. [Stmt. ¶ 18.] Additionally, in putting together the Plans and the AIs, the County gathered and analyzed a variety of information and data to determine, among other things, what impediments to fair housing existed in the County. [*Id.*] For example, the County reviewed discrimination complaints filed at WRO[7] and in its Section 8 office. [*Id.*] Moreover, it analyzed a "comprehensive list of demographic material," including the racial composition of municipalities and any increases or declines in such composition. [*Id.*] The views of a wide swath of constituents also provided a crucial source of information to the County. [Stmt. ¶ 20.] County Executive Andrew Spano and other County representatives had countless conversations during the limitations period with representatives of the African American community,

[7] WRO is a HUD-certified housing counseling agency. [Stmt. ¶ 19] It investigates, mediates, and refers complaints to other agencies. [*Id.*]

municipalities, and others involved in the housing arena. [*Id.*] *No one* identified racial discrimination or segregation as a concern. [*Id.*] Instead, the County heard that the lack of affordable housing posed the greatest challenge. [*Id.*]

In addition to the County's ongoing dialogue with its constituents, the Plans involved an "extensive citizen participation process that included Westchester County departments and agencies, not-for-profit organizations, local municipal officials, and interested citizens in the 39 towns, villages and cities that comprise the Consortium."[8] [Stmt. ¶ 21; *see also id.* (citizen participation plan, noting membership preference for minority group members in Citizen Development Advisory Group.] The not-for-profit housing groups with which the County met included the fair housing organization WRO and a "non-profit housing coalition." [Stmt. ¶ 21; *see also id.* (County met with the Housing Action Council to determine impediments to fair housing choice.] The County also consulted with the WRO, a group devoted to furthering fair housing in the County, in drafting the AIs. [*Id.*]

Besides many face-to-face meetings, the County used questionnaires to solicit the views of municipalities, CDBG grantees, not-for-profit organizations, County departments, public housing authorities, Section 8 administrators, and members of the public. [Stmt. ¶ 23.] The questionnaire for public housing authorities and Section 8 administrators requested information on housing discrimination complaints the responders had received and requested the responders to rank tools for "eliminating housing discrimination." [*Id.*; *see also id.* (*only* respondent reporting complaints of housing discrimination, but noting that such complaints were

[8] Relator never participated in or attended any forum at which the County solicited the public's views on its housing and community development activities or utilized any HUD or other government administrative channels. [Stmt. ¶ 22.] It simply, and wastefully, embarked on the tack of trying to get this Court to legislate through litigation. In doing so, it undermines its own professed fair housing goals by causing the County to expend precious funds defending meritless fraud allegations – resources that could have been used to provide additional affordable housing opportunities to low-income and minority families.

"rare" and were not "formal" and not specifying that such complaints related to race).] The questionnaire for municipalities, County departments, and not-for-profits asked responders to rank the priority of "fair housing counseling" among other community service needs. [*Id.*] The input the County received prior to the 2000 and 2004 AIs did not reflect that racial discrimination constituted a significant barrier to fair housing. [Stmt. ¶ 24.] Rather, the responders, along with voluminous additional data and information before the County, confirmed that the County's most pressing problem was lack of affordable housing stock. [*Id.*]

The County reasonably believed that the shortage of affordable housing disparately impacted classes protected by the FHA. [Stmt. ¶ 25.] The County's analysis of census data suggested that minority group members made up a disproportionate share of the low income, rent-burdened, and overcrowded households that needed affordable housing. [*Id.*] Generally, African Americans and Hispanics disproportionately benefited from the Consortium's grants, which themselves primarily benefited the County's low and moderate income residents. [*Id.*] Additional information before the County highlighted that the patterns of race, income and poverty within the County are closely linked and a substantial overlap exists between race and low-income impoverished persons. [Stmt. ¶ 26; *see also id.* (County Affordable Needs Assessment, reporting that minorities are much more likely to live in deficient or overcrowded units); *id.* (Grant Street Senior Housing Fair Marketing Plan, reflecting higher proportion of minority renter households with low incomes and on Section 8 waiting lists); *id.* (affordable housing development funding applications, noting lack of home affordability "particularly burdensome for minority households"); *id.* (WRO CDBG grant application, discussing demographics of housing counseling clientele); *id.* (WestCop annual reports, recognizing that "[p]overty in Westchester County correlates strongly with race, ethnicity and family status"); *id.*

(discussing distressed area in Peekskill with many low-income minority residents); *id.* (CDBG application for day care services, noting high percentage of low-income and minority clientele); *id.* (Ossining Community Action application, noting that poverty concentrated in Ossining's African American and Hispanic neighborhoods); *id.* (Project Love after-school program application, noting "high correlation between race and poverty"); *id.* (CDBG application for summer camp, alluding to link between family income and minority status); *id.* (census block groups with 40% or more persons below poverty line or 40% minority); *id.* (Mount Vernon, Yonkers Community Health Centers description, "Low income and minority families surrounded by affluence are often subject to socioeconomic discrimination.").] Thus, the County reasonably understood that the affordable housing shortage constituted the most important barrier to fair housing for minority group members.

Relator asserts that the County's minority residents disproportionately experience housing problems *because* of their race (as opposed to their socioeconomic status). In support of this contention, Relator mainly relies on year 2000 census data that reflect that some municipalities had few African American residents and others had large African American populations. [Stmt. ¶ 27.] Based on these numbers alone, Relator claims that the County is segregated. [*Id.*] This conclusion is unduly simplistic, failing to address historical matters and whether alleged segregation is a *de facto* matter or was intentional. *Cf. Coalition of Bedford-Stuyvesant Bloc. Ass'n, Inc. v. Cuomo*, 651 F. Supp. 1202, 1210-11 (E.D.N.Y. 1987) (dismissing discrimination claim based on placement of homeless shelters in minority-concentrated communities because statistics insufficient to establish discriminatory intent). In any event, whatever one concludes as to historical population distribution, Relator has made no showing that it has anything to do with any barrier to fair housing between 2000 and 2006. The County

cannot be deemed to be placed on notice of race-based impediments to fair housing choice solely because of historical population patterns.[9] Relator also cannot show that, had the County analyzed race-related issues in the manner ADC would like, it would have reached different conclusions.

Relator also contends that the County should have undertaken a wide variety of additional inquiries in relation to its AIs. But Relator cannot point to any statute or regulation dictating that the County undertake these activities, only certain non-binding HUD suggestions that are not necessarily focused on a County consortium of communities (rather than a state or a single-city HUD entitlement) or on the unusual economic conditions of the County. Given that the County does not possess limitless resources,[10] the County's failure to follow each and every suggestion by HUD simply cannot be deemed to be a failure to satisfy its obligations – never mind fraud.

### B. The County Took Appropriate Actions to Overcome Impediments to Fair Housing.

As it certified it would do, the County took appropriate actions throughout the relevant period to overcome the impediments to fair housing that it identified. Relator ignores, minimizes, or distorts these actions and, further, erroneously contends that the *only* appropriate action available to the County was to take punitive measures against its municipalities. No such requirement exists, and with good reason. It is far from irrational to conclude that a cooperative

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[9] The reasons for poor and minority concentrations in inner cities are multi-faceted. Concentration *per se* is not evidence of discrimination and is not necessarily the outcome of government housing policies or decisions. *Cf. Hope v. DuPage County*, 738 F.2d 797, 806, 809 n.4 (7th Cir. 1984) (rejecting that housing patterns created inference of discrimination and noting that "it is natural and rational that lower cost subsidized housing occurs with greater frequency in incorporated areas" with higher percentage of minority population because subsidized housing requires services such as public transportation, convenient shopping and school opportunities, and other services not found in more rural areas). Nor can Westchester intervene with any certain ability to change these fundamental processes.

[10] The affordable housing crisis within the County dwarfs the insufficient resources available. [Stmt. ¶ 28]

approach is superior to a punitive one that would drive municipalities away from participation in the Consortium. Such a reasoned belief cannot constitute reckless disregard of the truth of its AFFH certification.

Relator ignores the fact that the County non-discriminatorily administers a variety of federal and state housing and community development programs[11] that improve communities, develop and rehabilitate affordable housing, provide rental or home-ownership assistance, and provide related social services in a manner that AFFH (including fair housing counseling).[12] [Stmt. ¶ 29.] The Consortium uses nearly all of the federal funds it receives to benefit low- and moderate-income persons and in communities that have high minority populations and its grants disproportionately benefit minority groups. [Stmt. ¶¶ 30- 31.]

On multiple fronts, the County has tackled the need for fair and affordable housing. [Stmt. ¶ 32.] These efforts include funding land acquisition, infrastructure improvements, and construction, spearheading initiatives designed to spur the creation of affordable housing, and spreading the word about the need for, and desirability, of it.[13] [*Id.*] George Raymond, a well-known and respected affordable housing advocate and expert who heads the Housing Opportunity Commission, lauded the County for its trailblazing strategies to

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[11] In addition to CDBG, these include (but are not limited to) HOME, the Weatherization Referral Assistance Program, the Lead Based Paint Removal Program, the Property Improvement Program, the Residential Emergency Services to Offer Repairs to the Elderly program, HOPWA, the Section 8 program, American Dream Downpayment Initiative, ESG, and the Affordable Housing Corporation Home Improvement Plan. [Stmt. ¶¶ 2, 29.]

[12] The County even funded Westchester Hispanic Coalition's challenge to Mount Kisco's discriminatory zoning ordinance. [Stmt. ¶ 30.]

[13] The County also assists its homeless population and those at risk of becoming homeless by supporting shelters, homeless-prevention programs, and related social services. [Stmt. ¶ 41.]

increase affordable housing. [*Id.*] No other county in New York has done as much as Westchester County to increase affordable housing opportunities. [*Id.*]

For example, the County created and funded the New Homes Land Acquisition Program, through which the County purchases property at market rate and then conveys it to a developer for $1 in return for the development of affordable units on the conveyed property. [Stmt. ¶ 33.] As of March 2006, the County had approved $30 million in funding under this program. [*Id.*] Another County-funded program, the Housing Implementation Fund, subsidizes the construction of municipal infrastructure for affordable housing. [Stmt. ¶ 34.] As of March 2006, the County had approved $34 million in funding under this program. [*Id.*] The County's Industrial Development Agency issues tax-exempt bonds to developers of affordable housing. [Stmt. ¶ 35.]

In 1990, the County retained consultants to assess the County's affordable housing need. [Stmt. ¶ 36.] In 1993, the County allocated the needed units among all of its municipalities. [*Id.*] The County updated its housing needs assessment in 2004 and the affordable housing allocations in 2005. [*Id.*] As a result of these activities, over 3,000 units of affordable housing were built or under construction as of July 2005.[14] [*Id.*] Although this amount falls short of the County's needs, the amount of new affordable housing greatly exceeded

[14] Relator makes much hay over the fact that some municipalities have had more affordable housing built within their borders than others and contends that the municipalities in which less affordable housing has been constructed should automatically be deemed not to have affirmatively furthered fair housing. The world is not so simple. The shortage of affordable housing is not a problem that can be solved overnight. Restrictive zoning is just one of many factors that can potentially impede the construction of affordable housing. *Cf. Hope v. DuPage County*, 738 F.2d 797, 806, 809 n.4 (7th Cir. 1984). Other factors include the limited resources available, and the fact that land is especially expensive in many of the localities in which Relator would like more affordable housing constructed. [Stmt. ¶¶ 12, 14, 32, 37.] Also, many of these communities are more remote from commercial and transportation hubs, making them undesirable to low-income persons. Even if zoning in these locations permitted high density developments, that does not mean that developers would build affordable housing. [Stmt. ¶ 37.]

the affordable housing goals set forth in its Plans. [*Id.*] The goals set forth in the Plans – and not the most ambitious plan in New York state – are the proper measures of whether the County has taken appropriate actions.

The County's strategies are constantly evolving. In 2003 and 2005, the County entered into agreements with the Towns of Lewisboro and Somers, respectively, pursuant to which the County provides funding to those municipalities for open space initiatives with the concomitant obligation that the municipalities create affordable housing. [Stmt. ¶ 38.]

With the assistance of a public relations firm, the County has conducted a "Campaign for Affordable Housing" throughout the limitations period to educate it citizens and increase support for affordable housing. [Stmt. ¶ 39.] County Executive Spano has repeatedly used his State of the County Addresses as a platform to further this cause. [*Id.*] The County has also led public meetings and tours of affordable housing developments, and created a video showcasing affordable housing developments and a website to educate its citizenry about affordable housing and to inspire localities to rise to the challenge. [*Id.*] This website, http://www.westchestergov.com/housing.htm, provides plentiful information about fair and affordable housing issues, including resources for developers, tenants, landlords, and homeowners. [*Id.*] Further to the County's ongoing efforts to educate and encourage affordable housing, the County Planning Board uses the zoning "referrals" it receives from municipalities pursuant to statute to encourage municipalities to include affordable housing in their plans. [Stmt. ¶ 40.] And, the County urges Section 8 voucher holders to move into communities with lower concentrations of minorities and/or impoverished persons. [Stmt. ¶ 44.]

Throughout the relevant period, the County has also combated housing discrimination. [Stmt. ¶ 42.] It has supported and worked with fair housing organizations. [*Id.*]

In 1999, the County enacted a Human Rights Law ("HRL"), which outlaws, among other things, housing discrimination. [Stmt. ¶ 43 (citing HRL § 700.5).] The HRL created the County's Human Rights Commission, which opened its doors in 2000, whose mission encompasses legal, educational and legislative advocacy in the housing arena.[15] [Stmt. ¶ 43; *see also id.* (citing HRL §§ 700.08, 700.09).] The County also educates persons about their right to be free of unlawful discrimination by creating and disseminating information concerning the anti-discrimination laws. [Stmt. ¶ 45; *id.* (citing HRL §§ 700.08, 700.09).]

The County has also ensured that the voices of the African American and Hispanic communities are heard. For example, since 1998, the County's African American Advisory Board has provided feedback and input to the County Executive and Board of Legislators on issues impacting the African American community, including on housing issues, and develops and recommends effective policies, legislation and/or services to eliminate discrimination and improve opportunities for African-Americans and their families. [Stmt. ¶ 46.] The County's Office for African American Affairs similarly works to identify and resolve issues affecting African Americans in the County. [*Id.*] The County likewise has an Office of Hispanic Affairs, which aims to help Hispanic residents integrate into the larger community and a Hispanic Advisory Board, which advises and assists the County Executive on public policy relating to Hispanic Americans in Westchester County, including housing issues. [Stmt. ¶ 47.]

In the face of this extensive list of appropriate actions taken by the County that address the barriers to fair housing within the County, Relator nevertheless asserts that the County cannot have satisfied its AFFH certification because it did not employ hard-nosed tactics, such as bringing litigation or withholding funds, to overcome any real or perceived opposition to

[15] In March 2008, the County amended its Fair Housing Law to conform to the federal FHA. [Stmt. ¶ 43.]

the construction of affordable housing. [Stmt. ¶ 48.] But the County never certified that it would steamroll over any perceived lack of municipal enthusiasm for its affordable housing initiatives. [*Id.*] During the limitations period, the County has mostly followed the "catch more flies with honey" approach in its dealings with municipalities, meaning that it has worked with municipalities to create fair and affordable housing opportunities. [*Id.*] The County has seen this approach bear fruit. [*Id.*] A litigation first approach would, in the County's view, be counterproductive. [*Id.*]

### C. HUD Approved the County's Submissions That Fully Disclosed the Conduct of Which Relator Complains.

Relator suggests that the County's AIs, on their face, did not satisfy its AFFH obligation. [*See* Kalish Aff. Ex. 45 (Compl.) at ¶¶ 3, 32-36.] Although not required to do so, the County submitted its AIs to HUD with its 2000 and 2004 Plans. [Stmt. ¶ 49.] Throughout the limitations period, HUD reviewed and approved the County's Plan submissions and never sanctioned the County. [*Id.*]; 24 C.F.R. § 570.910. HUD's approval of these and other County submissions, which fully disclosed the County's activities to HUD, demonstrates both that the County complied with its AFFH and that it reasonably believed that it had done so. [Stmt. ¶¶ 49-55.]

Each year, the County also submitted to HUD performance reports, or CAPERs, pursuant to 24 C.F.R. § 91.520. [Stmt. ¶ 50.] These CAPERs each contained a section entitled "Affirmatively Furthering Fair Housing." [*Id.*]. In this section and elsewhere in the CAPERs, the County (1) alerted HUD that its AI focused on affordable housing issues (and, from 2004 onward, even re-listed all of the impediments identified in its 2004 AI); (2) discussed the actions that the County had taken to overcome identified impediments; (3) disclosed that municipal support for the County's housing allocation was not unanimous and that "it is difficult to get

municipalities to comply with this plan"; and (4) informed HUD that the County pursued a cooperative approach with municipalities and others in pursuit of its affordable housing goals. [Stmt. ¶ 51.] Each year during the limitations period, HUD approved the County's CAPERs. [Stmt. ¶ 52.] The County also submitted annual Action Plans pursuant to 24 C.F.R. § 91.420, which HUD similarly approved. [*Id.*]

Underscoring both that it reviewed the County' submissions and deemed them adequate, HUD provided comments on certain of the County's submissions during the limitations period. [Stmt. ¶ 53.] A few such comments stemmed from HUD's Office of Fair Housing and Equal Opportunity ("FHEO"). [*Id.*] Though FHEO noted that the County did not provide certain information concerning minorities, it nevertheless stated that "the County has been found to be administering its Consolidated Program in a satisfactory manner." [*Id.*] Moreover, FHEO provided *no* criticism or advice after September 30, 2002. [*Id.*] Rather, HUD demonstrated its high regard for the County by choosing it as one of eleven jurisdictions with best practices in grant administration. [Stmt. ¶ 54; *see also id.* (County's selection "was based largely on recommendations made by HUD Field Office staff"); Ex. 70.]

HUD also subjected the County to various audits during the limitations period. [Stmt. ¶ 55.] One of these audits even specifically included a "limited review of the County's Fair Housing practices . . . to determine compliance with applicable guidelines, regulations, and [the Rehabilitation Act]." [*Id.*]. Although HUD offered limited constructive criticism in that particular audit's conclusions, it did not even rise to the level of a "Concern" or a "Finding." [*Id.*] The other audits did not identify any fair housing concerns. [*Id.*]

HUD clearly deemed the County in compliance with its AFFH obligations and the County reasonably understood HUD's approval of its submissions to mean that it complied with such AFFH obligations.

**ARGUMENT**

"For a *qui tam* action to survive summary judgment, the relator must produce sufficient evidence to support an inference of knowing fraud." *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995). Because the Relator here can show neither unlawful intent nor a fraudulent certification, the County is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Simply put, no issue of fact exists as to whether the County made a false claim because the County's certification is true in every regard: it did "conduct an analysis of impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting that analysis and actions[.]" [*See, e.g.*, Stmt. ¶ 4; Kalish Aff. Ex. 3 at D019487.] And even if that certification somehow were deficient, there is no evidence that the County acted with unlawful intent in making it. Moreover, Relator cannot show that any alleged shortcoming in the certification was material to HUD's decision to fund the Consortium's programs. Finally, the County renews its argument that this Court lacks subject matter jurisdiction over this action because Relator's allegations were publicly disclosed and Relator was not the original source of those allegations.

## POINT I

## THE COUNTY TRUTHFULLY CERTIFIED IT WOULD AFFIRMATIVELY FURTHER FAIR HOUSING.

The County cannot be liable under the False Claims Act ("FCA") because it made no false claims. Rather, it complied with the terms of its AFFH certifications in that it conducted an "AI" and took "appropriate actions" to overcome the impediments it identified.

Contrary to relator's unsupported assertion, no precise statutory, regulatory, or jurisprudential roadmap exists for the broad mandate of conducting an AI, and reasonable minds can differ about how specifically certain issues may be addressed.[16] However, "[f]or a certified statement to be 'false' under the Act, it must be an intentional, palpable lie. . . . Innocent mistakes, mere negligent misrepresentations and differences in interpretations are not false certifications under the Act." *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996); *see also United States ex rel. Swafford v. Borgess Med. Ctr.*, No. 00-1288, 2001 WL 1609913, at *1 (6th Cir. Dec. 12, 2001) ("Disputes as to the interpretation of regulations do not implicate [FCA] liability."); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999); *United States ex rel. Kersulis v. RehabCare Group, Inc.*, No. 4:00-CV-00636 GTE, 2007 WL 294122, at *13-*16 (E.D. Ark. Jan. 29, 2007) (even if plaintiff's interpretation of the rule were correct, defendant could not have submitted a "knowingly" false certification of compliance where "'defendant's interpretation of the applicable regulations is

[16] In fact, HUD has recognized that the AFFH certification does not provide clear guidance. *See* "Proposed Rules on Determining Accuracy of Certification that Fair Housing is Furthered," 63 Fed. Reg. 57882-01, 1998 WL 745863, at 57882 (HUD Oct. 28, 1998) ("Proposed Rules"). Despite HUD's efforts in providing "both guidance and training to grantees on meeting the Consolidated Plan fair housing certification requirements," "*confusion remains over both the[ir] meaning and application . . . .*" *Id.* at 57883 (emphasis added). Although the Court declined to rest its interpretation of the AFFH certification on the legislative history of this failed regulatory attempt [Kalish Aff. Ex. 16 (Op.) at 32], the County does not cite this history here in support of a particular interpretation. Rather, the County cites this history as evidence that confusion existed as to the meaning and application of the regulation, which is relevant to the question of whether the County can be deemed to have knowingly submitted a false certification.

reasonable even though incorrect.'") (citations omitted). In light of the punitive nature of the FCA, it would be unfair to append to these certifications specific requirements that simply are not there. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992).

Whether the County could have done a "better" job in carrying out general mandates covered by the certification does not speak to whether the County's certification was false because the certification does not contain qualitative criteria or requirements. HUD has explicitly recognized that the AFFH certification contained only "minimal requirements for compliance with the certification that a jurisdiction will [AFFH] [and lacks] performance standards for [AFFH]." *See* Final Rule, "Consolidated Submission for Community Planning and Development Programs," 60 Fed. Reg. 1878-01, 1895 (Jan. 5, 1995). Thus, Relator's allegations that the County should have conducted the analysis differently, or better, misses the point of the certification. *See Mikes v. Straus*, 274 F.3d 687, 698 (2d Cir. 2001) ("The term 'medical necessity' does not impart a qualitative element mandating a particular standard of medical care, and Mikes does not point to any legal authority requiring us to read such a mandate into the form."); *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 732-33 (7th Cir. 1999) ("Equating 'imperfect tests' with 'no tests' would strain language past the breaking point. . . . All this record reveals is a dispute about whether Baxter's testing protocols could be improved. An affirmative answer to that question would not suggest that Baxter's representations to the United States . . . were false or fraudulent.") (citation omitted). HUD's actions in approving the County's submissions, giving the County passing grades in periodic audits, and declining to intervene in this lawsuit demonstrate that HUD has deemed the County to be in compliance with its certification. *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 677 (5th Cir. 2003) (en

banc) ("The undisputed conduct and exchanges by and between [HUD and defendant] during this entire period demonstrates, not only that the vouchers were promptly paid, but that all parties regarded them as entitled to be paid.").

**A. The County Conducted An AI**

With respect to the County's obligation to "conduct an analysis of impediments to fair housing choice within the jurisdiction," the County's 2000 and 2004 AIs clearly satisfy that requirement. These AIs, respectively, identify twelve and thirteen impediments to fair housing that had the effect of reducing housing choice for protected classes in the County. The barriers identified in the County's AIs, which include policies, practices, and conditions in both the public and private sectors, demonstrate that the County undertook a comprehensive review of potential impediments to fair housing. In the absence of a more specific mandate as to what an AI constituted, the County reasonably undertook its AI by investigating potential barriers to fair housing, analyzing them, and distilling from this information a list of impediments to fair housing.

The potential impediments considered by the County included race-specific impediments to fair housing. Relator survived the County's motion to dismiss for failure to state a claim because the Court construed its complaint to allege that the County "excluded consideration of impediments to fair housing based on race when it was required by statute to consider them." [Kalish Aff. Ex. 16 (Op.) at 31.] With the benefit of discovery, it is now indisputable that the County did not "exclude[] consideration" of race-based impediments. Among other things, the County reviewed discrimination complaints filed with WRO, solicited and considered information on discrimination complaints received by public housing agencies and Section 8 offices, and analyzed census data. Its AI also benefited from input about housing barriers by not-for-profit entities (including fair housing organizations), various County agencies

and offices, Section 8 offices, public housing authorities, municipalities, and members of the public. Thus, the County unquestionably considered the existence of race-based impediments, even though it ultimately determined that issues related to affordability posed the greatest challenges to fair housing choice. As Relator itself has recognized, nothing required the County to include race discrimination among its impediments to fair housing. [Kalish Aff. Ex. 76 at 2 n. 2.] As Relator alleged, the County did not "understand[] housing discrimination to be a problem throughout the County[,]" [Kalish Aff. Ex. 45 (Compl.) at ¶ 43.] Because the County "consider[ed] race in . . . appropriate way[s]," it should "prevail on the merits." [Kalish Aff. Ex. 16 (Op.) at 33.]

Although Relator contends that the County should have complied with the AI requirement better or differently, it cannot point to any requirement mandating that the County conduct the AI in the manner Relator sees fit. *See United States v. Gatewood*, 173 F.3d 983, 987 (6th Cir. 1999) ("The indictment . . . purports to raise a direct conflict between the certification that Gatewood made and the actual facts . . . [but actually] presents a false dichotomy, because certifying that one has made payments to subcontractors is not inconsistent with having yet to pay the subcontractors in full."); *Castenson v. City of Harcourt*, 86 F. Supp. 2d 866, 880-881 (N.D. Iowa 2000) (holding defendant, who failed to conduct an archeological survey, did not falsely certify compliance with the National Environmental Policy Act because no explicit survey requirement found in the regulations).

Admittedly, the County did not follow each of HUD's suggestions contained in its Fair Housing Planning Guide (the "Guide"). [*See, e.g.*, Kalish Aff. Ex. 16 (Op.) at 28 (discussing "HUD's *suggested* analysis-of-impediments format") (citing the Guide at 2-28 [Kalish Aff. Ex. 73 at PL-763]) (emphasis added).] The Guide, however, does not purport to

decree a one-size fits-all AI model. Rather, the Guide itself characterizes its advice as "suggestions on how . . . jurisdictions can carry out their [fair housing planning] responsibilities." [Kalish Aff. Ex. 73 at PL-0740, PL-0734, PL-0761 ("Suggested AI Format"), PL-0765 (same), PL-0744 (describing list of data items needed for an AI as not "conclusive").] Suggestions and recommendations fall short of mandates. Moreover, the Guide sets the bar low for assessing compliance with the AFFH certification. HUD indicates that *only* if "the AI was *substantially incomplete* or the actions taken were *plainly inappropriate* to address the identified impediments," would it provide "notice to the jurisdiction that it believes the AFFH to be inaccurate and would provide the jurisdiction an opportunity to comment."[17] [Kalish Aff. Ex. 73 at PL-0759 (emphasis added).] Thus, even the Guide does not contemplate that a jurisdiction must adhere to each and every one of its suggestions concerning the elements and format of an AI in order to comply with the AFFH certification.

Even if the Guide itself purported to require a jurisdiction to follow each and every suggestion within it, which is simply not the case, such mandate would not be persuasive. As the Court recognized, the Guide "'lack[s] the force of law'" and "'do[es] not warrant *Chevron*-style deference.'" [Kalish Aff. Ex 16 (Op.) at 27 (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).] It is "'entitled to respect' . . . only to the extent that [its] interpretations have the 'power to persuade.'" [*Id.* (quoting *Christensen*, 529 U.S. at 587).] Although the Court found the Guide "persuasive on the issue addressed" in its decision on the County's motion to dismiss [*id.* at 27-28], the issues in the present motion are different. In the motion to dismiss, the issue was whether the County had to consider race discrimination in conducting its AI. The issues now before the Court are whether the County, in considering race

[17] Indeed, HUD's decision *not* to provide such notice to the County speaks volumes as to the County's compliance with its obligation to conduct an AI.

discrimination and other potential impediments, had to follow each and every suggestion by HUD as to how to conduct its analysis *and* if the County's failure to follow each and every suggestion somehow disqualified the County's AI.[18] With respect to these issues, HUD's laundry list of suggestions concerning an AI is not "firmly rooted in the statutory and regulatory framework and consistent with the case law." [*Cf. id.* at 27.] Statutes, regulations, and case law do not speak to the issue of what specific tasks an AI must comprise or what particular format it must take. Thus, the Guide should not be deemed to be persuasive on the precise elements of a compliant AI.

In sum, the County reviewed and analyzed various information relating to housing barriers in the County, including information considering race discrimination. The County satisfied the requirements of an AI.

**B. <u>The County Took Appropriate Actions</u>**

With respect to the County's obligation "to take appropriate actions to overcome the effects of any impediments identified through" its AI, the County also satisfied this requirement. As set forth *supra*, increasing the County's supply of affordable housing has been a top policy priority for the County throughout the limitations period. The County has pursued this policy through a variety of means including through funding mechanisms, technical assistance, and campaigns to win over the hearts and minds of residents and local officials. During the limitations period and before, the County has also expanded the tools to fight housing discrimination in the County by creating a Human Rights Commission, disseminating information about the right to be free of discrimination, and funding not-for-profits that provide fair housing counseling and undertake other efforts to counter discrimination.

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[18] Additionally, as addressed *infra*, issues of intent and materiality exist.

Contrary to Relator's assertion, an obligation to take "appropriate actions" does not mandate that the County overcome local opposition by instituting litigation or withholding funds from the Consortium Municipalities. First, although the County at times encountered some local resistance to affordable housing, the County nevertheless believed that, over time, it was able to work productively with its various municipalities. It never deemed any municipality not to be AFFH. Second, an adversarial relationship would have been counter-productive. The County must work with municipalities on a range of issues on a daily basis. Moreover, if the County turned on its municipal partners, then less needy municipalities would have dropped out of the Consortium, leaving the County with fewer funds for the needier municipalities.

As this lawsuit undoubtedly attests, ADC prefers litigation over diplomacy as an engine of social change.[19] But litigation, a costly and uncertain tactic, is hardly the panacea that Relator makes it out to be. *See United States v. Yonkers Bd. of Educ.*, 239 F.3d 211, 213-14 (2d Cir. 2001) (recounting lengthy proceedings and noting "[i]n spite of the length, care, and detail of this Court's opinion, the City resisted (and at times even stood in contempt of) the District Court's efforts to remedy the City's intentional racial discrimination"). The County operates in a context where New York vests broad authority over land use with municipalities. *See Suffolk Housing Servs. v. Town of Brookhaven*, 109 A.D.2d 323, 331 (2d Dept. 1985) (the "Court of Appeals . . . has not . . . articulated any constitutional obligation on the part of our municipalities to zone for low-to-moderate-income housing"), *aff'd* 70 N.Y.2d 122 (1987); *Land.com v.*

[19] In addition to any number of productive ways that the Relator could have expressed its concerns to the County, including through public meetings organized by the County, the regulations also provide a mechanism that Relator could have utilized to express its concerns to HUD. 24 C.F.R. § 1.*7*; *see also* 24 CFR 91.105(j)("the jurisdiction must provide a timely, substantive written response to every written citizen complaint . . . ."). The regulations also set forth what HUD may do when it is confronted with inaccurate certifications. 24 C.F.R. §§ 570.900, 570.904, 570.910. The procedure provides for due process, including that a jurisdiction has an opportunity to remedy any deficiencies HUD has identified. Apparently, this process was not sufficiently punitive for Relator's taste.

*Kleiner*, 815 N.Y.S.2d 234, 235 (2d Dept. 2006) (rejecting challenges under *Berenson v. Town of New Castle* and FHA to Orangetown's zoning ordinance); *North Shore Unitarian Universalist Soc'y, Inc. v. Incorporated Village of Upper Brookville*, 493 N.Y.S.2d 564, 565 (2d Dept. 1985) (rejecting challenge and noting "zoning ordinances carry a presumption of constitutionality which must be rebutted by proof beyond a reasonable doubt"). Moreover, as the *Yonkers* litigation demonstrates, even where plaintiffs prevail, municipalities still have numerous means at their disposal to tie up affordable housing. *Yonkers*, 239 F.3d 211, 213-16; John P. Dellera, *County Powers in Assisted Housing Programs: The Constitutional Limits in New York*, 20 Fordham Urban L.J. 109, 113 (1993) ("The resistance of Yonkers to the construction of court-ordered public housing shows how a housing development may be adversely affected when the municipal government opposes the project."). In short, the County's zealous efforts to create affordable housing opportunities for all protected classes through cooperative efforts was a reasonable approach. Relator cannot show a false claim, but only a policy disagreement.

Because the County conducted an AI and took appropriate actions to overcome the impediments it identified, Relator cannot present an issue of material fact as to whether the County presented a false claim.

## POINT II

## RELATOR CANNOT SHOW THAT THE COUNTY KNOWINGLY PRESENTED A FALSE CERTIFICATION.

Even if the Court determined that an issue of fact existed as to whether the County complied with the terms of the AFFH certification, the Court should nonetheless grant the County's motion for summary judgment because Relator cannot create an issue of fact with

respect to intent. Importantly, Relator has not sued the County under the FHA,[20] but the FCA. Thus, alongside the potential windfall of a treble-damage recovery exists the requirement that Relator prove that the County "knowingly" submitted false certifications. *United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 341 (5th Cir. 2008) ("FCA's demanding knowledge requirement"). The FCA defines "knowingly" to mean that defendant "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b). Relator need not prove specific intent to defraud. *Id.* "Reckless disregard" requires at least "extreme gross negligence." *See United States ex rel. Ervin & Assocs., Inc. v. Hamilton Secs. Group*, 298 F. Supp. 2d 91, 100-01 (D.D.C. 2004) ("Proof of reckless disregard requires much more than errors, even egregious errors."); *see also United States ex rel. Farmer*, 523 F.3d at 338 & n.9.

The County's actions bespeak an entity that believed that it complied with applicable requirements and had nothing to hide. For example, though it had no obligation to do so, the County initiated a face-to-face meeting with Relator to discuss Relator's New York Freedom of Information Law ("FOIL") requests. The County also posted on its website its Plans, including its AIs, and voluntarily provided its AIs to HUD. The County's AI and its other submissions to HUD fully disclosed the practices and policies of which Relator complains in this lawsuit. [Kalish Aff. Ex. 45 (Compl.) at ¶¶ 32-36.] These practices and policies include that the County viewed affordable housing issues to constitute the key fair housing concerns facing the County and that the County intended to overcome impediments to fair housing by working cooperatively with the municipalities, even though some resistance to affordable housing may

[20] No intent requirement exists under the FHA. *See Tinsley v. Kemp*, 750 F. Supp. 1001, 1010-12 (W.D. Mo. 1990); *Jaimes v. Toledo Metro. Hous. Auth.*, 715 F. Supp. 835, 841 (N.D. Oh. 1989).

have existed at the municipal level. HUD repeatedly approved the County's submissions and gave the County passing grades in periodic audits. The County's openness with respect to its practices indicates that it did not knowingly submit any false claims. *See United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993) ("'The fact that a contractor has fully disclosed all information to the government may show that the contractor has not "knowingly" submitted a false claim, that is, that it did not act with "deliberate ignorance" or "reckless disregard for the truth."'") (quoting *amicus curiae* Brief of the United States) (citing 31 U.S.C. § 3729(b)).

HUD's acceptance of the County's submissions reinforced the County's reasonable belief in its own compliance. 24 C.F.R. § 91.225(a)(1) requires that the jurisdiction annually submit to HUD an AFFH certification "satisfactory to HUD." 24 C.F.R. § 91.5 defines certification as a "written assertion, based on supporting evidence, that . . . . shall be deemed to be accurate unless HUD determines otherwise, after inspecting the evidence and providing due notice and an opportunity for comment." *See also* 24 C.F.R. 570.900 *et seq.*; 24 C.F.R. 85.43 (describing enforcement options where grantee "*materially* fails to comply with . . . an assurance") (emphasis added). Although HUD suggested on a few occasions that the County's submissions could be improved, HUD repeatedly informed the County that its submissions, which included the certifications, were "satisfactory." HUD never availed itself of any procedures it could have used to compel the County to correct any perceived deficiencies on the County's part. This case is thus like *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999). In *Lamers*, the Seventh Circuit found that the fact that the government approved a City's grant application "even when it knew [that the city's] program was not entirely up to snuff," rendered "[t]he notion that the [government] was somehow being

duped by the City . . . absurd." *Id.* The Seventh Circuit found inappropriate Lamers' attempt to "preempt" the government's "discretionary decision not to pursue regulatory penalties against the City." *Id.* ("[V]iolations of Federal Transit Act regulations are not fraud unless the violator knowingly lies to the government about them."); *X Corp. v. Doe*, 816 F.Supp. 1086, 1094 (E.D. Va. 1993) ("X Corp.'s disclosure [to the government] provides persuasive evidence that X Corp. did not 'knowingly' make a misrepresentation."). Notably, HUD continues to fund the County's housing community development programs and has declined to intervene in this lawsuit. *See Luckey*, 183 F.3d 733. HUD's acquiescence in the County's conduct demonstrates that the County did not "knowingly" submit any false claims.

If the County was mistaken in its belief that its AI met HUD's requirements and that it took appropriate actions, its mistake amounted to no more than negligence. As set forth above, the statute and the regulations do not spell out what an AI or appropriate actions entail. *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 675 (5th Cir. 2003) (en banc) (noting that to prove scienter in case involving housing regulation that was "not precise or measurable," the U.S. Attorney would have to prove defendant "knew he could not honestly describe the property as" complying with regulation). The broad-ranging impediments identified by the County reflect, at the least, a good-faith attempt to assess fair housing barriers. Even if the Court determined that the County fell short of its obligation in some respect, its AIs cannot be deemed so deficient as to create an issue of fact concerning whether the County knowingly did not comply. *United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 341 (5th Cir. 2008) ("Although the jury could find that defendants were negligent . . . and that the breakdowns that defendants accepted may not have complied with all applicable rules and regulations, it is significant that the documents were not totally barren in this regard. No reasonable jury could

find the knowledge requirement met based on this evidence alone."); *Southland Mgmt. Corp.*, 326 F.3d at 684 (Jones J. concurring) ("Where there are legitimate grounds for disagreement over the scope of a contractual or regulatory provision, and the claimant's actions are in good faith, the claimant cannot be said to have knowingly presented a false claim."); *cf. Wang v. FMC Corp.*, 975 F.2d 1412, 1420-21 (9th Cir. 1992) (stating "[b]ad math is no fraud," "[p]roof of one's mistakes or inabilities is not evidence that one is a cheat," and "low quality" work and "faulty" design does not render defendant "culpable under the Act"); *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 526 & n.15 (9th Cir. 1999) (deficient auditing procedures bespeak negligence, not fraud). Thus, no issue of fact exists here as to the County's intent.

## POINT III

## ANY DEFICIENCIES IN THE COUNTY'S AIS WERE NOT MATERIAL TO HUD'S FUNDING DECISION.

Although the Second Circuit has not yet decided the issue, courts generally hold that the FCA requires that the false statement be material to the government's funding decision. *United States ex rel. Smith v. Yale Univ.*, 415 F. Supp. 2d 58, 90 n.14 (D. Conn. 2006); *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001) (recognizing "[a] materiality requirement holds that only a subset of admittedly false claims is subject to False Claims Act liability"). Relator cannot raise an issue of fact that whatever deficiency may have existed in the County's AFFH certification was material to HUD's funding decision. *Luckey v. Baxter*, 183 F.3d 730, 732-33 (7th Cir. 1999) (in cases where a relator alleges fraud by omission, relator must show "that the omitted facts were material to the listener's decision").[21]

[21] Whether a false statement is material is a mixed question of law and fact that the Court decides. *United States v. Intervest Corp.*, 67 F. Supp. 2d 637, 647 (S.D. Miss. 1999).

HUD repeatedly approved the County's submissions notwithstanding the FHEO's observations concerning the County's race analyses. This demonstrates that whatever shortcomings may have existed in the County's analyses, such shortcomings were not material to HUD's decision to fund the Consortium's programs. "Clearly, HUD was unconcerned with the apparent discrepancy between the [AFFH] certification and [the County's AIs] and intended to continue the payments." *United States v. Intervest Corp.*, 67 F. Supp. 2d 637, 648-49 (S.D. Miss. 1999) (holding certification not "substantively material to the decision to pay" because "HUD [paid] HAP Vouchers despite the fact that inspection reports they were receiving indicated that the certification was not true."). Although HUD formally required that the County submit the certification, it did not condition payment on the County's following each and every suggestion on how to analyze issues concerning race. *Southland Mgmt. Corp.*, 326 F.3d at 680-81 (Jones J. concurring) (when HUD knew that defendant's apartments did not meet relevant standard, its continued payment to defendant reflected that compliance with standard was immaterial). Not only did HUD continue to fund the County despite the FHEO's comments, it did not even warn the County that it was in danger of losing its funding or require the County to fix the issues it identified. Thus, whatever flaws may have existed in the County's AI, any such flaws were not material to HUD's funding decisions.

## POINT IV

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

As the County argued in support of its motion to dismiss for lack of subject matter jurisdiction,[22] the Court lacks jurisdiction over this litigation because Relator's lawsuit mainly

[22] [*See* Kalish Aff. Ex. 74 (County Br. in Supp. of Mot. to Dismiss) at 9, 15-20; *id.* Ex. 75 (Reply Br. in Further Supp. of Mot. to Dismiss) at 5-10.]

relies upon the County's responses to its requests under FOIL which consisted entirely of administrative reports that the County had submitted to HUD and posted on its website. *See United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 383 (3d Cir. 1999) (Alito, J.). *See* 31 U.S.C. § 3730(e)(4)(A). In its decision denying the County's motion to dismiss, the Court agreed that information disclosed pursuant to a Freedom of Information Law request might constitute a "public disclosure" under the jurisdictional bar. [Kalish Aff. Ex. 16 (Op.) at 12.] However, the Court concluded that disclosures in non-federal administrative reports, such as the County reports at issue here, do not trigger the bar. [*Id.* at 19.] We respectfully disagree and renew our argument to preserve it for future review.[23] To that end, we note that Relator is not the original source of the information regarding the County because it does not have any "direct and independent knowledge of the information on which [its] allegations are based," as required by the FCA, 31 U.S.C. § 3730(e)(4)(B). Because Relator learned the information upon which it bases its claim against the County through FOIL requests, Relator cannot prove that it was the "'source of the core information' upon which the . . . complaint is based." *United States v. New York Med. Coll.*, 252 F.3d 118, 121 (2d Cir. 2001) (citation omitted). Thus, the Court lacks subject matter jurisdiction over this lawsuit.

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[23] *See United States ex rel Bly-Magee v. Premo*, 470 F.3d 914, 918-19 (9th Cir. 2006); *Battle v. Board of Regents for Georgia*, 468 F.3d 755, 762 (11th Cir. 2006); *Hays v. Hoffman*, 325 F.3d 982, 988-89 (8th Cir. 2003); *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1143-44 (D. Wy. 2006).

## CONCLUSION

For the foregoing reasons, the County's Motion for Summary Judgment should be granted, the Complaint should be dismissed with prejudice, and the County should be awarded its costs, reasonable attorneys' fees and such other and further relief as the Court finds to be in the interest of justice.

Dated: New York, New York
September 30, 2008

Respectfully submitted,

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