UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARIBEL BAEZ; FELIPA CRUZ; R.D., ON BEHALF OF HER MINOR CHILD, A.S.; on their own behalf and on behalf of all others similarly situated; UPPER MANHATTAN TOGETHER, INC.; and SOUTH BRONX CHURCHES SPONSORING COMMITTEE, INC.,

Plaintiffs,

v.

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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Civ. No. 13-8916 (WHP)

MEMORANDUM OF LAW OF DEFENDANT NEW YORK CITY HOUSING AUTHORITY IN OPPOSITION TO PLAINTIFFS' MOTION TO HOLD DEFENDANT IN COMTEMPT OF THE STIPULATION AND ORDER OF SETTLEMENT

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TABLE OF CONTENTS

Preliminary Statement 1

Statement of Facts 2

Argument 3

I. PLAINTIFFS HAVE FAILED TO COMPLY WITH A CONDITION PRECEDENT TO MAKING THIS MOTION 3

II. PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN OF PROOF TO HOLD NYCHA IN CIVIL CONTEMPT FOR VIOLATION OF THE STIPULATION AND ORDER OF SETTLEMENT 5

A. Legal Standard 5

B. The Order Allegedly Violated by NYCHA Does Not Clearly and Unambiguously Provide For Only One Work Order Per Complaint & Completion of that Work Order Within 7-Days for Simple Repairs and 15-Days for Complex Repairs 8

C. Plaintiffs Have Failed to Adduce Clear and Convincing Proof of Noncompliance 12

1. Service Level Requirements 12

2. Reporting Requirements 15

i. Timing of Reports 15

ii. Form of Reports 17

D. Plaintiffs Cannot Demonstrate that NYCHA Was Not Reasonably Diligent in Attempting to Comply with the Stipulation and Order 19

III. THE COURT SHOULD DENY THE RELIEF REQUESTED BY PLAINTIFFS 22

A. Service Level Requirements 23

B. Reports Deadline 24

C. Appointment of a Special Master 24

D. Prospective Fines 26

Conclusion 28

TABLE OF AUTHORITIES

CASES

Alves v. Mann, 2012 U.S. Dist. LEXIS 171773 (D.N.J. Dec. 4, 2012), *aff'd*, 559 Fed. Appx. 151 (3rd Cir. 2014) ... 25

Casale v. Kelly, 710 F. Supp. 2d 347 (S.D.N.Y. 2010) ... 23, 27

Chao v. Gotham Registry, Inc., 514 F.3d 280 (2d Cir. 2008) ... 8

City of New York v. Venkatarum, Civ. No. 06-6578 (NRB), 2012 U.S. Dist. LEXIS 99814 (July 18, 2012) ... 22

Dunn v. New York State Department of Labor, 1994 U.S. Dist. LEXIS 1512, 73cv1656 (KTD) (S.D.N.Y. Feb. 16, 1994), *aff'd*, 47 F.3d 485 (2d Cir. 1995) ... 5-6

Equal Employment Opportunity Commission v. Local 28 of the Sheet Metal Workers Int'l Ass'n, 247 F.3d 333 (2d Cir. 2001) ... 22-23

Gulino v. Bd. of Educ. of the City School Dist. of the City of New York, 907 F. Supp.2d 492 (S.D.N.Y. 2012) ... 25-26

Hart v. Community School Bd. of Brooklyn, 383 F. Supp. 699 (E.D.N.Y. 1974) ... 25

Juan F. v. Weicker, 37 F.3d 874 (2d Cir. 1994) ... 23

Latino Officers Ass'n City of New York v. City of New York, 519 F. Supp.2d 438 (S.D.N.Y. 2007), *aff'd*, 558 F.3d 159 (2d Cir. 2009) ... 5, 6-8, 16, 17

New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956 (2d Cir. 1983) ... 25

Rufo v. Inmates of Sufffolk County Jail, 502 U.S. 367 (1992) ... 23

Spallone v. United States, 493 U.S. 265 (1990) ... 23, 26

St. Asimi Maritime Co., Ltd. v. First National Bank of Chicago, 436 F. Supp. 1095 (S.D.N.Y. 1977) ... 24

Thompson v. U.S. Department of Housing & Urban Development, 404 F.3d 821 (4th Cir. 2005) ... 23

United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981), *cert. den.*, 456 U.S. 926 (1982) ... 26

UMW v. Bagwell, 512 U.S. 821 (1994) 27

Walker v. U.S. Dep't of Housing & Urban Development, 912 F.2d 819 (5th Cir. 1990) 23

STATUTES AND RULES

Fed. R. Civ. P. 60(b)(5) 2, 23

PRELIMINARY STATEMENT

Defendant New York City Housing Authority ("NYCHA") respectfully submits this memorandum of law in opposition to plaintiffs' motion to hold NYCHA in contempt for allegedly violating the Stipulation and Order of Settlement ("Stipulation") or for modification of the Stipulation.

As an initial matter, plaintiffs failed to satisfy a condition precedent to making this motion as paragraph 17 requires that plaintiffs discuss in good faith possible solutions to the alleged violations and disclose the documents and information on which they rely.

As set forth more fully below, plaintiffs' motion to hold NYCHA in civil contempt must be denied because they have not met their burden of proof to show that the order NYCHA allegedly failed to comply with is clear and unambiguous, the proof of noncompliance is clear and convincing, and NYCHA has not diligently attempted to comply in a reasonable manner. Plaintiffs' contention that the Stipulation clearly and ambiguously requires that only one work order will be generated in response to a mold or excessive moisture complaint and that NYCHA must complete all work associated with that work order within seven days on average for simple repairs and 15 days on average for complex repairs misinterprets the service level requirements ("SLRs") and is contrary to the language of the Stipulation and the parties' negotiations. NYCHA is not in systemic noncompliance with the SLRs and the reporting requirements of the Stipulation.

Nor have plaintiffs shown by clear and convincing evidence that NYCHA has not been reasonably diligent in attempting to comply in a reasonable manner. NYCHA is in compliance with the SLRs of the Stipulation and has completed nearly 35,000 work orders for mold and

excessive moisture in the first three quarters; plaintiffs acknowledge NYCHA is in compliance as to the 15-day work orders; the self-reported recurrence rate for Level 2/3 work orders (even inclusive of those work orders requiring capital work) is improving; NYCHA has issued revised Standard Procedures concerning Mold and Reasonable Accommodation and has engaged in extensive training of its staff; and NYCHA has made three substantial report productions. Further, NYCHA is taking large-scale measures to improve delivery of services to residents and to address the issue of mold and excessive moisture in public housing.

For many of the same reasons, plaintiffs have failed to meet their burden under Fed.R.Civ.P. 60(b)(5) of establishing that a significant change in circumstances warrants modification of the stipulation approved only a year ago.

STATEMENT OF FACTS

For a full statement of the facts, NYCHA respectfully refers the Court to the accompanying declarations of Brian Clarke dated June 12, 2015 ("Clarke Dec."), Luis Ponce dated June 12, 2015 ("Ponce Dec."), and Donna Murphy dated June 12, 2015 ("Murphy Dec."), and the exhibits thereto.

ARGUMENT

Point I.

PLAINTIFFS HAVE FAILED TO COMPLY WITH A CONDITION PRECEDENT TO MAKING THIS MOTION.

Plaintiffs failed to comply with paragraph 17 of the Stipulation prior to bringing the instant motion. Paragraph 17 provides that plaintiffs may move for enforcement of the Stipulation only after attempting to remedy the alleged violation through good faith discussion with NYCHA regarding "...the claimed violations and the possible solutions. Plaintiffs shall provide copies of any documents or data they rely on that plaintiffs' counsel obtained from sources other than NYCHA and shall identify any NYCHA documents on which they rely." Plaintiffs did not have good faith discussions with NYCHA and failed to produce or identify all documents relied upon as required.

Plaintiffs' interpretation of the service levels became apparent to NYCHA in the latter half of 2014 and the parties met on November 24, 2014 to discuss this issue. At the November 2014 meeting, plaintiffs declined to disclose the documents relied upon, stating that NYCHA would find out in plaintiffs' motion. (Murphy Dec., ¶4) Plaintiffs also indicated that one basis of compromise might be an exclusion of cosmetic work orders from the service level requirements, while emphasizing that their suggestion was not a formal offer. (Murphy Dec., ¶4) In light of the parties' common goal of improving mold and excessive moisture remediation for NYCHA residents, by letter dated February 19, 2015, NYCHA proposed a compromise resolution consistent with the November discussion: that as to complex repairs, a service level of processing 95% of the mold and excessive moisture-related work orders in an average of no more than seven (7) days would apply to the parent work order, and a service level of processing

95% of all of the child work orders related to that parent work order (exclusive of cosmetic repairs) in an average of no more than fifteen (15) days will apply. In other words, a service level of processing 95% of work orders related to complex repairs in an average of up to 22 days, exclusive of cosmetic work orders such as painting and plastering.[1] (Murphy Dec., ¶5, Exh. A)

Plaintiffs failed to respond at all to NYCHA's offer. Instead, on March 5, 2015, Steven M. Edwards, Esq. of Hogan Lovells US LLP filed a notice of appearance with the Court; on March 6, 2015, plaintiffs emailed a letter rejecting NYCHA's offer without making any counterproposal for discussion and, 19 minutes later, filed their letter request for a pre-motion conference via ecf. Plaintiffs did not provide copies of the non-NYCHA documents or data on which they now rely or identify some of the NYCHA documents on which they rely, such as the email of Steven Rappaport. NYCHA engaged in good faith discussions with plaintiffs' representatives -- counsel from the National Center for Economic Justice ("NCEJ") and the Natural Resources Defense Council ("NRDC") -- to resolve the dispute. However, plaintiff's motion reflects that by November 13, 2014 plaintiffs had new lead counsel who was conducting apartment visits (*see* Edwards Dec., ¶21) and apparently preparing this motion. (Murphy Dec., ¶6)

Accordingly, plaintiffs' motion should be denied for failing to comply with a condition precedent to this motion.

[1] In their moving brief, plaintiffs mischaracterize this offer as "no relief" as to 7-day repairs and, as to 15-day repairs, an offer to process the parent work order within 7 days but to have an unlimited number of child work orders and to have 15 days to process each of them. Pb. 11-12.

Point II.

PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN OF PROOF TO HOLD NYCHA IN CIVIL CONTEMPT FOR VIOLATION OF THE STIPULATION AND ORDER OF SETTLEMENT.

A. Legal Standard

A party may be held in civil contempt for failure to comply with a court order only if the movant establishes that "(1) the order the contemnor failed to comply with is clear and unambiguous; (2) the proof of noncompliance is clear and convincing; and (3) the contemnor has not diligently attempted to comply in a reasonable manner." *Latino Officers Ass'n City of New York v. City of New York*, 519 F. Supp.2d 438, 443 (S.D.N.Y. 2007), *aff'd*, 558 F.3d 159 (2d Cir. 2009) (citations omitted).

> A court order is clear and unambiguous when it "leaves no uncertainty in the minds of those to whom it was addressed;" those parties "must be able to ascertain from the four corners of the order precisely what acts are forbidden." The Court's power to hold a defendant in contempt is a "potent weapon" that should not be exercised "where there is fair ground of doubt as to the wrongfulness of the defendant's conduct."

Latino Officers Ass'n City of New York, 519 F. Supp.2d at 443-44 (citations omitted).

Two cases amply illustrate that contempt adjudications are not made lightly. In *Dunn v. New York State Department of Labor*, 1994 U.S. Dist. LEXIS 1512, 73cv1656 (KTD) (S.D.N.Y. Feb. 16, 1994), *aff'd*, 47 F.3d 485 (2d Cir. 1995), the district court denied a motion for an order adjudging the DOL in contempt of an order requiring that 60% of first level unemployment insurance appeals be rendered within 30 days and 80% within 45 days of the appeal. Although the DOL met the standard in only 9 of the prior 127 months and its promptness was "very poor" at the time of the motion (with a 30-day rate of 38% and a 45-day rate of 69%), the district court found that the DOL had been reasonably diligent in its attempt to comply. The court noted that

social and economic conditions over which the DOL had no control dramatically affected the DOL's caseload; measures implemented after the filing of the contempt motion (on which the court deferred ruling so the effect of the initiative could be assessed) had a positive impact although it still did not bring the DOL into compliance; and the DOL was near the national average in meeting promptness standards. *See Dunn*, 1994 U.S. Dist. LEXIS 1512, *4-10. The court further observed that, if applicable, insufficient federal funding would be a factor relevant to reasonable diligence. *Id.* at *5, n.2.

In *Latino Officers Ass'n City of New York*, 519 F. Supp.2d 438, the district court denied a motion for an order holding the City defendants in contempt of a settlement of an employment discrimination class action against the NYPD requiring that defendants establish a Disciplinary Review Unit (DRU) to track and analyze discrimination in the discipline of minorities; maintain an Advisory Committee; develop a guide to the discipline system; expand databases to analyze disciplinary discrimination within 90 days of the effective date; and make quarterly and cumulative reports of specified data to plaintiffs within 60 days of the close of each quarter. The court rejected plaintiffs' contention that defendants violated the settlement in that it was the DRU's responsibility to eradicate discrimination in discipline and plaintiffs' statistical analysis reflected continuing discrimination; the court noted that the unit's responsibility is to track, analyze and review the system and monitor compliance, not act as a guarantor against discrimination. *Id.* at 444.

With respect to plaintiffs' contention that defendants failed to implement the guide to the discipline system because the final version did not include all recommendations submitted by plaintiffs, the court observed that the Agreement required only that defendants obtain plaintiffs recommendations, not that they adopt all of plaintiffs' recommendations. "The fact that

plaintiffs may now wish that they had bargained for stronger language does not license the Court to rewrite the Agreement they made." *Id.* at 445.

The parties in *Latino Officers Ass'n City of New York* agreed that the disciplinary database for formal discipline was not timely implemented; no quarterly formal discipline report was received for the first quarter; the first informal discipline reports due by March 1, 2005 were received on October 14, 2005; and some subsequent reports were received more than 60 days after the conclusion of the quarter. *Id.* at 442-43. By the second quarter of 2006, the informal discipline reports were consistently timely submitted and by the third quarter of 2006 the formal disciplinary reports were being timely submitted. *Id.* at 445-46. Defendants cited technical difficulties and the desire to produce the reports together as reasons for the delay. Nevertheless, the court held defendants were not in contempt as they were reasonably diligent in bringing themselves into substantial compliance with the agreement. *Id.* The court further rejected plaintiffs' contention that evidence of continued discrimination in the NYPD's discipline system violated the agreement, noting that the agreement did not warrant that discrimination in discipline would never occur or create a regime of strict liability. *Id.* at 447-48. As the court denied the contempt motion, it denied the relief requested by plaintiffs.

On appeal, the Court of Appeals for the Second Circuit emphasized that "the relevant inquiry is not whether defendants adequately rebutted plaintiffs' evidence but rather, whether plaintiffs' evidence alone was adequate to establish [the requisite elements]". *Latino Officers Ass'n City of New York*, 558 F.3d at 164. Affirming the district court's decision, the Second Circuit noted the defendants' substantial steps to eliminate discriminatory practices – the disciplinary review unit, written guidelines and report required by the agreement, as well as a decision to conduct a review of one command's disciplines per month to train commanding

officers – and concluded plaintiff failed to meet their burden. *Id.* at 165. *See also Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 291-92 (2d Cir. 2008) (affirming denial of petition of contempt of consent order requiring employer to comply with FLSA overtime provisions; decree was ambiguous with respect to employer's conduct and, while defendant's attempts to comply did not exhaust all means available, defendant took diligent and energetic steps to comply in a reasonable manner).

As set forth more fully below, plaintiffs have failed to meet their burden of establishing the elements required for an order for civil contempt against NYCHA.

B. The Order Allegedly Violated by NYCHA Does Not Clearly and Unambiguously Provide For Only One Work Order Per Complaint & Completion of that Work Order Within 7-Days for Simple Repairs and 15-Days for Complex Repairs.

Plaintiffs' contention that the Stipulation clearly and ambiguously requires that only one work order will be generated in response to a mold or excessive moisture complaint and that NYCHA must complete all work associated with that work order within seven days on average for simple repairs and 15 days on average for complex repairs misinterprets the service level requirements ("SLRs") and is contrary to the language of the Stipulation and the parties' negotiations.

The Stipulation provides that NYCHA will process 95% of the mold and excessive moisture-related work orders in an average of no more than seven (7) days for simple repairs that can be done by a maintenance worker in a single visit or fifteen (15) days for relatively complex repairs that need skilled trades or other specialized staff to address and may require multiple visits, excluding conditions related to capital improvements or where the tenant does not provide access.

Section I.1 of the Stipulation and Order defines the 7- and 15-day completions as tied to work orders. The following definitions apply:

> c. Work Order - the process by which NYCHA schedules a repair or other work to be performed to address a condition in an apartment requiring remediation.
>
> d. Work Order to be Completed within Seven (7) days - Work orders for which the time between the Creation Date and the Actual Finish Date should, on average, be less than or equal to seven days. They involve simple repairs that can be done by a maintenance worker in a single visit to the apartment.
>
> e. Work Order to be Completed within Fifteen (15) days - Work orders for which the time between the Creation Date and the Actual Finish Date should, on average, be less than or equal to fifteen days. These involve relatively complex repairs that need skilled trades or other specialized staff to address and may require multiple visits to the apartment.

As defined in Section I.1(d), a work order schedules "a repair" for "a condition." Multiple repairs for multiple conditions require multiple work orders. Thus, as NYCHA made clear during the parties' negotiation of the Stipulation and Order, individual NYCHA work orders are generated for each trade or craft. The repair to be completed within 15 days is the repair that a particular trade can make. The trade workers performing those repairs may make multiple visits, but they are all from the same trade. If another repair by a different trade is needed after one trade finishes its work, another work order is generated to make that repair, which may also require multiple visits. (Clarke Dec., ¶15)

During negotiations, NYCHA explained its work order processes and the Maximo system which tracks work orders to plaintiffs, and plaintiffs' counsel had the opportunity to view work orders as well as attend a presentation on the Maximo system during an onsite visit on August 16, 2013. (Clarke Dec., ¶15-16) It was made clear to plaintiffs during negotiations that work by different trades or crafts required separate work orders. It was NYCHA's work order process

that was central to, and informed, the negotiations and the Stipulation terms and plaintiffs' current attempt to dismiss it as "of no moment" (Pb. 24) is simply audacious.

Section III.5(a) expressly measures NYCHA's compliance in terms of each work order, consistent with NYCHA's processes and the parties' negotiations:

> For purposes of this Stipulation and Order, NYCHA shall be deemed to be in compliance with paragraph 4 of this Stipulation and Order with respect to work orders that are to be completed within seven days during a quarterly period defined in paragraph 10 so long as NYCHA processes to completion at least ninety-five (95%) of such work orders in an average of no more than seven (7) days during the period. For purposes of this Stipulation and Order, NYCHA shall be deemed to be in compliance with paragraph 4 of this Stipulation and Order with respect to work orders that are to be completed within fifteen days during a quarterly period defined in paragraph 10 so long as NYCHA processes to completion at least ninety-five (95%) of such work orders in an average of no more than fifteen (15) days during the period.

Plaintiffs' misinterpretation appears to be based on their unarticulated assumption that the 7- and 15-day time frames are based on a parent work order. (*See* Marks Dec., ¶8) However, had the parties intended for the time frames to be defined by the narrower category of parent work orders rather than work orders, it would have been specified in the Stipulation.

Plaintiffs employ tortuous reasoning to support their desired interpretation. Plaintiffs illogically contend that because work order is defined in the singular, the parties did not contemplate multiple work orders. Plaintiffs quote a portion of paragraph 4 referring to "...completion of mold and excessive moisture-related work orders..." and, focusing only on the word "completion" and ignoring "work orders", argue that completion can only mean that all remediation must be completed start to finish. As to paragraph 5 quoted above defining compliance in terms of work orders, plaintiffs acknowledge it refers to work orders in the plural but argue that the absence of specific reference to child work orders supports their interpretation.

Plaintiffs similarly distort the meaning of paragraph 6 - which summarizes how NYCHA will respond to a complaint including initiating a work order, providing written material to an adult authorized occupant and, under certain circumstances, contacting the resident post-remediation and having a supervisor inspect the apartment – in their attempt to argue that the use of "work order" in the singular means only a single work order will be created in response to a mold complaint. This is not only illogical but is plainly contrary to the parties' discussions of NYCHA's work order system during negotiations.

NYCHA's interpretation is consistent with the Policy Manual cited by plaintiffs (Pb. 24) and is not contradicted by Mr. Rappaport's June 25, 2013 email transmitting a draft procedure document. The portion of the Policy Manual quoted, that NYCHA "...shall complete complex repairs related to mold and/or moisture that need skilled trades or other specialized staff that may require multiple visits to the apartment on average in less than or equal to fifteen (15) days" continues with "Examples of complex repairs are plumbing repairs within pipe chases, replacing/installing tub surrounds, and roof drain repairs." These examples reinforce NYCHA's interpretation as they are examples of work performed by a different craft or trade (plumber, carpenter and roofer, respectively) each of which requires a separate work order. The import of these examples is that each of these repairs must be completed within 15 days on average, not that all of them must be.

Moreover, plaintiffs' counsel's statements at the fairness hearing, cited at Pb. 24, are consistent with NYCHA's interpretation of the SLRs; as defined in Section I.1(d), a work order schedules "a repair" for "a condition." No contradiction or interjection from NYCHA's counsel was warranted. Additionally, when Mr. Rappaport did address the Court he stated, without contradiction from plaintiff's counsel: "The service levels in the settlement are those that the

Housing Authority believes [it] is meeting now and is committed to continue to meet." (Bass Dec., Exh. 3 at 18)

Finally, contrary to plaintiffs' assertion, the New York City Office of Inspector General ("OIG") did not agree with their interpretation of the SLR in its December 2014 report. (Edwards Dec., Exh. 5) The OIG report did not address, or purport to address, the parties' conflicting interpretations.[2] Further, OIG's extremely abbreviated summary of the Stipulation misstates the SLR by failing to even reference work orders and omitting entirely the concept of an average service level. In any event, even if the OIG had taken a position on the parties' legal dispute, it has no expertise in the field of contract interpretation.

As set forth above, plaintiffs have not met their burden of establishing that the Stipulation clearly and unambiguously provides that only one work order will be generated in response to a mold or excessive moisture complaint and that NYCHA will complete all work associated with that work order within seven days on average for simple repairs and 15 days on average for complex repairs. In fact, as NYCHA has shown above, the Stipulation clearly and unambiguously provides that the 7- and 15-day time frames apply to each work order to address each repair and multiple work orders may be generated in response to a complaint.

C. Plaintiffs Have Failed to Adduce Clear and Convincing Proof of Noncompliance.

1. Service Level Requirements

Paragraph 13(b) of the Stipulation provides that "[n]on-systemic, individual, and isolated violations of this Stipulation and Order shall not form a basis for a finding that NYCHA has

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[2] However, the OIG report concluded that mold remediation was timely finished in a strong majority (76-79%) of sampled cases; found no evidence of malfunctioning or inadequate ventilation systems leading to mold or excessive moisture; and found no evidence that NYCHA improperly cancelled requests for maintenance or repairs. (*See* Edwards Dec., Exh. 5 at 11)

acted in violation of this Stipulation and Order." NYCHA is not in systemic noncompliance with the SLRs of the Stipulation, or even in noncompliance.

The Stipulation explicitly sets forth the relevant measure of compliance with the SLR and NYCHA has met those service levels for the first three quarters of the stipulation period. For the first quarter of May-July 2014, even including 100% of the work orders, the 7-day work orders were completed in an average of 6.8 days and 15-day work orders were completed in an average of 5.5 days.[3] For the second quarter of August-October 2014, even including 100% of the work orders, the 7-day work orders were completed in an average of 6.3 days and 15-day work orders were completed in an average of 5.8 days. For the third quarter of November 2014 to January 2015, the averages for 95% of the work orders were completed in an average of 6.3 days and 15-day work orders were completed in an average of 14.5 days. *See* Ponce Dec., Exh. E, F and G.

Plaintiffs concede that NYCHA is in compliance with respect to the 15-day work orders even under their interpretation of the SLR. (Pb. 26.) However, plaintiffs suggest that NYCHA is not in compliance with the Stipulation because it includes in its calculation of the average service level those work orders which are completed after a NYCHA worker visits the apartment in response to a report of mold or excessive moisture but ultimately determines the report is unfounded. A work order which is generated based on a report later determined to be unfounded still requires that NYCHA devote resources to responding and processing the work order. These work orders are processed and completed and are properly included in the service level

[3] Plaintiffs state that if parent and child work orders are linked, NYCHA's average time to complete simple repairs in the first quarter of May-July 2014 is 8.7 days, Pb. 10, and for the third quarter of November 2014-January 2015 is 9.5 days, Pb. 13. However, NYCHA's average service level is based on an average of the lowest 95% work orders and there is no indication that plaintiffs took that factor into account in their calculations.

calculations. The parties specified in the Stipulation which work orders would not be included in the service level calculations – where the tenant fails to provide access or where the problem is related to a capital improvement – they did not agree to exclude work orders ultimately determined to be unfounded.

In arguing that NYCHA is in systemic noncompliance, plaintiffs rely upon admittedly anecdotal evidence (Pb. 33) and the level of tenant-reported recurrence rate for Level 2 and 3 work orders. Neither factor supports a finding of noncompliance, let alone systemic noncompliance.

The Stipulation does not set forth any recurrence rate as a measure of compliance. Moreover, the closed Level 2 and 3 work orders for which NYCHA is contacting residents include Level 2 and 3 work orders for which capital improvements are required and, therefore, some recurrence will occur until the necessary capital improvement work can be completed. (Ponce Dec., ¶13) Despite the inclusion of those work orders, there has been improvement in the tenant-reported recurrence rate for Level 2 and 3 work orders even during these early stages of the Stipulation Period. For the second quarter, NYCHA successfully contacted 1,517 residents and 41% reported that the mold or excessive moisture condition had recurred. For the third quarter, NYCHA successfully contacted 1,451 residents and 27% reported a recurrence – a decrease of 14%. (Ponce Decl., ¶13)

During the period covered by these reports, NYCHA responded to 34,493 mold or excessive moisture complaints. (Ponce Dec., ¶12) Plaintiffs' anecdotal evidence of an

extraordinarily small fraction of the mold or excessive moisture work orders addressed by NYCHA fail to establish systemic noncompliance by clear and convincing evidence.[4]

Finally, NYCHA anticipates that its continuing strategies to address the root causes of mold and excessive moisture will positively impact the reported recurrence rate, as well as the overall number of work orders related to mold and excessive moisture.[5]

2. **Reporting Requirements**

i. Timing of Reports

Plaintiffs now acknowledge that, with the exception of the 60-day period specified in paragraph 10(b)(1)(a) regarding semi-annual sampling, the Stipulation does not specify a deadline for production of reports. Nevertheless, having not otherwise bargained for reporting deadlines, plaintiffs assert that the reports are "untimely", NYCHA is in violation of the Stipulation, and the Court rewrite the Stipulation to impose a 10-day deadline.

NYCHA produced reports for the first reporting period ending on July 2014 on September 30, 2014, the 61st day after the close of the period; produced reports for the period

[4] At the pre-motion conference, the Court indicated that it would determine whether a hearing was necessary after receiving the parties' submissions. With the exception of the individual declarations executed by several tenants, most of the information provided by plaintiffs regarding individual tenants does not provide sufficient identifying information to permit NYCHA to respond. Therefore, to the extent the Court intends to rely upon such anecdotal information, NYCHA requests that plaintiffs specifically identify the tenants and the units and that NYCHA be afforded an opportunity to investigate and supplement its response.

[5] The NBC Dateline report and the report of Office of the Comptroller regarding NYCHA's efforts to maximize federal funding cited by plaintiffs (Pb. 17), are irrelevant to NYCHA's compliance during the stipulation period beginning May 2014. Among other things, both reports concern time frames long before May 2014 under prior administrations and, as NYCHA noted in its letter response to the Comptroller's report, is seriously flawed (*see* Edwards Dec., Exh. 4, Addendum).

ending October 2014 on February 20, 2015, the 112th day after the close of the reporting period; and produced reports for the period ending January 2015 on March 31, 2015, the 59th day after the close of the reporting period. (Ponce Dec., ¶¶ 9-11, Exh. E, F and G)

By letter dated February 19, 2015, NYCHA advised plaintiffs that it anticipated that going forward the reports will be produced approximately 60 days after the conclusion of the reporting period. NYCHA's 60-day goal – the same timeframe for production of reports agreed to by the parties in *Latino Officers Ass'n City of New York* - is entirely reasonable. Generating the report on follow-up calls to all Level 2 and 3 work orders requires that NYCHA's Customer Contact Center ("CCC") be provided with contact information regarding the closed Level 2 and 3 work orders and that CCC staff make multiple attempts to contact each resident (with the calls numbering in the thousands each quarter) and document the response. (Ponce Dec., ¶11) The quality assurance reports required that, following the close of the period, NYCHA identify a sufficient number of closed Level 2 and 3 work orders to permit 100 inspections, generate inspection work orders for those units, complete those inspections, and generate a report on the results. The reporting on reasonable accommodation necessitated the coordination of information and documents from NYCHA's Equal Opportunity and Operations departments. (Ponce Dec., ¶10)

In fact, by stipulating to a 60-day period in paragraph 6 (as the time frame within which NYCHA was to contact residents with closed Level 2/3 work orders) and in paragraph 10(b)(1)(a) (as the time frame for certain sampling), the parties clearly anticipated that production of the reports would require *at least* 60 days after the close of the reporting period.[6]

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[6] Contrary to plaintiffs' assertion, Mr. Rappaport did not state at the fairness hearing that NYCHA would produce reports the following week. (Pb. 29-30). Rather, Mr. Rappaport was

Even if the Stipulation had specified a 60-day deadline for all reports, NYCHA, like the defendants in *Latino Officers Ass'n City of New York*, would be deemed reasonably diligent in bringing itself into substantial compliance with the agreement.

ii. Form of Reports

Paragraph 10(a) of the Stipulation requires quarterly reports on the number and percentage of work orders in each category (7-day, 15-day and capital improvement), completed within SLR, and post-closure contacts and QA inspection, with a breakdown by "housing property" (not specific apartment), problem code and failure class, and category. There is no requirement that any parent or child work orders be linked or apartment number be provided. The terms of this paragraph do not require the work order detail report as produced by NYCHA; however, NYCHA provided the detailed report in lieu of the breakdown by housing property, problem code and failure class, and category.

Paragraph 6 requires quarterly reporting on Level 2 and 3 post-closure resident contacts.

Paragraph 10(c) requires reports on re-inspections of certain Level 2 and 3 work orders. The Stipulation provides that the findings of these reports shall be used solely for assessment purposes, i.e., not compliance or enforcement.

Paragraph 10(b) provides for a semi-annual reports on a sampling of work orders for one month within that period.

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clearly alluding to the fact that if the Court approved the Stipulation in April, the first quarter of the stipulation period would commence in May. *See* Stipulation, ¶ 10 ("On a quarterly basis (commencing with data for the first full calendar month after the effective date of this Stipulation and Order as defined in Paragraph 16 of this Stipulation and Order) NYCHA shall provide plaintiffs' counsel with a report . . .").

Paragraph 11 provides for semi-annual reports on reasonable accommodations requests related to mold on behalf of residents with asthma.

In its first quarterly production, NYCHA produced the work order reports in a pdf format; pursuant to plaintiffs' request at the November 2014 meeting, NYCHA produced the reports for the second quarter in Excel format. (Murphy Dec., ¶8) Moreover, Plaintiffs' contention that NYCHA has refused to define for them certain terms used in the reports is not true. Plaintiffs were invited at the November 2014 meeting and in subsequent correspondence to send NYCHA a list of terms they wished defined, but they did not do so. (Murphy Dec., ¶9)

As to the form of the reports, plaintiffs assert that NYCHA failed to provide the ¶10(b) semi-annual report on a sampling of work orders for one month within that period; did not include apartment numbers and information linking parent-child work orders in the second quarter production for the ¶10(a) reports; and redacted tenant identification information from the reasonable accommodation reports.

With respect to the semi-annual sampling of work orders, NYCHA produced detailed reports on all work orders during this period in response to the quarterly reporting required by ¶10(a); therefore, production of a report for a sampling of work orders for one month pursuant to ¶10(b) would be duplicative. Paragraph 10(a) does not require parent-child work order linking or apartment numbers; nevertheless, the information was subsequently restored in the report as the reports also satisfied ¶10(b).

NYCHA properly redacted medical and tenant identifying information from the reasonable accommodation reports in order to protect the confidentiality of its tenants. These reports are intended to be a high level indication of NYCHA's responsiveness and such information is not necessary for that purpose.

D. Plaintiffs Cannot Demonstrate that NYCHA Was Not Reasonably Diligent in Attempting to Comply with the Stipulation and Order.

As set forth in the accompanying declarations and exhibits, NYCHA has been reasonably diligent in attempting to comply with the Stipulation. It taken substantial steps to address mold and excessive moisture in its public housing and continues its efforts to improve its performance.

As noted above, NYCHA is in compliance with the SLRs of the Stipulation and completed nearly 35,000 work orders for mold and excessive moisture in the first three quarters; plaintiffs acknowledge NYCHA is in compliance as to the 15-day work orders; the self-reported recurrence rate for Level 2/3 work orders (even inclusive of those work orders requiring capital work) is improving; and NYCHA has issued revised Mold SP and Reasonable Accommodation SP and engaged in extensive training of its staff. NYCHA has made three substantial report productions and anticipates that future reports will be produced approximately 60 days after the conclusion of the reporting period.

Most significantly, NYCHA is taking large-scale measures to improve delivery of services to residents and to address the issue of mold and excessive moisture in public housing. As set forth in more detail in the Clarke declaration, on May 19, 2015, NYCHA announced *NextGeneration NYCHA*, a long-term strategic plan to stabilize NYCHA and improve residents' quality of life. Among the strategies of *NextGeneration NYCHA* are faster repairs and transparency around performance. In January 2015, NYCHA launched the Optimal Property Management Operating Model ("OPMOM") system to empower local property managers at 18 developments spanning 22,386 units to perform budgeting, purchasing and hiring. NYCHA will

ultimately identify best practices from OPMOM and deliver them to all other public housing developments by 2016. (Clarke Decl., ¶¶6-7)

NYCHA has also successfully pursued funding for capital improvement work which would address the root cause of mold and excessive moisture. In 2013, NYCHA worked with the New York City Housing Development Corporation ("HDC") to issue a $700 million "Bond B" which included $500 million for capital improvement work. Bond B allowed NYCHA to expedite building envelope improvements at 33 developments to benefit approximately 60,000 residents. (Clarke Decl., ¶¶4, 9-13)

In March 2015, the Federal Emergency Management Agency ("FEMA") issued a $3 billion grant to NYCHA to repair and upgrade developments in Brooklyn, Manhattan and Queens which had suffered severe damage from Superstorm Sandy. These funds will enable NYCHA to construct elevated boilers, install flood barrier systems and stand-by generators, and perform other critical repairs and resiliency measures to better protect the 80,000 affected residents. The funds will also be used to repair doors, walls, floors, playground equipment and fencing still damaged after the storm. Work will begin in Summer 2015 and will take 18 to 48 months to complete. (Clarke Decl., ¶9)

NYCHA has also pursued capital support from the City and State of New York to fund a vital roof replacement program, which will directly impact the one of the primary causes of mold. Roof replacement has multiple benefits in that it improves safety, prevents leaks, mold and asbestos problems, and significantly decreases maintenance work orders. Roof replacement is directly related to the integrity of a building's envelope and is critical to addressing the root causes of mold and excessive moisture. An analysis of three developments where roofs were

replaced reflected that work orders normally associated with mold abatement work decreased by an average of 56 percent. (Clarke Decl., ¶10)

The City has committed to provide $100 million per year for the next three years and called upon the State to match the funds. The City's first $100 million will be spent on replacing roofs at 66 buildings housing nearly 13,000 residents that have high numbers of maintenance work orders for leak repairs, painting and mold. The buildings are at the following Developments: Queensbridge North, Queensbridge South, Albany I & II, Sheepshead Bay and Parkside. Work commenced this month. (Clarke Decl., ¶11)

In April 2015, the New York State legislature set aside $100 million to assist NYCHA with public housing modernization and improvement. NYCHA has requested that these funds be earmarked for roof repair and replacement and, consistent with the State's conditions, entered into a management agreement with the Dormitory Authority of the State of New York ("DASNY") to scope, procure and administer those funds. NYCHA had conducted physical assessments of development roofs in 2006, 2011 and 2014 and rated each on a numerical scale from one (good) to five (beyond its useful life). If permitted, NYCHA will use the $100 million to replace or repair 123 roofs at 18 developments containing the worst roofs in NYCHA's portfolio. (Clarke Decl., ¶12)

Plaintiffs have not established that the Stipulation is clear and unambiguous in the manner they assert, that NYCHA failed to comply with it by clear and convincing evidence, and that NYCHA has not diligently attempted to comply in a reasonable manner. Accordingly, plaintiffs' motion to hold NYCHA in civil contempt of the Stipulation should be denied.

Point III.

THE COURT SHOULD DENY THE RELIEF REQUESTED BY PLAINTIFFS.

As a remedy, plaintiffs request that the Court:

(1) declare that NYCHA is required to complete simple repairs on average within 7 days and complex repairs on average within 15 days, using plaintiffs' interpretation that there can be only one work order in response to a complaint;[7]

(2) impose a cap of 14- and 21- days, respectively, on every response to a complaint of a simple or complex repair;

(3) impose a 10-day deadline for the production of all reports other than those involving reasonable accommodation;

(4) require NYCHA to include apartment numbers and parent-child relationships in the report required by paragraph 10(a);

(5) prohibit NYCHA from redacting tenant identifying information from reasonable accommodation reports;

(6) appoint an independent master or monitor; and

(7) impose a monetary penalty of $10,000 for every recurrence of mold payable to the tenant.[8]

Upon finding that a party is in civil contempt, a court retains "broad discretion to fashion an appropriate coercive remedy… based on the nature of harm and the probable effect of alternative sanctions." *City of New York v. Venkatarum*, Civ. No. 06-6578 (NRB), 2012 U.S.

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[7] Plaintiffs purport to be stating the requirements of the Stipulation, but omit reference to the fact that the average service level is calculated using the lowest 95% work orders.

[8] Plaintiffs also ask that NYCHA be required to define terms used in the reports. As NYCHA has previously and repeatedly invited plaintiffs to identify the terms it needs defined and plaintiffs have inexplicably failed to do, NYCHA again invites plaintiffs to email a list of terms it needs defined.

Dist. LEXIS 99814 (July 18, 2012) (quoting *Equal Employment Opportunity Commission v. Local 28 of the Sheet Metal Workers Int'l Ass'n*, 247 F.3d 333, 336 (2d Cir. 2001). In assessing sanctions for civil contempt, "a court is obliged to use the least possible power adequate to the end proposed." *Casale v. Kelly*, 710 F. Supp. 2d 347 (S.D.N.Y. 2010), *quoting Spallone v. United States*, 493 U.S. 265, 276 (1990). The Court should deny the requested relief because plaintiffs have not met their evidentiary burden to hold NYCHA in civil contempt of the Stipulation and, even if they had, the requested relief is not appropriate.

Nor have plaintiffs met their burden under Fed.R.Civ.P. 60(b)(5) of establishing that a significant change in circumstances warrants modification of the stipulation approved only a year ago and that any such modification is "suitably tailored to the changed circumstance." *See Rufo v. Inmates of Sufffolk County Jail*, 502 U.S. 367, 391 (1992). In modifying a consent decree, the court should strive to "preserve the essence of the parties' bargain." *Thompson v. U.S. Department of Housing & Urban Development*, 404 F.3d 821, 833 (4th Cir. 2005) (quotation omitted). "Modification is a remedy not to be lightly awarded, 'especially where the design is not to relieve a party of obligations but to impose new responsibilities'" as a contrary rule would discourage compromise settlements. *Juan F. v. Weicker*, 37 F.3d 874, 878 (2d Cir. 1994), *quoting Walker v. U.S. Dep't of Housing & Urban Development*, 912 F.2d 819, 826 (5th Cir. 1990).

A. **Service Level Requirements**

As noted above, NYCHA has not failed to comply with the Stipulation and its interpretation of the SLR is supported by the language of the Stipulation, the parties' negotiations, and the Maximo work order system which informed the parties' negotiations.

Plaintiffs' proposal of a hard cap of 14- and 21- days on every response to a mold and excessive moisture complaint is unworkable. This cap is contrary to the entire framework of the Stipulation and would fracture the essence of the parties' bargain. The parties expressly recognized that there would be outliers to the 7- and 15-day work orders when they agreed to measure compliance by average service levels of 95% of the work orders. NYCHA could not realistically comply with such a term. Plaintiffs cannot point to any changed circumstances from only a year ago which would warrant imposition of such a draconian term.

B. **Reports Deadline**

NYCHA has addressed plaintiffs' arguments as to the timing and contents of the reports above. Like plaintiffs' cap proposal, the imposition of a 10-day deadline for production of periodic reports is unreasonable and is contrary to the framework of the Stipulation.

St. Asimi Maritime Co., Ltd. v. First National Bank of Chicago, 436 F. Supp. 1095 (S.D.N.Y. 1977), cited by Pb. at 32-33, does not support the proposition that the court should impose a 10-day deadline for production of periodic reports. *St. Asimi Maritime Co., Ltd.* involved a dispute between the plaintiffs/owners of eight maritime vessels and the bank which held mortgages on the vessels; each alleged non-compliance with a consent order. With respect to certain provisions requiring plaintiffs to cooperate in supplying corporate records, the court directed defendants to make a one-time submission of a list to plaintiffs of the information still required and for plaintiffs to respond in writing within ten days. *Id.* at 1101. The case did not involve the type of periodic and substantial production of reports at issue here.

C. **Appointment of a Special Master**

Plaintiffs request the appointment of a special master who "should be given complete access to NYCHA's data and staff, and should be authorized to monitor repairs as they are being

done and reported, propose improvements in the process to the parties, and make recommendations to the Court" (Pb. at 34), and "have the ability to ensure NYCHA is complying with the policies and procedures outlined in the Order and Policy Manual, especially the requirement that NYCHA workers remediate the underlying sources of mold and excessive moisture" (Pb. at 34-35).

The caselaw cited by plaintiffs does not support appointment of a special master. In *New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 963 (2d Cir. 1983), cited by plaintiffs, the special master was appointed to replace a Review Panel the parties consented to in the original consent judgment. Affirming the district court's finding of noncompliance with a 1975 Consent Judgment involving the care and treatment of developmentally disabled children and adults residing at the infamous former Willowbrook State Developmental Center, the Second Circuit also affirmed the appointment of a special master to replace a Review Panel (no longer funded by the state) which had been appointed in accordance with the terms of the 1975 Consent Judgment. The Second Circuit noted that the provisions of the order describing the special master's powers were taken practically verbatim from the powers and duties of the Review Panel in the Consent Judgment and in some respects were narrower. Similarly, in *Alves v. Mann*, 2012 U.S. Dist. LEXIS 171773 (D.N.J. Dec. 4, 2012), *aff'd*, 559 Fed. Appx. 151 (3rd Cir. 2014), cited by plaintiffs, a monitor was appointed upon a joint motion of the parties for final approval of a settlement of a class action brought on behalf of involuntarily civilly committed sex offenders; the settlement agreement negotiated by the parties themselves required the court-appointed monitor.

Hart v. Community School Bd. of Brooklyn, 383 F. Supp. 699, 764 (E.D.N.Y. 1974), involved the post-trial appointment of a special master in a school desegregation case to assist

the court by coordinating and evaluating remedial proposals prepared at the court's direction. *Gulino v. Bd. of Educ. of the City School Dist. of the City of New York*, 907 F. Supp.2d 492, 509 (S.D.N.Y. 2012), involved a heavily litigated employment discrimination class action where the court granted in part and denied in part a class decertification motion, and held that the plaintiff class survived as to its request for a monitor.

Plaintiffs' request should be denied as this case is not the exceptional case requiring the appointment of a special master and such appointment would be intrusive as to NYCHA's operations and management. *See United States v. City of Parma*, 661 F.2d 562, 579-80 (6th Cir. 1981), *cert. den.*, 456 U.S. 926 (1982) (reversing a district court's order appointing a special master as part of a remedial order after finding that the city had engaged in acts that had the effect of creating a segregated community; the court reasoned "[t]he appointment of a special master to oversee implementation of a court order by a municipality is an extraordinary remedy. We do not believe that such an appointment would represent the least intrusive method of achieving the government's stated goal in this case ..."). The stipulation period is in its early stages, NYCHA is in compliance with the Stipulation as it properly interprets the SLR, the tenant-reported recurrence rate is trending in a positive direction despite encompassing work orders related to needed capital work, and NYCHA is taking large-scale measures to improve services to residents and to implement capital improvements directed to address the root causes of mold and excessive moisture. Under these circumstances, appointment of a special master should be denied.

D. **Prospective Fines**

Plaintiffs assert that they have established that NYCHA should be held in civil contempt and suggest that the Court impose a monetary penalty of $10,000 for every recurrence of mold

payable. However, plaintiffs have not met their burden of proving civil contempt. Moreover, plaintiffs' proposal should be rejected because in negotiating the settlement none of the parties anticipated that there would be no recurrence of mold.

In assessing sanctions for civil contempt, "a court is obliged to use the least possible power adequate to the end proposed." *Casale v. Kelly*, 710 F. Supp. 2d 347 (S.D.N.Y. 2010) (Judge Shira Scheindlin found the City of New York in civil contempt only where the City continued to enforce unconstitutional anti-loitering statutes for decades despite judicial invalidation of those statutes and numerous court orders; court set a schedule of fines but under "purge provision" City could avoid fine by filing and publishing affirmation of intent to abide by order and doing so), *quoting Spallone v. United States*, 493 U.S. 265, 276 (1990).

Even assuming plaintiffs could established that NYCHA is in civil contempt of the Stipulation, prospective coercive fines are inappropriate in light of NYCHA's contrary interpretation of the Stipulation; NYCHA's substantial efforts to address mold and excessive moisture both in responding to work orders and in large scale responses; the early stage of the stipulation period; the absence of any prior proceedings regarding the Stipulation; and NYCHA's precarious financial condition. Against these factors it is clear that any monetary sanction would be punitive, rather than civil and coercive, in nature and is prohibited under *UMW v. Bagwell*, 512 U.S. 821 (1994).

Accordingly, the relief requested by plaintiffs, whether sought as a remedy for civil contempt or as a modification warranted by a significant change in circumstances, should be denied.

CONCLUSION

For the reasons stated above, defendant New York City Housing Authority respectfully requests that the Court deny plaintiffs' motion in its entirety.

Dated: New York, New York
June 12, 2015

Respectfully submitted,

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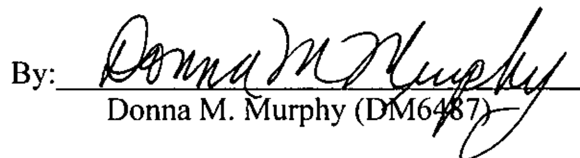
By: 
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