UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARIBEL BAEZ; FELIPA CRUZ; RD., 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,	:	13 Civ. 8916 (WHP)
vs.	:	
NEW YORK CITY HOUSING AUTHORITY,	:	
Defendant.	:	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO ENFORCE OR MODIFY THE STIPULATION AND ORDER, FOR APPOINTMENT OF A MASTER AND FOR CONTEMPT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Plaintiffs submit this memorandum in support of their motion for an order to enforce the Stipulation and Order of Settlement approved by the Court on April 17, 2014 ("Order" or "Settlement"), for appointment of a master and for contempt.

PRELIMINARY STATEMENT

Plaintiffs bring this motion because Defendant New York City Housing Authority ("NYCHA") has failed to comply with the Order. The Order was designed to address NYCHA's failure to remediate dangerous mold and excessive moisture conditions that harm the health of the plaintiff class, public housing tenants who suffer from asthma. Instead of complying with the Order, NYCHA has proffered a series of inadequate and inconsistent excuses for its systemic non-compliance with the Order, leaving dangerous health conditions in New York City public housing unresolved.

NYCHA's own reports demonstrate that it has failed to achieve the Order's goal of effectively and timely remediating mold and excessive moisture in New York City's public housing developments by eliminating the underlying causes of those problems. In follow-up calls conducted by NYCHA, tenants report that mold has "reoccurred" in 34% of allegedly closed cases on average. That level of performance is unacceptable and suggests that NYCHA is applying cosmetic fixes, rather than eliminating the causes of mold and excessive moisture at their source.

Plaintiffs' interviews with tenants bear this out. After tenants report a mold problem, NYCHA's workers often simply wash the mold with bleach or detergent agents, or paint over it, without ameliorating the source of excessive moisture that causes the mold to recur. NYCHA's own reports demonstrate that it has treated more than 98% of repairs as "simple repairs" that can be addressed by a maintenance worker in a single visit, leaving less than 2% to be classified as "complex repairs."

Furthermore, while NYCHA claims that it has satisfied the time requirements in the Order, its own reports again demonstrate that this is not the case. The Order requires NYCHA to complete "simple repairs" in no more than seven days on average and "more complex repairs" in no more than fifteen days on average. NYCHA has taken the position, however, that the seven and fifteen-day deadlines apply serially to each separate task of a single repair (which NYCHA characterizes as "parent" and "child" work orders). As a result, some repairs are taking weeks and even months. In approximately 58.3% of the work orders reported on in the first three quarters following entry of the Order, NYCHA failed to complete any work.

NYCHA has also failed to meet the Order's reporting requirements. NYCHA's reports have been late—in one case more than 200 days after the end of the reporting period—and the information in the reports has been misleading or inadequate. Additionally, more than a year after the Order was entered, NYCHA has still not provided one of the required reports. Worse, when Plaintiffs alerted NYCHA to their improper parent and child work order separation, NYCHA's response was to eliminate from the second quarterly report the information that enabled Plaintiffs to link parent and child work orders.

Plaintiffs seek an order from the Court confirming NYCHA's obligation to complete simple mold and moisture remediation repairs in no more than seven days and more complex repairs in no more than fifteen days, on average, and enforcing NYCHA's obligations under the Order to rid residents' homes of mold and excessive moisture in an effective and timely manner. Plaintiffs also seek an order requiring NYCHA to provide timely, complete, and accurate reports. In addition, Plaintiffs request that the Court appoint a master to aid in ensuring that, moving forward, NYCHA will comply with the Court's Order. Finally, Plaintiffs seek an order finding NYCHA in contempt and propose penalties for violations that may occur in the future.

STATEMENT OF FACTS

A. The Action.

In December 2013, public housing tenants in New York City who suffer from asthma filed a Complaint in this Court on behalf of themselves and all others similarly situated under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"), among other statutes, against NYCHA for failure effectively to abate mold and excessive moisture in their apartments following requests for accommodation. As NYCHA acknowledged in its own Tenant Handbook, "too much exposure to mold may cause or worsen conditions such as asthma, hay fever, or other allergies. . . . Mold and mildew can pose a health hazard for [tenants] and [their] family, so it is important to eliminate the problem as soon as possible." Complaint ¶ 66, annexed to the Declaration of Greg Bass dated April 22, 2015 ("Bass Decl."), as Exhibit 1 (quoting Tenant Handbook).

The Complaint alleged that prior to this litigation, NYCHA utilized "Band-Aid" procedures that permitted mold and excessive moisture damage to recur, and there were significant delays in completing repairs, to the extent that they were completed at all. Complaint (attached to the Bass Decl. as Ex. 1) ¶ 70. The goal of the litigation was to require NYCHA to change its conduct, so that repairs would be timely and effective, and would eliminate the causes of the mold and moisture at their source. To achieve that goal, Plaintiffs sought injunctive relief to compel compliance by NYCHA of the protections afforded them under the ADA and related laws regarding an equal and meaningful opportunity to use, benefit from, and enjoy public housing. *Id.* ¶¶ 116, 119, 123 and 125.

NYCHA chose to settle rather than contest the claims. As a result, the parties agreed to a stipulation of settlement at the outset of the case. Bass Decl. ¶ 2. On February 11, 2014, the Court certified the class agreed to by the parties as "[c]urrent and future residents of NYCHA

who have asthma that substantially limits a major life activity and who have mold and/or excessive moisture in their NYCHA housing." Order dated April 8, 2014, at 2, annexed to the Bass Decl. as Exhibit 2.

On March 27, 2014, the Court held a class settlement fairness hearing pursuant to Fed. R. Civ. P. 23(e), where the Court heard directly from NYCHA tenants regarding the effects of mold and excessive moisture in their homes, including the significant contamination in bathrooms, kitchens, bedrooms, and common areas. Transcript from the March 27, 2014 hearing ("Mar. 27 Hearing Tr."), at 19-48, annexed to the Bass Decl. as Exhibit 3. Thirty-one NYCHA residents spoke at the fairness hearing, and many told the Court how the mold and excessive moisture in their homes exacerbated their asthma and other respiratory conditions. *Id.* At the conclusion of the hearing, the Court noted that the residents' remarks suggested that NYCHA's response "almost reflexively is to paint, and that doesn't appear . . . to be an adequate or appropriate solution based upon testimony from people who said that just days after their apartment or the room is painted that mold is reappearing." *Id.* at 52.

Plaintiffs specifically discussed the seven-day and fifteen-day provisions in the proposed settlement at the fairness hearing. Marc Cohan, attorney for Plaintiffs, explained to the Court how the parties' settlement agreement addresses the issue of NYCHA's timeliness in responding to mold and excessive moisture complaints. Mr. Cohan made clear that under the settlement agreement, NYCHA would have to respond to a tenant's complaint of mold or excessive moisture by conducting repairs "within seven days if those repairs were in fact simple repairs or within 15 days if they were more complex repairs *to abate the moisture and mold condition. That became the cornerstone of the settlement agreement.*" *Id.* at 5 (emphasis added). Counsel

for NYCHA neither contradicted these statements nor offered any differing interpretation of these mandates.

B. The Order.

The Court approved the class settlement on April 8, 2014, and separately signed the Order on April 17, 2014. Order, annexed to the Bass Decl. as Exhibit 4. The Order established a new NYCHA policy for mold and moisture abatement that replaced the pre-existing procedures. Under the Order, NYCHA agreed to abate flooding conditions within twenty-four hours; repair and abate mold and excessive moisture within seven days on average where the repairs were simple and could be completed by a maintenance worker in a single visit to the apartment; and repair and abate mold and excessive moisture within fifteen days on average for more complex repairs requiring skilled tradesmen or other specialized staff and potentially multiple visits to the apartment. *Id.* ¶¶ 1(d)-(e), 3-4. To be deemed in compliance, NYCHA must "process[] to completion" during each quarterly period at least 95% of the work orders in an average of no more than seven days for simple repairs and fifteen days for complex repairs. *Id.* ¶ 5.

The Order requires NYCHA to follow up with residents within sixty days to determine whether the repairs were completed and whether mold and excessive moisture problems, along with their underlying causes, have been effectively addressed. If the conditions are not corrected, NYCHA must create new work orders and a supervisor must inspect the results of the work. *Id.* ¶ 6. NYCHA must provide quarterly reports to Plaintiffs' counsel detailing the number of residents contacted and the percentage who complained that their problems were not effectively addressed. *Id.*

NYCHA is obligated to provide further reporting to Plaintiffs' counsel, including: (1) a quarterly report on the number of work orders, the percentage requiring action within seven or fifteen days, the number and percentage completed within the agreed upon service levels, the

number of quality assurance inspections completed, and various subcategories of information, *id.* ¶ 10(a); (2) every six months, a report containing a random sample for one month of complaints and work orders, specifying whether the work was completed within the agreed upon service levels, *id.* ¶ 10(b); (3) a quarterly report on 100 randomly or systematically selected closed work orders that have been subject to re-inspection, *id.* ¶ 10(c); and (4) every six months, copies of reasonable accommodation requests and related grievances under the ADA, information on the status of each request, and copies of any grievances, *id.* ¶ 11.

The Order also requires NYCHA to implement new written policies and standard operating procedures to replace the previous ineffective procedures. *Id.* ¶¶ 7-8. Exhibit A to the Order is a document entitled "Operations and Maintenance Policy for Mold & Moisture Control in Residential Buildings" (the "Policy Manual"). The Policy Manual provides that NYCHA must "promptly remove visible mold and identify the root cause for the mold growth [and] identify the moisture source that supports the mold growth and promptly correct it," and that NYCHA "shall complete simple repairs" on average in seven days or less and "shall complete complex repairs" on average in fifteen days or less. *Id.*, Ex. A at 6-7.

In addition to significantly modifying the procedures for abating mold and excessive moisture, the Order requires NYCHA to re-train all of its personnel to ensure that they will respond to requests for reasonable accommodations under the ADA and complaints of mold and excessive moisture in accordance with the Policy Manual's new protocols. Order ¶¶ 7, 8(c)-(e). Specifically, NYCHA must provide reasonable accommodations to residents with asthma during the mold and excessive moisture remediation process. *Id.* ¶ 8 (referencing Exhibits B-G to the Order). Reasonable accommodations under the Order include, but are not limited to, permitting tenants to "install and operate an additional air conditioner if electrical system permits"; "transfer

to a temporary location during mold/moisture remediation"; "permanent relocation to another NYCHA apartment if the apartment is uninhabitable and another apartment is available"; and "the use of low-toxicity fungicides to cover surfaces with mold and/or the use of appropriate dust suppression methods during mold removal." Order, Exhibit B at 3.

Plaintiffs may seek enforcement of systemic violations of the Order. *Id.* ¶ 13(b). The Order provides that Plaintiffs will give NYCHA notice and an opportunity to cure any violation of the Order within thirty days. *Id.* ¶ 17. After that, Plaintiffs may move to enforce the Order, *id.*, and the Order contemplates that NYCHA may be held in contempt as a result of such an enforcement action, *id.* ¶ 22. The Order also provides that Plaintiffs may move for fees in connection with an enforcement motion that results in a finding of contempt, mandates additional obligations by NYCHA, or results in an agreement by NYCHA to take, or refrain from taking, a particular action. *Id.*

C. NYCHA's Interpretation of the Order.

Soon after the Settlement was reached, Plaintiffs sought to ensure that NYCHA would begin making the necessary, time-sensitive mold and excessive moisture repairs required under the Order. On April 22, 2014, Plaintiffs sent a letter to Steven Rappaport, Assistant General Counsel for NYCHA, detailing Defendant's obligations under the Order. Letter from Greg Bass to Steven Rappaport dated April 22, 2014, at 1, annexed to the Bass Decl. as Exhibit 5. On May 6, 2014, Plaintiffs further requested that NYCHA provide inspection and moisture reading updates for the three named-plaintiff tenants, as well as two other tenants already brought to NYCHA's attention. Letter from Greg Bass to Steven Rappaport dated May 6, 2014, annexed to the Bass Decl. as Exhibit 6. At that time, NYCHA still had not remediated the mold, water leaks, and excessive moisture in these tenants' homes. *Id.*

On July 28, 2014, the parties met to discuss outstanding issues. Bass Decl. ¶ 8. At that meeting, NYCHA informed Plaintiffs that it had changed its practice with respect to parent and child work orders. Declaration of Nancy S. Marks dated April 22, 2015 ("Marks Decl.") ¶ 6. During the negotiations, NYCHA had told Plaintiffs that it opened a "parent" work order in connection with every repair, and it kept those work orders open until the repair was completed. *Id.* ¶ 3. It was Plaintiffs' clear understanding that the seven and fifteen-day deadlines apply to those parent work orders, irrespective of how many child work orders are required. *Id.* ¶¶ 5-6. At the July 28 meeting NYCHA revealed, for the first time, that it had changed its practice by now closing the parent work order every time a child work order was opened, and closing each child work order when the next child work order was opened. *Id.* ¶ 6. This, in NYCHA's view, gave it the right to apply the seven and fifteen-day deadlines serially to each separate work order required for a repair. *Id.* The import of this faulty interpretation was that NYCHA was not obligated to complete mold and excessive moisture remediation in any NYCHA apartment within either seven or fifteen days. *Id.* In fact, since an indefinite number of seven or fifteen-day work orders could potentially be required for a repair, NYCHA essentially claimed that it had no outside time limit within which to complete the necessary repairs, from start to finish, for any apartment.

Plaintiffs strongly disagreed with NYCHA's interpretation of the Order—which is at odds with the Order itself and directly contradicted by specific language in the incorporated Policy Manual—and then confirmed that disagreement in a letter dated August 1, 2014. Letter from Greg Bass to Steven Rappaport dated August 1, 2014, annexed to Bass Decl. as Exhibit 7. On August 6, 2014, NYCHA sent Plaintiffs an email reaffirming its erroneous interpretation of

the Order. Email from Steven Rappaport to Greg Bass dated August 6, 2014, annexed to Bass Decl. as Exhibit 8.

D. The First NYCHA Quarterly Reports.

On September 23, 2014, Plaintiffs sent another letter to NYCHA noting that the reports due after the first quarter (May-July 2014) had not been provided and giving NYCHA an opportunity to cure pursuant to paragraph 17 of the Order. Letter from Greg Bass to Steven Rappaport dated September 23, 2014, annexed to Bass Decl. as Exhibit 9. On September 30, 2014, NYCHA belatedly sent to Plaintiffs' counsel four reports, which appear to be an effort to comply with paragraphs 6 and 10(a) of the Order. First Quarterly Reports, attached to Letter from Donna Murphy to Greg Bass dated September 30, 2014, annexed to the Declaration of Steven M. Edwards dated April 22, 2015 ("Edwards Decl."), as Exhibit 1. These reports included information on the average number of days taken to complete repairs and follow up contacts with tenants after completion of work. NYCHA claimed that it had "exceeded its commitment with regard to the agreed-upon service levels for completing 95% of the Work Orders" and that "[e]ven including 100% of the Work Orders, the averages for the entire reporting period are 6.8 days for the 7-day work orders and 5.5 days for the 15-day Work Orders." *Id.*

According to the report provided pursuant to paragraph 10(a) of the Order, there were 10,327 seven-day work orders and 193 fifteen-day work orders between May and July of 2014—in other words, more than 98% of the work orders were for simple seven-day repairs. Edwards Decl. ¶ 7. This raises serious concerns about whether NYCHA has deliberately limited its efforts to cosmetic repairs—ignoring the causes of excessive moisture and mold—in order to achieve a higher compliance level. That concern is buttressed by the report provided pursuant to paragraph 6 of the Order, which states that tenants reported that the mold had "reoccurred" in

34% of the cases. *Id.* ¶ 19. Furthermore, 60.8% of the cases were labeled with a remedy code that indicated no work was actually performed. *Id.* ¶ 13. Actual work was performed in only 39.2% of the work orders reported. *Id.*

In addition, the quarterly report provided pursuant to paragraph 10(a) of the Order included a field that enabled Plaintiffs to link parent and child work orders. *Id.* ¶¶ 8, 10. When those links are taken into account, NYCHA's average time to complete simple seven-day repairs increases from 6.8 days to 8.7 days, and when work orders for which no work was performed are eliminated from the calculation, the average increases to 9.4 days. *Id.* ¶¶ 11, 17. Moreover, the data indicate that, once parents and children are linked, only 63.4% of the work orders were completed in seven days or under. *Id.* ¶ 18. Furthermore, there were 1,102 seven-day work orders that were closed in more than fifteen days, and some repairs took over 90 days to complete. *Id.*

E. Notice and an Opportunity to Cure.

On October 10, 2014, Plaintiffs sent NYCHA notice of noncompliance and an opportunity to cure its erroneous interpretation of the work order deadlines in the Order, pursuant to ¶ 17 of the Order. Letter from Greg Bass to Steven Rappaport dated October 10, 2014, annexed to the Bass Decl. as Exhibit 10. On November 24, 2014, in an effort to resolve the problem, Plaintiffs' counsel met with Donna Murphy, who had replaced Mr. Rappaport as counsel for NYCHA. Bass Decl. ¶ 13. They again explained Plaintiffs' position regarding the parent and child work orders, but Ms. Murphy continued to adhere to NYCHA's position that a single complaint of mold or excessive moisture in an apartment may necessitate the opening of an indefinite sequence of separate work orders, and that NYCHA is not obligated to complete mold and excessive moisture abatement within either seven or fifteen days. *Id.* On December 5, 2014, Mr. Bass sent Ms. Murphy a letter confirming that the parties were at an impasse on this

issue but offering to explore a resolution without the need for judicial intervention. Letter from Greg Bass to Donna Murphy dated December 5, 2014, annexed to the Bass Decl. as Exhibit 11. NYCHA never responded to that letter. Bass Decl. ¶ 14.

On January 14, 2015, Plaintiffs sent NYCHA another notice and opportunity to cure. Letter from Greg Bass to Donna Murphy dated January 14, 2015, annexed to the Bass Decl. as Exhibit 12. In this letter, Plaintiffs repeated their position on the correct interpretation of the Order and pointed out that, when parent and child work orders are combined, the First Quarterly Report suggested that the time to complete repairs may significantly exceed seven or fifteen days on average. *Id.* The letter also noted that NYCHA was treating cosmetic measures such as wiping surfaces clean or painting over them as full repairs, and further emphasized that NYCHA was apparently not assessing the underlying source of the mold as required by the Order. *Id.* In addition, in calculating averages, NYCHA was treating allegedly "unfounded" complaints as completed repairs. Worse, NYCHA workers were often telling tenants that the mold in their apartments was dirt, not mold. *Id.* Plaintiffs also requested an explanation of the undefined work order codes used in the report, and they made clear that NYCHA's reporting was untimely. *Id.* Furthermore, Plaintiffs pointed out that NYCHA had failed to provide the report required by paragraph 10(c) of the Order after the first quarter, as well as the report required by paragraph 11 (a report on reasonable accommodation requests received by NYCHA), which was due at the end of October. *Id.*

NYCHA responded on February 19, 2015. Letter from Donna Murphy to Greg Bass dated February 19, 2015, annexed to the Bass Decl. as Exhibit 13. In this letter, NYCHA offered no relief from its position on seven-day repairs, which constitute more than 98% of the repairs. *Id.* NYCHA offered to process parent work orders for fifteen-day repairs in seven days, but it

took the position that it was still free to have an unlimited number of child work orders and take up to fifteen days for each. *Id.* NYCHA also continued to adhere to its position on all other issues, except it offered to provide the required quarterly and semi-annual reports within "approximately 60 days after the conclusion of the reporting period." *Id.*

In a letter dated March 6, 2015, Plaintiffs informed NYCHA that the proposals in its February 19 letter were inadequate. Letter from Greg Bass to Donna Murphy dated March 6, 2015, annexed to Bass Decl. as Exhibit 14.

F. The Second and Third NYCHA Quarterly Reports.

On February 20, 2015, NYCHA provided another round of reports—almost six months after the completion of the first quarter and more than three months after the second quarter (August-October 2014) had ended. Second Quarterly Reports, attached to Letter from Donna Murphy to Greg Bass dated February 20, 2015, annexed to the Edwards Decl. as Exhibit 2. These reports included a report pursuant to paragraph 10(c) of the Order, which related to the first quarter, which ended July 31, 2014. Edwards Decl. ¶ 20. NYCHA also provided the reasonable accommodation-related information required by paragraph 11, although it was more than 100 days late and redacted the names of the tenants, thereby making it impossible for Plaintiffs to follow up with them. *Id.* NYCHA did not provide the report required by paragraph 10(b) of the Order, which was due on January 1, 2015. *Id.*

Inexplicably, the quarterly report provided pursuant to paragraph 10(a) of the Order, which identified all work orders from the second quarterly period, eliminated the information that enabled Plaintiffs to conduct an analysis combining parent and child work orders, as well as information identifying specific apartments where work was done. *See* Edwards Decl. Ex. 2. In other words, NYCHA's response to Plaintiffs' claim that NYCHA was not in compliance with the seven and fifteen-day requirements of the Order when parent and child work orders are

combined was to eliminate the information that enabled Plaintiffs to draw that relationship. As a result, it was impossible to calculate an accurate average time to complete repairs for the second quarter, although the second quarterly report demonstrates that NYCHA performed work in connection with only 40.3% of the work orders, and no work was performed in connection with almost 60% of the work orders. Edwards Decl. ¶¶ 10, 14. In addition, the report provided pursuant to paragraph 6 of the Order states that tenants complained that mold "reoccurred" in 41% of the cases. *Id.* ¶ 19.

On March 31, 2015, NYCHA provided the third set of quarterly reports, sixty days after the third quarter ended. Third Quarterly Reports, attached to Letter from Donna Murphy to Greg Bass dated March 31, 2015, annexed to the Edwards Decl. as Exhibit 3. These reports include the information required to link parent and child work orders, although they continue to omit the apartment numbers, making it impossible for Plaintiffs to follow up. Edwards Decl. ¶ 8. The findings in the third quarterly report are similar to the first and second. According to the data in the report, actual work was performed in only 45.9% of the work orders reported; 54.1% of the work orders were labeled with a remedy code that indicated no work was actually performed. *Id.* ¶ 15. When the parent-child links were taken into account, NYCHA's average time to complete simple seven-day repairs increases from 6.3 days to 9.5 days, and when work orders for which no work was performed are eliminated from the calculation, the average increases to 10.9 days. *Id.* ¶¶ 11, 17. Moreover, the data indicate that only 54.6% of the seven-day work orders were completed in seven days or less, and 1,318 of those work orders were closed in more than fifteen days. *Id.* ¶ 18. Furthermore, the third quarterly report on closed work order contacts states that 27% of tenants reported that mold had "reoccurred" in their apartments. *Id.* ¶ 19.

G. Apartment Inspections.

In late 2014, Plaintiffs' counsel visited approximately thirty apartments of NYCHA residents that had mold and excessive moisture problems to help assess NYCHA's compliance with the Order. Edwards Decl. ¶ 21. Community organizers and volunteer leaders from Plaintiff-organizations Upper Manhattan Together, Inc. ("Manhattan Together"), South Bronx Churches Sponsoring Committee, Inc., and Little Sisters of the Assumption Family Health Service, which is associated with Manhattan Together, accompanied Plaintiffs' attorneys during the inspections. *Id.*

Of the tenants visited, 85% reported that mold and excessive moisture persisted in their apartments for over a year. Edwards Decl. ¶ 23. Many tenants also had visible black mold covering substantial portions—and in some cases, all—of their bathroom ceilings. *See, e.g.*, Declaration of Alisha P. dated April 16, 2015 ("Alisha P. Decl."), ¶ 6; Declaration of Judy A. dated April 17, 2015 ("Judy A. Decl."), ¶ 6; Declaration of Wanda R. dated April 17, 2015 ("Wanda R. Decl."), ¶ 10. Other tenants had bubbling drywall, crumbling plaster, and peeling paint from excessive moisture or mold. Edwards Decl. ¶ 25. The majority of the tenants visited had bathroom vents that did not function properly. *Id.* ¶ 26; *see, e.g.*, Declaration of Magdalena D. dated April 19, 2015 ("Magdalena D. Decl."), ¶ 6.

When asked whether they had reported the mold and excessive moisture to NYCHA, thirty-one out of thirty-four of the tenants said they had reported the conditions, and even though tenants in twenty-four of the apartments reported that NYCHA had contacted them in some way in response to their complaints, mold had been remediated in only four of the apartments at the time of the attorney apartment inspections. Edwards Decl. ¶ 27. Tenants reported that, during scheduled NYCHA appointments, the NYCHA workers would simply say that there was no mold in the apartment and that mold stains were only dirt; that NYCHA washed down and

painted over the mold but failed to adequately remediate it; or that NYCHA failed to address the underlying sources of the mold. *See, e.g.*, Declaration of Valerie M. dated April 20, 2015 ("Valerie M. Decl."), ¶ 10; Declaration of Felipa Cruz dated April 22, 2015 ("Cruz Decl."), ¶¶ 9, 13; Alisha P. Decl. ¶¶ 12, 19, 21; Judy A. Decl. ¶¶ 9-10; Wanda R. Decl. ¶¶ 12-15. Importantly, when asked whether NYCHA utilized dust-suppression methods when working on the mold, not even one tenant could report that such methods were used; in all cases, NYCHA did not even close-off the work area. Edwards Decl. ¶ 27. Consistent with the quarterly reports, many tenants reported that the mold problem was recurrent, often within only a matter of months. *See, e.g.*, Wanda R. Decl. ¶ 21; Declaration of Maria O. dated April 17, 2015 ("Maria O. Decl."), ¶¶ 12-13. The tenants' testimony reveals that NYCHA's performance has not improved since the Order was entered.

Tenant declarations submitted with this motion further illustrate the impact of mold on the housing conditions of the tenants with whom Plaintiffs' attorneys met and of NYCHA's consistent failures to remediate. Provided below are three examples of what the tenants reported to Plaintiffs' counsel:

- Alisha P. lives in a NYCHA apartment with her three children, all of whom suffer from asthma. Alisha P. Decl. ¶ 5. When NYCHA would not respond to her request for mold repairs, Alisha had to resort to Housing Court. *Id.* ¶ 8. Alisha has returned to Housing Court several times to enforce orders entered by the court because NYCHA failed to complete the required work in her apartment by the mandated times. *Id.* ¶ 9. During one of her most recent court visits, a judge ordered NYCHA to make all mold and moisture-related repairs in Alisha's apartment by March 16, 2015. *Id.* ¶ 23. Since then, a NYCHA worker has only superficially cleaned the moldy walls. *Id.* ¶ 24-25. The mold persists,

and Alisha reports that the mold and mildew smell in the bathroom is so strong that she and her children often avoid that area of the apartment. *See id.* ¶¶ 7, 28.

- Wanda R. lives in a NYCHA apartment with her mother and three children. Wanda R. Decl. ¶ 3. Wanda's mother and children all have asthma. *Id.* ¶¶ 4-8. Wanda and her mother have contacted NYCHA several times to complain about a persistent mold problem in their bathroom. *Id.* ¶ 11. Instead of addressing the source of excessive moisture causing the mold in her bathroom and peeling paint in the adjacent hallway, NYCHA has only cleaned the mold and painted the walls. *Id.* ¶ 12. On other occasions, NYCHA representatives told Wanda that the marks on her walls were not mold but dirt, and they did not make any repairs. *Id.* ¶ 14. During one of NYCHA's latest visits to the apartment, instead of making any repairs, a NYCHA employee advised Wanda to stop taking hot showers and leave the bathroom door open while showering. *Id.*
- Judy A. lives in a NYCHA apartment with her three children and brother. Judy A. Decl. ¶ 3. Judy and all three of her children suffer from asthma. *Id.* ¶¶ 4–5. Judy has dealt with mold issues in her apartment, namely the bathroom, for over ten years. *Id.* ¶ 6. At certain times, black mold has covered her ceiling. *Id.* During these times, the mold is so bad that, upon entering the bathroom, Judy and her children find it harder to breathe. *Id.* In 2014 and 2015 alone, Judy has had to contact NYCHA numerous times to complain about the mold that keeps returning. *Id.* ¶ 9. Each time a NYCHA worker comes in response, the worker either cleans the mold with liquid solution or paints over the mold. *Id.* ¶¶ 9–17. Once, a NYCHA worker left the cleaning solution with Judy and told her to wipe the mold with the solution herself if the mold came back. *Id.* ¶ 9. Soon after these superficial repairs, the mold inevitably returns. *Id.* ¶¶ 12, 13, 18.

These tenants' experiences are not isolated incidents, but follow a long-term, systemic pattern of failure to rid apartments of mold and excessive moisture. The community organizers have assisted tenants with similar issues for years. Declaration of Ray Lopez dated April 21, 2015 ("Lopez Decl.") ¶¶ 7, 11; Declaration of Michael Stanley dated April 22, 2015 ("Stanley Decl.") ¶¶ 5-7. They had hoped that this lawsuit would change NYCHA's conduct, but in their view there has been no real improvement. Lopez Decl. ¶¶ 26, 33; Stanley Decl. ¶¶ 9, 29. Furthermore, the examples provided in support of this motion are just the tip of the iceberg; there are many more cases like these. Lopez Decl. ¶ 19; Stanley Decl. ¶¶ 6, 13, 28. There is also an informative report produced by NBC's Dateline which reveals the extent of NYCHA's remediation procedures prior to the filing of this litigation. Lopez Decl. ¶ 20 (citing http://www.nbcnews.com/video/dateline/53993240).

In the view of the community organizers, the problem is not simply a lack of resources or funding, there is a culture of neglect and noncompliance at NYCHA. *See* Lopez Decl. ¶¶ 10-11, 33; Stanley Decl. ¶ 29. In fact, a Comptroller's report that audited NYCHA's operating practices in 2012-2013 found that NYCHA had failed to take advantage of $692 million in incentives and subsidies. *See Audit Report of Efforts by the New York City Housing Authority to Maximize Federal Funding, Enhance Revenue, and Achieve Cost Savings*, CITY OF NEW YORK OFFICE OF THE COMPTROLLER (Dec. 16, 2014), annexed to the Edwards Decl. as Exhibit 4, at 2, 12. The Court can take judicial notice of the Comptroller's report because it is available on a government website: http://comptroller.nyc.gov/wp-content/uploads/documents/FK14_072A.pdf (last visited Apr. 14, 2015). *See, e.g.*, *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, No. 07 Civ. 10470, 2013 WL 6869410, at *4 (S.D.N.Y. Dec. 30, 2013) ("Courts routinely

take judicial notice of data on government websites because it is presumed authentic and reliable.").

H. Office of the Inspector General Report on NYCHA's Mold Remediation.

In December 2014, the New York City Office of the Inspector General ("OIG") released a report detailing its investigative findings relating to NYCHA's mold and excessive moisture abatement procedures and practices (the "OIG Report"). Letter from Ianuzzi to Olatoye dated Dec. 17, 2014, annexed to the Edwards Decl. as Exhibit 5. This report is admissible under Federal Rule of Evidence 803(8). *See D'Olimpio v. Crisafi*, 718 F. Supp. 2d 357, 373-74 (S.D.N.Y. 2010). Notably, the report agrees with Plaintiffs' interpretation of the seven and fifteen-day work order requirements in the Order, OIG Report at 4, and it attaches a draft of NYCHA's own standard operating procedures manual which states that simple repairs "must be *completed*" within seven calendar days on average and complex repairs "must be *completed*" within fifteen calendar days. *Id.*, attachment at 5-6 (emphasis added).

ARGUMENT

I. NYCHA IS IN VIOLATION OF THIS COURT'S ORDER.

A. The Order is Both an Enforceable Order and a Binding Contract Subject to the General Principles of Contract Interpretation.

The Order settling Plaintiffs' class action against NYCHA was reached on consent and entered by the Court. Such orders are enforced as consent decrees. *McDay v. Paterson*, No. 09 Civ. 500 (PKC) (GWG), 2010 WL 4456995, at *9 n.1 (S.D.N.Y. Nov. 1, 2010); Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. 321, 325 (1988). As a result, violation of the Order can lead to a finding of contempt. *Casale v. Kelly*, 710 F. Supp. 2d 347, 359 (S.D.N.Y. 2010) (adjudging the City of New York in contempt for failure to abide by a so-

ordered stipulation requiring the City to stop enforcing unconstitutional loitering statute where City failed "'in meaningful respects to achieve substantial and diligent compliance'").

Failure to comply with a settlement order may warrant a finding of civil contempt where the order is "clear and unambiguous, the proof of noncompliance is clear and convincing, and the defendants have not been reasonably diligent and energetic in attempting to accomplish what was ordered." *E.E.O.C. v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers*, 669 F. Supp. 606, 611 (S.D.N.Y. 1987) (citation and internal quotation marks omitted), *aff'd sub nom.*, *E.E.O.C. v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Joint Apprentice-Journeyman Educ. Fund*, 925 F.2d 588 (2d Cir. 1991).

"Consent decrees have elements of both contracts and judicial decrees. A consent decree embodies an agreement of the parties and is also an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (citations and internal quotation marks omitted). Because consent decrees are deemed hybrids, "they are construed largely as contracts, but are enforced as orders." *E.E.O.C. v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers*, No. 71 Civ. 2877 (RLC), 1988 WL 131293, at *1 (S.D.N.Y. Dec. 1, 1988) (internal citation and quotation marks omitted), *aff'd*, 925 F.2d 588 (2d Cir. 1991). Accordingly, when construing a consent decree, the court is empowered to interpret the agreement according to the principles of contract law. *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y.*, No. 06 Civ. 2860 (DLC), 2012 WL 1574819, at *5 (S.D.N.Y. May 3, 2012), *aff'd*, 712 F.3d 761 (2d Cir. 2013).

As with a contract, the Order must be considered as a whole with effect given to the parties' expressed intentions. *Id*. Where a settlement order is unambiguous it must be enforced

according to the plain meaning of its terms. *Wilder v. Bernstein*, 153 F.R.D. 524, 527-28 (S.D.N.Y. 1994). "Contract language is not ambiguous when it has 'a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion.'" *Health-Chem Corp. v. Baker*, 737 F. Supp. 770, 773 (S.D.N.Y. 1990) (citation and internal punctuation omitted), *aff'd*, 915 F.2d 805 (2d Cir. 1990). This Court has previously held that clear contractual language does not become ambiguous just because the parties to the litigation disagree in their interpretations. *Id.*

If the Court finds ambiguity, then pursuant to the parol evidence rule, the Court may consider evidence in addition to the Order itself. *Care Travel Co. v. Pan Am. World Airways, Inc.*, 944 F.2d 983, 988 (2d Cir. 1991). Such evidence may be considered for the purpose of ascertaining the parties' intent, but cannot be used to alter the terms of the document. *Wayland Inv. Fund, LLC v. Millenium Seacarriers, Inc.*, 111 F. Supp. 2d 450, 453 (S.D.N.Y. 2000). Parol evidence is limited to what the parties actually said during the negotiations, as opposed to what they claim were their subjective beliefs. *See, e.g., Hotchkiss v. Nat'l City Bank of N.Y.*, 200 F. 287, 293 (S.D.N.Y. 1911) (meaning is determined by acts and words, not the statements of "twenty bishops" as to intent), *aff'd*, *Mechanics' & Metals Nat'l Bank v. Ernst*, 231 U.S. 60 (1913).

Furthermore, an obligation of good faith and fair dealing is read into every New York contract, and is therefore also read into the Order. *See Travellers Int'l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1575 (2d Cir. 1994). Under this covenant, "neither party to a contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *First Am. Int'l Bank v. Cmty's. Bank*, 771 F.

Supp. 2d 276, 283 (S.D.N.Y. 2011) (citation and internal quotation marks omitted). Thus, "any promises which a reasonable person in the position of the promisee would be justified in understanding [are] included," so long as they are not "inconsistent with other terms of the contractual relationship." *Manhattan Motorcars, Inc. v. Automobili Lamborghini, S.p.A.*, 244 F.R.D. 204, 214 (S.D.N.Y. 2007) (citation and internal quotation marks omitted).

B. The Order Requires NYCHA to Complete Simple Repairs Within Seven Days and Complex Repairs Within Fifteen Days on Average.

The Order unambiguously requires mold and excessive moisture repairs to be made within seven or fifteen days, on average, depending on the type of remediation required. NYCHA nevertheless claims that each repair can require a "parent" and multiple "child" work orders, and the seven or fifteen-day deadlines apply serially to each work order such that the time to complete a repair can substantially exceed seven or fifteen days. NYCHA's position is inconsistent with the language of the Order, both in the express wording of its individual provisions and in the four corners of the document taken as a whole.

The Order defines "work order" as a scheduling procedure: "the process by which NYCHA schedules a repair or other work to be performed to address a condition in an apartment requiring remediation." Order (attached to the Bass Decl. as Ex. 4) ¶ 1(c). It does not contain any reference to multiple, independent work orders for each repair. Rather, it contemplates a single "process" for scheduling a "repair" or "other work" to address a "condition" requiring remediation.

This straightforward reading of the Order is supported by the definitions of work orders to be completed within seven days, which are for "simple repairs that can be done by a maintenance worker in a single visit," and work orders to be completed within fifteen days, which are for "relatively complex repairs that need skilled trades or other specialized staff to

address and may require multiple visits to the apartment." *Id.* ¶ 1(d) and (e). The Order states that references to seven days and fifteen days concern "the time between the Creation Date and the Actual Finish Date." *Id*. The Order does not refer to multiple work orders for each repair.

Aligning with these definitions, the substantive requirements of paragraph 4 of the Order provide that, to be compliant, NYCHA must "maintain an average service level of no more than seven (7) days for *completion* of mold and excessive moisture-related work orders that require simple repairs . . . ." *Id.* ¶ 4 (emphasis added). "Completion" in this context can only mean one thing: finishing the work, not finishing the individual "child" work orders. Mold and moisture remediation must be "completed" start to finish, within seven days, not through an indefinite extension of multiple, independent work orders.

NYCHA seeks to read into that language a proviso that simple repairs may spawn multiple work orders and that "each" work order must be completed within seven days, but the language does not say that. The word "each" does not appear anywhere in paragraph 4 of the Order. The Order equates work orders with repairs and makes it clear that all work orders for simple repairs must be "completed" within seven days.

The remainder of paragraph 4, relating to more complex repairs, makes that even more clear. It provides for "an average service level of no more than fifteen (15) days for *completion* of more complex *repairs*." *Id.* (emphasis added). It does not refer to work orders at all. The parties clearly agreed that more complex repairs must be completed within fifteen days regardless of how many work orders were involved. That being the case, it would not have made sense for the parties to have agreed to a different approach for determining time to complete simple repairs.

The use of work orders, in the plural, carries into paragraph 5 of the Order. It provides the criteria by which NYCHA will be deemed to be in compliance, and it talks about "work orders that are to be completed" within seven or fifteen days. *Id.* ¶ 5. It does not say that NYCHA will be deemed to be in compliance if each subsidiary work order is completed within seven or fifteen days; it says the "work orders," which is defined as the "process" necessary to complete a "repair," must be completed within the relevant time period. *Id.* ¶ 1(c).

Paragraph 6 of the Order addresses the issue from a different perspective, but it also makes the intent of the parties clear. Instead of discussing work orders in the plural, it states that a "work order" will be created and discussed with the tenant whenever a mold or excessive moisture condition is detected. *Id.* ¶ 6. It then states that within sixty days after completion of the work order, "NYCHA shall make a good-faith attempt to contact the resident to determine if *all* of the work identified in the Work Order was *completed*, and the mold and excessive moisture *problems* and their underlying *causes* have been *effectively addressed."* *Id.* (emphasis added). If the mold and underlying excessive moisture have not been "effectively addressed," a "new work order will be created," together with a supervisory inspection of the results. *Id*. Thus, after the work identified in a work order is completed, NYCHA is required to assess whether the work resulted in the successful remediation of mold and moisture. That provision would not make sense unless a work order leads to a completed repair.

Paragraph 7 of the Order states that NYCHA shall implement the requirements of paragraphs 3 through 6 of the Order in accordance with the "Operations & Maintenance Policy for Mold & Moisture Control in Residential Buildings" (*id.* ¶ 7), which is annexed to the Order as Exhibit A, and therefore made a part of it. *See In re Qiao Xing Sec. Litig.*, No. 07-CIV-7097 (DLC), 2008 WL 872298, at *1 (S.D.N.Y. Apr. 2, 2008) (stating that the Stipulation of

Settlement filed with the court, together with the exhibits thereto, set forth the terms and conditions of the proposed settlement). The Policy Manual clearly states that NYCHA:

- [S]hall *complete* simple *repairs* related to mold and moisture by a maintenance worker in a single visit to the apartment on average in less than or equal to seven (7) days . . . [and]

- [S]hall *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 . . . .

Exhibit A to the Order, at 6-7 (emphasis added). Based on that language, there can be no doubt that it was the parties' intent and understanding that simple repairs would be completed in seven days on average, and more complex repairs would be completed in fifteen days on average, regardless of the number of subsidiary work orders required.

That NYCHA may have internal procedures that utilize multiple child work orders for each repair is of no moment. For purposes of reaching an understanding with Plaintiffs as memorialized in the Order, NYCHA chose to express its intent in terms of a single work order for each repair and agreed that simple repairs would be completed within seven days on average and more complex repairs would be completed within fifteen days on average. That was Plaintiffs' intent as well. Marks Decl. ¶¶ 5, 6.

The parol evidence also supports that understanding. At the fairness hearing, Plaintiffs' counsel told the Court that the cornerstone of the parties' agreement contemplated that NYCHA "would have to either conduct repairs within seven days if those repairs were in fact simple repairs or within 15 days if they were more complex repairs to abate the moisture and mold condition." Mar. 27 Hearing Tr. (attached to the Bass Decl. as Ex. 3), at 5. Plaintiffs' counsel later made it clear, without contradiction from NYCHA's counsel, that NYCHA would "have to produce results within seven to 15 days based on the severity of the condition to be addressed." *Id.* at 50.

NYCHA's counsel Steven Rappaport also made it clear that this was his understanding during the negotiation of the Stipulation. In an email exchanging drafts of NYCHA's mold policy, he stated:

> NYCHA staff will promptly address complaints concerning mold and moisture. In all cases, development staff will clean visible mold and moisture up to 10 cumulative square feet. They will *remediate the problem*, including repairs to address the underlying causes, within an average of seven days, if technical services staff are not required. Technical Services staff will be contacted if the mold covers more than 10 feet, or is in more than one apartment, or chronically recurs. In instances where technical services staff are required, they will *remediate the problem*, including the underlying causes, within an average of 15 days unless capital repairs are needed. NYCHA will move the household during the repair if the apartment becomes uninhabitable, or as a reasonable accommodation for a particular household with a resident who requires it due to a particular health condition.

Email from Steven Rappaport to Nancy Marks and Albert Huang dated June 25, 2013, annexed to the Marks Decl. as Exhibit 1 (emphasis added). As this email makes clear, even if remediation required servicers other than development staff, the remediation would be complete in an average of seven days for simple repairs and an average of fifteen days for more complex repairs.

Furthermore, as noted above, the OIG construed the Order to require that simple repairs "must be completed" within seven days and complex repairs "must be completed" within fifteen days. Edwards Decl. Ex. 5 at 4. And NYCHA's own standard operating procedures manual says the same thing. *Id.*, attachment at 5-6. NYCHA's view, apparently created for the purposes of litigation, that simple repairs and complex repairs can require an unbounded series of child work orders, each of which restarts the clock on the original work order, is untenable and has no support in the agreement, the parties' negotiations leading up to the agreement, or the parties' representations to the Court.

At bottom, "[a] contract must be construed, if possible, to avoid an interpretation that will result in an absurdity, an injustice or have an inequitable or unusual result." *Icahn v. Todtman*, No. 99 Civ. 11783 (JCF), 2002 WL 362788, at *3 (S.D.N.Y. Mar. 6, 2002) (citation and internal quotation marks omitted). No reasonable plaintiff, having filed a lawsuit challenging NYCHA's unreasonable delay in the remediation of mold—a condition that causes adverse health consequences for persons with asthma—would agree to deadlines that could be extended indefinitely through an infinite number of child work orders, each of which is subject to its own seven or fifteen-day deadline. Plaintiffs commenced suit to require effective and timely mold and moisture abatement in NYCHA apartments, not timely completion of work orders for painting. Plaintiffs did not agree that NYCHA could extend the time to complete repairs indefinitely, and neither the four corners of the Stipulation nor the parol evidence can support such an interpretation. *See Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 643 N.E.2d 504, 508 (N.Y. Ct. App. 1994) ("Language in contracts placing one party at the mercy of the other is not favored by the courts.") (citation and internal quotation marks omitted).

C. NYCHA Has Failed to Make Timely and Effective Repairs, in Violation of the Order.

As noted above, NYCHA's own reports—properly interpreted—demonstrate that NYCHA has failed to make timely seven-day repairs. Edwards Decl. ¶¶ 11, 18. (Plaintiffs acknowledge that, for fifteen-day repairs, which constitute less than 2% of the repairs, NYCHA appears to be in compliance when parent and child work orders are combined.) Edwards Decl. ¶ 11. The average time to complete repairs substantially exceeds seven days; repairs were completed in seven days or less in only 63.4% of cases in the first quarter and 54.6% in the third quarter; and in more than 3,000 cases seven-day repairs took more than fifteen days to complete and some repairs took over ninety days to complete. *Id.* ¶¶ 11, 18. Furthermore, many of the

repairs are cosmetic, even though the Order requires "mold and excessive moisture problems *and their underlying causes* [to be] effectively addressed," and the Policy Manual states that NYCHA must "apply remediation techniques designed to eliminate or control the problems at their source . . . ." Order (attached to the Bass Decl. as Ex. 4) ¶ 6 (emphasis added); Order, Ex. A at 6.

For these reasons, it is not surprising that 34% of tenants reported that mold had reoccurred in the first quarter, 41% reported that mold had reoccurred in the second quarter, and 27% reported that mold had reoccurred in the third quarter—for an overall reoccurrence rate of 34%. Edwards Decl. ¶ 19. This is consistent with what tenants have told Plaintiffs' lawyers in interviews. *See, e.g.*, Wanda R. Decl. ¶ 21. NYCHA's failure to comply in more than a third of the cases is a breach of the Order.

A contract may permit some level of noncompliance, so long as substantial performance is achieved. *See* 15 Williston on Contracts § 44:52 (4th ed. 2008) ("minor or technical breaches of a contract are excused . . . because actual performance that was rendered was so similar or close to that required under the contract that the failure to perform exactly results in an immaterial breach."). A level of noncompliance that exceeds 33% cannot constitute substantial compliance under any circumstances. *See* Restatement (Second) of Contracts §241, cmt. b (1981) (a failure is material if "the injured party will be deprived of the benefit which he reasonably expected from the exchange."). NYCHA has violated the Order, both in terms of timeliness and effectiveness of repairs.

D. NYCHA Has Failed to Provide Timely and Complete Reports in Violation of the Order.

The Order requires NYCHA to provide five different types of reports. Order (attached to the Bass Decl. as Ex. 4) ¶¶ 6, 10-11. Two of those reports must be provided on a quarterly basis: the report on follow-up calls required by paragraph 6 and the detailed report on all work orders

required by paragraph 10(a). One of those reports must be provided within sixty days of the completion of quarterly assessments: the report on 100 closed work orders required by paragraph 10(c). Two of those reports must be provided on a semi-annual basis: the random sampling reports required by paragraph 10(b) and the reasonable accommodation reports required by paragraph 11.

The parties are now more than a year into the implementation of the Order, and NYCHA has repeatedly failed to provide timely reports. NYCHA: (1) provided the paragraph 6 and 10(a) reports for the first quarter more than sixty days after the quarter ended, provided the paragraph 6 and 10(a) reports for the second quarter more than 100 days after the quarter ended; (2) provided the paragraph 10(c) report for the first quarter more than 200 days after the quarter ended, provided the paragraph 10(c) report for the second quarter more than 100 days after the quarter ended; (3) provided the paragraph 11 report more than 100 days after the first six-month period ended; and (4) failed to provide the paragraph 10(b) report at all. *See* Edwards Decl. Exs. 1-3. In addition, NYCHA refused to provide an explanation of work order terms used in the reports; it unilaterally eliminated from the second quarter paragraph 10(a) report the information needed to combine parent and child work orders, as well as the identity of the apartments; and it redacted the names of tenants requesting reasonable accommodation from the paragraph 11 reports. Edwards Decl. ¶¶ 8, 20.

NYCHA contends that it needs at least sixty days to generate the reports required by the Order. *See* Bass Decl. Ex. 13. That does not explain why it has taken NYCHA more than sixty days (and in some cases more than 200 days) to provide some of the reports, but more importantly, there is no reason why NYCHA cannot provide computer-generated reports shortly after the data are entered. The identity and results of work orders presumably are entered in real

time, when they occur, so there is no reason why a computer-generated report cannot be furnished within ten days after the end of a quarter or a semi-annual period.

Furthermore, there is no reason why NYCHA cannot provide an explanation of the terms that are used in the reports. Plaintiffs should not be required to guess at the meaning of words such as "Verified," "Null," and "Resolved Through Triage." While NYCHA has reinstated the relationship between parent and child work orders in the third quarterly report provided pursuant to paragraph 10(a) of the Order, there was no excuse for eliminating it in the second quarterly report, thereby frustrating Plaintiffs' efforts to determine the actual time NYCHA has taken to complete repairs. Moreover, the reports should identify the apartment numbers and tenant names so Plaintiffs can follow up and determine whether the reports are accurate and the problems were "effectively addressed" as required by the Order.

In discussions, NYCHA has accurately pointed out that there are no express deadlines in the Order for providing reports. But NYCHA is still subject to the obligation of good faith and fair dealing, which includes an obligation to take reasonable steps to ensure that the other party receives the fruits of the contract. *KGK Jewelry LLC v. ESDNetwork*, No. 11 Civ. 9236 (LTS) (RLE), 2013 WL 105780, at *3 (S.D.N.Y. Jan. 9, 2013) (implied duty of good faith and fair dealing "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract") (citation and internal quotation marks omitted). The whole point of these reports is to permit Plaintiffs to ascertain, on a timely basis, whether NYCHA is in fact complying with the Order.

Provision of "quarterly" reports is a self-evident requirement, and providing the reports two months after the end of the quarter is not a reasonable fulfillment of that requirement. NYCHA's counsel Steven Rappaport recognized this when he stated at the fairness hearing that

the Order would require NYCHA to "provide data" the following week if it were approved that day, and he requested that the approval be as of April "so that we can begin the collection of data in May when we will be geared up to do that." Mar. 27 Hearing Tr. (attached to the Bass Decl. as Ex. 3) at 55. The inordinate delays in providing reports are frustrating Plaintiffs' efforts to determine whether the problems identified in the complaint are being "effectively addressed."

NYCHA's failure to provide timely and complete reports is a violation of the Order.

II. PLAINTIFFS ARE ENTITLED TO RELIEF.

A. The Court Should Issue an Order Confirming that Simple Repairs Must be Completed within Seven Days and Complex Repairs Must be Completed within Fifteen Days.

The proper interpretation of the settlement between the parties, which has been embodied in an order, is an issue of law, and therefore a matter for the Court. *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985). Moreover, since the settlement stipulation here is an order, it is subject to continuing supervision and enforcement by the Court. *Id.* "Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced." *Frew*, 540 U.S. at 440.

At a minimum, therefore, the Court should issue an order confirming that NYCHA must complete simple repairs in no more than seven days on average and complex repairs in no more than fifteen days on average. That is what the Order requires. NYCHA should not be permitted to escape from that obligation by breaking each repair down into a potentially endless series of parent and child work orders, each of which has a seven or fifteen-day deadline.

Beyond that, Plaintiffs are concerned that some repairs are taking months to complete, yet NYCHA still claims to be within the average. NYCHA also has the ability to drive down the average by making cosmetic repairs in one or two days when more comprehensive repairs are needed. Delays in making repairs pose a serious threat to the health of the members of the

Plaintiff class, all of whom suffer from asthma. The purpose of the Court's Order was to require NYCHA to perform substantive repairs and complete remediation of mold and excessive moisture so that individuals with asthma could live in their homes without the fear of being exposed to harmful conditions. Instead, as Plaintiffs have determined over the course of the last year, NYCHA has reverted to business as usual.

For these reasons, Plaintiffs propose that the Order be strengthened by placing a "cap," i.e. a maximum limit, on the number of days NYCHA can expend in completing mold and excessive moisture-related repairs. The Order should be modified to require NYCHA to make all simple repairs (i.e. the seven-day repairs) within no more than fourteen days, and all complex repairs (i.e. the fifteen-day repairs) within no more than twenty-one days. The cap places an overall limit on the time NYCHA can take for completing mold and excessive moisture remediation, no matter the number of work orders opened for a complaint. Through this modification, the purpose of the Order will be reinforced.

The Court has the power to modify consent decrees, such as the one at issue here, when the modification advances the decree's primary objectives. *See N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 (2d Cir. 1983). "To modify such consent decrees, the court need only identify a defect or deficiency in its original decree which impedes achieving its goal, either because experience has proven it less effective, disadvantageous, or because circumstances and conditions have changed which warrant fine-tuning the decree." *Heath v. De Courcy*, 888 F.2d 1105, 1110 (6th Cir. 1989); *see also Hurley v. Coughlin*, 158 F.R.D. 22, 30 (S.D.N.Y. 1993) ("[T]he reasonable imposition of equitable remedies outside the confines of the decree is permitted to secure compliance by the parties."). Modification is also permissible

where, as here, "enforcement of the decree without modification would be detrimental to the public interest." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992).

Here, it is in the public interest to make such modifications in order to achieve the goal of prompt and effective remediation of a dangerous condition that NYCHA itself admits harms the class members' health. *See United States v. Sec'y of Hous. & Urban Dev.*, 239 F.3d 211, 218 (2d Cir. 2001) (upholding district court's modification of consent decree requiring City of Yonkers to provide affordable housing, where enforcement of consent decree without modification would be detrimental to the public interest). Even in cases where—unlike here—the defendant is not at fault, a court can modify a consent decree "as necessary to remedy the problem." *Thompson v. U.S. Dep't of Housing & Urban Dev.*, 404 F.3d 821, 830 (4th Cir. 2005).

B. The Court Should Order NYCHA to File Complete Reports Within Ten Days of the End of a Reporting Period.

As noted above, with the exception of the reasonable accommodation requests required by paragraph 11, all of the reports required by the Order are computer generated. The reasonable accommodation requests are relatively few in number, and complying with paragraph 11 is a simple matter of compiling and copying the requests that have been made in the previous six months. Accordingly, there is no reason why NYCHA cannot produce all of the required reports within ten days after a reporting period.

As demonstrated above, NYCHA has breached the covenant of good faith and fair dealing by failing to provide reports in a timely fashion and by deliberately withholding information required to fully understand the reports. The Court can remedy that breach by imposing affirmative obligations on the breaching party to provide timely information. *See St. Asimi Mar. Co. v. First Nat'l Bank of Chicago*, 436 F. Supp. 1095, 1101 (S.D.N.Y. 1977) (party

required to produce information within ten days where there had been inexcusable delay even though there was no deadline). The Court should also ensure that the reports are complete by requiring NYCHA to reinstate the apartment numbers and parent-child work order relationships in the report required by paragraph 10(a) of the Order; by prohibiting NYCHA from redacting the names of tenants in the accommodation requests required by paragraph 11; and by requiring NYCHA to provide an explanation of terms used in the reports.

C. The Court Should Appoint a Master.

Beyond NYCHA's erroneous interpretation of the seven and fifteen-day requirements and its failure to provide timely reports, NYCHA has failed to correct mold and moisture problems through its shoddy and incomplete work. Ensuring the quality of the work is crucial to enforcing the Defendant's substantive compliance with the Order. In addition to voluminous anecdotal evidence, NYCHA's own reports—showing that mold recurred in 34% of the cases on average—demonstrate that NYCHA's efforts to date have been completely inadequate. Edwards Decl.¶ 19. The most effective way to deal with this is to appoint an independent master or monitor.

The Court has the power to appoint a master, either under its broad equitable powers or through Federal Rule of Civil Procedure 53. *See Ex Parte Peterson*, 253 U.S. 300, 312-13 (1920) ("Courts have . . . inherent power . . . to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties," including "special masters, auditors, examiners, and commissioners.") (internal citation omitted). Monitoring of this kind is especially appropriate in cases like this, where Plaintiffs are requesting systemic reform of agency practices. *See Alves v. Main*, No. 01 Civ. 789 (DMC), 2012 WL 6043272 (D.N.J. Dec. 4, 2012) (ordering appointment of a three-year independent monitor and permanent treatment ombudsman to oversee implementation of settlement agreement guaranteeing increased access to

mental health care for civilly committed persons), *aff'd*, 559 F. App'x 151 (3d Cir. 2014); *Carey*, 706 F.2d at 962-63 (2d Cir. 1983) (holding that "[t]he monitoring of a Consent Judgment that mandates individualized care for thousands of class members and that entails balancing of the interests of parties with third-party employees, [defendants], and community groups is just the sort of 'polycentric problem'" that warranted district court's appointment of monitor (quoting *Hart v. Cmty. Sch. Bd. of Brooklyn*, 383 F. Supp. 699, 766 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975))).

The master 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. *See Juan F. v. Weicker*, 37 F.3d 874, 880 (2d Cir. 1994) (discussing a monitor in § 1983 class action who was "empowered to monitor implementation and compliance, to convene a meeting of the parties, establish a reporting structure that enables the monitor to effectively assess the progress of the implementation of the . . . Consent Decree, obtain information from [defendants], issue compliance reports, attempt to resolve disputes, and review requests by either party for modification . . . , and if necessary, to make a recommendation to the Trial Judge regarding the request for modification") (internal quotation marks omitted); *Gulino v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 907 F. Supp. 2d 492, 509 (S.D.N.Y. 2012) (appointment of monitor to ensure ongoing compliance), *aff'd sub nom.*, *Gulino v. Bd. of Educ. of New York City Sch. Dist. of City of N.Y.*, 555 F. App'x 37 (2d Cir. 2014).

Specifically, the master should have the ability to ensure that NYCHA is complying with the policies and procedures outlined in the Order and the Policy Manual, especially the

requirement that NYCHA workers remediate the underlying sources of mold and excessive moisture.

D. The Court Should Rule that NYCHA is in Contempt and Provide a Schedule of Penalties for Violations in the Future.

NYCHA has failed to comply with the Order. It has failed to complete repairs in no more than an average of seven or fifteen days; it has failed to make adequate repairs; and it has failed to provide timely reports. What is more, when Plaintiffs pointed out that NYCHA was not in compliance when the parent and child work orders identified in the first quarterly report were combined, NYCHA's response was to remove information from the second quarterly report so parent and child work orders could not be linked. That was an act of bad faith.

"[T]he district courts have the inherent power to find a party in contempt for bad faith conduct violating the court's orders . . . ." *S. New England Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 144 (2d Cir. 2010) (citation omitted) (holding the district court's finding of contempt not an abuse of discretion). Contempt can be found when "the order violated by the contemnor is clear and unambiguous, the proof of non-compliance is clear and convincing, and the contemnor was not reasonably diligent in attempting to comply." *E.E.O.C. v. Local 638*, 81 F.3d 1162, 1171 (2d Cir. 1996) (citation and internal quotation marks omitted). Moreover, a court can find a party in contempt if it has "not been reasonably diligent and energetic in attempting to accomplish what was ordered" by the court. *Int'l Ass'n of Bridge*, 669 F. Supp. at 611 (internal citations omitted). Where, as here, a lack of diligence is coupled with bad faith, a finding of contempt is particularly appropriate. *Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd.*, 885 F.2d 1, 5 (2d Cir. 1989) (finding contempt when "sustained and material violations of the consent judgment for prolonged periods of time" demonstrated defendant "failed to ensure proper and effective compliance with the terms of that judgment" and was not "reasonably

diligent and energetic in attempting to accomplish what was ordered" (quoting *E.E.O.C. v. Local 638 . . . Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172, 1178 (1985) (internal quotation marks omitted))).

NYCHA's conduct reveals an effort to evade the requirements of the Order, as opposed to mere difficulty in complying. The significant number of "reoccurrences" demonstrates that NYCHA has limited its efforts to cosmetic repairs and has failed to take effective measure to eliminate the causes of mold and excessive moisture at their source. *See* Order (attached to Bass Decl. as Ex. 4) ¶ 6; Exhibit A to Order at 6. The padding of reports with work orders in which no work is done, the elimination of links between parent and child work orders, the elimination of tenant names and apartment numbers, and the inordinate delay in providing reports suggest that NYCHA was trying to make it difficult for Plaintiffs to follow up with tenants to determine the extent of noncompliance.

Plaintiffs propose that the Court find NYCHA in contempt and provide a schedule of penalties for future violations of the Order. *See, e.g., Global NAPs Inc.*, 624 F.3d at 146 (an order for civil contempt may serve the dual purposes of securing future compliance and compensating the party that had been wronged by the non-compliance (citing *Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 657 (2d Cir. 2004))). That penalty should be $10,000 for each apartment where mold reoccurs as a result of NYCHA's failure to eliminate the cause of the mold or excessive moisture. Mold reocurrence should be determined at the time of the follow-up calls conducted by NYCHA and reported to Plaintiffs pursuant to paragraph 6 of the Order. *See, e.g., F.T.C. v. BlueHippo Funding, LLC*, 762 F.3d 238, 243 (2d Cir. 2014) ("[A] court should craft sanctions aimed at least in part on making whole the victims of the contumacious conduct.") (citations omitted). These proceeds

should be directly payable to the tenants and could be in the form of rent abatement. *See, e.g., United States v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947) ("Where compensation is intended, a fine is imposed, payable to the complainant."). NYCHA should be required to identify those apartments to Plaintiffs, so Plaintiffs or the master can inspect the apartments and make an independent assessment of whether a penalty should be sought. If NYCHA wishes to contest the penalty, a procedure can be established for doing that.

Only relief of this nature will both adequately compensate class members for NYCHA's noncompliance and force NYCHA to conclude that it has no choice but to comply with the requirements of the Order and to solve the problems of mold and excessive moisture that have plagued New York City public housing residents for too many years.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to enforce the Order, for appointment of a special master and for contempt should be granted. Plaintiffs reserve the right to file a separate motion for attorneys' fees pursuant to the Order as appropriate.

Dated: New York, New York
April 22, 2015

HOGAN LOVELLS US LLP

/s/ Steven M. Edwards
Steven M. Edwards
Pooja A. Boisture
Erin Marie Meyer
875 Third Avenue
New York, New York 10022
Tel: (212) 918-3000

NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE

/s/ Marc Cohan
Marc Cohan
Gregory Bass
Petra Tasheff
275 Seventh Avenue, Ste 1506
New York, New York 10001
Tel: (212) 633-6967

NATURAL RESOURCES DEFENSE COUNCIL

/s/ Nancy S. Marks
Nancy S. Marks
Albert Y. Huang
40 West 20th Street
New York, New York 10011
Tel: (212) 727-2700

Attorneys for Plaintiffs