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' REPLY 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

PRELIMINARY STATEMENT 1

ARGUMENT 2

I. NYCHA HAS VIOLATED THE ORDER. 2

A. NYCHA Employs an Incorrect Legal Standard. 2

B. NYCHA Has Violated the Order by Failing to Make Effective Mold and Excessive Moisture Repairs. 3

C. The Order Mandates Completion of Simple Repairs Within Seven Days and Complex Repairs Within Fifteen Days on Average. 6

D. NYCHA Is in Violation of the Service Level Requirements. 8

E. NYCHA Is in Violation of Both the Timing and Content Provisions of the Order's Reporting Requirement. 9

F. Plaintiffs Have Given NYCHA Notice and Opportunity to Cure. 10

II. PLAINTIFFS ARE ENTITLED TO RELIEF. 12

A. The Court Should Declare that Plaintiffs' Interpretation of the Service Level Requirements Is Correct and Should "Cap" NYCHA's Service Times. 12

B. The Court Should Order NYCHA to Provide Complete and Timely Reports. 14

C. The Court Should Appoint a Master. 16

D. The Court Should Find NYCHA in Contempt and Provide a Schedule of Penalties. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Acli Gov't Sec., Inc. v. Rhoades,
No. 81 Civ. 2555 (SAS), 1995 WL 731627 (S.D.N.Y. Dec. 11, 1995)....20

Berger v. Heckler,
771 F.2d 1556 (2d Cir. 1985)....2, 3

Conn. Mut. Life Ins. Co. v. Wolf,
No. 93 Civ. 5752 (SJ), 1997 WL 597064 (E.D.N.Y. Sept. 24, 1997)....10

Cronin v. Browner,
90 F. Supp. 2d 364 (S.D.N.Y. 2000)....16

Dunn v. New York State Dep't of Labor,
No. 73 Civ. 1656 (KTD), 1994 WL 48799 (S.D.N.Y. Feb. 16, 1994), *aff'd in part, vacated in part*, 47 F.3d 485 (2d Cir. 1995)....19

E.E.O.C. v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers,
669 F. Supp. 606 (S.D.N.Y. 1987), *aff'd*, 925 F.2d 588 (2d Cir. 1991)....18

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)....13

E.E.O.C. v. Local 638 & Local 28 of the Sheet Metal Workers' Int'l Ass'n,
No. 2877 (HFW), 1982 WL 445 (S.D.N.Y. Aug. 16, 1982), *aff'd in part*, 753 F.2d 1172 (2d Cir. 1985), *aff'd sub nom. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421 (1986).... 14, 15-16

Henrietta D. v. Giuliani,
119 F. Supp. 2d 181 (E.D.N.Y. 2000), *aff'd sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003)....16, 18

KGK Jewelry LLC v. ESDNetwork,
No. 11 Civ. 9236 (LTS) (RLE), 2013 WL 105780 (S.D.N.Y. Jan. 9, 2013)....9

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)....18, 19

Perfect Fit Indus., Inc. v. Acme Quilting Co.,
673 F.2d 53 (2d Cir. 1982)....20

Rufo v. Inmates of Suffolk Cnty. Jail,
502 U.S. 367 (1992)....13

United States v. Apple Inc.,
992 F. Supp. 2d 263 (S.D.N.Y. 2014), *aff'd*, Nos. 14-60, 14-61, 2015 WL 3405534 (2d Cir. May 28, 2015) 16

United States v. City of Parma,
661 F.2d 562 (6th Cir. 1981) 16, 17

United States v. Sec'y of Hous. & Urban Dev.,
239 F.3d 211 (2d Cir. 2001)....................13

United States v. Visa U.S.A., Inc.,
No. 98 Civ. 7076 (BSJ), 2007 WL 1741885 (S.D.N.Y. June 15, 2007)....................2, 3

STATUTES

Fed. R. Civ. P. 53 16

Fed. R. Civ. P. 60(b) 13

Plaintiffs submit this memorandum of law in further support of their motion to enforce or modify 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, and in reply to the opposition memorandum filed by Defendant New York City Housing Authority ("NYCHA") on June 12, 2015 ("Def. Br.").

PRELIMINARY STATEMENT

More than a year after entry of the Order in this class action, NYCHA residents continue to suffer the grave health effects of unabated mold and excessive moisture in their apartments. The central concern behind Plaintiffs' motion is that NYCHA's system for remediating mold and excessive moisture is broken. When NYCHA responds to mold and moisture complaints, its nearly universal practice is to bleach or scrape, paint, and then check the repairs off its list as completed. In home after home, the problems reoccur because NYCHA neglects to address excessive moisture as a root cause of mold contamination. This shoddy, cosmetic approach defies the Order's express commands and NYCHA's own written policies.

NYCHA's own reports suggest that it is only making cosmetic fixes. As a result, NYCHA's data reveal a troubling rate of reoccurrence for mold and moisture problems in the year since the Order took effect—residents have reported a rapid return of harmful conditions in over one-third of the instances in which NYCHA followed up after performing repairs. Community organizers visiting scores of apartments in the past year hear the same story again and again: NYCHA workers may show up, but the mold comes back, often within weeks and sometimes days. The cycle repeats itself endlessly, with NYCHA deeming its job complete following superficial repairs. NYCHA does not contest these basic facts presented in Plaintiffs' motion.

NYCHA also misinterprets its express obligations under the Order to abate mold and excessive moisture in a timely fashion. As a result, NYCHA is taking too long to address problems, and, further, its reports to Plaintiffs are insufficient and untimely produced. In entering into the Settlement, Plaintiffs did not agree, nor does the Order state, that repairs could take months and that performance reporting would be made whenever NYCHA decided.

In opposition, NYCHA offers arguments that sidestep its unrebutted failure to fix the systemic problems that spurred this action. The events of the past year and NYCHA's refusal to acknowledge its mistakes have demonstrated that NYCHA cannot be trusted to implement the Settlement. The Court should appoint a master to oversee NYCHA's compliance and impose penalties to ensure that NYCHA residents will obtain the long-awaited relief granted to them through the Settlement.

ARGUMENT

I. NYCHA HAS VIOLATED THE ORDER.

NYCHA cannot dispute the evidence that clearly demonstrates its ongoing violation of the core substantive mandates of the Order—the control and outright elimination of mold and excessive moisture conditions at their source in public housing.

A. NYCHA Employs an Incorrect Legal Standard.

NYCHA characterizes Plaintiffs' application as a motion for contempt. While contempt is one aspect of the relief sought (discussed at page 35 of Plaintiffs' 37-page brief), the primary focus is "enforcement of the Order." In the Second Circuit, "[a] motion to enforce is an appropriate procedural vehicle for parties to seek compliance with a court order." *United States v. Visa U.S.A., Inc.*, No. 98 Civ. 7076 (BSJ), 2007 WL 1741885, at *3 (S.D.N.Y. June 15, 2007). "Consent decrees are a hybrid in the sense that they are at once both contracts and orders; they are construed largely as contracts, but are enforced as orders." *Berger v. Heckler*, 771 F.2d

1556, 1567-68 (2d Cir. 1985) (citations omitted). Thus, "[e]nsuring compliance with a prior order is an equitable goal which a court is empowered to pursue even absent a finding of contempt." *Id.* at 1569 (citations omitted). In pursuing that goal, proof by preponderance of the evidence is required. *See, e.g.*, *Visa U.S.A.*, 2007 WL 1741885, at *4 (applying preponderance of the evidence standard).

B. NYCHA Has Violated the Order by Failing to Make Effective Mold and Excessive Moisture Repairs.

The Order was designed to remedy NYCHA's past practices, which were wholly inadequate. The Order declares that NYCHA's new approach will be as follows:

> [W]here mold and excessive moisture problems are detected, NYCHA shall *promptly* and methodically assess the situation and apply remediation techniques designed to *eliminate* or control mold and/or excessive moisture problems *at their source*, while protecting the health of residents and staff.

Order, annexed to the Declaration of Greg Bass dated April 22, 2015 ("Bass Decl."), as Ex. 4 (Doc. 37), at 2 (emphasis added). NYCHA's obligations include "removing visible mold, identifying the excessive moisture sources that support the mold growth, and *eliminating* them." Order at 2 (emphasis added). The Order also states that NYCHA will take "*proactive measures*" to combat the spread of mold and excessive moisture in apartments and other areas of public housing. *Id*. (emphasis added).

Paragraph 6 of the Order contemplates that "the mold and excessive moisture problems and their underlying causes [will be] *effectively addressed*." *Id.* at 5 (emphasis added). Paragraph 7 of the Order states that NYCHA shall implement this requirement in accordance with its "Operations & Maintenance Policy for Mold & Moisture Control in Residential Buildings" ("Policy Manual"), which is attached to the Order as Ex. A. *Id.* The Policy Manual directs: "If mold is a problem in an apartment or building, [NYCHA] must clean up the mold and *eliminate sources* of moisture." Policy Manual at 3 (emphasis added). *See also* Ex. C to

Declaration of Brian Clarke dated June 12, 2015 ("Clarke Decl.") (Doc. 59), at 5 ("[T]he supervisor must create a plan to address . . . [e]limination of the underlying excessive and/or uncontrolled moisture conditions; and [a]voidance of the reoccurrence of the mold/mildew and/or moisture conditions."). To that end, NYCHA's "guiding principles" affirm that NYCHA shall "*promptly*" identify and correct the problem. Policy Manual at 6 (emphasis added). The ultimate goal of the process is "remediation" and "abatement." *Id.* at 9.

NYCHA's own documents demonstrate that it has not satisfied these standards. Its quarterly reports reveal that tenants have complained that mold "reoccurred" in (1) 34% of reported cases in the first quarter; (2) 41% of reported cases in the second quarter; and (3) 27% of reported cases in the third quarter, for an average rate of 34%—more than one-third of tenants contacted by NYCHA over three quarters. Declaration of Steven M. Edwards dated April 22, 2015 ("Edwards Decl.") (Doc. 36), ¶ 19. These significant rates of mold reoccurrence reported by NYCHA tenants establish NYCHA's failure to "effectively address" the causes of the problem and remediate and abate the mold.

NYCHA's quarterly reports also demonstrate that it has classified more than 98% of the work orders as simple repairs, Edwards Decl. ¶ 7, which the Order defines as "repairs that can be done by a maintenance worker in a single visit to the apartment." Order ¶ 1(d). Fewer than 2% of the work orders have been for more complex repairs, which the Order defines as "repairs that need skilled trades or other specialized staff to address and may require multiple visits to the apartment." *Id.* ¶ 1(e). In other words, based on the definitions in the Order, it appears that NYCHA has used tradespeople like plumbers and plasterers in fewer than 2% of the work orders and instead has relied on maintenance staff to apply quick cosmetic fixes, like wiping off the

mold with a sponge, 98% of the time. Under the circumstances, it is unsurprising that tenants report a "reoccurrence" rate of 34% on average.

The unrebutted declarations of class members accompanying Plaintiffs' motion graphically illustrate the human toll this noncompliance has taken, including substantial black mold contamination and excessive moisture leading to bubbling drywall, crumbling plaster, and peeling paint. *See* Tenant Declarations submitted in support of the motion (Docs. 41, 42, 43, 45, 46, 48 and 49). The experiences of these class members are not isolated. Of the tenants visited by Plaintiffs' counsel following entry of the Order, 85% reported the presence of mold and excessive moisture in their apartments for longer than one year. Edwards Decl. ¶ 23. The declarations of community organizers evidence an agency culture of neglect; the organizers have had to assist hundreds of tenants with mold and excessive moisture problems for years, both before and after the Settlement. Declaration of Ray Lopez dated April 21, 2015 (Doc. 39), ¶¶ 7, 10-11, 33; Declaration of Michael Stanley dated April 22, 2015 ("Stanley Decl.") (Doc. 40), ¶¶ 5-7, 29.

In a footnote, NYCHA complains that it lacks sufficient information to respond to this proof because tenants are identified only by their initials. Def. Br. at 15 n.4. That contention is disingenuous in light of Mr. Stanley's declaration, which states that he has shared the spreadsheets in unredacted form with NYCHA in the regular course of business. Stanley Decl. ¶ 6. Plaintiffs understand that NYCHA has questioned some of the tenant declarants that were identified by their first names and last initials. Plaintiffs used tenants' initials to protect their privacy in public filings. NYCHA has not asked Plaintiffs to disclose their full names, and NYCHA has not challenged the testimony of the known tenants in any way.

Instead of rebutting Plaintiffs' factual submissions, NYCHA offers three rationalizations for its conduct: (1) the Order does not contain a mandatory performance measure for mold reoccurrence; (2) the reported reoccurrence percentages have declined somewhat over the three initial quarters of the Settlement period; and (3) some unspecified number of repairs require capital improvements "and, therefore, some recurrence will occur until the necessary capital improvement work can be completed." Declaration of Luis Ponce dated June 12, 2015 ("Ponce Decl.") (Doc. 58), ¶ 13. These contentions are unavailing.

A reoccurrence rate of 34% is unacceptable under any standard. No resident of private housing would accept this level of performance; residents of public housing are not required to accept it just because they are poor. Furthermore, contrary to what NYCHA suggests, the reoccurrence rate has not declined over the three quarters; it went up to 41% in the second quarter, which is hardly evidence of consistent improvement, and the reoccurrence rate of 27% is still a blatant violation of the Order. Moreover, in more than a year since the Order was issued, NYCHA has not identified any work deferred for capital repairs, despite the requirement in paragraph 10(a) of the Order that it do so, suggesting that no capital repairs have been made. *See* Supplemental Declaration of Steven M. Edwards dated June 26, 2015 ("Edwards Supp. Decl."), ¶ 4.

In short, irrespective of how the Court decides the seven and fifteen-day issue, discussed below, NYCHA is not in compliance with the Order by any measure.

C. The Order Mandates Completion of Simple Repairs Within Seven Days and Complex Repairs Within Fifteen Days on Average.

In their opening brief, Plaintiffs demonstrated that NYCHA's reading of the Order as permitting multiple seven or fifteen-day work orders for each repair was untenable because the language of the Order, as well as the contemporaneous statements of the parties in negotiations,

evidenced the parties' intent that simple "repairs" would be completed in an average of seven days and more complex "repairs" would be completed in an average of fifteen days. Plaintiffs' Opening Brief ("Pl. Br."), at 21-22. Since the negotiations, NYCHA has shifted ground to argue that each remediation can involve multiple repairs, leading to completion deadlines that are indefinite. Def. Br. at 9 ("Multiple repairs for multiple conditions require multiple work orders."). NYCHA's new position is inconsistent with the language of the Order.

The Order states that a "repair" will address a "condition" that requires "remediation." Order ¶ 1(c). The Order recognizes that "remediation techniques" are "designed to *eliminate or control* mold and/or excessive moisture problems at their source . . . ." *Id.* at 2 (emphasis added). The Order mandates that when a repair is completed, NYCHA will contact the tenant to determine whether "the mold and excessive moisture problems and their underlying causes have been *effectively addressed*." *Id.* ¶ 6 (emphasis added). The Order then requires NYCHA to report the results of those contacts to Plaintiffs. *Id.* This whole process would not make sense if a "repair" is only a small part of the total work needed to abate and remediate mold and excessive moisture.

NYCHA's position also does not make common sense. No reasonable plaintiff dealing with respiratory disabilities and related health conditions would agree to give NYCHA unfettered discretion to string out repairs for months by applying an endless series of seven and fifteen-day deadlines to each step required to complete a repair. Nor would any reasonable plaintiff agree that NYCHA may skew its performance averages with work orders that represent visits to inspect apartments where no work is actually done. *See* Edwards Decl. ¶¶ 12-16 (58.3% of the work orders indicate that no work was done).

NYCHA attempts to avoid the implications of the Marks Declaration, which recounts what NYCHA said to Plaintiffs about work orders during the negotiations leading up to the Order, but it does not dispute what the declaration says. NYCHA told Plaintiffs that the "parent" work orders were kept open until all subsidiary child work orders are complete. Declaration of Nancy S. Marks dated April 22, 2015 ("Marks Decl.") (Doc. 38), ¶ 3. Since all parent work orders are subject to the seven or fifteen-day requirement, this means—in plain language—that the mold must be abated in seven or fifteen days.

After agreeing to the terms of the Order based on negotiations that occurred prior to December 17, 2013, when the proposed order was filed with the Court, NYCHA cannot now claim that it made a change in its internal practices "in or about late 2013" that completely altered its obligations under the Order. *See* Ponce Decl. ¶ 8. That is especially so since it is undisputed that NYCHA did not disclose that change to Plaintiffs. *See* Marks Decl. ¶ 6. The Court should interpret the Order in accordance with its clear terms and in a way that is logical and reasonable.

D. NYCHA Is in Violation of the Service Level Requirements.

In their opening brief, Plaintiffs demonstrated that NYCHA's claim of compliance for 100% of the seven-day repairs—which represent 98% of the total—was incorrect. When parent and child work orders are linked, and work orders in which no work was done are excluded, the average time to complete seven-day repairs was 9.4 days in the first quarter and 10.9 days in the third quarter. Edwards Decl. ¶ 17. These figures may understate the overall picture because NYCHA eliminated the parent and child links in the second quarter report. *Id.* ¶ 10.

NYCHA criticizes Plaintiffs for failing to apply the 95% service level requirement in the Order, which may allow NYCHA to throw out the 5% worst cases. Def. Br. at 13 n.3. Plaintiffs calculated a 100% service level because that is what NYCHA used in its own reports; NYCHA

still has not provided a calculation based on 95%. When parent and child work orders are taken into account (although this still cannot be done for the second quarter), and work orders in which no work was done are excluded, and the 5% worst cases are removed, NYCHA's average is 7.6 days for the first quarter and increased to 9.5 days for the third quarter. Edwards Supp. Decl. ¶ 5. Thus, even considering the 95% level, NYCHA is not in compliance with the Order.

NYCHA's argument that work orders in which no work was done should be counted in determining the average should be rejected out of hand. The purpose of the Order is to require that simple repairs be "completed" in seven days and that more complex repairs be "completed" in fifteen days. Order ¶¶ 1(d)-(e), 4 and 5. Neither the word "completed" nor the word "repair" implies inspecting an apartment to determine *if* work needs to be done. While inspections may take time (although not much time), they are not completed repairs.

E. NYCHA Is in Violation of Both the Timing and Content Provisions of the Order's Reporting Requirements.

NYCHA does not dispute any of Plaintiffs' evidence about the timing and content of its reports. Rather, it contends that the Order does not specify a production deadline and does not require certain information such as parent and child links and apartment numbers. NYCHA fails to address the crux of Plaintiffs' argument—that the covenant of good faith and fair dealing imposes certain obligations on NYCHA over and above the contract. *See generally 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 operates to ensure receipt of fruits of contract).

Plaintiffs have asked NYCHA to provide useful reports in a timely fashion. NYCHA has not said it cannot do so; its position is that it does not want to do so. In such cases, courts have

found a breach of the implied obligation of good faith and fair dealing. *See, e.g.*, *Conn. Mut. Life Ins. Co. v. Wolf*, No. 93 Civ. 5752 (SJ), 1997 WL 597064, at *5 (E.D.N.Y. Sept. 24, 1997).

NYCHA also does not deny that it has failed to supply the definitions of terms used in the report, instead disingenuously contending that Plaintiffs have not specified which terms need defining. Def. Br. at 18. Plaintiffs in fact have repeatedly requested definitions of all terms used in the reports, but NYCHA has not responded. *See* Bass Decl., Exs. 12 and 14. The fair response would have been to provide a glossary of all terms, which NYCHA could easily do.

F. Plaintiffs Have Given NYCHA Notice and Opportunity to Cure.

NYCHA contends that the Court should deny Plaintiffs' motion to enforce regarding the parties' differing interpretations of the seven and fifteen-day service level mandates because of Plaintiffs' alleged failure to comply with paragraph 17 of the Order as a "condition precedent." Def. Br. at 3. When Plaintiffs suggested at the pre-motion conference that the parties were at an impasse and the issue was ripe for determination by the Court, NYCHA did not dispute that characterization. *See* Conference Transcript 3:21, annexed to Edwards Supp. Decl. as Ex. 2. NYCHA's argument, advanced for the first time in response to the motion, is meritless.

Paragraph 17 of the Order obligates Plaintiffs to give NYCHA a thirty-day opportunity to cure any violation prior to bringing an enforcement motion. Order ¶ 17. It also requires Plaintiffs to identify any documents they are relying on to claim that there is a violation at that point. *Id.* It does not mandate endless negotiation, or require Plaintiffs to identify all evidence on which they may rely in making the motion.

NYCHA ignores the facts set forth in the Bass Declaration, which show that Plaintiffs fully and repeatedly complied with this requirement. At a meeting on July 28, 2014, well before the meeting of counsel on November 24, 2014, to which NYCHA refers in its response, Def. Br. at 3, the parties discussed the proper interpretation of the seven and fifteen-day requirements in

the Order. Bass Decl. ¶ 8. Plaintiffs then confirmed their disagreement with NYCHA's interpretation in correspondence dated August 1, 2014. Bass Decl., Ex. 7. NYCHA reaffirmed its unwillingness to compromise on its interpretation in an email dated August 6, 2014. *Id.*, Ex. 8. At that point, the parties were at an impasse and Plaintiffs could have pursued a motion to enforce.

Subsequently, on October 10, 2014, Plaintiffs sent NYCHA a second notice of noncompliance regarding its erroneous interpretation of the seven and fifteen-day deadlines. *Id.*, Ex. 10. At the November 24, 2014 meeting held to discuss the issue, NYCHA continued to adhere to its interpretation. Bass Decl. ¶ 13. On December 5, 2014, Plaintiffs sent NYCHA another letter confirming that the parties remained at an impasse on this issue, but nevertheless offering to consider any informal resolution that NYCHA might propose that would ensure completion of basic mold and excessive moisture remediation within seven or fifteen days, on average. Bass Decl., Ex. 11. NYCHA did not respond to this letter, and Plaintiffs could have brought a motion to enforce at that point. Bass Decl. ¶ 14.

On January 14, 2015, Plaintiffs sent a third notice of noncompliance and raised the seven and fifteen-day issue as well as various other violations. Bass Decl., Ex. 12. NYCHA belatedly responded on February 19, 2015, refusing to compromise on the timing of simple repairs—which constitute 98% of the repairs that were made in the first three quarters—and offering a minor accommodation on fifteen-day repairs. *Id.*, Ex. 13. Plaintiffs rejected NYCHA's proposal by letter dated March 6, 2015. *Id.*, Ex. 14.

Having plainly reached an impasse on this issue for the third time, Plaintiffs sent the Court a letter on March 6, 2015, requesting a pre-motion conference. Edwards Supp. Decl., Ex. 1. This letter could have been construed as another notice, but NYCHA continued to adhere

to its position in a letter to the Court dated March 13, 2015. *See* Ex. B annexed to Declaration of Donna Murphy dated June 12, 2015 (Doc. 57). NYCHA's position that it was not afforded notice and an opportunity to cure is without merit.

II. PLAINTIFFS ARE ENTITLED TO RELIEF.

NYCHA's primary response to the motion is that Plaintiffs have not demonstrated by clear and convincing evidence that NYCHA is in contempt. As discussed further below, Plaintiffs have satisfied that standard, and more importantly, contempt is only one of the remedies sought. Plaintiffs have demonstrated that NYCHA has breached the Order, and the Court has broad discretion to award appropriate relief. The Court can also resolve the parties' dispute over the meaning of the Order without making a finding of contempt.

A. The Court Should Declare that Plaintiffs' Interpretation of the Service Level Requirements Is Correct and Should "Cap" NYCHA's Service Times.

Plaintiffs seek a declaration that their interpretation of the seven and fifteen-day deadlines is correct. The Court should rule that simple repairs—i.e. the "effective" abatement of mold and excessive moisture—should be completed in seven days on average, and more complex repairs for the "effective" abatement of mold and excessive moisture should be completed in fifteen days on average. Absent such a ruling, the present Order as NYCHA interprets it would not provide effective relief.

Plaintiffs also propose a "cap" on NYCHA's time to make repairs out of concern that thousands of repairs are taking more than fifteen days to complete and some repairs are taking more than ninety days to complete. Edwards Decl. ¶ 18. Plaintiffs acknowledge such a cap would be a modification to the Order, but it is necessary to provide effective relief for the thousands of tenants for whom repairs take much longer than the seven and fifteen-day averages

and to make NYCHA's ultimate obligations simple and clear. No person should be forced to tolerate a situation in which mold in his or her house remains unabated for months.

As NYCHA concedes, the Court retains broad discretion to fashion an appropriate coercive remedy. Def. Br. at 22-23; *see also 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, 593 (2d Cir. 1991) ("Until parties to [a consent decree] have fulfilled their express obligations, the court has continuing authority and discretion—pursuant to its independent, juridical interests—to ensure compliance."). That is particularly true in an "institutional reform" case like this, where a court has the power to take a "flexible approach," including imposing new responsibilities to achieve the goals of the litigation. *United States v. Sec'y of Hous. & Urban Dev.*, 239 F.3d 211, 216-17 (2d Cir. 2001) (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 381 (1992)). This flexible approach is required to safeguard the public's right to the "sound and efficient operation of its institutions." *Rufo*, 502 U.S. at 381 (citations and quotation marks omitted).

Federal Rule of Civil Procedure 60(b) provides that consent decrees can be modified if they are "no longer equitable" or for "any other reason that justifies relief." Modification "is appropriate when a decree proves to be unworkable because of unforseen [sic] obstacles, or when enforcement of the decree without modification would be detrimental to the public interest." *Sec'y of Hous. & Urban Dev.*, 239 F.3d at 217 (quoting *Rufo*, 502 U.S. at 384) (internal quotation marks omitted). Here, defining NYCHA's obligations in terms of an uncapped average creates a situation in which thousands of tenants can be required to wait months for mold and excessive moisture abatement even though NYCHA is still complying with the average. The Court has the power to fix that problem.

B. The Court Should Order NYCHA to Provide Complete and Timely Reports.

Contrary to NYCHA's assertion, the Order does not give NYCHA *carte blanche* to provide reports whenever it chooses. The paragraphs 6 and 10(a) reports are due quarterly, and the paragraph 11 report is due semi-annually. The deadlines implied by terms like "quarterly" and "semi-annually" are self-evident. *See E.E.O.C. v. Local 638 & Local 28 of the Sheet Metal Workers' Int'l Ass'n*, No. 2877 (HFW), 1982 WL 445, at *4 (S.D.N.Y. Aug. 16, 1982) ("Compliance with the quarterly reporting requirements is not satisfied by anything less than four complete reports each year."), *aff'd in part*, 753 F.2d 1172 (2d Cir. 1985), *aff'd sub nom. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421 (1986).

NYCHA offers no evidence to suggest that it cannot produce the paragraphs 10(a), 10(b) and 11 reports within ten days after the close of each quarter. The data in the paragraph 10(a) report are entered in real time such that a computer-generated report can be produced readily. Likewise, the paragraph 11 report requires nothing more than compiling and copying reasonable accommodation requests submitted in each six-month period.

NYCHA argues that it needs sixty days after the close of each quarter to produce the reports required under paragraph 6 because these reports require follow-up telephone calls. Def. Br. at 16. The calls are to be made within sixty days after the completion of a *repair*, not after the end of a quarter. Order ¶ 6. Thus, the follow-up calls should occur on a rolling basis throughout the quarter as repairs are completed, and reporting on the calls can be generated within ten days after the close of the quarter as to all calls made during that quarter, even if the time to complete some of the follow-up calls has not yet expired.

The process required for reports pursuant to paragraph 10(c) is more detailed, but the Order is clear that the report is due sixty days after completion of the 100 quality-assurance inspections of remediation work performed within the quarter. While the Order contemplates a

period of time after the close of the quarter for these follow-up inspections to be performed, producing the 10(c) report more than 100 or 200 days after the quarter-end does not reflect reasonable diligence and, further, frustrates Plaintiffs' right under the Order to monitor compliance.

NYCHA suggests that it does not have to provide the reports required by paragraph 10(b) because they are "duplicative." Def. Br. at 18. This is not correct. Paragraph 10(a) mandates quarterly reports detailing *work order* performance. By contrast, Paragraph 10(b) requires statistical sampling of *complaints*. The Paragraph 10(b) report gives Plaintiffs the ability to link all work orders generated in response to a complaint by a particular tenant, so if work is done, mold reoccurs and then more work is done, Plaintiffs can assess why the work has not been effective. Plaintiffs acknowledge that they may be able to do this on their own if the Court orders NYCHA to provide tenant names and apartment numbers as discussed below, but NYCHA cannot ignore a court order simply because it has unilaterally decided that the relief it affords is "duplicative."

NYCHA's contention that the Order does not specifically require the inclusion of apartment numbers, information linking parent-child work orders, and tenant identification is also indefensible. NYCHA has provided this information in some reports, only to eliminate it in others. This is information that NYCHA can easily provide. Contrary to what NYCHA suggests, this information is needed for more than "assessment purposes." Def. Br. at 17. Information about tenants' identities, apartment numbers, and parent-child work orders is necessary to permit Plaintiffs' counsel to conduct its own follow-up with tenants regarding the effectiveness of NYCHA's abatement efforts and to determine whether NYCHA is in compliance with the Order. *See Local 638*, 1982 WL 445, at *3 (finding defendants in contempt

for failure to provide timely and complete reports because compliance with reporting provisions "is absolutely vital to the effective monitoring and implementation" of the court's order).

C. The Court Should Appoint a Master.

This is precisely the type of case that demands the appointment of a master. Appointing a master is among the Court's well-established, inherent powers to craft equitable remedies, and is also contemplated by Federal Rule of Civil Procedure 53. *See United States v. Apple Inc.*, 992 F. Supp. 2d 263, 280 (S.D.N.Y. 2014), *aff'd*, Nos. 14-60, 14-61, 2015 WL 3405534 (2d Cir. May 28, 2015). Furthermore, "external monitors have been found to be appropriate where consensual methods of implementation of remedial orders are unreliable or where a party has proved resistant or intransigent to complying with the remedial purpose of the injunction in question." *Id.* (internal quotation and citation omitted).

Courts have not hesitated to appoint masters in cases where, as here, a consent decree requires a government institution to undertake a complicated task that it has shown itself unable or unwilling to perform. For example, in *Cronin v. Browner*, 90 F. Supp. 2d 364 (S.D.N.Y. 2000), the court noted that there is "considerable room for appointing special masters when the purpose of the master is to enforce a judicial decree." *Id.* at 377. The court added that appointing a master is especially appropriate where, as here, the underlying decree is "designed to protect human health." *Id.*; *see also Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 221 (E.D.N.Y. 2000) (appointing magistrate judge to monitor compliance with the terms of court's order where court found that defendants violated federal and state laws in failing to provide people living with HIV/AIDS with meaningful access to public assistance programs), *aff'd sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003).

NYCHA cites one case to argue against the appointment of a master. In *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981), the court reversed the appointment of a monitor in

conjunction with the entry of a consent decree, noting a goal of the decree was to foster a self-directed culture of change within the municipality by "giving maximum freedom to the local jurisdiction to develop its own solution." *Id.* at 578. This unique consideration simply does not apply to NYCHA, which has not demonstrated the capacity or resolve to develop its own solutions. This action was compelled by NYCHA's abject failure, for many years, to abate rampant conditions of mold and excessive moisture that were harming residents with asthma and other respiratory illnesses. And this motion is necessitated by NYCHA's continuing failure to live up to the Order's requirements—instead of "effectively addressing" the problems of mold and excessive moisture and eliminating the causes at their source, NYCHA's own reports demonstrate that NYCHA has made mostly only cosmetic repairs and that there is an average reoccurrence rate of 34%.

NYCHA's main excuse for the reoccurrence rate is that many buildings require capital improvements. Def. Br. at 14, 26; Ponce Decl. ¶ 13. But its own reports suggest that in more than a year since the Order was entered, it has not made any such improvements. Edwards Supp. Decl. ¶ 4. While the Order focuses on simple and more complex repairs, it requires "effective" relief, remediation, and abatement, which includes capital repairs if necessary. NYCHA claims that money is coming in and it will make capital improvements. Clarke Decl. ¶¶ 3-9, 11-12, 21. Plaintiffs obviously support increased funding that would allow NYCHA to comply with the Order, but have yet to see any concrete developments.

A master will enable Plaintiffs and the Court to address the high reoccurrence rate and to monitor what is done with NYCHA's anticipated funding. NYCHA's goal should be to fix the problem rather than waste time and money arguing over why things have not been done. Where, as here, a government agency has failed to solve a problem that is depriving a class of "equal and

meaningful access to publicly subsidized benefits," appointment of a master is particularly appropriate. *Henrietta D.*, 119 F. Supp. 2d at 184.

D. The Court Should Find NYCHA in Contempt and Provide a Schedule of Penalties.

Plaintiffs fully appreciate that "contempt adjudications are not made lightly," Def. Br. at 5, but Plaintiffs are concerned that NYCHA will not comply with the Order going forward if there are no financial consequences. Plaintiffs have submitted "clear and convincing" proof of NYCHA's noncompliance with the "clear and unambiguous" effective remediation requirements of the Order, unmitigated by a showing that NYCHA has been "reasonably diligent and energetic" in attempting to comply with the Order's provisions. *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*, 925 F.2d 588 (2d Cir. 1991). Furthermore, the noncompliance is not minor; it is massive.

NYCHA argues that it should not face penalties for its admittedly deficient performance by analogizing to cases in which courts have denied contempt motions against government agencies despite very poor performance. Def. Br. at 5-8. NYCHA's reliance on *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), is misplaced. In that case, Judge Kaplan declined to find the New York Police Department ("NYPD") in contempt of a settlement order, which mandated creation of a "disciplinary review" unit to track, analyze and review the discipline system and monitor compliance. 519 F. Supp. 2d at 444. The court found that the NYPD had created the unit, and it was functioning effectively, although there had been some initial problems producing reports due to technical difficulties. *Id.* at 446. The court found that the NYPD had been reasonably diligent and energetic in attempting to comply with the court's order and rejected the plaintiff's argument

that the NYPD should be held in contempt because there was still evidence of racial discrimination in the police force. *Id.* at 446-48. The court noted that the disciplinary review committee was "not a guarantor against racial discrimination in the NYPD discipline system." *Id.* at 444.

Here, by contrast, NYCHA has not been reasonably diligent and energetic in complying with the Order. The application of cosmetic fixes resulting in a "reoccurrence" rate of 34% is not reasonable diligence. A refusal to provide information that easily could be provided is not reasonable diligence. A unilateral decision to eliminate the parent-child links from the reports when they showed a failure to comply, and a unilateral decision not to provide certain reports at all, are not evidence of reasonable diligence. Most importantly, unlike the order in *Latino Officers*, the Order here does require NYCHA to eradicate mold.

Plaintiffs are not suggesting that NYCHA should not be given an opportunity to present a defense if Plaintiffs seek a penalty for NYCHA's failure to comply. If NYCHA can demonstrate that it has been reasonably diligent and energetic in a particular instance, presumably it can avoid a sanction. But if NYCHA continues to treat tenants who are being deprived of habitable apartments and are suffering damage to their health the way it has in the past, there should be consequences.

NYCHA also cites *Dunn v. New York State Dep't of Labor*, No. 73 Civ. 1656 (KTD), 1994 WL 48799, at *2 (S.D.N.Y. Feb. 16, 1994), *aff'd in part, vacated in part*, 47 F.3d 485 (2d Cir. 1995) to suggest that its noncompliance may be excused due to social and economic conditions out of NYCHA's control. NYCHA's reliance on *Dunn* is misplaced. Apart from a conclusory allegation regarding timeliness of work order completion, Clarke Decl. ¶ 19, NYCHA does not contend that it is beyond its control to effectively abate mold and excessive

moisture in an average of seven or fifteen days. Even if "necessary capital improvement work," Def. Br. at 14, must be completed to reduce the mold and moisture reoccurrence rate, NYCHA does not contend that it lacks the ability to make those improvements, particularly given its allegedly successful pursuit of funding for such work. Def. Br. at 20; Clarke Decl. ¶¶ 8-12.

The prospective penalties that Plaintiffs propose are not punitive because they are designed "to coerce the contemnor into complying in the future with the court's order." *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 673 F.2d 53, 56 (2d Cir. 1982). Furthermore, they will be imposed only if NYCHA fails to comply with the Order. *Id.* at 57 (upholding district court's penalty because contemnor could "forestall or end any accumulation of fines simply by complying with the [court's] Order."). As such, NYCHA has the ability to purge the penalty through compliance. *See Acli Gov't Sec., Inc. v. Rhoades*, No. 81 Civ. 2555 (SAS), 1995 WL 731627, at *4 (S.D.N.Y. Dec. 11, 1995) (because defendant can avoid sanction by prospectively complying with court order, he holds "key to his prison") (internal citation omitted). The objective here is not to punish NYCHA; it is to obtain compliance.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion.

Dated: New York, New York
June 26, 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 Marks
Nancy S. Marks
Albert Y. Huang
40 West 20th Street
New York, New York 10011
Tel: (212) 727-2700

Attorneys for Plaintiffs