

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----	X	
UNITED STATES OF AMERICA <i>ex rel.</i>	:	
ANTI-DISCRIMINATION CENTER OF	:	
METRO NEW YORK, INC.,	:	
	:	
Plaintiff,	:	
	:	No. 06 Civ. 2860 (DLC)
v.	:	
	:	ECF Case
WESTCHESTER COUNTY, NEW YORK,	:	
	:	
Defendant.	:	
-----	X	

**MONITOR’S REPORT REGARDING WESTCHESTER COUNTY’S
COMPLIANCE WITH PARAGRAPH 33(c) OF THE STIPULATION AND
ORDER OF SETTLEMENT AND DISMISSAL**

TABLE OF CONTENTS

- I. Statement of Facts..... 5
 - A. The County’s Duties under the Settlement..... 5
 - B. County Public Outreach Campaigns..... 7
 - 1. Westchester Smart 7
 - 2. Safer Communities 8
 - 3. Other Initiatives 9
 - C. Paragraph 33 Activities..... 10
 - D. The County’s AI Dispute with HUD and Related Public Statements 14
 - 1. The AI Requirement 15
 - 2. Submission of AIs: 2010–2012..... 17
 - 3. The Monitor’s Zoning Analysis..... 20
 - 4. HUD Moves to Reallocate Federal Funds and Astorino Raises the Specter of a Demand for 10,768 Units and a \$1 Billion Cost 21
 - 5. Mr. Astorino Comes Under Criticism from the Press 25
- II. Evaluation of the County’s Statements about the Settlement..... 32
 - A. The Settlement’s AI Requirement: The Second Circuit Found that HUD Never Asked the County to Abolish Local Zoning 32
 - 1. The County Executive’s Public Statements..... 33
 - 2. The Second Circuit Found that HUD Requested that the County Analyze Zoning, Not Dismantle It..... 35
 - B. The Settlement’s Housing Development Requirement: 750 Units..... 37
 - 1. Throughout 2013, Mr. Astorino Accused HUD and the Monitor of Attempting to Require the County to Develop 10,768 Units 38
 - 2. Under Oath, County Witnesses Concede that the Settlement Requires the County to Develop at Least 750 Units of Affordable Housing..... 41
 - C. The Public Should Have Been Informed that the Settlement’s Price Tag Is \$51.6 Million..... 43
 - 1. The County Incorrectly Informed the Public that It Could Be Required to Spend \$1 Billion to Fund the Settlement 44
 - D. The County Executive Should Have Informed the Public that the Settlement Does Not Require the Construction of High-Rises..... 45

- 1. Mr. Astorino Has Stated that HUD Wants High-Rises in Every Community. 45
- 2. The Settlement Does Not Require High-Rise Affordable Housing Developments 47
- E. The County Executive Should Have Acknowledged Reports of Housing Discrimination in Westchester 48
 - 1. The Westchester Residential Opportunities Report..... 49
 - 2. The County Executive and Efforts to Uncover Discrimination..... 49
- III. The County Has Not Created and Funded an Effective Public Outreach Campaign 51
 - A. Fair Housing Poster Campaign 52
 - B. Fair Housing Training Sessions 53
 - C. One Community Campaign 54
- IV. Recommended Remedies..... 55

This report of the Monitor is submitted pursuant to paragraphs 13(c), 13(d), and 39 of the Stipulation and Order of Settlement and Dismissal (the “Settlement”) entered in this matter on August 10, 2009. It examines Westchester County’s (the “County”) public statements and publications and presents (i) evidence concerning potential violations of the County’s duties under Paragraph 33, and (ii) evidence bearing on the question whether the County, through County Executive Robert P. Astorino and other senior County officials and employees, made statements that were demonstrably false or so lacking a basis in fact as to violate the implied duty to engage in good faith with respect to efforts to educate the public.

Since February 2010, the Monitor has issued five reports that have directly and indirectly addressed the issues raised above, including (i) assessment of the steps taken to establish and implement campaigns to educate the public about the benefits of mixed-income housing and integration, (ii) the tone set by the County Executive, and (iii) the accuracy of statements issued by the County Executive’s office.¹

¹ See, e.g., Monitor’s Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the 2014 Calendar Year, at 31, April 1, 2015 (ECF No. 506) (“The County should also consider the influence that its public statements have on the Westchester community’s support for fair housing and develop public education campaigns designed to broaden support for fair housing that are at least equal in scope to its very public criticism of the Settlement and its implementation.”); Monitor’s Second Biennial Assessment of Westchester County’s Compliance (“Second Biennial Assessment”), at 8-9, June 26, 2014 (ECF No. 478) (Astorino’s statements “have undercut the Settlement and sown confusion into efforts at compliance often with no apparent basis in fact.”); Monitor’s First Biennial Assessment of Westchester County’s Efforts and Progress Related to the Obligations Set Forth in the Stipulation and Order of Settlement and Dismissal, at 2, 39-43, Jan. 6, 2012 (ECF No. 391) (“Considered individually or as a whole, [these public statements] are not evidence of a program of support for the Settlement, or fair

Pursuant to Paragraph 33(c) of the Settlement, the County leadership has an obligation to create and fund public outreach campaigns promoting the goals of the Settlement. Any reasonable effort to discharge that duty includes the obligation to speak accurately about the terms and implications of the Settlement. The difference, however, between what County officials told the public and what County officials stated under oath in depositions with the Monitor was, in many cases, stark. Once under oath, in many instances, County officials either abandoned the County Executive's public claims, contradicted each other, disclaimed any knowledge of facts related to those claims, or adopted facially unreasonable interpretations of documents. Based on County employees' testimony and a recent decision of the Second Circuit, it is clear that many of the County's statements to the public are demonstrably false and should be corrected. These statements, in both their content and prominence, dwarf the impact of what may be most charitably described as a delayed and decidedly measured public education campaign required by Paragraph 33(c) of the Settlement.

housing, or integration.”); Monitor’s Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the Period of February 11, 2010 through July 6, 2010, at 9, July 7, 2010 (ECF No. 329) (“Review of the tone at the top is critical in circumstances, where, as here, an Executive decision has led to an objection by HUD and has raised questions, by other County leaders and at least one editorial board, about the Administration’s willingness to comply with all aspects of the Stipulation.”). On June 12, 2013, the Monitor criticized the County’s press release, dated June 11, 2013, entitled “Federal Monitor’s Report Cards Expand Scope of Housing Settlement,” in which the County mischaracterized the Monitor’s efforts to analyze local zoning, and formally requested that the County “remove misleading statements about the draft zoning reports from your website.” Letter from James E. Johnson to Robert P. Astorino, at 1, June 12, 2013, attached hereto as Ex. 1.

Recommended remedies are to be found in the conclusion of this report. Chief among them is simple: that the Court set to rest misinterpretation of key terms of the Settlement and declare the following facts to be true: (i) that HUD has not attempted to dismantle local zoning; (ii) that the cost of compliance with the Settlement is not \$1 billion, but \$51.6 million; (iii) that HUD never sought to build high-rise apartment buildings in Westchester's residential neighborhoods; and (iv) that Westchester has a duty to ensure the development of at least 750 AFFH units. Such a declaration, while no substitute for a public education campaign, should be distributed broadly throughout the County to enable the public to have both a clear understanding of the legal requirements of the Settlement and the facts related to its implementation.

* * *

After an extended period in which the Monitor, HUD, and members of the public and the press called into question both the adequacy of the County's efforts to educate the public and the accuracy of many of the County's statements concerning the Settlement, in August 2014, the Court granted the Monitor's application to examine the County Executive and his team under oath about the County's compliance with the Settlement's public outreach obligations. *See* Order, Aug. 27, 2014 (ECF No. 504). After requesting and reviewing thousands of County emails and other documents from 2013 relating to the County's public statements, the Monitor conducted depositions in May, June, and September of 2015 and four County witnesses testified: Robert Astorino, the County Executive; Edwin McCormack, the Director of Communications; Edward Buroughs, the Commissioner of Planning; and Norma Drummond, the Deputy Commissioner of

Planning. The depositions explored the accuracy of, among other things, the following statements made by the County Executive over the years: (i) broad assertions that HUD and the Monitor, collectively or separately, were attempting to destroy local zoning; (ii) claims that HUD was planning to build high-rise apartment buildings in single-family residential neighborhoods; (iii) claims that HUD or the Monitor had set a new affordable housing development target of more than 10,000 units; (iv) claims that the cost of compliance with the Settlement would be over \$1 billion; and (v) denials that the County Executive knew of any housing discrimination in Westchester. The Monitor's depositions also explored whether the County withheld information from the public that would have helped it better understand the implementation of the Settlement. Appendix A contains a table comparing the relevant provision of the Settlement, the County's statements to the public, and the testimony under oath. Many times in their depositions, the County witnesses directly contradicted the County Executive's claims. At times, they also contradicted each other.

Mr. Astorino has been County Executive since January 2010. He brought on Mr. McCormack shortly after he took office. Mr. McCormack's principal responsibilities have included managing the public relations messaging of the Office of the County Executive, coordinating responses to press inquiries, coordinating the drafting of the State of the County addresses and, when called upon, approving communication campaigns sponsored by the Office of the County Executive. Both Mr. Buroughs and Ms. Drummond have served the County for decades. Mr. Buroughs was named acting Commissioner of Planning in January 2010 and assumed the full title in January 2011.

Ms. Drummond has served the County for more than 29 years. Her duties, at the time of the deposition, included responsibility for administering the Community Development Block Grant program. She also testified that she informed municipalities of their portion of the County's efforts to build affordable housing pursuant to the Westchester County Housing Opportunity Commission's Affordable Housing Allocation Plan.

This report is organized into four sections. In Section I, the report sets forth the County's public education duties under the Settlement, describes the County's efforts to create a public education campaign, and summarizes the County's dispute with HUD relating to the Analysis of Impediments, which serves as a necessary backdrop to the County's public statements about the Settlement. In Section II, the report evaluates the County's public statements about the Settlement and compares them with the documents, including the Settlement itself, and with the County officials' deposition testimony. In Section III, the report evaluates whether the County's public education efforts to date comply with the Settlement. In Section IV, the report sets forth recommended corrective actions for the County to undertake in light of the Monitor's findings.

I. Statement of Facts

A. The County's Duties under the Settlement

The Settlement affirmatively requires the County to engage in public outreach and education to promote the benefits of integration, mixed-income housing, and fair housing. Paragraph 33 sets forth the County's "additional obligations to affirmatively further fair housing" ("AFFH") and requires the County to spend "an amount not less than four

hundred thousand dollars (\$400,000)” in implementing such obligations. Settlement ¶ 33(h). These obligations include advertising fair housing rights and avenues to redress allegations of housing discrimination, ¶ 33(b); educating realtors, condominium boards, and landlords with respect to fair and affordable housing activities, ¶ 33(d); affirmatively marketing affordable housing within the County and in the region, ¶ 33(e); and centralizing the intake of potential home buyers for affordable housing, ¶ 33(f).

Paragraph 33 also requires the County to “create and fund campaigns to broaden support for fair housing and to promote the fair and equitable distribution of affordable housing in all communities, including public outreach specifically addressing the benefits of mixed-income housing and racially and ethnically integrated communities.”

Settlement ¶ 33(c).

The Settlement also provides that “the development of affordable housing in a way that affirmatively furthers fair housing is a matter of significant public interest,” and “the broad and equitable distribution of affordable housing promotes sustainable and integrated residential patterns, increases fair and equal access to economic, educational and other opportunities, and advances the health and welfare of the residents of [Westchester County] and the municipalities therein.” Settlement, at 1.

The County has an affirmative duty to comply with the obligations of the Settlement. *See United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 712 F.3d 761, 769 (2d Cir. 2013) (obligations of the Settlement “place[] an affirmative duty” on the County Executive to bring Source of Income legislation into existence). In other words, with respect to Settlement obligations, the

County must take concrete steps “to help bring the object in question into being.” *Id.* According to the Second Circuit, promoting that goal is “not met by taking no action or taking an action that detracts from, rather than furthers, the end goal.” *Id.* Just as the County Executive could not comply with the Paragraph 33(g) requirement to promote source-of-income legislation, on the one hand, and veto the legislation, on the other,² the County cannot claim to have discharged its duty to educate the public about the benefits of integration and fair housing while repeatedly disseminating false and misleading information about efforts to achieve those very goals.

B. County Public Outreach Campaigns

In the period from 2013 through 2015, the County created and funded two public education campaigns and other public information initiatives unrelated to the Settlement. They are discussed here because of the contrast they offer to steps the County took in discharging its duties under Paragraph 33.

1. Westchester Smart

“Westchester Smart” is an economic development campaign that was launched in January 2015. *See* Press Release, Westchester County, *Astorino: What Makes Westchester Smart?*, attached hereto as Ex. 2. In preparing the campaign, the County “put together a group of about 50 leaders throughout Westchester . . . , [including]

² *See U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, New York*, 712 F.3d 761, 771 (2d Cir. 2013) (affirming determination of Monitor and Judge Cote’s ruling that Mr. Astorino’s June 25, 2010 “veto was wholly inconsistent with the County Executive’s duty to promote.”).

business leaders, heads of nonprofits, young professionals ... [and] educat[ors] who represented various stakeholding interests within the county.” McCormack Dep. 31:4–16, May 29, 2015, attached hereto as Ex. 3. This process yielded a glossy 32-page report promoting “ideas and initiatives for a stronger economy.” Report, *Westchester Smart*, January 2015, attached hereto as Ex. 4. The County also launched five “smart economic development initiatives,” including an annual “#WestchesterSmart Mobile App Development Bowl,” the first of which featured the Westchester Knicks Dancers squad and a marching band. *See* Ex. 3, McCormack Dep. 32:13–33:4, May 29, 2015; *see also* Press Release, Westchester County, *Astorino Unveils Five ‘Smart’ Economic Development Initiatives*, attached hereto as Ex. 5; Press Release, Westchester County, *2nd Annual Mobile App Development Bowl Kicks Off Friday*, January 28, 2016, attached hereto as Ex. 6.

2. Safer Communities

The County’s “Safer Communities” campaign was launched in February 2013 in the wake of the December 2012 elementary school shooting in Newtown, Connecticut. *See* Ex. 3, McCormack Dep. 35:10–11, May 29, 2015; Press Release, Westchester County, *Astorino Launches ‘Safer Communities’ Initiative as a Response to Newtown Tragedy* (“*Safer Communities* Press Release”), Feb. 20, 2013, attached hereto as Ex. 7. According to Mr. McCormack, Mr. Astorino “brought all the [County] commissioners together and said ‘I want to do something ... meaningful and lasting. I want to go beyond the headlines, beyond the press releases and take a look at what we can do as a

government ... to put something together” Ex. 3, McCormack Dep. 23:21–24:5, May 29, 2015.

To that end, the County carried out various programs, including a “School Safety Symposium” held at SUNY Purchase. *Id.* 24:12–24:24. The symposium featured a keynote address given by NYPD Commissioner William Bratton, *id.*, speeches by experts, including a former Secret Service agent, Ex. 7, *Safer Communities* Press Release at 2; and a panel discussion with a number of prominent Westchester school administrators. *Id.* Mr. Astorino invited “[e]very school leader in Westchester[,] their administrative teams[,] and Boards of Education” to the symposium. *Id.*

After the symposium, the County rolled out many other events, including a “Community Violence Prevention Forum” at the Westchester County Center, Ex. 7, *Safer Communities* Press Release at 3, which featured representatives from the Centers for Disease Control and Prevention (“CDC”), Ex. 3, McCormack Dep. 25:5–6, May 29, 2015, and, in the past year, two publicized panels on sports-related concussions. *See generally*, *Safer Communities* Webpage, <http://www3.westchestergov.com/safer-communities> (last visited March 15, 2016), attached hereto as Ex. 8.

3. Other Initiatives

Other public outreach initiatives pursued by the County over the past six years include a biannual “Shared Municipal Services Expo” at the County Center intended to promote fiscal savings, *see* Ex. 3, McCormack Dep. 36:12–37:19, May 29, 2015; events to promote the local Hispanic/Latino business community, *id.* at 48:11–22; and a

“Fatherhood Initiative,” in collaboration with former New York Knicks star Allan Houston. *See id.* 26:4–8; *see also* Press Release, Westchester County, *Astorino Encourages Dads to ‘Be There’ on Father’s Day and Beyond*, June 19, 2015, attached hereto as Ex. 9.

C. Paragraph 33 Activities

The County has represented in some of its quarterly reports that it has taken affirmative steps to create and fund public outreach campaigns that comply with Paragraph 33(c), including organizing a poster campaign and fair housing training sessions, creating a website touting the benefits of fair housing, and placing advertisements in County buses and bus shelters. This section of the report summarizes those activities

In 2012, the County distributed fair housing and anti-discrimination-themed posters to municipalities to be posted in public locations, and to housing agencies and developers to be posted at housing sites developed pursuant to the Settlement. *See*, Second Biennial Assessment, at 12–13. The posters were created by the National Fair Housing Alliance, HUD, and the Leadership Conference on Civil Rights Education Fund. The County’s ongoing effort with respect to the posters is limited to ensuring that the posters remain posted and making additional posters available as needed. *See* Westchester County Fair and Affordable Housing Implementation Plan 2014 2Q Quarterly Report (“2014 2Q Quarterly Report”), attached hereto as Ex. 10, at 16.

Separately, the County's Planning Department and Information Technology Department had developed a fair housing poster initiative, but that attempt was shelved after focus groups "hated it." McCormack Dep. 52:10-53:9, Sept. 18, 2015, attached hereto as Ex. 11. Focus group members found the County's proposed posters ineffective and offensive. *See generally*, WESTCHESTER RESIDENTIAL OPPORTUNITIES, FOCUS GROUP RESULTS AND COMMENTS, Aug, 16, 2012, attached hereto as Ex. 12.; *see also* Second Biennial Assessment, at 13.

In 2014 and 2015, the County Human Rights Commission ("HRC") conducted fair housing training sessions for members of cooperative boards, realtors, students, senior citizens, and affordable housing developers. *See* Westchester County Fair and Affordable Housing Implementation Plan 2014 1Q Quarterly Report, attached hereto as Ex. 13, at 15; Ex. 10, 2014 2Q Quarterly Report, at 15; Westchester County Fair and Affordable Housing Implementation Plan 2014 3Q Quarterly Report, attached hereto as Ex. 14, at 15; Westchester County Fair and Affordable Housing Implementation Plan 2014 4Q Quarterly Report, attached hereto as Ex. 15, at 13. Instructing agents on how to comply with fair housing regulations is a compliance program, not a campaign to educate the public as to "why" it is important.

During Mr. McCormack's second deposition, he announced that the County had begun work on a public outreach campaign called the "One Community Campaign." Ex. 11, McCormack Dep. 53:10-54:14, Sept. 18, 2015. In its quarterly report for the third quarter of 2015, the County announced that the One Community Campaign consisted of "(1) a letter of introduction from the County Executive that highlights the themes of the

campaign, including the benefits of diversity and fair housing; and (2) links to various web-based resources for, among other things, understanding the importance of fair and affordable housing and diversity.”³ See Westchester County Fair and Affordable Housing Implementation Plan 2015 3Q Quarterly Report (“2015 3Q Quarterly Report”), attached hereto as Ex. 16, at 14. The County also announced that it was preparing to expand the campaign to include advertisements in Bee-Line buses and bus shelters in January 2016. See Westchester County Fair and Affordable Housing Implementation Plan 2015 4Q Quarterly Report (“2015 4Q Quarterly Report”), attached hereto as Ex. 17, at 11.

The One Community Campaign website contains a page that lists some of the benefits of “[a]ffordable, mixed-income housing and racially and ethnically diverse neighborhoods”:

Benefits of Mixed-Income Housing

- Mixed income housing promotes racially and ethnically diverse communities, providing a nurturing environment with diverse schools to raise children.
- Mixed income housing provides opportunities for seniors, young adults, and families to live in communities, at prices they can afford.
- Mixed income housing promotes economic empowerment and integration.

³ The One Community Campaign website is: <http://homes.westchestergov.com/one-community-campaign>.

- Mixed income housing helps the local workforce, including volunteer first responders, live in the same community where they work.
- Mixed income housing revitalizes distressed areas.

Benefits of Racially and Ethnically Integrated Communities

- Diversity contributes to greater tolerance, fair-mindedness and openness to diverse networks and settings.
- Diversity makes us more creative, more diligent and harder-working.
- Diversity broadens the range of cultural experiences available.
- Diversity is a magnet for talent, stimulates new ideas and spurs economic growth. Diversity in the classroom improves students' academic outcomes and social growth. Schools flourish because contact with different types of people, different perspectives, different ways of thinking and different lifestyles helps us understand our own culture and values, and the world around us. Our children grow up to be more culturally sensitive, deal better with diverse work situations, and are less likely to apply racial stereotypes.

See Webpage, <http://homes.westchestergov.com/benefits-for-the-public>. The website also contains a gallery of affordable housing in Westchester, which provides web visitors an opportunity to “see how they enhance and fit into local communities.” *See* Affordable Housing Photo Gallery, available at <http://homes.westchestergov.com/affordable-housing-gallery>. The One Community Campaign is the first public education campaign undertaken by the County that specifically mentions the benefits of diversity.

The County first referenced the One Community Campaign in its third quarterly report for 2015, in which it said that it “launched the One Community Campaign (“OCC”) in the third quarter of 2015.” Ex. 16 (2015 3Q Quarterly Report), at 14. On September 18, 2015, during his deposition, Mr. McCormack testified that the One Community Campaign was launched “just several weeks ago.” Ex. 11, McCormack Dep., 53:10–54:2, Sept. 18, 2015. Documents produced by the County show that the earliest email relating to the campaign was dated August 20, 2015. *See* Email from Daniel Branda to Norma Drummond, WC105348, August 20, 2015, attached hereto as Ex. 18. Oddly, in its response to the Monitor’s interrogatories about the program, the County for the first time asserted that the first affirmative step in furtherance of the creation of the One Community Campaign was taken “[o]n or about September 20, 2012.” *See* Letter from Edwin J. McCormack to James E. Johnson, October 19, 2015, attached hereto as Ex. 19.

D. The County’s AI Dispute with HUD and Related Public Statements

This report does not purport to identify or collect all of the County’s public statements about the Settlement and affordable housing since August 2009. The report addresses public statements that were made, in large part, against the background of the County’s long-running dispute with HUD concerning the County’s obligation to submit a satisfactory Analysis of Impediments (“AI”). *See* Settlement ¶ 32.

1. The AI Requirement

Jurisdictions that seek HUD federal funding must prepare and submit an AI as part of the grantee's certification "that the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 and the Fair Housing Act . . . , and to certify that the grantee will AFFH." *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, N.Y.*, 668 F. Supp. 2d 548, 551 (S.D.N.Y. 2009) (internal quotation marks omitted) (citing 42 U.S.C. § 5304(b)(2) and 24 C.F.R. § 570.601(a)(2)). In the AI, the grantee is required to identify and analyze the impediments to fair housing that exist in the jurisdiction, including impediments based on race or municipal resistance to the development of affordable housing. *See, e.g., U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester County, New York*, 495 F. Supp. 2d 375, 386–87 (S.D.N.Y. 2007) (citing HUD's *Fair Housing Planning Guide* as persuasive authority "firmly rooted in the statutory and regulatory framework and consistent with the case law"). The grantee also must take appropriate steps to address and overcome the effects of such impediments.⁴ *See id.* The AI requirement is designed to ensure that the federal funds are spent in ways that will be most effective.

The County's failure to appropriately consider race in its AIs was at the heart of the False Claims Act lawsuit that resulted in the Settlement. The relator, the Anti-Discrimination Center of Metro New York, alleged that the County certified its

⁴ The requirements of an AI are described in further detail in the following court opinion and Monitor's report: *U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester County, New York*, 495 F. Supp. 2d 375, 386–87 (S.D.N.Y. 2007); Second Biennial Assessment, at 35–36.

compliance with HUD grant requirements even while failing to comply with HUD regulations. This Court ruled that the County was obligated to consider race in connection with its AI and certification to HUD, *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 495 F. Supp. 2d 375, 376 (S.D.N.Y. 2007), and that the County's certifications to HUD were false as a matter of law, *see United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 668 F. Supp. 2d 548, 562–65 (S.D.N.Y. 2009).

Initially due in 2009, the County still has not submitted an AI that HUD would judge acceptable. The Second Circuit recently held that HUD appropriately rejected the County's AIs, because they failed to adequately analyze whether municipal zoning posed an impediment to fair housing on grounds that it disparately impacted racial and ethnic minorities and low-income residents. *Cty. of Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 802 F.3d 413 (2d Cir. 2015). Since 2011, the Monitor has taken steps to help resolve the dispute. These steps have included preparing zoning analyses that could be used as a basis for preparing an AI that is acceptable to HUD. In response to the County's failure to submit an acceptable AI, HUD has withheld and reallocated millions of dollars in federal funds, sparking additional litigation between the County and HUD that has continued for years and reached the Second Circuit twice.

The AI dispute between HUD and the County has been described in several previous reports of the Monitor and in opinions issued by this Court and the Second Circuit. *See, e.g.*, Second Biennial Assessment, at 35–59; *County of Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 116 F. Supp. 3d 251 (S.D.N.Y. 2015); *U.S. Dep't of Hous.*

& *Urban Dev. v. County of Westchester*, 802 F.3d 413, 413–28 (2d Cir. 2015). Only those facts relevant to the present report are described below.

2. Submission of AIs: 2010–2012.

The County’s first AI was submitted to HUD on July 23, 2010. On December 21, 2010, HUD rejected the AI and proposed several revisions, including identifying the steps the County would take to overcome “exclusionary zoning practices.”

On April 13, 2011, the County submitted another AI to HUD. On May 13, 2011, HUD rejected the AI and listed seven potentially restrictive zoning practices that the County’s future AI submissions should analyze: (1) restrictions that limit or prohibit multifamily housing; (2) restrictions on the size of a development; (3) restrictions directed at Section 8 or other affordable housing; (4) restrictions that directly or indirectly limit the number of bedrooms in a unit; (5) restrictions on lot size or other density requirements that encourage single family housing or restrict multifamily housing; (6) restrictions on townhouse development; and (7) “infrastructure barriers related to zoning such as the absence of sewer systems that are impediments to the development of rental housing or to affordable housing.” Letter from John D. Trasviña and Mercedes M. Márquez to Kevin Plunkett, at 5, May 13, 2011, WC105294, attached hereto as Ex. 20.

The County submitted a revised AI on July 11, 2011. HUD found that submission unacceptable as well. Having reached an impasse over the AI requirement, the parties took their dispute to the Monitor. On November 17, 2011, the Monitor found that the County’s AI must, among other things, specify a strategy to overcome exclusionary

zoning practices and identify zoning regulations that would, if not remedied by the municipality, require the County to pursue legal action. *See* Monitor's Report and Recommendation Regarding Dispute Resolution (Amended), at 13–18, Nov. 17, 2011 (ECF No. 384). The County objected to the Monitor's findings and sought review from Magistrate Judge Gabriel W. Gorenstein. *See* County's Objections to the Monitor's Report & Recommendation, Dec. 7, 2011 (ECF No. 386). The Monitor's findings became final when, on March 16, 2012, Magistrate Judge Gorenstein overruled the County's objections. *See* Opinion and Order, at 18–19, Mar. 16, 2012 (ECF No. 396).

On February 29, 2012, the County submitted an analysis of Westchester's municipal zoning regulations that claimed to address the restrictive practices HUD had identified in its May 13, 2011 letter. On April 20, 2012, HUD rejected the submission as inadequate, finding that it did not comply with its directives and did not examine whether any of the zoning restrictions were exclusionary.

The County submitted several more revisions of its zoning analysis during the remainder of 2012. On March 13, 2013, HUD, in a detailed ten-page letter, explained why the supplemental zoning submissions remained inadequate. *See* Letter from Glenda L. Fussa to Kevin Plunkett, March 13, 2013, attached hereto as Ex. 21.⁵ HUD also

⁵ The letter provides in pertinent part:

The County's "test" ignores the second prong of the Berenson analysis, the consideration of regional needs and requirements. In that regard, the County makes a conclusory statement that it "has found no basis to find that any municipality has not given consideration to regional needs and requirements." This conclusion ignores the

highlighted the County's failure to properly analyze exclusionary zoning and its continuing failure "to develop a strategy to overcome exclusionary zoning practices." *Id.* The letter also noted that the County failed to examine whether municipal zoning codes considered the regional housing need, as determined by the Westchester County Housing Opportunity Commission's Affordable Housing Allocation Plan of 2005, which recommended the development of 10,768 affordable units in Westchester by 2015 to meet the growing need for such housing. *Id.*; see also WESTCHESTER CTY. HOUSING OPPORTUNITY COMM'N, AFFORDABLE HOUSING ALLOCATION PLAN 2000–2015 (Nov. 9, 2005), attached hereto as Ex. 22.

municipal housing allocations prepared by the County's own Housing Opportunity Commission and included in a 2005 *Affordable Housing Allocation Plan*. The plan was based on a 2004 study, commissioned by the County, of its affordable housing needs for the years 2000 to 2015. This assessment identified the need for an additional 10,768 affordable housing units by 2015. In its July 6 letter, the County stated that it was not required to consider this evidence because the Allocation Plan was not enacted into law, and because it has not been specifically incorporated into the Settlement. The Department disagrees. Both the Needs Assessment and the Allocation Plan provide important evidence of the regional needs. As such, the Department expects the County to consider such evidence in examining whether a zoning ordinance considers regional needs and requirements.

Ex. 21, Letter from Glenda L. Fussa to Kevin Plunkett, March 13, 2013, at 4–5 (internal citations omitted). HUD's letter addressed deficiencies in the County's draft AI, and, generally, HUD was not seeking to impose new development obligations under the Settlement. See *Cty. of Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 802 F.3d 413 (2d Cir. 2015).

3. The Monitor's Zoning Analysis

In the submitted AIs and zoning analyses, the County concluded that there was no evidence of exclusionary zoning in any of the 31 eligible municipalities. HUD determined that the analysis in the AIs was inadequate.⁶ In an effort to break the impasse, the Monitor undertook to evaluate whether the County was correct that none of the 31 eligible communities had exclusionary zoning laws, or whether HUD was correct that the County's analysis was inaccurate and incomplete. That effort involved both fact-finding and legal analysis. The Monitor's team of housing consultants reviewed the County's zoning submissions, which included approximately 780 pages of tables, maps, and other data, and conducted their own research to assess the zoning practices in each of the 31 eligible municipalities. *See, e.g.*, Second Biennial Assessment, at 50. Under the Monitor's supervision, the team compiled and analyzed information concerning the various aspects of each municipality's zoning ordinance, including progress in meeting the allocations set forth in the Westchester County Housing Opportunity Commission's Affordable Housing Allocation Plan of 2005. *Id.*

On March 21, 2013, as part of the fact-finding, the Monitor distributed draft zoning analyses prepared by his team of housing consultants to each of the 31 eligible municipalities and gave each municipality an opportunity to respond to the accuracy of

⁶ Notably, the Second Circuit later determined that the County's purported analysis was no analysis at all. Instead, the County "reached the same boilerplate conclusion for every municipality." *U.S. Dep't of Hous. & Urban Dev. v. County of Westchester*, 802 F.3d 412, 433 (2d Cir. 2015).

his proposed findings by April 18, 2013. *See, e.g.*, Letter from James E. Johnson to Mayor Paul Rosenberg, March 21, 2013, attached hereto as Ex. 23. The Monitor wrote,

This letter forwards proposed factual findings Before reaching any final conclusions and engaging further with the County, I would appreciate receiving your input [I]f there are any inaccuracies in the findings, it would be of great help if you provided corrections and the factual basis for those corrections.

Id. at 2. The draft zoning reports analyzed each municipality’s zoning regulations and examined the municipalities’ progress in meeting the allocations set forth in the Affordable Housing Allocation Plan of 2005. *Id.*

4. HUD Moves to Reallocate Federal Funds and Astorino Raises the Specter of a Demand for 10,768 Units and a \$1 Billion Cost

On March 25, 2013, HUD advised the County that it would reallocate \$7.4 million in fiscal year (“FY”) 2011 federal funding due to the County’s continued failure to submit an acceptable AI, unless the County provided by April 25 “a satisfactory zoning analysis and plan to overcome exclusionary zoning practices.” Letter from Vincent Hom to Robert P. Astorino, March 25, 2013, attached hereto as Ex. 24.

On April 23, 2013, Mr. Astorino delivered his annual State of the County address in White Plains, New York. In the speech, Mr. Astorino cited HUD’s March 13, 2013 letter and the Monitor’s draft zoning reports to claim that HUD and the Monitor believed the County’s affordable housing building mandate “is really 10,768,” at a cost of “between \$700 million and \$1 billion.” *See* Robert Astorino, 2013 State of the County

Address to the People of Westchester (“2013 State of the County Address”), at 22–23,

April 23, 2013, attached hereto as Ex. 25. Mr. Astorino also said:

To come up with \$1 billion, we would have to raise County property taxes 200 percent; 200 percent at a time when the State tax cap is 2%. How is that going to work? And that’s just county taxes. School and local taxes would certainly increase too, along with crowded classrooms and a strain on services.

Id. at 23. Mr. Astorino also claimed that HUD’s letter of May 13, 2011 contained a demand that the County eliminate zoning “restrictions—in any neighborhood—on height, size, acreage, density, number of bedrooms, and lack of water or sewers.” *Id.* at 22. Mr. Astorino said that:

The federal government is trying to force me as County Executive to sue each municipality to abolish even basic zoning protections, [which] means the neighborhood you live in today could change over time—and there is nothing you can do to stop it. A five-story building—or higher—could be put on your street. Washington bureaucrats, who you will never see or meet, want the power to determine who will live where and how each neighborhood will look.

Id. at 21–22.

On April 24, 2013, the County submitted to HUD an updated AI and zoning analysis. Like the County’s seven previous submissions, the County’s zoning analysis concluded that none of the eligible municipalities had exclusionary zoning practices.

That same day, the County sued HUD. The complaint alleged that HUD’s threat to reallocate the County’s federal housing funding violated the Administrative Procedure Act and sought a temporary restraining order. See Complaint, at 35, *County of Westchester v. Dep’t of Housing & Urban Dev.*, No. 13 Civ. 2741 (S.D.N.Y. April 24,

2013) (ECF No. 1). Two days later, on April 26, 2013, Judge Cote denied the County's application for a temporary restraining order and declined to grant the County's application for a preliminary injunction. *See* Transcript of Proceedings, at 16:22–18:23, *County of Westchester v. Dep't of Housing & Urban Dev.*, No. 13 Civ. 2741 (S.D.N.Y. April 26, 2013) (ECF No. 7).

During April and May 2013, the Monitor received responses from 23 of the 31 eligible municipalities responding to his appeal for assistance with his independent analysis of Westchester municipal zoning regulations. Many of the responses provided additional information with respect to the proposed findings of the draft zoning reports that helped the Monitor's team prepare a more accurate zoning analysis. All of the municipal responses were reviewed, considered, and incorporated during the process of revising the housing consultants' preliminary findings.

Some municipalities took exception to the fact that the Monitor's team had used the Affordable Housing Allocation Plan to analyze each municipality's progress towards meeting the regional need for affordable housing. *See, e.g.*, Letter from John D. Cavallaro (Tuckahoe Village Attorney) to James E. Johnson, at 8–9, May 16, 2013, attached hereto as Ex. 26. Several municipalities struck a positive and cooperative tone and provided additional data for use in the Monitor's zoning report. Irvington Mayor Brian C. Smith, for example, thanked the Monitor “for taking the time to analyze our zoning” and noted he was “pleased that your analysis concluded that there are only minor restrictive zoning practices contained within our code.” Letter from Brian C. Smith (Irvington Mayor) to James E. Johnson, April 18, 2013, attached hereto as Ex. 27.

Pelham Mayor Timothy S. Cassidy said he “appreciate[d] your accepting my phone call a few weeks ago” and noted that the “newly elected government takes the issues concerning affordable housing seriously. We will address any further requests, as necessary.” Letter from Timothy S. Cassidy (Pelham Mayor) to James E. Johnson, May 13, 2013, attached hereto as Ex. 28. Mayor Mary C. Marvin of Bronxville thanked the Monitor “for the opportunity to review your draft report” and provided several comments for the Monitor’s consideration. Letter from Mary C. Marvin (Bronxville Mayor) to James E. Johnson, April 18, 2013, attached hereto as Ex. 29. “We hope this information will be helpful to you in completing your report,” she wrote. *Id.*

On April 24, 2013, Mr. Astorino’s chief of staff, George Oros, sent an email to seven members of the County Board of Legislators mentioning a letter from Hastings-on-Hudson responding to the Monitor’s March 21 draft zoning report, noting that Hastings-on-Hudson “take[s] exception to the Monitor and Pratt [the Monitor’s housing consultants] and HUD’s assertions on exclusionary zoning.”⁷ See Email from George Oros to Bernice Spreckman, et al., April 24, 2013, WC00003368, attached hereto as Ex. 30. Mr. Oros forwarded the email to Mr. Astorino, Mr. McCormack, and Deputy County Executive Kevin Plunkett, and wrote, “If the public saw these types of letters it would give substantial third part[y] validation to what the CE [County Executive] has been saying about what HUD is trying to do. *How do we best accomplish that?*” Ex. 30, Email from George Oros to Robert P. Astorino, et al., April 24, 2013, WC00003368

⁷ The representatives included Bernice Spreckman, John Testa, Sheila Marcotte, James Maisano, David Gelfarb, Gordon Burrows, and Michael Smith.

(emphasis added). Mr. McCormack replied: “Let’s talk. It would be good to get out in front of this in a unified way. Have a couple of ideas.” Ex. 30, Email from Edwin McCormack to George Oros, et al., April 24, 2013, WC00003368.

Beginning in April 2013 and lasting through September of 2013, Mr. Astorino hosted a series of *Ask Astorino* town hall events in communities across Westchester in which he charged that HUD and the Monitor had changed the terms of the Settlement and that the new terms would require the building of over 10,000 units at a cost of one billion dollars.⁸

5. Mr. Astorino Comes Under Criticism from the Press

On April 25, 2013, *The Journal News* published an editorial criticizing Mr. Astorino’s State of the County address. *See Astorino’s Address Full of Excuses*, THE JOURNAL NEWS, April 25, 2013, attached hereto as Ex. 32. The editorial board called Mr. Astorino’s address “muck,” and wrote that it was

chock-full of hyperbole, distortions, misdirection, excuse-making and scapegoating—red meat for foes of the 2009 settlement with the federal government.

Id. The editorial also criticized Mr. Astorino’s handling of the AI dispute:

Under the settlement, an acceptable analysis was due more than three years ago. Despite submitting one incurious

⁸ The Ask Astorino events took place in several municipalities, including: Somers (February 27, 2013); Ossining (March 5, 2013); Yonkers (April 2, 2013); Rye (May 1, 2013); Greenburgh (May 16, 2013); Lewisboro (June 3, 2013); Harrison (June 10, 2013); North Castle (June 18, 2013); Yonkers (June 24, 2013); Peekskill (July 1, 2013); Mount Pleasant (July 8, 2013); Mount Vernon (July 15, 2013); and New Rochelle (Sept. 30, 2013). The PowerPoint presentations that he used are attached hereto as Ex. 31.

analysis after another—Astorino has largely refused to look beyond housing cost when considering barriers to housing choice—the county executive blames Washington for the prospective loss of the federal money.

Id.

On May 12, 2013, Mr. Astorino wrote an op-ed responding to *The Journal News*' editorial. See Robert P. Astorino, *Astorino Contends Zoning Is Not Discrimination*, THE JOURNAL NEWS, May 12, 2013, attached hereto as Ex. 33. Mr. Astorino's op-ed defended statements he made about the Settlement and AI dispute during the State of the County address, asserting that

If HUD is allowed to destroy local zoning, there will be no rules for what gets built on any street.

Id. He also claimed that

the federal monitor assigned to the settlement began asking the county about the progress being made by all of Westchester's 43 municipalities in meeting their individual allocations of the 10,768 units. When we pointed out that the study was never adopted by the county or made part of the settlement, HUD wrote in its March 13 letter this year: "The Department disagrees."

Id.

Mr. Astorino appeared on television several times in May 2013 to address the AI dispute and to assert his view that HUD and the Monitor were attempting to impose new requirements on the County. On May 14, 2013, Mr. Astorino was interviewed by Errol Louis on NY1, where he asserted the following:

[T]he federal government is trying to ... go way beyond the terms of the 2009 Settlement. And they admit that. ... [HUD is] demanding now that the county basically go after

every municipality to abolish local zoning. [I]n their view, any restrictions in a zoning code on height, on density, on acreage, on number of bedrooms, on watershed protected property—that is the drinking water for New York City by the way—...should be eliminated from zoning codes so that housing can be built at any density in any neighborhood.

See Interview by NY1's Errol Louis with Robert P. Astorino, in Westchester County, N.Y., May 14, 2013, at 03:07–03:47, transcript attached hereto as Ex. 34.

On May 15, he appeared on Richard French's television program on RNN and stated that

[The] [f]ederal government is requiring ... that the County sue the municipalities to abolish any restrictions in the zoning codes relating to height restrictions, density, etc., ... [i]n any neighborhood [I]f you take away these restrictions in a zoning code, ... then you have a mish mosh. And they are now attacking, by the way, single-family, quarter-acre zoning lots as potentially discriminatory that must be overturned. ... There is an out of control, overreaching federal government [I]n their warped view, zoning and discrimination are the same thing; they are not.

The zoning issue is ... frightening because if bureaucrats in DC get to choose who lives where and how neighborhoods are going to be developed. ... It's a mad scientist in DC.

Interview by RNN's Richard French with Robert P. Astorino, May 15, 2013, at 01:36–07:02, transcript attached hereto as Ex. 35.

On May 31, 2013, in response to Mr. Astorino's public statements about the AI dispute and Settlement, HUD Deputy Secretary Maurice A. Jones wrote Board of Legislators Chairman Kenneth Jenkins and represented that the Settlement does not contain a requirement to fund the construction of 10,768 new affordable housing units.

See Letter from Maurice A. Jones to Kenneth W. Jenkins, May 31, 2013, attached hereto as Ex. 36. He also emphasized, with respect to the Affordable Housing Allocation Plan, that

HUD is not requiring the County to build this number of units [referring to 10,768], but to use this study as a tool to examine how the eligible municipalities are contributing to meet the regional needs.

Id. Jones also wrote that “HUD has never suggested that the County must ‘dismantle’ zoning in any neighborhood.” *Id.*

A proposed press release summarizing Deputy Secretary Jones’ letter was sent by email to Mr. Plunkett, Mr. McCormack, Mr. Oros, and Mr. Astorino on May 31, 2013.

See Email from Katherine Delgado to Kevin J. Plunkett, et al., May 31, 2013, WC00003364, attached hereto as Ex. 37. After the letter was delivered, Mr. Plunkett wrote that “we need to have the history of the ‘allocation plan’ correspondence from HUD and Jim Johnson ready to go to reporters—I recall Ned [McCormack] has already assembled the correspondence and may have already sent it out to some reporters.” Ex. 37, Email from Kevin J. Plunkett to Katherine Delgado, et al., May 31, 2013, WC00003364.

On June 11, 2013, a week and a half after Jones’ letter, the County issued a press release about the Monitor’s draft zoning reports and Deputy Secretary Jones’ letter. See Press Release, Westchester County Executive, *Federal Monitor’s Report Cards Expand Scope of Housing Settlement* (“*Report Cards* Press Release”), attached hereto as Ex. 38. The press release claimed that the Monitor’s draft reports

assign[ed] ‘obligations’ and ‘benchmark allocations’ to the 31 eligible communities in the 2009 affordable housing settlement that far exceed the terms of the Settlement, in particular the target of developing 750 affordable housing units Reaction from local municipalities has been confusion, anger and disbelief.

Id. The press release characterized Deputy Secretary Jones’ letter as “confirm[ing] that [HUD] expects Westchester to go beyond the settlement’s 750 units.” *Id.*

The next day, on June 12, the Monitor wrote Mr. Astorino and reminded the County that the Monitor had no authority to change the obligations of the Settlement and emphasized that the Monitor’s zoning analysis effort was not an attempt to impose new obligations on the County. *See* Ex. 1, Letter from James E. Johnson to Robert P.

Astorino, June 12, 2013. The Monitor also asked Mr. Astorino to remove the misleading “Federal Monitor’s Report Cards Expand Scope of Housing Settlement” press release.

Id. Mr. Astorino refused; speaking to the press that day, he said the letters “will not only stay up but I hope and pray that everyone in this county reads them.” *Fed Monitor, NY County Exec at Odds Over Housing*, ASSOCIATED PRESS, June 12, 2013, attached hereto as Ex. 39. Mr. Astorino did not disclose the Monitor’s letter to the public.

On that same day, June 12, Mr. Astorino held a press conference in which he criticized the Monitor’s effort to analyze zoning and accused HUD and the Monitor of assigning new benchmark allocations for the development of affordable housing units. He was joined by nine municipal leaders.⁹ Mr. Astorino did not inform the public of the

⁹ The following municipal leaders were in attendance: Tuckahoe Mayor Steve Ecklund, Lewisboro Supervisor Peter Parsons, Rye Brook Deputy Mayor Jeffrey Rednick, North Castle Supervisor Howard Arden, Bedford Planning Director Jeff

Monitor's letter.¹⁰ Nor did he inform the public that, without County consent, the number of required units could not be changed.

On June 13, 2013, the County submitted another zoning analysis to HUD. HUD rejected the County's analysis on July 12, 2013. On July 23, the County provided HUD with another zoning analysis.

On July 31, 2013, after having requested relevant data from the municipalities, the Monitor issued a report analyzing the zoning ordinances in eligible municipalities within the County under state law—applying *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975). *See* Monitor's Report on Westchester County's Analysis of Municipal Zoning, July 31, 2013, attached hereto as Ex. 41.¹¹ The Monitor concluded that the zoning regulations in seven municipalities did not provide meaningful opportunities for affordable housing and were exclusionary. *See id.* at 34–36. The Monitor found that the County's assertion that exclusionary zoning was absent from the County “is strongly

Osterman, Somers Supervisor Mary Beth Murphy, Mount Pleasant Supervisor Joan Maybury, Cortlandt Deputy Director of Planning Chris Kehoe, and North Salem Supervisor Warren Lucas. Each of these municipalities had submitted a response to the Monitor's request for information regarding the draft zoning reports.

¹⁰ In his deposition with the Monitor, Mr. Astorino stated under oath that he had only a vague recollection of the Monitor's June 12, 2013 letter. *See* Astorino Dep. 108:20–109:4, Sept. 15, 2015, attached hereto as Ex. 40. Mr. McCormack testified that he discussed the letter with Mr. Astorino around the time of Mr. Astorino's June 12, 2013 press conference. *See* Ex. 11, McCormack Dep. 17:25-18:15, Sept. 18, 2015.

¹¹ A substantially similar report was subsequently filed with the Court on September 13, 2013. *See* Monitor's Final Report on Westchester County's Analysis of Zoning (“*Berenson* Report”), Sept. 13, 2013 (ECF No. 452).

contradicted by its own data.” *See id.* at 39. The Monitor’s finding was noted by the Second Circuit. *See County of Westchester*, 802 F.3d at 425.

On August 9, 2013, HUD found the County’s July 23, 2013 AI submission to be inadequate. Specifically, HUD found the County’s continued assertion that local zoning ordinances “do not have a disparate impact on minorities” to not be supported by the available data.

On August 14, 2013, Judge Cote granted HUD’s motion to dismiss the County’s complaint challenging its planned reallocation of federal funding.¹² *See County of Westchester v. U.S. Dep’t of Housing & Urban Dev.*, No. 13 Civ. 2741, 2013 WL 4400843 (S.D.N.Y. Aug. 14, 2013). On August 16, HUD stated that it would be reallocating the County’s FY2011 federal funds.

On September 6, 2013, Mr. Astorino wrote another op-ed, this time in *The Wall Street Journal*, asserting that HUD “wants to control local zoning.” Robert P. Astorino, *Washington’s ‘Fair Housing’ Assault on Local Zoning*, THE WALL STREET JOURNAL, Sept. 6, 2013, attached hereto as Ex. 42.

¹² On February 18, 2015, the Second Circuit affirmed the dismissal (as moot) of claims relating to funds that had already been reallocated to other jurisdictions, but vacated the district court’s dismissal of claims relating to funds that had not yet been reallocated. *See Westchester v. U.S. Dep’t of Housing & Urban Dev.*, 778 F.3d 412 (2d Cir. 2015). On September 25, 2015, the Second Circuit ruled that HUD could continue to withhold funds that had not been reallocated for so long as the County did not submit an acceptable AI. *See Westchester v. U.S. Dep’t of Housing & Urban Dev.*, 802 F.3d 413 (2d Cir. 2015).

II. Evaluation of the County's Statements about the Settlement

This report does not attempt to evaluate every statement issued by the County in the six years since the beginning of the Astorino administration. Rather, it focuses on the period from January 2013 through September 2013. Most of the claims and statements discussed below were made during this period, although some were made as early as Spring 2011 and most were repeated after September 2013.

A. The Settlement's AI Requirement: The Second Circuit Found that HUD Never Asked the County to Abolish Local Zoning

The Settlement contains two provisions that relate either to analyzing municipal zoning regulations or modifying them: Paragraph 25 calls for the promotion of a model zoning ordinance and Paragraph 32 calls for the submission of an appropriate AI that considers the role zoning plays in impeding fair housing. The model ordinance includes, *inter alia*: (i) a requirement that new development projects include a certain percentage of affordable units; (ii) standards for affirmative marketing of new housing developments; (iii) standards for expedited review and approval of affordable housing; and (iv) standards to ensure the continued affordability of newly-constructed units. *See* Westchester County Fair and Affordable Housing Implementation Plan, Appendix D-1(i): Model Ordinance Provisions ("Model Ordinance"), August 9, 2010, attached hereto as Ex. 43. Municipalities are not required to adopt the model ordinance, and if they decide to adopt its provisions, the model ordinance provisions "are proposed to supplement existing municipal zoning codes in Westchester County." *Id.*

With respect to Paragraph 32, the Second Circuit has affirmed HUD's authority to require that an AI contain a rigorous, as opposed to boilerplate, analysis of zoning. *See County of Westchester v. U.S. Dep't of Housing and Urban Development*, 802 F.3d 413, 430–37 (2d Cir. 2015). Ultimately, it was HUD's request for rigor that became the focus of the County's complaints against HUD and the Monitor.

This section of the report collects many of the County's assertions to the effect that HUD's insistence on a rigorous AI amounted to a demand to dismantle local zoning. It then presents both the Second Circuit's dispositive rejection of that claim, *County of Westchester v. HUD*, 802 F.3d 413, 433 (2015), as well as the County Executive's testimony in which he conceded that the Model Ordinance does not require the dismantling of local zoning and that he had never received a request from HUD to dismantle zoning.

1. The County Executive's Public Statements

Between July 2011 and March 2014, the County Executive repeatedly asserted that HUD wants to eliminate municipal zoning regulations in Westchester.

For example, in a press conference held on July 15, 2011, Mr. Astorino said HUD "is demanding that we dismantle local zoning, sue our municipalities and bankrupt our taxpayers." Transcript of Press Conference, at 4, July 15, 2011 (ECF No 391-11). In an op-ed published in the *New York Daily News* in 2011, Mr. Astorino asserted that HUD was "trying to use the settlement as a hammer to dismantle local zoning . . ." Robert P. Astorino, *HUD's Warped War on Westchester*, NEW YORK DAILY NEWS, Nov. 30, 2011,

attached hereto as Ex. 44. In an op-ed in *The Wall Street Journal*, the County Executive claimed that HUD “wants to control local zoning and remake communities.” Ex. 42, Robert P. Astorino, *Washington’s ‘Fair Housing’ Assault on Local Zoning*, THE WALL STREET JOURNAL, Sept. 6, 2013.

In an op-ed for *The Journal News*, Mr. Astorino discussed what he called HUD’s “American dream”:

If HUD is allowed to destroy local zoning, there will be no rules for what gets built on any street—not only in Westchester but across the United States. No rules for HUD means no rules for any developer. The notion of working hard to buy a home with a backyard and swingset only to wake up one day and have a high-rise next door is an American dream recognizable only to HUD.

Ex. 33, *Astorino Contends Zoning Is Not Discrimination*, THE JOURNAL NEWS, May 12, 2013.

Mr. Astorino’s State of the County addresses also advanced his view of HUD’s purported designs on Westchester’s local zoning. In his 2013 address, Mr. Astorino painted a dark picture of HUD’s “grand experiment”:

The federal government has a very different agenda and vision for Westchester. In fact, HUD calls us its—quote—“grand experiment.” Washington bureaucrats, who you will never see or meet, want the power to determine who will live where and how each neighborhood will look. What’s at stake is the fundamental right of our cities, towns, and villages to plan and zone for themselves.

Ex. 25 (2013 State of the County Address), at 21. Mr. Astorino added that HUD’s “demands are outrageous. HUD wants no restrictions—in any neighborhood—on height, size, acreage, density, number of bedrooms, and lack of water or sewers.” *Id.* at 22.

In the 2014 State of the County address, Mr. Astorino declared:

From HUD's point of view, the settlement was never about building affordable housing. ... [T]he goal is control over our local communities. Dismantle zoning regulations, and there are no longer any checks or balances on the agency's social engineering ambitions in Westchester, not on Long Island, or anywhere around the country. The Community Development Block Grants have been HUD's prime weapon. The strategy was simple. Withhold the money and wait for the county to capitulate on zoning.

Robert Astorino, 2014 State of the County Address, at 26–27, attached hereto as Ex. 45.

Rye is one of the 31 communities to which the Settlement applies. On May 1, 2013, Mr. Astorino made an appearance at a town hall meeting in Rye and spoke about the threat of “government housing” in every neighborhood:

If the Federal Government gets their way, what will happen? Because what they're demanding that I do is to sue the communities, including Rye. To sue, to force the abolishment of any restrictions in zoning codes, like height and density, and all that stuff; that in their view restricts people. If you live in a quarter acre piece of property on a single family house, like I do; without these restrictions, your neighbor goes to sell, the government or a developer can buy that, and can put whatever they want. And in the view of the Federal Government, every neighborhood should have the possibility or should have government housing in it.

Robert Astorino, Remarks at Rye *Ask Astorino* Town Hall, May 1, 2013, at 37:29–39:19, WC105136, transcript attached hereto as Ex. 46.

2. The Second Circuit Found that HUD Requested that the County Analyze Zoning, Not Dismantle It

Given the history of this matter, it was all but assured that some of the County's assertions would be evaluated in court even before this report. The Second Circuit

reviewed the County's assertions that HUD wished to dismantle local zoning and rejected them:

HUD did not at any point tell the County that its CPD funds would only be released if certain municipalities in the County *changed* their zoning laws. Instead, HUD required the County to assess and analyze *whether* certain zoning laws in the jurisdiction impeded fair housing and, if so, to identify a plan to overcome the effects of such impediments. . . . As HUD made clear in this letter, the basis for its rejection of the County's AI was not that the County's municipalities failed to *change* their zoning laws. It was that HUD determined—based on its own review of the laws and the data, as well as the monitor's reports—that the County's zoning *analysis* was flawed, inaccurate, and incomplete.

County of Westchester v. HUD, 802 F.3d 413, 433–34 (2d Cir. 2015) (emphasis in original).

In his deposition testimony, Mr. Astorino admitted that the Model Ordinance did not call for the dismantling of local zoning. *See* Astorino Dep. 278:21–279:2, June 24, 2015, attached hereto as Ex. 47; Ex. 40, Astorino Dep. 62:14–65:12, Sept. 15, 2015. He also admitted that he had never received any such request from HUD. Ex. 47, Astorino Dep. 228:18–229:2, June 24, 2015. He offered his opinion, nevertheless, that HUD wanted to dismantle local zoning. *See id.* at 226:20–229:25. That opinion has no basis in fact and, indeed, the Second Circuit rejected that assertion. *County of Westchester*, 802 F.3d at 433.

B. The Settlement's Housing Development Requirement: 750 Units

The Settlement requires the County to “ensure the development of at least seven hundred fifty (750) new affordable housing units.” *See* Settlement ¶ 7. This was an essential term of the Settlement and is interwoven into other provisions, such as the County's obligation to spend \$51.6 million to fund the development of the units and the annual housing development benchmarks. *See* Settlement ¶¶ 2, 3, 23. To ensure that the development target remained fixed, the parties stipulated that the 750-unit figure could be modified only upon the following conditions: (i) both parties consented to the modification; and (ii) the mutual consent for the modification was submitted in writing and approved by the Monitor and ordered by the Court. *See* Settlement ¶¶ 15(a), 15(a)(vi), 15(c), 15(d). No such request has ever been submitted.

This section of the report provides examples of statements by the County Executive in which he asserts, in various formulations, that “the County's target is really 10,768.” Ex. 25 (2013 State of the County Address), at 23. It also sets forth the sworn testimony of Mr. Astorino, Mr. Buroughs, and Ms. Drummond, in which each admits that the obligation to build 750 units remains unchanged. Separate from the plain terms of the Settlement, their testimony means that either all three County officials, under oath, provided false testimony, or that the statements to the public were false.

1. Throughout 2013, Mr. Astorino Accused HUD and the Monitor of Attempting to Require the County to Develop 10,768 Units

Since 2013, Mr. Astorino has repeatedly told the public that HUD and the Monitor want the County to build 10,768 affordable housing units, not 750. Examples of these statements follow:

In his 2013 State of the County address, Mr. Astorino warned Westchester residents that the “County’s target is really 10,768,” citing correspondence with HUD concerning the AI dispute to support his argument. Ex. 25 (2013 State of the County Address), at 22–23.

A month later, the County asserted that the Monitor had assigned “obligations” and “benchmark allocations” to the 31 eligible communities “that far exceed the terms of the Settlement.” See Ex. 38 (*Report Cards* Press Release).

In an op-ed published in *The Journal News*, Mr. Astorino defended his claim that HUD and the Monitor were seeking to force the County to build 10,768 units, stating that

Two years ago, the federal monitor assigned to the settlement began asking the county about the progress being made by all of Westchester’s 43 municipalities in meeting their individual allocations of the 10,768 units. When we pointed out that the study was never adopted by the county or made part of the settlement, HUD wrote in its March 13 letter this year: “The Department disagrees.”

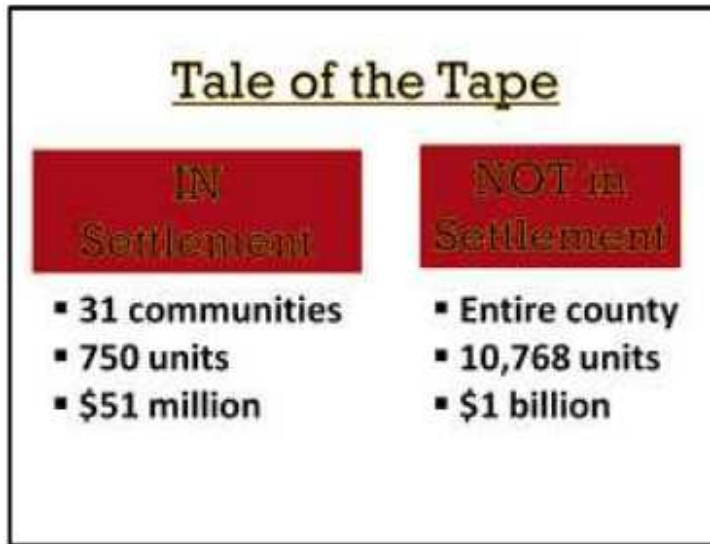
Ex. 33, *Astorino Contends Zoning Is Not Discrimination*, THE JOURNAL NEWS, May 12, 2013. Mr. Astorino repeated this claim in at least five town hall meetings. During a town hall meeting in North Castle on June 18, 2013, Mr. Astorino said this about HUD and the Monitor:

So they take this settlement, start expanding it, take a study from 2004, there's no bearing whatsoever on this, and now start to write letters to the Town Board and say, hey, where are you, by the way, on that 666 units you're supposed to be building? Excuse me? And that's their response. They're under no obligation to [build 10,768 units]. But the federal government is saying, well, wait a minute. That's what you're supposed to be doing and your zoning, by the way, must be exclusionary if you're not building this.

Robert Astorino, Remarks at North Castle *Ask Astorino* Town Hall, June 18, 2013, at 35:39–37:36, WC105129, transcript attached hereto as Ex. 48.¹³

PowerPoint slides prepared for and shown during Mr. Astorino's "Ask Astorino" town hall events contain a side-by-side comparison of the Settlement's affordable housing requirements and the "new target" that HUD and the Monitor purportedly were imposing on the County. *See* Slide Show, WC00001706, at Slides 13, 69, attached hereto as Ex. 31.

¹³ Mr. Astorino made similar remarks at the following town halls: Yonkers (June 24, 2013) WC105138, at 00:59:48 – 1:04:53, transcript attached hereto as Ex. 49; Greenburgh (May 16, 2013), WC105130, at 38:40–39:42, transcript attached hereto as Ex. 50; Ex. 46, Rye (May 1, 2013), WC105136, at 37:29–39:19; Yorktown, WC105139, at 01:45–09:04, transcript attached hereto as Ex. 51.



Mr. Astorino also used a PowerPoint presentation during a June 12, 2013 press conference in which he claimed that HUD and the Monitor were assigning new benchmark allocations for the development of affordable housing units. *See* Email / Slide Show, WC00002948, 2949, at Slide 5, attached hereto as Ex. 53.



At no time did Mr. Astorino inform the public of this material fact: the housing targets could not be changed without the County’s consent and a court order. In fact, during his deposition, Mr. Astorino testified that he could not recall the Court being petitioned to change the housing targets. *See* Ex. 47, Astorino Dep. 217:23–218:10, June 24, 2015. Nor did he inform the public that Ms. Drummond had used the Affordable Housing Allocation Plan in her communications with municipalities. *Id.* at 195:12–198:17.

2. Under Oath, County Witnesses Concede that the Settlement Requires the County to Develop at Least 750 Units of Affordable Housing

Once placed under oath, Mr. Astorino and other County officials conceded that the Settlement has always required the County to develop at least 750 units and that this requirement has never been changed. *See, e.g.*, Drummond Dep. at 89:5–13, attached

hereto as Ex. 54; Buroughs Dep. at 62:23–64:3, attached hereto as Ex. 55; Ex. 47, Astorino Dep. 217:10–219:5, June 24, 2015.

The Monitor was able to identify just one circumstance in which Mr. Astorino accurately informed the public about the Settlement’s 750-unit requirement. In an “Ask Astorino” town hall-style event in North Castle on June 18, 2013, after Mr. Astorino claimed that HUD and the Monitor were seeking to impose on Westchester an obligation to develop 10,768 units, a resident engaged in the following discussion with the County Executive:

Resident: “It seems like one of the main issues that was brought up tonight is the number of housing units. Where is that now in the system of the federal courts?”

Mr. Astorino: “That’s not in the courts at all at this point. If for some reason the Federal Government or the Monitor starts issuing opinions that we are under an obligation to do that and more, and I as County Executive need to sue our communities, to overturn zoning, or those restrictions, we’ll be back in court real quick.”

Robert Astorino, Remarks at North Castle *Ask Astorino* Town Hall, June 18, 2013, at 1:07:35–1:08:16, WC105129, attached hereto as Ex. 56.

Under oath, Mr. Astorino conceded that the County “didn’t go to the Court on the issue of 10,768 units.” Ex. 47, Astorino Dep. 336:25–337:8, June 24, 2015. Ms. Drummond testified that she had no knowledge of HUD or the Monitor applying to the Court to change the amount of units the County had to develop. Ex. 54, Drummond Dep. 58:22–59:8. Mr. Buroughs testified that the County was under an obligation to ensure the development of 750 units of affordable housing, that the County’s obligation had always

been 750 units, that neither HUD nor the Monitor had ever attempted to modify the 750-unit requirement, and that the Court had never entered an order changing the 750-unit requirement. Ex. 55, Buroughs Dep. 62:12–64:3.

In separate correspondence over the course of two weeks, both HUD and the Monitor pointed out the County's error in its interpretation of the obligation. *See* Ex. 36, Letter from Maurice A. Jones to Kenneth W. Jenkins, May 31, 2013; Ex. 1, Letter from James E. Johnson to Robert P. Astorino, at 5, June 12, 2013. Notwithstanding these letters confirming the straightforward terms of the Settlement, the County continued to misinform the public that the new obligation was 10,768 units knowing full well that neither HUD nor the Monitor had begun the process for a modification. For the Court to conclude that this was anything other than a willful misrepresentation, the Court would have to conclude that the County misunderstood the procedural protections within the Settlement itself, misunderstood letters from the Monitor and HUD, and that three County officials testified untruthfully.

C. The Public Should Have Been Informed that the Settlement's Price Tag Is \$51.6 Million

Upon signing the Settlement, the County assumed the obligation to spend \$51.6 million to ensure the development of at least 750 affordable housing units. *See* Settlement ¶¶ 3, 23.

1. The County Incorrectly Informed the Public that It Could Be Required to Spend \$1 Billion to Fund the Settlement

Despite that unambiguous requirement, Mr. Astorino has made public assertions that place the Settlement's price tag as high as \$1 billion. In a 2011 television interview with Richard French, Mr. Astorino claimed that "the federal government is trying to . . . make the agreement go from \$51 million to \$100 million" and is "trying to force the County to do things that are not in the Settlement." Interview by RNN's Richard French with Robert P. Astorino, September 23, 2011, at 06:14–07:51, transcript attached hereto as Ex. 57.

Later, his estimate increased tenfold. In Mr. Astorino's 2013 State of the County address, he said the following: "Put a dollar figure on building 10,768 units and the cost is between 700 million and \$1 billion." Ex. 25 (2013 State of the County Address), at 23.

Mr. Buroughs was responsible for calculating the \$1 billion figure, *see* Ex. 55, Buroughs Dep. 74:5–75:20, but was not able to produce any document to support that calculation. Mr. Buroughs explained that "[i]f there were such a document, it wouldn't have been found" because Mr. Buroughs would not have kept his notes reflecting the calculation. *Id.*

The Settlement requires the County to spend \$51.6 million to develop at least 750 affordable housing units. *See* Settlement ¶¶ 3, 7. Ms. Drummond acknowledged that fact in her deposition. *See* Ex. 54, Drummond Dep. 89:14–19. Even Mr. Burroughs, though he calculated the \$1 billion estimate, understood that no more than 750 units were

required to be built. *See* Ex. 55, Buroughs Dep. 62:12–64:3. In essence, the \$1 billion price tag was a fiction based on applying simple arithmetic to a complete fabrication.

D. The County Executive Should Have Informed the Public that the Settlement Does Not Require the Construction of High-Rises

1. Mr. Astorino Has Stated that HUD Wants High-Rises in Every Community.

There are no provisions in the Settlement related to building height. Indeed, there are no provisions in the Settlement that call for the County to build anything at any height. Writing in *The Wall Street Journal*, Mr. Astorino stated that “[a]partments, high-rises or whatever else the federal government or a developer wants can be built on any block in America,” if HUD gets to control local zoning. Ex. 42, Robert P. Astorino, *Washington’s ‘Fair Housing’ Assault on Local Zoning*, THE WALL STREET JOURNAL, Sept. 6, 2013. In an op-ed in *The Journal News*, Mr. Astorino warned of high-rise buildings right next door:

If HUD is allowed to destroy local zoning, there will be no rules for what gets built on any street—not only in Westchester but across the United States. No rules for HUD means no rules for any developer. The notion of working hard to buy a home with a backyard and swingset only to wake up one day and have a high-rise next door is an American dream recognizable only to HUD.

Ex. 33, *Astorino Contends Zoning Is Not Discrimination*, THE JOURNAL NEWS, May 12, 2013. Mr. Astorino stated in his 2013 State of the County address that, if HUD got its way and abolished “even basic zoning protections[,] . . . the neighborhood you live in today could change over time—and there is nothing you can do to stop it. A five-story

building—or higher—could be put on your street.” Ex. 25 (2013 State of the County Address), at 22.

Mr. Astorino repeated the essence of these statements at “Ask Astorino” events held in municipalities across the County. For example, in North Castle, Mr. Astorino warned of the real-world consequences of HUD’s purported vision for Westchester:

So what is at stake? If your neighbor decides to sell his or her home, if there are no restrictions in zoning codes in your neighborhood on any of that stuff on height and density, whatever, then what will go next to you is a question mark. It can be either a multi-family house, a development if they can squeeze it on the property, whatever it is. It could be an apartment, maybe a retail.

Robert Astorino, Remarks at North Castle *Ask Astorino* Town Hall, June 18, 2013 at 33:45–34:30, WC105129, attached hereto as Ex. 58. Addressing residents of New Rochelle, Astorino said:

Pick any neighborhood, put in any street you want in New Rochelle, because this is how it will affect you. Because if these limitations, restrictions come out of zoning codes, then it does come out of New Rochelle’s zoning code as well. So you take a quarter acre piece of property. Your neighbor goes to sell. Any government, Federal Government, State, New Rochelle could, the County could one day, or a developer, anybody, can come and purchase that piece of property. Now, if there’s nothing that restricts height, or density, or acreage, or number of bedrooms, then whatever can go on that piece of property can be—can fit on that property, will go on that property. Whether it’s a five-story apartment building, whether it’s a multi-family house, whatever. That is what the goal of the Federal Government is.

Robert Astorino, Remarks at New Rochelle *Ask Astorino* Town Hall, Sept. 30, 2013, at 36:24–38:48, WC105133, transcript attached hereto as Ex. 59. Notably, New Rochelle was not subject to the Settlement at all.

In a May 15, 2013 email to a communications aide, Mr. Astorino recommended changes to a draft op-ed for submission to *Daily Voice* and explained his reasoning for including the image of the high-rise.

One change: A high rise can be built on any street, even right next door to you. (*We always need to personalize. The abstract takes the emotion out and gives people the false sense that it will be built somewhere else, and not next to them*).

Email from Robert Astorino to Britta Vander Litten, May 15, 2013, WC00003274, attached hereto as Ex. 60 (emphasis added). Under oath, when presented with this email, Mr. Astorino explained: “I want an emotional response, whatever that may be, because an emotional response gets people active to understand an issue and even to participate. If it’s abstract, then it doesn’t mean anything to them, it’s not personal to them, they don’t take an interest in it.” Ex. 47, Astorino Dep. 270:14–271:6, June 24, 2015.

2. The Settlement Does Not Require High-Rise Affordable Housing Developments

Nowhere does the Settlement require affordable housing developments to be a certain height; nor does the Settlement abolish height restrictions in zoning codes. The Model Ordinance adopted by the County also does not mandate that affordable housing be of a certain height. *See generally* Ex. 43 (Model Ordinance). To the Monitor’s

knowledge, none of the developments built so far pursuant to the Settlement are taller than four stories.

In his deposition testimony, Mr. Astorino was asked if HUD had “proposed buildings higher than five-story buildings during the course of this Settlement?”

Mr. Astorino responded: “To my knowledge, no.” Ex. 47, Astorino Dep. 230:4–19, June 24, 2015. In her deposition testimony, Ms. Drummond testified that HUD has never proposed to build any high-rise developments in Westchester. *See* Ex. 54, Drummond Dep. 88:24–89:4.

E. The County Executive Should Have Acknowledged Reports of Housing Discrimination in Westchester

The Settlement imposes a duty on the County to create and fund public outreach campaigns specifically addressing the benefits of racially and ethnically integrated communities. *See* Settlement ¶ 33(c). Early in his tenure, Mr. Astorino appeared to embrace that goal by both acknowledging the existence of housing discrimination and committing his administration to combatting it. Within less than a year, however, his tone changed dramatically. Rather than supporting the need for remedial steps, including those set forth in the Settlement, he denied that housing discrimination existed.

This section of the report contrasts Mr. Astorino’s public posture of denying housing discrimination with his sworn testimony about evidence of housing discrimination being brought to his attention. It also provides examples where Mr. Astorino said he had asked for federal assistance in identifying housing discrimination and his own testimony where he admitted that such requests were never made.

1. The Westchester Residential Opportunities Report

On January 26, 2011, Mr. Astorino hosted Geoffrey Anderson of Westchester Residential Opportunities, Inc. (“WRO”)¹⁴ at a press conference to announce the release of a WRO report on housing discrimination. The report was the result of an 18-month review in which Black, Hispanic, and white testers went to real estate agents seeking rental apartments in Westchester and other parts of the lower Hudson Valley. *See* WESTCHESTER RESIDENTIAL OPPORTUNITIES, WRO FAIR HOUSING TESTING REPORT: EQUAL HOUSING IN THE LOWER HUDSON VALLEY?, 3–4 (January 2011), attached hereto as Ex. 61. The WRO found strong evidence of discriminatory intent. *Id.* at 17–18. African-American testers were shown fewer rental units than their white counterparts, were “steered” to predominantly minority neighborhoods, and often had to make more phone calls to schedule appointments than did control testers. *Id.* Mr. Astorino subsequently issued a press release in which he said “the report concludes discrimination still exists.” Press Release, Westchester County Executive, *Housing Bias Report: County Has Made Significant Improvement*, Jan. 26, 2011, attached hereto as Ex. 62.

2. The County Executive and Efforts to Uncover Discrimination

Barely eight months after the WRO report was issued, in an appearance on “Hannity,” the nightly Fox News Channel program, Mr. Astorino had the following discussion:

¹⁴ WRO is a non-profit organization that promotes equal and affordable housing opportunities in Westchester.

Sean Hannity: “Has any African-American, has any Hispanic-American been denied access to your housing?”

Mr. Astorino: “Not that I know of, but look, does racism, discrimination exist in this world? Of course it does. But they are saying Westchester is segregated, has been segregated and continues to be. The facts don’t bear that out.”

Interview by Fox News’ Sean Hannity with Robert P. Astorino, Sept. 7, 2011, at 3:21–7:15, transcript attached hereto as Ex. 63.¹⁵

Despite the findings of the WRO report, Mr. Astorino has trumpeted Westchester’s lack of housing discrimination in his town hall-style events across the County. At one such event in North Castle, Mr. Astorino asserted that discrimination is not “perpetuated by communities.” Robert Astorino, Remarks at North Castle *Ask Astorino* Town Hall, June 18, 2003, 29:18–30:10, WC105129, attached hereto as Ex. 66.

Mr. Astorino also discussed his efforts to find evidence of discrimination and segregation. Speaking in Yonkers, Mr. Astorino said he had appealed to the federal government for help in finding discrimination and segregation in the County, claiming that the County could find none.

¹⁵ Mr. Astorino’s statements also are inconsistent with the Monitor’s *Berenson* and *Huntington* reports, which found evidence of exclusionary zoning in multiple municipalities. See *Berenson* Report, Sept. 13, 2013 (ECF No. 452) (finding that seven municipalities had zoning ordinances that limited affordable housing or made the development of affordable housing practically infeasible); Monitor’s *Huntington* Analysis of Westchester County Municipal Zoning (“*Huntington* Report”), Sept. 8, 2014, attached hereto as Ex. 64 (identifying six municipalities that had evidence of a prima facie violation of the federal *Huntington* standard). Rather than work with the Monitor and the municipalities to address the findings of the two reports, the County issued a press release opposing the findings. See Press Release, *Astorino Stands by Local Communities*, Sept. 30, 2014, attached hereto as Ex. 65.

And if they or others think that the County is discriminatory, then they need to let us know where so we can go after it. Because I've said that to the Federal Government a hundred times—you tell us where it is, and we will look at it and we'll go after it. You tell us. And they have no answer other than, "We know it's there," and . . . they don't accept the conclusions that we've reached. So they want us to rewrite the facts, and I won't do that.

Robert Astorino, Remarks at Yonkers *Ask Astorino* Town Hall, at 40:21–42:06, WC105138, attached hereto as Ex. 67. Mr. Astorino admitted in deposition that, "A hundred times might have been an exaggeration," and he was unable to identify a single federal government official whom he had asked to help the County identify housing discrimination and segregation. *See* Ex. 40, Astorino Dep. 93:5–108:10, Sept. 15, 2015.

III. The County Has Not Created and Funded an Effective Public Outreach Campaign

The testimony of Mr. Astorino, Ms. Drummond, and Mr. McCormack makes clear that the County had not, until recently, launched what they described as a public outreach campaign in compliance with Paragraph 33(c). In his first deposition, Mr. Astorino, in fact, could not recall any such campaign ever being launched, *see* Ex. 47, Astorino Dep. 72:6–74:13, 80:9–22, 92:22–93:24, 107:23–109:21, June 24, 2015, but assumed that a campaign would be implemented because he had not heard otherwise: "If they have not specifically come to me for that, then I expect the job is getting done." *Id.* at 79:15–17. Ms. Drummond testified in June 2015 and also could not recall the creation of an effective public outreach campaign. Ex. 54, Drummond Dep. 44:9–45:18.

In June 2015, the Monitor requested information to assess the County's compliance both with Paragraph 33(c), which requires the creation and funding of a

public outreach campaign, and Paragraph 33(h), which requires the expenditure of at least \$400,000 towards the various Paragraph 33 obligations.¹⁶ Documents produced by the County purportedly show that the County has spent more than the minimum amount required by Paragraph 33(h) to “pay for consultants and public education, outreach, and advertising to AFFH, as described in this paragraph.” Whatever product was received for these payments, it was not until September 2015 that the County’s quarterly reports first note anything like a public education campaign required by Paragraph 33(c). Various efforts to develop or launch such a campaign were summarized in Section I.C. and are evaluated for their compliance with Paragraph 33(c) below.

A. Fair Housing Poster Campaign

As discussed in Section I.C., in 2012, the County initiated a fair housing poster campaign designed to raise awareness of avenues to redress housing discrimination and advertise the rights of all persons to fair housing. These posters fall squarely under Paragraph 33(b), not Paragraph 33(c). None of the posters reviewed by the Monitor

¹⁶ On June 2, 2015, the Monitor requested information about the County’s expenditures under Paragraph 33(h) and the County produced responsive materials on July 20, 2015. *See* Letter from James E. Johnson to Robert P. Astorino and Robert F. Meehan, June 2, 2015, attached hereto as Ex. 68; Letter from Kevin J. Plunkett to James E. Johnson, July 20, 2015, attached hereto as Ex. 69. On June 10, 2015, the Monitor requested information about the County’s engagement of consultants to create and fund public outreach campaigns, and the County produced responsive materials on June 17, 2015. *See* Letter from James E. Johnson to Robert F. Meehan, June 10, 2015, attached hereto as Ex. 70; Letter from Adam Rodriguez to James E. Johnson, June 17, 2015, attached hereto as Ex. 71.

address “the benefits of mixed-income housing and racially and ethnically integrated communities.” In any event, the campaign effort was effectively discontinued.

The County’s own poster campaign, which was abandoned after a focus group gave it negative reviews, appears to have been an attempt at an affirmative marketing campaign under Paragraph 33(e) as opposed to one meant to educate the public about the benefits of mixed-income housing and integrated communities—Ms. Drummond testified that the materials “could have potentially been used for marketing” and “for other purposes.” Ex. 54, Drummond Dep. 37:24–40:6.

B. Fair Housing Training Sessions

Summaries of the training sessions scheduled by the County provide no indication that they meet Paragraph 33(c)’s requirements for a public outreach campaign. At one such training session at the Yonkers Hispanic Community Fair, for example, the HRC “answer[ed] questions about Commission activities and Immigration/National origin issues.” *See* Ex. 16 (2015 3Q Quarterly Report), at 16.

Notably, most of the training sessions in 2015 were held in four ineligible Westchester municipalities—Mount Vernon, New Rochelle, White Plains, and Yonkers—rather than the communities covered by the Settlement. *See* Westchester County Fair and Affordable Housing Plan 2015 1Q Quarterly Report, attached hereto as Ex. 72, at 13; Westchester County Fair and Affordable Housing Plan 2015 2Q Quarterly Report, attached hereto as Ex. 73, at 13; Ex. 16 (2015 3Q Quarterly Report), at 16; Ex. 17 (2015 4Q Quarterly Report), at 13. That is inconsistent with the County’s obligation to

“create and fund campaigns to broaden support for fair housing and to promote the fair and equitable distribution of affordable housing *in all communities*.” Settlement ¶ 33(c) (emphasis added). An effective public outreach campaign should be designed to reach all of Westchester, with a particular focus on eligible communities.

C. One Community Campaign

According to the County’s quarterly reports, the “One Community Campaign” commenced sometime in the fall of 2015. It would stand to reason that Ms. Drummond could recall no campaign because she testified months before it was initiated. What the County now calls a campaign consists of two things: a letter from Mr. Astorino and a page on its website. It compares poorly with the Safer Communities and Westchester Smart campaigns launched by the County in 2013 and 2015, respectively. Those campaigns featured the following:

- multiple public events;
- events with County commissioners and other leaders;
- multiple press releases highlighting the County message; and
- appearances by visitors either distinguished by virtue of their positions or sufficiently well-known to attract public notice.

The effort named the “One Community Campaign” has none of these features.

Indeed, the effort that most resembles the foregoing campaigns is the effort to persuade the public to believe the following false assertions: that HUD wanted to tear up local zoning; and that HUD and the Monitor were imposing a duty to build more than

10,000 new housing units and levy a cost of \$1 billion on the County. This effort included attention-grabbing rhetoric like the false assertion that HUD was intending to build five-story apartment buildings in residential neighborhoods and that the County Executive was not only personally unaware of housing discrimination but could get no help from HUD in finding it. These messages were, like the campaigns above, the subject of staged events, press availabilities, and op-eds. This effort, when compared to the webpage and accompanying letter from the County Executive, is the equivalent of the veto of the Source of Income legislation following a letter purporting to promote it.

Viewed in the context of the County's other conduct, the One Community Campaign falls far short of Paragraph 33(c)'s call for an affirmative campaign that "broaden[s] support" for fair housing.

IV. Recommended Remedies

Paragraph 39 authorizes the Monitor to recommend steps or activities to improve the County's performance of its duties under the Settlement. This report has shown that Mr. Astorino and his top officials failed to create and fund a public education campaign and, instead, launched a misinformation campaign that "detracts from, rather than furthers, the end goal" of compliance with the County's Paragraph 33(c) obligation.¹⁷ *Westchester Cty.*, 712 F.3d at 769. In order to appropriately remedy the damage Mr. Astorino has done to the public's understanding of the Settlement and its failure to

¹⁷ Consistent with Paragraph 40, the Monitor had a conference call with representatives of the County and the Government on March 14, 2016 to discuss the compliance issues and recommendations for corrective action addressed in the report.

establish a public education campaign consistent with Paragraph 33(c), the Monitor recommends that the Court and County take steps to ensure that the public is accurately informed about the terms of the Settlement and that the public receives an education campaign that honors the letter and spirit of Paragraph 33(c). Those steps include:

(a) a Court declaration reemphasizing the essential terms of the Settlement and issuing findings making clear that none of the terms have been changed and the County's statements analyzed in Section II of this report are false;

(b) distribution by the County, voluntarily or by order, of the declaration and findings described above to the leadership of all of the eligible communities;

(c) posting the declaration and findings described above prominently on the County website and the removal of press releases inconsistent with the declaration and findings;

(d) unsealing the videotapes of the depositions of, at the least, the County Executive, the Commissioner of Planning, and the Director of Communications, inasmuch as each made or reviewed unsupported public statements that were inconsistent with both the terms of the Settlement and their own sworn testimony; and

(e) hiring, within 30 days of the issuance of this report, a public communications consultant that will craft a message and implement a strategy sufficiently robust to provide information broadly to the public that describes the benefits of integration, as required by Paragraph 33(c). Within 30 days of the hiring of a public communications consultant, the County should submit a plan for a public education campaign to the Monitor for approval. In the absence of a satisfactory plan, the Monitor should be

empowered to designate a public communications consultant to develop a plan. Pursuant to Paragraph 17(b) of the Settlement, the Monitor will seek an order requiring the County to pay additional costs incurred in overseeing the development and implementation of the public education campaign.

Dated: March 17, 2016
New York, New York

Respectfully submitted,

/s/ James E. Johnson
James E. Johnson
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
(jejohnson@debevoise.com)
Monitor

Appendix A: Comparison of Consent Decree, County Public Statements, and Deposition Testimony

<u>Report Section</u>	<u>Consent Decree Provision</u>	<u>Public Statements</u>	<u>Deposition Testimony</u>
Section II.B.	<p>“The County shall, within seven (7) years of the entry of this Stipulation and Order, ensure the development of at least seven hundred fifty (750) new affordable housing units.” Settlement ¶ 7.</p> <p>“For one hundred eighty (180) calendar days following each such [biennial] assessment, the Monitor shall have the authority, after having first secured the written consent of the Government and the County, to modify or refine the number of Affordable AFFH Units described in paragraph 7, provided that: (A) such modification or refinement occurs no earlier than four years following the entry of the Stipulation and Order, and no earlier than two years after the Monitor has first modified or refined the final time frames in which the Affordable AFFH Units must be developed; and (B) the County has provided compelling evidence and the Monitor finds that the County has</p>	<p>Astorino told Westchester residents that HUD’s correspondence with the County indicated the “County’s target is really 10,768.” Robert P. Astorino, 2013 State of the County Address to the People of Westchester, at 23, Apr. 23, 2013.</p> <p>Astorino accused the Monitor of “assigning ‘obligations’ and ‘benchmark allocations’ to the 31 eligible communities...that far exceed the terms of the Settlement.” Press Release, Westchester County Executive, <i>Federal Monitor’s Report Cards Expand Scope of Housing Settlement</i>, June 11, 2013.</p> <p>In an op-ed, Astorino wrote, “Two years ago, the federal monitor assigned to the settlement began asking the county about the progress being made by all of Westchester’s 43 municipalities in meeting their individual allocations of the 10,768 units. When we pointed out that the</p>	<p>Drummond said that the “Consent Decree states at least 750 [AFFH units].” Drummond Dep. 89:5–89:10, June 3, 2015.</p> <p>Asked if the “County’s obligation remains 750,” Buroughs replied, “Yes.” When asked if the number has “ever been changed since the County entered the settlement of 2009,” Buroughs testified, “Not to my knowledge.” When asked if “the Court [has] ever entered an order changing that number,” Buroughs testified “Not to my knowledge.” When asked if HUD ever “filed an application with the Court to change that number,” Buroughs testified, “Not to my knowledge.” Buroughs Dep. 62:23–64:3, May 22, 2015.</p> <p>Astorino was asked about the meaning of the phrase “at least” in the following language from Paragraph 7: “The County shall, within seven (7) years of the entry of this Stipulation and Order, ensure the development of at least seven hundred fifty (750) new affordable housing units.” Astorino replied, “A minimum of 750.” Asked about whether the Monitor</p>

<u>Report Section</u>	<u>Consent Decree Provision</u>	<u>Public Statements</u>	<u>Deposition Testimony</u>
	<p>taken all appropriate actions to meet the obligations set forth in paragraph 7, further extension of the time frames will not be sufficient to permit the possible satisfaction of the County’s obligations, and specific factors beyond the County’s influence or control exist that preclude the County’s satisfaction of its obligations.” Settlement ¶ 15(a)(vi).</p> <p>“The Monitor shall provide the Government and the County written notification of any proposed modifications or refinements, upon recommendation of either the Government or the County or in the Monitor’s discretion, and all decisions concerning those proposed modifications or refinements.” Settlement ¶ 15(c).</p> <p>“In the event that the Government and the County provide the requisite consent, modifications or refinements approved by the Monitor shall be submitted to the Court to be so-</p>	<p>study was never adopted by the county or made part of the settlement, HUD wrote in its March 13 letter this year: ‘The Department disagrees.’” Robert P. Astorino, <i>Astorino contends zoning is not discrimination</i>, THE JOURNAL NEWS, May 12, 2013.</p> <p>At a town hall, Astorino stated, “So they take this settlement, start expanding it, take a study from 2004, there’s no bearing whatsoever on this, and now start to write letters to the Town Board and say, hey, where are you, by the way, on that 666 units you’re supposed to be building? Excuse me? And that’s their response. They’re under no obligation to [build 10,768 units]. But the federal government is saying, well, wait a minute. That’s what you’re supposed to be doing and your zoning, by the way, must be exclusionary if you’re not building this.” Robert Astorino, Remarks at North Castle “Ask Astorino” Meeting, June 18, 2013, at 35:39–</p>	<p>ever “petitioned the Court to change the [Settlement],” Astorino replied, “I don’t recall, but that would be an issue that the County Law Department would deal with.” When asked whether he was “aware of the Judge entering any order changing this agreement,” Astorino replied, “I’m not aware, no. Again, that would be an issue for the Legal Department.” Astorino Dep. 217:10–219:5, June 24, 2015.</p> <p>Astorino was asked about the fact that the Monitor’s cover letter to the draft zoning reports, dated March 31, 2013, stated that the letter “forwards proposed factual findings.” Specifically, the Monitor asked Astorino, “Although the word ‘proposed’ appears in this document, you don’t believe that they were proposed findings, correct?” Astorino replied, “I absolutely do not believe they were proposed. They were findings. They did not say draft, and when the numbers were introduced and the references to the communities of how they were measuring up against those allotments from 2004 and ‘5 were put in there, that created a new standard.” Astorino Dep. 73:9–74:11, Sept. 15, 2015.</p>

<u>Report Section</u>	<u>Consent Decree Provision</u>	<u>Public Statements</u>	<u>Deposition Testimony</u>
	ordered and incorporated into this Stipulation and Order.” Settlement ¶ 15(d).	37:36, WC105129.	
Section II.C.	The Settlement requires the County to spend \$51.6 million to develop at least 750 Affordable AFFH units. <i>See</i> Settlement ¶ 3.	<p>Astorino claimed that “the federal government is trying to . . . make the agreement go from \$51 million to \$100 million” and is “trying to force the County to do things that are not in the Settlement.” Interview by RNN’s Richard French with Robert P. Astorino, Sept. 23, 2011, at 06:14–07:51.</p> <p>Astorino said, “Put a dollar figure on building 10,768 units and the cost is between 700 million and \$1 billion.” Robert P. Astorino, 2013 State of the County Address to the People of Westchester, at 23, April 23, 2013.</p>	Asked whether she was “aware of any requirement put in place by HUD that the County spend \$1 billion on developing affordable housing,” Drummond replied, “A requirement by HUD to spend one billion? No.” Drummond Dep. 89:14–19, June 3, 2015.
Section II.A, D	“The County shall complete, within one hundred twenty (120) calendar days of the entry of this Stipulation and Order, an [Analysis of Impediments] within its jurisdiction that complies with the guidance in HUD’s Fair Housing Planning Guide.	Astorino said HUD “is demanding that we dismantle local zoning, sue our municipalities and bankrupt our taxpayers.” Transcript of Press Conference, at 4, July 15, 2011 (ECF No 391-11).	When asked if he was “aware of any such letters by HUD, by the way, to make a request to abolish zoning, as you said here,” Astorino said, “Well, as I—well, the answer to that is none that I recall.” Astorino Dep. 298:9–298:14, June 24, 2015.

<u>Report Section</u>	<u>Consent Decree Provision</u>	<u>Public Statements</u>	<u>Deposition Testimony</u>
	<p>The AI must be deemed acceptable by HUD.” Settlement ¶ 32 (internal citations omitted).</p> <p>“To facilitate the development of Affordable AFFH units, the County shall include in the implementation plan: a ‘model ordinance’ that the County will promote to municipalities to advance fair housing.” Settlement ¶ 25(a).</p> <p>“It is appropriate for the County to take legal action to compel compliance if municipalities hinder or impede the County in its performance of [its duties under the Settlement].” Settlement at 2.</p> <p>The County also agreed in the Settlement to “initiate... legal action as appropriate to accomplish the purpose of this Stipulation and Order to AFFH,” Settlement ¶ 7(j), and to include in its Analysis of Impediments the “appropriate actions the County will take to address and overcome the effects of”</p>	<p>Astorino asserted that HUD was “trying to use the settlement as a hammer to dismantle local zoning” Robert P. Astorino, <i>HUD’s warped war on Westchester</i>, NEW YORK DAILY NEWS, Nov. 30, 2011.</p> <p>Astorino claimed that HUD “wants to control local zoning and remake communities.” Robert P. Astorino, <i>Washington’s ‘Fair Housing’ Assault on Local Zoning</i>, THE WALL STREET JOURNAL, Sept. 6, 2013.</p> <p>Astorino said, “If HUD is allowed to destroy local zoning, there will be no rules for what gets built on any street—not only in Westchester but across the United States. No rules for HUD means no rules for any developer. The notion of working hard to buy a home with a backyard and swingset only to wake up one day and have a high-rise next door is an American dream recognizable only to HUD.” Robert P. Astorino, <i>Astorino contends zoning is not</i></p>	<p>When asked if he saw “anything in this language [the language of the Westchester County Fair and Affordable Housing Implementation Plan] that suggests that the model ordinance is to replace existing municipal zoning,” Astorino replied, “Not necessarily to replace, although it could if the community chose to do that or was recommended to do that.” Astorino Dep. 65:5–65:11, Sept. 15, 2015.</p> <p>When asked if he ever “received a letter from HUD indicating that every neighborhood should have the possibility or should have government housing in it,” Astorino said, “A specific letter, no, but I think that is what they’re trying to accomplish, is that it could have in any zone—and when I say government housing, I mean housing that has government dollars attached to it, which could be county or local or federal dollars attached to it, the ability in these zones to have that.” Astorino Dep. 91:10–91:22, Sept. 15, 2015.</p> <p>When asked if he knew “whether or not the model zoning ordinance calls for the county to dismantle local zoning,” Astorino said, “No I don’t think it does.” Astorino Dep. 278:21–</p>

<u>Report Section</u>	<u>Consent Decree Provision</u>	<u>Public Statements</u>	<u>Deposition Testimony</u>
	<p>impediments to fair housing, Settlement ¶ 32(b)(ii).</p>	<p><i>discrimination</i>, THE JOURNAL NEWS, May 12, 2013.</p> <p>Astorino said, “The federal government has a very different agenda and vision for Westchester. In fact, HUD calls us its – quote – ‘grand experiment.’ Washington bureaucrats, who you will never see or meet, want the power to determine who will live where and how each neighborhood will look. What’s at stake is the fundamental right of our cities, towns, and villages to plan and zone for themselves.” Robert P. Astorino, 2013 State of the County Address to the People of Westchester, at 21, April 23, 2013.</p> <p>Astorino said, “From HUD’s point of view, the settlement was never about building affordable housing. ... [T]he goal is control over our local communities. Dismantle zoning regulations, and there are no longer any checks or balances on the agency’s social engineering ambitions in Westchester, not on</p>	<p>279:2, June 24, 2015.</p> <p>When asked if she was “aware of any proposal by HUD to put in place a five-story building,” Ms. Drummond answered, “No, not to my knowledge.” Drummond Dep. 88:24–89:4, June 3, 2015.</p>

<u>Report Section</u>	<u>Consent Decree Provision</u>	<u>Public Statements</u>	<u>Deposition Testimony</u>
		<p>Long Island, or anywhere around the country. The Community Development Block Grants have been HUD’s prime weapon. The strategy was simple. Withhold the money and wait for the county to capitulate on zoning.” Robert P. Astorino, 2014 State of the County Address, at 26–27, May 1, 2014.</p> <p>Astorino said, “If the Federal Government gets their way, what will happen? Because what they’re demanding that I do is to sue the communities, including Rye. To sue, to force the abolishment of any restrictions in zoning codes, like height and density, and all that stuff; that in their view restricts people. If you live in a quarter acre piece of property on a single family house, like I do; without these restrictions, your neighbor goes to sell, the government or a developer can buy that, and can put whatever they want. And in the view of the Federal Government, every neighborhood should have the possibility or should</p>	

<u>Report Section</u>	<u>Consent Decree Provision</u>	<u>Public Statements</u>	<u>Deposition Testimony</u>
		<p>have government housing in it.” Robert Astorino, Remarks at Rye “Ask Astorino” Meeting, May 1, 2013, at 00:37:29–00:39:19, WC105136.</p> <p>Astorino said, if HUD got its way and abolished “even basic zoning protections[,] . . . the neighborhood you live in today could change over time—and there is nothing you can do to stop it. A five-story building—or higher—could be put on your street.” Robert P. Astorino, 2013 State of the County Address to the People of Westchester, at 22, April 23, 2013.</p>	
Section II.E.	The Settlement imposes a duty on the County to “create and fund campaigns to broaden support for fair housing and to promote the fair and equitable distribution of affordable housing in all communities, including public outreach specifically addressing the benefits of mixed-income housing and racially and ethnically integrated communities.”	<p>Sean Hannity: “Has any African-American, has any Hispanic-American been denied access to your housing?”</p> <p>Mr. Astorino: “Not that I know of, but look, does racism, discrimination exist in this world? Of course it does. But they are saying Westchester is segregated, has been segregated and</p>	The Monitor questioned Astorino about whether he asked the federal government “a hundred times” about discrimination in Westchester. Astorino said, “A hundred times might have been an exaggeration, but clearly what I meant, because I’ve repeated it probably a hundred times in public, is that we have a legitimate disagreement with the Federal Government on this issue, and we have examined this issue many, many times,

<u>Report Section</u>	<u>Consent Decree Provision</u>	<u>Public Statements</u>	<u>Deposition Testimony</u>
	Settlement ¶ 33(c).	<p>continues to be. The facts don't bear that out."</p> <p>Interview by Fox News' Sean Hannity with Robert P. Astorino, Sept. 7, 2011, at 6:19–6:48.</p> <p>Astorino said, "And if they or others think that the County is discriminatory, then they need to let us know where so we can go after it. Because I've said that to the Federal Government a hundred times—you tell us where it is, and we will look at it and we'll go after it. You tell us. And they have no answer other than, 'We know it's there,' and . . . they don't accept the conclusions that we've reached. So they want us to rewrite the facts, and I won't do that." Remarks at Yonkers "Ask Astorino" Meeting, at 40:21–42:06, WC105138.</p>	<p>submitted eight different AIs, none of which were accepted, so that encapsulizes [sic] what I was saying and what I continue to say." Astorino Dep. 105:2–106:4, Sept. 15, 2015.</p> <p>Astorino was unable to identify a single federal government official whom he had asked to help the County identify housing discrimination. <i>See</i> Astorino Dep. 93:5–108:10, Sept. 15, 2015.</p>