UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARIBEL BAEZ; FELIPA CRUZ; RD., ON BEHALF OF HER MINOR CHILD, A.S.; on their own behalf and on behalf of all others similarly situated; UPPER MANHATTAN TOGETHER, INC.; and SOUTH BRONX CHURCHES SPONSORING COMMITTEE, INC.,	:	
Plaintiffs,	:	
	:	13 Civ. 8916 (WHP)
vs.	:	
NEW YORK CITY HOUSING AUTHORITY,	:	
Defendant.	:	

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

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Plaintiffs submit this supplemental memorandum addressing the fourth quarter report provided by the New York Housing Authority ("NYCHA") on June 30, 2015, and related issues.

PRELIMINARY STATEMENT

NYCHA claims that its report for the quarter ending April 30, 2015, shows that the "reoccurrence" rate improved to 22%, but a closer analysis reveals that the number of reported reoccurrences increased by 76%—from 387 in the third quarter to 508 in the fourth quarter—and the rate of reported reoccurrences relative to work orders increased by more than 70%. In reality, the reoccurrence rate has fluctuated so much in the past year that it is not predictive of a downward trend.

NYCHA makes its claim of improvement while leaving many questions about its methodology unanswered. Missing pieces of information, including the records of the underlying calls on which NYCHA bases its reoccurrence rate calculation, simply underscore why the Court should appoint a master. The absence of information also confirms that NYCHA's reports cannot be trusted to provide accurate and reliable information about what is actually happening on the ground.

Even with the fourth quarter results, the average reoccurence rate for the year is 31%. Further, a reocurrence rate of 22% in the fourth quarter—more than one fifth of the cases—is still a breach. For the objective of the Order—the effective remediation of mold and excessive moisture in NYCHA housing—to be achieved, the reoccurrence rate must be brought down to a *de minimis* level, which would certainly be less than 5%.

Plaintiffs are public housing tenants with asthma whose rights to reasonable accommodations for their disabilities are protected by the Americans with Disabilities Act ("ADA"). No person with asthma should be made to suffer because NYCHA will not fulfill its obligations. The fourth quarter report demonstrates that NYCHA still has a long way to go.

Moreover, in an audit report released on July 13, 2015, the New York City Comptroller confirmed NYCHA's inadequate maintenance and repair practices. The report reveals that NYCHA is able to manipulate reoccurrence rates, including through a policy that precludes the creation of mold and/or mildew work orders for a resident's entire apartment.

ANALYSIS

I. THERE ARE SERIOUS QUESTIONS ABOUT THE RELIABILITY OF THE DATA IN THE FOURTH QUARTER REPORT.

A. The Paragraph 6 Reports Are Not the Full Story.

In considering the fourth quarter report, it is important to understand what it purports to show. Paragraph 6 of the Stipulation and Order of Settlement approved by the Court on April 17, 2014 ("Order," annexed to Bass Decl. (Doc. 37) at Ex. 4), requires NYCHA to make a "good-faith attempt to contact" residents within sixty days after the completion of a Level II or Level III work order. Order ¶ 6. As explained in NYCHA's Operations & Maintenance Policy for Mold & Moisture Control in Residential Buildings ("Policy Manual") (*see* Order at Ex. A), there are three different levels of work orders: Level I, Level II, and Level III. A Level I work order corresponds to a "small isolated area" of fungal contamination that is less than ten square feet and can be remediated by regular building maintenance staff using basic respiratory protection. *Id.* at 10. A work order is considered "Level II" when the area impacted by fungal contamination is between ten and 100 square feet, for which regular building staff can also perform remediation using basic respiratory protection. *Id.* at 11. A work order is considered Level III if the mold or excessive moisture covers more than 100 square feet and requires enhanced containment and remediation procedures. *Id.* at 11-12.

The Paragraph 6 reports do not include Level I work orders. Approximately 70% of the work orders that NYCHA reported in the first four quarterly reports were deemed Level I work

orders. *See* Second Supplemental Declaration of Steven M. Edwards dated July 24, 2015 ("Edwards Second Supp. Decl.") ¶ 13. It is likely that Level I work orders have higher reoccurrence rates because the unskilled staff that implement those work orders are unlikely to remediate mold and excessive moisture at their source. The Paragraph 6 reports, therefore, are not the full story.

B. There Are Numerous Unanswered Questions About the Paragraph 6 Report for the Fourth Quarter.

NYCHA claims that its reoccurrence rate has improved over the first four quarters, but it is not clear how NYCHA got to that result. After oral argument before the Court on July 10, 2015, Plaintiffs contacted NYCHA's counsel for information on the process and copies of the call records. Edwards Second Supp. Decl. ¶ 14. NYCHA's counsel provided a nonresponsive answer, basically refusing to address the questions that were asked and failing to provide copies of the call records. *Id.* ¶ 14, Ex. 3. In the information she did provide, however, it appears that the call records include another category of information—whether the tenant is satisfied with the repair—that has not been provided. *Id.* ¶ 14, Ex. 3.

Furthermore, NYCHA inexplicably called significantly more tenants in the fourth quarter than in the first three quarters. The Order requires NYCHA to call all of the tenants for whom Level II or Level III work was done within 60 days, Order ¶ 6; yet NYCHA only called 2% of those tenants within 60 days in the first quarter, 3% in the second quarter and 26% in the third quarter, while it called 86% within 60 days in the fourth quarter. *See* Edwards Second Supp. Decl. ¶ 15. NYCHA ultimately attempted to reach 97% of the closed Level II and III work orders in the fourth quarter, as compared to 56% in the first quarter, 70% in the second quarter and 62% in the third quarter. *Id.* Plaintiffs asked NYCHA's counsel to explain why NYCHA called significantly more tenants in the fourth quarter, but no explanation was forthcoming. *Id.*

The difference in methodology raises questions about the comparability of results, which cannot be answered without access to the underlying documentation, including the call records.

C. NYCHA's Reoccurrence Data Is Not Predictive of a Downward Trend in Reoccurrence.

NYCHA claims that its reoccurrence rate of 22% in the fourth quarter indicates that it has increased the effectiveness of its mold and moisture remediation efforts and predicts continued improvement. Transcript of Oral Argument on July 10, 2015 ("Oral Argument Tr.") at 20:18-21, annexed to the Edwards Second Supp. Decl. as Exhibit 2. The reality is that the reoccurrence rate has significantly fluctuated throughout the first four quarters, going from 34% in the first quarter, to 41% in the second quarter, to 27% in the third quarter, and then to 22% in the fourth quarter. *Id.* ¶ 16, Ex. 4. Furthermore, the number of reported reoccurrences went up, from 387 in the third quarter to 508 in the fourth quarter, and the percentage of reported reoccurrences relative to work orders, as opposed to calls, increased by 70%. *Id.* ¶ 16, Ex. 4.

Most importantly, NYCHA's claim that mold abatement is improving is inconsistent with the declarations of the tenants and community organizers, which were created in the fourth quarter and provide insight into how things are going on the ground. The unrebutted tenant and community organizer declarations submitted by Plaintiffs graphically illustrate that significant mold contamination continues to reoccur and persist in numerous apartments. *See* Tenant Declarations (Docs. 41, 42, 43, 45, 46, 48, and 49); Declaration of Ray Lopez (Doc. 39); Declaration of Michael Stanley (Doc. 40). As a practical matter, while NYCHA's own data can be relied upon to show a breach, the fourth quarter data—which raises more questions than it answers—cannot be relied upon to show a cure.

II. THE REOCCURRENCE RATE FOR THE FOURTH QUARTER DEMONSTRATES THAT NYCHA CONTINUES TO VIOLATE THE ORDER.

Even if the Court were to rely on NYCHA's fourth quarter data, the reoccurrence rate for the fourth quarter is 22% and the average for the entire year is 31%. Edwards Second Supp. Decl. ¶ 16. Under any standard, that rate is sufficient to show a breach of the requirement that NYCHA effectively abate mold and excessive moisture. NYCHA has the burden of showing that it cured the breach, and it has utterly failed to do so. *See Sinco, Inc. v. Metro-North Commuter R.R. Co.*, 133 F. Supp. 2d 308, 313 (S.D.N.Y. 2001) (party that breached contract has burden to show that its proffered cure conforms to terms of contract).

The Order requires NYCHA to effectively abate mold at the outset. The reoccurrence rate demonstrates that NYCHA failed to do that. Based on the reoccurrence rate in the fourth quarter alone—which may not show the complete picture—the Court may conclude that mold has reoccurred in *at least* one-fifth of the apartments in which NYCHA did work, thereby demonstrating a clear violation of the Order.

At bottom, any reoccurrence above a *de minimis* level is unacceptable, given that the class members affected by NYCHA's breach are tenants suffering from asthma and other respiratory illnesses. *See, e.g.*, *D.D. v. N.Y. City Bd. of Educ.*, 465 F.3d 503, 511-12 (2d Cir. 2006) (with respect to state's obligation to provide free appropriate public education under the Individuals with Disabilities Education Act, compliance—not simply substantial compliance—is required). Any repeated exposure to constant mold and excessive moisture in a tenant's home is too high a reoccurrence; no tenant should have to suffer. *Id.* at 512 ("Had a single eligible student brought an action claiming that a systemic failure had deprived him of his right to a free appropriate public education, Defendants could not defeat his claim by establishing that they provide such access to a substantial number of eligible students.").

In *Reynolds v. Giuliani*, No. 98 Civ. 8877 (WHP), 2005 WL 342106 (S.D.N.Y. Feb. 14, 2005), this Court addressed the level of compliance required by the state and city agency defendants in processing applications for food stamps, Medicaid, and cash assistance. The Court took guidance from the applicable statutes' plain language that "Medicaid benefits 'shall be furnished' to persons eligible to receive them" and that "'a State Agency . . . shall provide timely, accurate, and fair service to applicants for . . . the food stamp program . . . .'" *Id.* at *17. (internal citations and punctuation omitted). Emphasizing the "shall" language in both statutes, the Court held that the Food Stamp and Medicaid Acts required strict compliance from state agencies. *Id.* (citing *Haskins v. Stanton*, 794 F.2d 1273, 1277 (7th Cir. 1986)). In such cases, only when the agencies have reached a point "at which any failure of total compliance is truly *de minimus*, where the state has come to comply 'as strictly as is humanly possible'" can compliance be found. *Id.* (internal citation omitted).

Here, too, each of the statutes under which Plaintiffs seek relief provides, with some degree of variation, that "no qualified individual with a disability *shall*, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphasis added); *see also* 29 U.S.C. § 794(a); 42 U.S.C. § 3604(f)(2)(A)-(B); N.Y. Exec. Law § 296(2-a)(d)(1)-(2). Similarly, the Order states that NYCHA "shall" remediate mold by eliminating its causes. Order at 2. As the Court found in *Reynolds*, a failure rate of one-third clearly violates the agency's obligations. *Reynolds*, 2005 WL 342106, at *19 ("Since approximately one-third of eligible applicants do not receive expedited food stamps within the required five-day limit, this Court cannot conclude that the City defendants are meeting their obligations . . . ."); *see also Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 203, 210 (E.D.N.Y.

2000) (finding violation of federal and state laws where plaintiffs, seeking relief under the ADA and related protections, demonstrated defendants' failure to timely provide them with subsistence benefits as required by law in at least 33% of all eligible cases).

III. THE FOURTH QUARTER REPORT DEMONSTRATES THAT NOTHING ELSE HAS CHANGED.

At both the July 10, 2015, hearing and in its opposition papers, NYCHA claimed that it is meeting the service level requirements. Oral Argument Tr. at 22:1-4; NYCHA Opposition Memorandum (Doc. 56) at 13. Plaintiffs' analysis of the fourth quarter report demonstrates, however, that little has changed from the analysis presented in Plaintiffs' opening brief.

In the fourth quarter, seven-day work orders again represent the vast majority of all work orders—more than 99%. Edwards Second Supp. Decl. ¶ 3. Only 49.61% of the work orders listed in the fourth quarter report indicate that any actual mold abatement work was performed by NYCHA. *Id.* ¶ 10. Moreover, only 58.04% of seven-day work orders were closed in seven days or less, and 1,171 seven-day work orders were closed after more than fifteen days. *Id.* ¶ 12. Plaintiffs were able to compare parent-child linkage between the fourth quarter and previous quarters to determine whether work was carried over from quarter to quarter, and that analysis reveals that six repairs took more than 97 days and one took 133 days. *Id.* ¶ 7.

NYCHA again calculated its average service level for the fourth quarter as it did in the past quarters, without linking parent work orders to their respective children. *See id.*, Ex. 1. When the parent-child links are taken into account, NYCHA's average service level for seven-day work orders increases from 6.2 days as reported by NYCHA to 9.0 days, and when work orders for which no work was performed are eliminated from the calculation, the average further increases to 10.1 days. *Id.* ¶¶ 8, 11. Moreover, even excluding the longest 5% of the work orders, the average service level is still non-compliant at 7.4 days, which becomes 8.5 days when

no-work work orders are excluded. *Id.* ¶¶ 8, 11. As previously noted, the Order defines "work orders" as "work to be performed" and "repairs," so the inclusion of work orders in which no work is done in the calculation of service levels is clearly improper. Order ¶ I(1)(c)-(d).

IV. THE RECENTLY-RELEASED COMPTROLLER'S AUDIT REPORT SUPPORTS PLAINTIFFS' READING OF THE DATA AND HIGHLIGHTS THE NEED FOR A COURT-APPOINTED MASTER.

The New York City Office of the Comptroller released a report titled "Audit Report on the New York City Housing Authority's Maintenance and Repair Practices" ("Comptroller's Report") on July 13, 2015, three days after the oral argument in this case. *See* Comptroller's Report, annexed to Edwards Second Supp. Decl. as Exhibit 10. The Comptroller's Report provides new information that is useful in interpreting the data in NYCHA's fourth quarter report. The scope of the Comptroller's Report covers January 1, 2013, to July 31, 2014, Comptroller's Report at 7, and thus overlaps with the Order's effective date. The Comptroller's Report confirms the long repair times tenants endure because of NYCHA's inadequate policies, the need for reporting on the total amount of time it takes NYCHA to fully complete repairs, and NYCHA's failure to document tenant satisfaction following repairs. *Id.* at 22, 26-29.

Among other things, the Comptroller's Report describes a June 2014 policy change under which "NYCHA no longer allowed mold and/or mildew Work Orders to be created for a resident's entire apartment." *Id.* at 22. As a result of this new practice, "NYCHA stopped creating a single Parent Work Order directing a mold inspection of an entire apartment. Rather, [NYCHA Customer Call Center] call takers created separate Work Orders to inspect each room in the apartment—potentially up to 10 rooms." *Id.*

The effect of this policy is that NYCHA opens separate work orders to clean mold in each room, separate work orders to plaster walls in each room, and separate work orders to paint walls in each room. *Id.* There are no obvious benefits to NYCHA of such a policy other than

artificially driving down the average service level, which decreases when the number of work orders increases and the amount of time per work order decreases. *See id.* NYCHA had no response to the Comptroller that directly addressed these issues. *Id.* at 23.

NYCHA's splitting of work orders by room also affects the quality of repairs that NYCHA performs. As discussed above, the type of remediation work NYCHA performs—Level I, Level II, or Level III—relates to the overall square footage of the mold. As the Comptroller's Report found, when NYCHA created separate parent and child work orders for each room containing mold within a single apartment, "NYCHA did not determine the aggregate square footage of affected areas throughout an apartment and may not have accurately assessed severity levels and follow appropriate policies and procedures." *Id.* at 34. Thus, in one out of eight mold locations with split work orders reviewed by the Comptroller's Office, "the severity level of the problem in the apartment was assessed lower based on the measurements in the individual rooms than [what] it would have been had the severity level been based on the square footage of the affected areas on the apartment as a whole." *Id.* A lower severity level assessment directly corresponds to the extent of mold and excess moisture remediation performed—the lower the assessed level, the less intensive the repair. *See id.*

The Comptroller's Report further determines that NYCHA did not train its staff in accordance with the procedures required by this Court's Order. *Id.* at 30-31. Even though the Order requires that NYCHA "train staff," without limitation, on the agreed-to mold remediation policies, Order ¶ 8(e); Ex. A to Order at 12, and even though NYCHA contracted with a vendor to provide the required training to staff from 2013 to 2015, 72.9% of the work orders audited by the Comptroller's Office were performed by staff who did not receive appropriate training.

Comptroller's Report at 32. The Comptroller suggests that NYCHA's failure to comply with its policies and procedures directly bears on the reoccurrence of mold in tenants' homes. *Id.* at 37.

In addition, the Comptroller casts doubt on the underlying accuracy of NYCHA's data reporting. *Id.* at 33 ("[B]ased on our review . . . NYCHA did not ensure that Operations staff accurately entered Work Order Action Plan data in [NYCHA's computer system].").

The Comptroller concludes that NYCHA's promises to improve its processes for delivering repair and maintenance services are both inadequate and unlikely to be met; indeed, the NextGeneration NYCHA plan "is the fourth plan issued by NYCHA in ten years to address maintenance and repair and other operational and fiscal issues." *Id.* at 7-8. Given the Comptroller's findings and conclusions, the need for a master could not be more dire.

CONCLUSION

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

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