U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, 3rd Floor
New York, New York 10007

November 9, 2015

BY HAND AND ECF

The Honorable Ronnie Abrams
United States District Judge
40 Foley Square
New York, NY 10007

Re: *United States v. The Durst Organization, Inc., et al.*, 14 Civ. 2698 (RA)

Dear Judge Abrams:

This Office represents the United States (the "Government") in the above-referenced Fair Housing Act ("FHA") enforcement action. We write respectfully to submit, for the Court's review, a fully-executed consent decree (the "Proposed CD") between the Government and the Durst Defendants. Below, we summarize the key provisions of the Proposed CD. We further respectfully request that the Court approve and enter the Proposed CD.

I. Key Terms of the Proposed CD

The Proposed CD is the product of extensive, arms-length negotiations. It reflects compromises, by both the Government and the Durst Defendants, on matters such as how to ensure that ongoing and future construction projects will be accessible; whether it is feasible to retrofit certain conditions at existing properties, such as The Helena, that were completed several years ago; the speed with which retrofits should be made; and how much the Durst Defendants should make available to compensate victims. The Proposed CD balances these interests by establishing a framework for (*i*) ensuring accessibility at Durst's ongoing and future construction projects; (*ii*) requiring specified retrofits at existing properties, including The Helena; (*iii*) setting up a settlement fund to compensate victims; and (*iv*) providing a suitable civil penalty.

First, the Proposed CD reflects the Durst Defendants' agreement – for each covered multifamily dwelling to be constructed during the term of the settlement – to "retain an FHA compliance consultant [] to help ensure that the as-constructed features at such property comply with the FHA's Accessible Design Requirements." *See* Proposed CD ¶ 42.[1] Among other things, the FHA compliance consultant will "conduct a visit" of each ongoing or future construction project "prior to the completion of construction" to "identify any construction issues that may result in inaccessible conditions and recommend appropriate solutions." *Id*. Further, the Durst Defendants also agree to submit annual certifications to affirm that they "retained an

[1] In January 2015, the Court entered a Consent Order, which included similar injunctive provisions, directed at two specific rental properties being developed by the Durst Defendants. *See* Consent Order ¶¶ 5-9 [Dkt. 49]. That consent order will terminate 60 days after the Government's receipt of final compliance reports for the two specific constructions. *Id*. ¶ 14. The Proposed CD makes those injunctive requirements applicable to other multifamily dwellings being constructed, or to be constructed, by the Durst Defendants during the term of the CD.

FHA consultant" for each relevant construction and to "specify[] each [property] for which [the] consultant was retained" and the Consultant's identity. *Id*. ¶ 43. Finally, the Durst Defendants have agreed to adopt policies and educational programs to ensure future FHA compliance by their agents and employees. *See id.* ¶¶ 40-41, 60-66.

Second, the Proposed CD reflects the Durst Defendants' agreement to make retrofits at their existing rental properties to enhance accessibility. Specifically, the Durst Defendants have agreed to meet specified accessibility standards – as set forth in Appendices A and B – to The Helena. *See id*. ¶¶ 2-10. In addition, the Durst Defendants also agree to make the retrofits specified in Appendix B available to any current or future tenant on a *permanent* basis — in other words, future tenants seeking any of those retrofits would not need to assert administrative or legal claims in order to obtain the retrofit. *See id*. ¶ 11. Further, with regard to an additional property, The Epic, the Durst Defendants have agreed to arrange for an inspection of that rental building to identify conditions that do not meet specified accessibility standards and then make appropriate retrofits within the term of the Proposed CD. *See id*. ¶¶ 12-25. Lastly, as to three other rental buildings in the Historic Front Street area, the Proposed CD requires the Durst Defendants to arrange for an inspection of those buildings and to make retrofits so long as another party, such as the original developers of those buildings, are responsible for the reasonable costs of such retrofits.[2] *Id*. ¶¶ 26-29.

Third, pursuant to the Proposed CD, the Durst Defendants have agreed to establish a settlement fund to compensate aggrieved persons at The Helena, The Epic, or one of the rental buildings on Front Street. Specifically, the Durst Defendants will, as an initial matter, make available $250,000 for the settlement fund. *See id*. ¶ 46. In the event that the initial fund amount is insufficient to compensate victims, the Proposed CD requires the Durst Defendants to provide up to $515,000 in total for this purpose. *Id*. ¶ 54.

Finally, under the terms of the Proposed CD, the Durst Defendants also have agreed to pay the maximum civil penalty, in the amount of $55,000, to the Government. *See id*. ¶ 59.

II. The Proposed CD Should Be Approved

Consensual resolutions of FHA cases are "highly favored" because they encourage "cooperation and voluntary compliance," limit litigation costs, and reduce the burden on judicial resources. *Jones v. Amalgamated Warbasse Houses, Inc*., 97 F.R.D. 355, 358-59 (E.D.N.Y. 1982); *see also Durrett v. Hous. Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (recognizing "a clear policy in favor of [ ] settlements" in FHA cases). Further, in the design and construction context, settlements advance the purpose of the FHA, and benefit the public, by ensuring that inaccessible features are retrofitted promptly, rather than after lengthy litigation.[3]

---

[2] As set forth in the recitals section, the Durst Defendants provided documentation showing that they were not involved with the initial design and construction of the three rental properties on Front Street and did not acquire majority ownership of those properties until February 2008. *See* Proposed CD at 4-5. Thus, the Proposed CD requires the Durst Defendants to retrofit – at their own costs – just the inaccessible conditions that were "caused or exacerbated by any structural modification or repair made after February 2008." *Id*. ¶ 28.

[3] Indeed, this proposed settlement represents the settlement of the ninth FHA design and construction case in this District. *See United States v. CVP I,* et al., 08 Civ. 7194 (SHS) (consent decree entered on October 15, 2010); *United States v. L&M 93rd Street LLC,* et al., 10 Civ. 7495

In light of the policy favoring settlement in FHA cases, judicial review of a proposed consent decree does not entail an inquiry "into the precise legal rights of the parties" or resolving "the merits of the claims or controversy." *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980). Instead, as the Second Circuit recently held, a district court should approve a governmental enforcement consent decree when it is "fair and reasonable." *SEC v. Citigroup Global Mkts., Inc.*, 752 F.3d 285, 293 (2d Cir. 2014).

Here, the Proposed CD should be approved. First, the Court can presume its fairness because it is the product of arms' length negotiations among experienced counsel. *See In re IPO Sec. Litig.*, 671 F. Supp. 2d 467, 480-81 (S.D.N.Y. 2009). Second, the Proposed CD is consistent with the FHA's text and purpose insofar as it reflects the Durst Defendants' agreement to make timely retrofits that remedy specified conditions in common spaces and dwelling units at the subject buildings, timely compensate aggrieved persons, and comply with the FHA on a going-forward basis. *See* 42 U.S.C. § 3614.

* * *

For the reasons set forth above, we respectfully request that the Court approve the proposed consent decree which would fully resolve the Government's claims against the Durst Defendants. While the claims against FXFowle, the architect for The Helena, remain outstanding, the Government is pursuing settlement discussions with counsel for FXFowle and will advise the Court as soon as a resolution is reached.

Respectfully,

PREET BHARARA
United States Attorney

By: */ s/ Li Yu*
LI YU
JESSICA JEAN HU
JACOB T. LILLYWHITE
Assistant United States Attorneys
Telephone: (212) 637-2734/2726/2639
Facsimile: (212) 637-2686

Encl.

cc: (By ECF)
Luise Barrack, Esq.
Carol Patterson, Esq. and James Rowland, Esq.

(RMB) (consent decree entered on July 22, 2011); *United States v. Larkspur, LLC*, et al., 11 Civ. 6321 (DAB) (consent decrees entered on October 5, 2011 and January 26, 2012); *United States v. 475 Ninth Avenue Associates LLC*, et al., 12 Civ. 4174 (JMF) (consent decree entered on May 25, 2012); *United States v. 2 Gold L.L.C.*, et al., 13 Civ. 2679 (RPP) (consent decrees entered on April 24, 2013 and June 5, 2014); *United States v. The John Buck Company, LLC*, et al., 13 Civ. 2678 (LGS) (consent decree entered on June 11, 2013); *United States v. Tower 31, LLC*, et al., 14 Civ. 6066 (AJN) (consent decree entered on August 11, 2014); *United States v. Related Companies*, et al., 14 Civ. 1826 (SAS) (consent decree entered on December 10, 2014).