UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

N.A.A.C.P., BOSTON CHAPTER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 78-850-DPW
SHAUN DONOVAN,[1] SECRETARY OF HOUSING AND URBAN DEVELOPMENT, BOSTON HOUSING AUTHORITY, and CITY OF BOSTON,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER
March 17, 2009

The dispute now before me concerns the terms of a consent decree governing the distribution of five hundred housing vouchers in Boston ("Consent Decree") by the United States Department of Housing and Urban Development ("HUD"). The Plaintiff, National Association for the Advancement of Colored People ("NAACP"), has filed a Supplemental Complaint for declaratory and injunctive relief against the Defendants: the Secretary of HUD, the Boston Housing Authority ("BHA"), and the City of Boston ("the City"). In the Supplemental Complaint, NAACP alleges breach of the consent decree by HUD, and breach of an agreement to modify the consent decree ("Modification Agreement") by HUD, BHA, and the City.[2]

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[1] Pursuant to Fed. R. Civ. P. 25(d), Secretary Shaun Donovan has been substituted for former Secretary Alphonso Jackson.

[2] NAACP has asserted four specific causes of action, the first three of which are against HUD alone: Count I for breach of the implied covenant of good faith and fair dealing under the Consent Decree; Count II for declaratory judgment regarding HUD's obligations in requesting appropriations for the renewal of

BHA filed two counterclaims against NAACP, alleging a separate breach of the Modification Agreement and a failure to amend the Modification Agreement, the latter of which has since been dismissed by stipulation. BHA also filed two cross-claims against HUD for failure to comply with the Consent Decree and breach of the Modification Agreement, but both cross-claims have also now been dismissed by stipulation.

The matter is before me on motions for judgment on the pleadings or summary judgment filed variously by the parties regarding the surviving claims.[3]

I. BACKGROUND

A. Factual Background

1. The Original and Modified Consent Decrees

This case originated in 1978 when NAACP filed an action against HUD for failing "to carry out its statutory mandate to promote fair housing in connection with its administration of housing and community development programs in the City of

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Litigation Vouchers; and Count III for breach of the Modified Consent Decree. Count IV is against HUD, BHA, and the City for breach of the Modification Agreement.

[3] Plaintiff NAACP has moved for summary judgment against each Defendant on the claims asserted in its Supplemental Complaint. BHA has moved for summary judgment against NAACP as to the claim asserted against BHA in the Supplemental Complaint as well as on its own counterclaim against NAACP. HUD has moved for judgment on the pleadings against NAACP or, in the alternative, for dismissal of the Supplemental Complaint due to lack of subject matter jurisdiction. The City has moved for judgment on the pleadings and summary judgment as to NAACP's claim against it.

Boston." *N.A.A.C.P., Boston Chapter v. Kemp* ("*NAACP I*"), 721 F. Supp. 361, 363 (D. Mass. 1989) (providing background on the origins of the case). Judge Skinner initially dismissed the case on grounds that the District Court lacked the legal authority to review HUD's compliance with its federal Fair Housing Act ("Title VIII") obligations. *Id.* The First Circuit, however, disagreed and remanded. *N.A.A.C.P. v. Sec'y of Housing & Urban Dev.* ("*NAACP II*"), 817 F.2d 149, 157-61 (1st Cir. 1987) (Breyer, J.). Upon remand, Judge Skinner entered a declaratory judgment and final decree. *NAACP I*, 721 F. Supp. at 370.

Thereafter, the parties agreed to forego appeal and, to that end, entered into a consent decree that the court approved in 1991 ("Original Consent Decree"). Pursuant to the Original Consent Decree, HUD issued five hundred housing vouchers in the form of subsidies for Section 8 housing for use by a Boston public housing agency.[4] Four hundred subsidies were allocated to BHA and one hundred to the Department of Housing and Community Development ("DHCD"), a Massachusetts state agency which subcontracted the administration of the subsidies to the Metropolitan Boston Housing Partnership ("MBHP"). Of the BHA's four hundred subsidies, three hundred were project-based and one

[4] Section 8 housing refers to the federal program that subsidizes housing for low-income families and individuals pursuant to the U.S. Housing Act of 1937, 42 U.S.C. § 1437 *et seq.* Section 8 funding is appropriated to HUD, but the program is administered by local housing authorities.

hundred were tenant-based.[5]

A dispute arose over the proper use of the project-based vouchers, and the units to be subsidized by these vouchers were never built. (Modification Agreement at 2.) Faced with an impasse, in 1999, HUD, BHA, the City, and NAACP entered into the Modification Agreement "contingent upon the Court's approval of the modification." (Modification Agreement at 4.) On February 8, 2000, Judge Skinner granted the parties' Joint Motion to Modify the Consent Decree ("Joint Motion"), and both the modified consent decree ("Modified Consent Decree") and the Modification Agreement became effective on that date.

The Modification Agreement changed the way BHA handled its four hundred vouchers. The three hundred project-based vouchers were converted into tenant-based subsidies. Pursuant to the Modification Agreement, BHA was to issue its four hundred tenant-based vouchers ("Litigation Vouchers") to "minority families desirous of making an integrative move into a predominantly white community," often referred to in the parties' submissions as "Skinner families." HUD agreed to "provide Section 8 funding as part of the settlement of the litigation . . . sufficient for at least fifteen years dated from the date of this Agreement, subject to the availability of appropriations." (Modification

[5] Tenant-based vouchers are subsidies awarded to individual families, transferrable to other rental properties, while project-based vouchers involve attaching a subsidy to a particular housing unit. *See* 24 C.F.R. § 982.1(b)(1)-(2).

Agreement at 13.) In addition, HUD agreed to provide $640,000 in funding for a housing choice program to provide counseling to minority families. The housing choice was to be administered by the Boston Fair Housing Commission ("BFHC"). (*Id.*)

The Modification Agreement listed specific performance benchmarks. Portions of the Modification Agreement now at issue before me include those providing that:

- If, at the end of the first six months after start-up or after any subsequent six-month period, less than 33 percent of minority families meeting certain criteria had moved into predominantly white neighborhoods, then the City and BHA agreed to solicit advice from NAACP on how to resolve the problem. (Modification Agreement at 10.)

- The term "start-up" was specifically defined in the Modification Agreement as "the first 90 days after 1) the BHA and HUD execute a contract to fund the housing choice program, 2) the City and the BHA take all necessary steps to make this funding available to the [BFHC], and 3) the funds can be drawn upon by the BFHC." (*Id.*)

- The deadline for the BHA to issue its four hundred vouchers was set for "no later than twenty-seven months after 1) the BHA and HUD execute a contract to fund the housing choice program, 2) the City and the BHA take all necessary steps to make this funding available to the [BFHC], and 3) the funds can be drawn upon by the BFHC." (*Id.* at 12.)

- BHA and HUD agreed to "promptly execute such a contract to fund the housing choice program and the BHA, HUD and the City agree to promptly take any other steps necessary to expeditiously make this funding available to the BFHC." (*Id.*)

- "The goal and measure of success of the housing choice program will be to assist at least 43 percent of the participating minority families . . . to locate and secure housing in predominantly white neighborhoods." (*Id.* at 9.)

2. The Housing Choice Program

HUD earmarked the $640,000 of housing choice program funding for BHA prior to the effective date of the Modification Agreement. But before the funding could be transferred to BHA (and ultimately BFHC), BHA and BFHC had to agree on the terms of the housing choice program. The discussions extended from January 2001 through July 2002. A housing choice program grant agreement was eventually executed on July 19, 2002, and funding for the program was released to BFHC on August 26, 2002, two-and-a-half years after the Modification Agreement became effective. During this period, NAACP made numerous inquiries as to progress in implementing the housing choice program.

3. The Litigation Vouchers

BHA contacted HUD, prior to 2001, to discuss the possibility of using its Litigation Vouchers for its regular waiting list. Although BHA had received its funding allocation for the Litigation Vouchers, the vouchers remained unused for a period of time, and BHA was concerned with being classified as a "poor performer" by HUD for having unused vouchers. In response, HUD indicated that temporarily using the vouchers for non-Skinner families was "an allowable use provided that [BHA] would guarantee that Skinner families would be taken care of out of their program when the need arose." From 2001 to 2003, BHA temporarily issued Litigation Vouchers to homeless families living in emergency shelters with the intention of replacing the vouchers through attrition.

In 2003, BHA began experiencing problems with over-leasing.[6] The BHA stopped issuing vouchers, but found the attrition rate to have slowed. BHA was therefore not able to replace the borrowed litigation vouchers.

As of April 30, 2004, only 260 Litigation Vouchers had been issued to minority families seeking to move to predominantly white neighborhoods. In May and June of 2004, no Litigation Vouchers were issued, and twenty families who had completed housing counseling prior to May were still waiting for their vouchers.[7] These families were issued Litigation Vouchers in August 2004. BHA indicated that the remaining 120 vouchers would not be issued until December 2004 due to constraints from the over-leasing problem.

4. HUD Funding Change

In 2004, HUD proposed to Congress a plan to convert its funding from a unit-based system to a dollar-based system. In the appropriation bill for HUD's 2005 fiscal year, Congress adopted the dollar-based system and required local housing authorities to operate within a fixed annual budget. The 2005 budgets were based on average actual leasing and cost data for

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[6] Over-leasing occurs when a housing authority has more vouchers under lease than it is authorized based on its HUD allocation.

[7] In addition, on June 23, 2004, a woman contacted NAACP stating that she had completed her housing counseling in March 2004 but was still awaiting her Litigation Voucher. After complaints to BHA and BFHC, the woman reported that she was issued a Litigation Voucher.

each housing authority during the months of May, June, and July 2004 ("Snapshot").

For the 2005 budget, HUD did not set out a separate line-item request for the Litigation Vouchers, instead treating them in the same manner as any other voucher in the budget. (Suppl. Compl. ¶ 36.) Once a Litigation Voucher was issued to a housing authority, the renewal of the Litigation Vouchers was treated the same as any other voucher type.

During the Snapshot, 217 Litigation Vouchers were under lease with an average subsidy of $1,264.72 per unit. The remaining 183 Litigation Vouchers were being used by BHA as general vouchers with an average subsidy of $977.05 per unit during the Snapshot. According to NAACP, if all four hundred Litigation Vouchers had been leased up during the Snapshot, BHA would have received an additional $627,976 in funding for 2005.

Congress continued to use the dollar-based system for 2006 funding, and determined 2006 budgets by applying an adjustment factor to each housing authority's 2005 annual budget. According to NAACP, if all four hundred Litigation Vouchers had been leased up during the Snapshot, BHA would have received an additional $640,119 in its 2006 annual budget.

B. Procedural History

NAACP initially filed a motion for an order to implement and enforce the Modified Consent Decree on May 23, 2005. Because Judge Skinner had passed away, the case was transferred pursuant to this Court's random assignment process to my docket on June 1,

2005. On January 19, 2006, I denied NAACP's motion without prejudice pending further factual development. On November 15, 2006, NAACP filed its current Supplemental Complaint seeking declaratory and injunctive relief from HUD for breach of its obligations pursuant to the Modified Consent Decree, and from HUD, BHA, and the City for breach of their obligations pursuant to the Modification Agreement. The parties thereafter pressed their positions through the various dispositive motions now before me. *See* note 2 *supra*.

II. ANALYSIS

In resolving the motions, I must first address jurisdictional issues as raised by HUD. I then confront HUD's and the City's motions for judgment on the pleadings. I turn thereafter to the several motions for summary judgment regarding the claims raised in the Supplemental Complaint. Finally, I will address BHA's motion for summary judgment on its remaining counterclaim against NAACP.

A. Subject Matter Jurisdiction

HUD challenges the jurisdiction of this Court to hear the claims raised in NAACP's Supplemental Complaint. It disputes NAACP's contention that both the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*., and the Modified Consent Decree provide the Court with jurisdiction. I address each of these arguments in turn.

1. APA Jurisdiction

HUD raises three challenges to the applicability of the APA

in this case: a) there is no waiver of sovereign immunity pursuant to the APA, because the Supplemental Complaint does not raise any statutory or regulatory violation; b) *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), calls into question use of the APA as a basis for enforcing the Modified Consent Decree; and c) because the APA only provides a waiver as to injunctive relief and not money damages, NAACP's remedies - e.g., in ¶ D.4 (that "HUD shall provide the maximum funding available and use its best efforts to obtain an appropriation for the shortfall") and ¶ D.5 (that "HUD, the BHA and the City shall, jointly or severally, provide $295,000.00 to [the Metropolitan Boston Housing Partnership] to fund housing search counseling services . . .") of the Supplemental Complaint's Request for Relief - cannot be granted under the APA. I am persuaded by HUD's first argument and find that the APA does not provide me with authority to review this case.

It is important to note that the APA does not provide courts with an implied grant of subject matter jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 107 (1977). Instead, it lays out a framework for analyzing those challenged agency actions over which the court does have jurisdiction. *Sierra Club v. Martin,* 110 F.3d 1551, 1555 (11th Cir. 1997).

In order for the APA to waive HUD's sovereign immunity, NAACP must show that HUD violated a statute or regulation. The APA states:

A person suffering *legal* wrong because of agency

> action, or adversely affected or aggrieved by agency action within the meaning of a *relevant statute*, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (emphasis added). Courts have required parties seeking waiver under the APA to show a statutory or regulatory violation. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sierra Club*, 110 F.3d at 1555 ("[T]here is no right to sue for a violation of the APA in the absence of a relevant statute. . . ."") (citations omitted); *Preferred Risk Mut. Ins. Co. v. U.S.*, 86 F.3d 789, 792 (8th Cir. 1996) (requiring that a plaintiff bringing an action under § 702 of the APA identify "a substantive statute or regulation that the agency action had transgressed"); *El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 753 (9th Cir. 1991) (declaring that § 702 requires "a relevant statute whose violation forms the legal basis for the complaint") (internal quotations omitted). In the original appeal brought by NAACP, the First Circuit held that HUD was subject to APA waiver of its sovereign immunity because the alleged Title VIII violations did not fall into any exceptions preventing the court from reviewing the actions of HUD. *See NAACP II*, 817 F.2d at 160. HUD correctly notes, however, that the Plaintiff's Supplemental Complaint only refers to violations of the Consent Decree and

Modification Agreement, and does not identify any Title VIII violations.

NAACP makes an argument for APA jurisdiction based on the *Ex parte Young* analysis conducted by the Supreme Court in *Frew v. Hawkins*, 540 U.S. 431 (2004). *Frew* involved "the intersection of two areas of federal law: the reach of the Eleventh Amendment and the rules governing consent decrees." 540 U.S. at 437. In *Frew*, the petitioners sought to enforce a federal consent decree that state officials had entered into in order to resolve a Medicaid violations suit. *Id.* at 434-35. The decree required state officials to take certain actions that were not required under the Medicaid statute. *Id.* at 439. The state officials argued that court enforcement of the consent decree would involve the federal court in matters beyond federal law, since the terms of the consent decree were broader than actual requirements under federal law. *Id.* at 438. Thus, they contended, "a federal court should not enforce a consent decree arising from an *Ex parte Young* suit unless the court first identifies, *at the enforcement stage*, a violation of federal law." *Id.* (emphasis added). The Supreme Court rejected this argument by noting that "[t]he decree reflects a choice among various ways that a State could implement the Medicaid Act." *Id.* at 439. Enforcing the decree therefore "vindicates an agreement that the state officials reached to comply with federal law." *Id.* NAACP argues that the *Ex parte Young* analysis in *Frew* is also applicable here. Since the APA waiver has already been found in connection with the original

Title VIII violation, NAACP argues, it is not required to show now that HUD's violation of the Modified Consent Decree is also a violation of a statute or regulation.

Frew is distinguishable on two grounds. First, *Frew* involved a motion to enforce the consent decree. *See* 540 U.S. at 435. The Plaintiff's Supplemental Complaint seeks not only remedies for breach of the Consent Decree, but also for breach of the Modification Agreement and breach of implied covenants of good faith and fair dealing. These latter claims do not touch directly upon the implementation of a federal statute. Second, unlike the Eleventh Amendment, the APA, a federal statute that has a fully developed scheme for judicial review, and under which jurisdiction only arises upon the violation of a separate relevant federal statute, *see* 5 U.S.C. § 702, is before me here. NAACP's claims involving the Modification Agreement do not involve a violation of a separate statute or regulation. Nor do statutory or regulatory violations play a role in the alleged breach of the Consent Decree. Thus, I find that the APA does not provide this Court with jurisdiction to hear NAACP's claims.

2. Jurisdiction Under the Consent Decree

By contrast, the Consent Decree itself expressly provides the court with ongoing jurisdiction. Part IV.A of the Modified Consent Decree[8] states:

[8] The language of Part IV remains unchanged by the modifications to the Original Consent Decree.

> Jurisdiction is retained by the court for the purpose of enabling the plaintiff and HUD to apply to the court at any time for such further orders as may be necessary or appropriate for the construction, implementation, modification or enforcement of this Decree. However, no additional funding obligations not already explicitly contained in this Decree shall be imposed on HUD.

In addition, under Part IV.C, if HUD is unable to meet its obligation under the Decree, "either party may move for such comparable alternative relief as is appropriate"; such relief, however, "may not result in an increase in HUD's financial obligations as specified in this Decree."

HUD acknowledges that the Consent Decree provides this Court with continuing jurisdiction over the enforcement of the obligations under the Decree. But HUD argues that this grant of jurisdiction may not be used to impose greater obligations on HUD than the Consent Decree requires. HUD's arguments, however, are primarily attacks on the remedies sought by NAACP. I will take up the question of remedies when I address the merits of the Plaintiff's allegations in the Supplemental Complaint. On the question of jurisdiction, I need only determine whether this Court has the authority to hear NAACP's claims of breach of the Consent Decree and Modification Agreement.

This Court has jurisdiction over the Supplemental Complaint not only under the express language of the Consent Decree, but also under the principle that courts have inherent jurisdiction to enforce their decrees. *See Riggs v. Johnson County*, 73 U.S.

166, 187 (1867) ("[T]he rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree."). A trial court retains its jurisdiction to enforce its consent decrees if it had proper jurisdiction over the original case. *See Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 286 (D.C. Cir. 1993) (citing the principle that a trial court retains jurisdiction over its consent decrees).

This "ancillary jurisdiction," however, can be used only to serve two limited purposes: a) to permit disposition of claims that are factually interdependent, and b) to enable a court to "function successfully, that is to manage its proceedings, vindicate its authority, and effectuate its decrees." *Ricci v. Patrick*, 544 F.3d 8, 22 (1st Cir. 2008) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-80 (1994)). The First Circuit in *Ricci* did not directly address whether a court had jurisdiction over a complaint whose request for relief may extend beyond the terms of the original order. The specific holding was that ancillary jurisdiction does not extend to reopening an order absent a showing that the terms of the order had been violated. *Ricci*, 544 F.3d at 22. But the First Circuit in *Ricci* emphasized the principle developed in *Kokkonen* that district courts lack a "free-ranging" ancillary jurisdiction, and

that there is no federal court jurisdiction to revisit a settlement agreement where the relevant court order lacked a provision retaining jurisdiction. *Id.* (citing *Kokkonen*, 511 U.S. at 381, and *Pigford v. Veneman*, 292 F.3d 918, 924 (D.C. Cir. 2002)).

Under these guiding principles, I find that this Court has jurisdiction to hear NAACP's claims under the Consent Decree and the Modification Agreement. The Original Consent Decree explicitly provided this Court with jurisdiction for "such further orders as may be necessary or appropriate" for the enforcement of the Decree. The Modified Consent Decree made no changes to this jurisdictional provision. In these circumstances, this Court has jurisdiction to address questions of both breach and remedy, in order to effectuate the Consent Decree as modified by the Joint Motion and the Modification Agreement.[9]

This court maintains jurisdiction to exercise power to "modify its decree in light of changed circumstances," a power reflected in Fed. R. Civ. P. 60(b)(5); *see also Frew*, 540 U.S. at 441; *Ricci*, 544 F.3d at 20. However, it can make modifications

[9]The modifications to the Consent Decree were never captured in a single document. Rather, the modifications were contained in the Joint Motion, which provided a brief summary of the changes embodied in the Modification Agreement, and the much more detailed Modification Agreement, which was incorporated by reference into the Joint Motion. Judge Skinner thereafter granted the motion without an opinion.

to consent decrees only on a showing of "a significant change in circumstances," *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992), which the party seeking modification has the burden to demonstrate. *Ricci*, 544 F.3d at 20-21. To the extent that NAACP requests further modifications to the Consent Decree, I will evaluate such requests under the demanding standard outlined in *Rufo* and *Ricci*.

B. Motions for Judgment on the Pleadings

Both HUD and the City have moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Rule 12(c) permits dismissal "[a]fter the pleadings are closed--but early enough not to delay trial." Fed. R. Civ. P. 12(c). In reviewing a motion under Rule 12(c), "the district court must accept all the nonmoving party's well-pleaded factual averments as true and draw all reasonable inferences in her favor." *Feliciano v. Rhode Island*, 160 F.3d 780, 788 (1st Cir. 1998).

1. HUD's Motion for Judgment on the Pleadings

HUD, although conceding that the Court has jurisdiction over compliance with the Consent Decree, argues that the Court cannot review the Supplemental Complaint, which it says exceeds the terms of judicial review established in the Consent Decree. Part IV of the Decree states that "[j]urisdiction is retained by the court . . . for such further orders as may be necessary or

appropriate for the construction, implementation, modification or enforcement of this Decree." HUD argues that under these terms, NAACP's remedies are limited to orders from the court through motions governed by the standards of civil contempt. HUD contends that it would violate the terms of the Decree to permit new non-contempt claims, requiring the Plaintiff to satisfy a burden only by a preponderance of the evidence at trial.

While NAACP did, in fact, file motions for enforcement orders pursuant to the Consent Decree at the beginning of this stage of the litigation, I specifically gave the Plaintiff leave to file this Supplemental Complaint in November 2006, and denied the City's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The procedural device of a complaint is not inappropriate in these circumstances: NAACP's causes of action concern not only breach of the Consent Decree but also of the Modification Agreement; and NAACP's named Defendants include not only HUD, but also BHA and the City.

Even if I were to treat the Supplemental Complaint as a motion by another name, I am not obligated to treat it only as a motion for contempt. The Consent Decree states simply that parties can apply for "such further orders as may be necessary." HUD itself admits that orders under the Decree could include motions for contempt, motions for enforcement, or motions for further orders. A motion for enforcement may proceed separately

from a motion for contempt. *See Nextel Comm. of Mid-Atlantic v. Town of Hanson*, 311 F. Supp. 2d 142, 159-60 (D. Mass. 2004).

It appears that one of HUD's major concerns is ensuring that NAACP is held to a demanding burden of proof. HUD observes that if NAACP had pursued a motion for enforcement of the Consent Decree, the case law of civil contempt would apply, which, HUD contends, "places the burden squarely on the Plaintiff to establish by clear and convincing evidence that HUD, inter alia, violated the Consent Decree and/or Modification Agreement." HUD observes that this standard is higher than the burden on the Plaintiff in a motion for summary judgment or at trial. While the observation is accurate, the concern is misplaced as a matter of pleading. To the extent that there is disagreement regarding the burden of proof on the Plaintiff in this case, that is no basis for the dismissal of the Supplemental Complaint under Fed. R. Civ. P. 12(c). Rather, what is presented is a dispute over the legal standard to be applied to the facts and theories in this case, and that is a matter to be taken up when evaluating the parties' respective motions for summary judgment or at trial itself.

2. The City's Motion for Judgment on the Pleadings

The City raises two arguments in support of its motion for judgment on the pleadings. First, it argues that the Modification Agreement cannot be enforced independently from the

Modified Consent Decree under a breach of contract cause of action. Second, the City argues that the court lacks supplemental jurisdiction over NAACP's claims against the City.

a. The Modification Agreement as an Enforceable Contract

Like HUD, the City argues that NAACP's only viable enforcement mechanism is a motion for contempt. The City's position relies on the premise that the Modification Agreement is not independently enforceable from the Modified Consent Decree. The City argues that "the Modification Agreement became part of the [Modified Consent] Decree," and therefore, the Modification Agreement itself should be viewed as a consent decree, rather than as a contract. According to the City, NAACP therefore has no valid breach of contract cause of action against the City. NAACP counters that even though the Modification Agreement was incorporated by reference into the Modified Consent Decree, "it became and remains a separate and independent basis for claims among the parties to it."

There appears to be little in the way of case law discussing whether a party can bring a breach of contract claim based on an agreement that has been incorporated by reference into a consent decree. *See Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 604 n.7 (2001) (noting that "federal jurisdiction to enforce a private contractual settlement will often be lacking unless the

terms of the agreement are incorporated into the order of dismissal"); *Fitzpatrick v. Queen*, No. 03-4318, 2005 WL 1172376, at *5 (E.D. Pa. May 16, 2005) ("It is unclear whether an aggrieved party retains the option of asserting an ordinary breach of contract claim where the agreement upon which the claim is based has been incorporated into a consent decree.").

Upon careful review of the Joint Motion and the Modification Agreement, however, I find NAACP's argument persuasive. Although a number of terms of the Modification Agreement are discussed in the Joint Motion, many key terms are not. These differences make the Modification Agreement sufficiently distinct from the Modified Consent Decree to support a breach of contract claim. This leads me to conclude that I have jurisdiction to hear a breach of contract claim against the City with respect to the Modification Agreement.

b. Supplemental Jurisdiction over Claims Against the City

The City next argues that because this Court has no jurisdiction over the claims against HUD, it also lacks supplemental jurisdiction over the claims against the City. I have already concluded that this Court has jurisdiction to hear the claims against HUD, Part II.A.2., *supra.* Consequently, I find that this Court has supplemental jurisdiction over the breach of contract claim against the City, pursuant to 28 U.S.C. § 1367(a). Because I find that the Modification Agreement is

independently enforceable under a claim for breach of contract, and because this Court has supplemental jurisdiction over that claim, I will deny the City's motion for judgment on the pleadings.

C. Motions for Summary Judgment

1. Standard of Review

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and affidavits show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of demonstrating "an absence of evidence to support the nonmoving party's case." *Clifford v. Barnhart*, 440 F.3d 276, 280 (1st Cir. 2006) (citing *Celotex Corp. v. Caltrett*, 477 U.S. 317, 325 (1986)). I view the record in the light most favorable to the nonmoving party. *Collazo v. Nicholson,* 535 F.3d 41, 44 (1st Cir. 2008).

2. Burden of Proof

As noted above, a plaintiff like NAACP, pursuing claims based on non-compliance with decrees and related agreements, can face varying burdens of proof depending on the nature of its claims. HUD has argued that NAACP is essentially pursuing (or ought to pursue) enforcement of the decree through a contempt proceeding, based on alleged violations of the Modified Consent Decree. For a contempt claim, NAACP would bear the burden of

proving "by clear and convincing evidence" that the Defendants were in violation of the Modified Consent Decree. *AMF Inc. v. Jewett*, 711 F.2d 1096, 1100 (1st Cir. 1983). HUD argues that this Court must hear NAACP's claims based on the "clear and convincing evidence" standard, rather than the less demanding "preponderance of the evidence" rule. But NAACP has chosen to pursue its claims using the traditional pleading device, and I see no reason to depart from the "preponderance of the evidence" burden of proof unless contempt claims are expressly asserted.

There is, nevertheless, a separate dimension to claims regarding proposed changes to the Modified Consent Decree. Modification of a consent decree results in "a permanent, facial change in the decree." *Brewster v. Dukakis*, 675 F.2d 1, 3 (1st Cir. 1982). "A party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo*, 502 U.S. at 383; *see also Ricci,* 544 F.3d at 20-21. If the party meets this standard, "the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Rufo,* 502 U.S. at 383.

3. Motions for Summary Judgment on the Supplemental Complaint

NAACP moves for summary judgment on each count in the Supplemental Complaint. Although the Supplemental Complaint identifies four separate causes of action, all of NAACP's claims

are concededly and effectively for breach of contract.

To support its argument that HUD, BHA, and the City have breached their obligations under the Modification Agreement, NAACP presents several specific breach of contract contentions. First, it contends that HUD, BHA, and the City breached their obligation in the Modification Agreement to make the $640,000 counseling grant fund available to BFHC "expeditiously." Second, it contends that HUD, BHA and the City breached their obligation to restrict the availability and use of the Litigation Vouchers to minority families desirous of making an integrative move to a predominantly white neighborhood. The third contention, also related to the Litigation Vouchers, is that HUD, BHA and the City breached their obligation to complete the distribution of Litigation Vouchers within the time prescribed by the Modification Agreement. BHA and the City have moved for summary judgment on the claims in the Supplemental Complaint.

a. The Housing Counseling Grant Contention

NAACP's first contention is that HUD, BHA, and the City all breached their obligation under the Modification Agreement to make the housing counseling grant of $640,000 available to BFHC expeditiously. Pursuant to the Modification Agreement, "[t]he BHA and HUD agree to promptly execute . . . a contract to fund the housing choice program and the BHA, HUD, and the City agree to *promptly* take any other steps necessary to *expeditiously* make

this funding available to the BFHC." (Modification Agreement at 12 (emphasis added).) The Modification Agreement became effective on February 8, 2000 and HUD had already identified $640,000 for the housing choice fund in the fall of 1999. Before the funds could be released, however, BHA and the City, through BFHC, had to agree on the terms of the housing choice program, and discussions extended from January 2001 through July 2002. An agreement was finalized on July 19, 2002. After two-and-a-half years, the $640,000 funding was released to BFHC on August 26, 2002. NAACP argues that this two-and-a-half year delay in releasing the funds shows that the Defendants failed to "expeditiously" make the funds available. I turn now to the task of interpreting this term in the Modification Agreement.

BHA offers several arguments about the interpretation of a consent decree that miss the point. It states that I should look at the "four corners" of the Consent Decree. *U.S. v. Armour & Co.*, 402 U.S. 673, 682 (1971). Specifically, it argues that NAACP is seeking to enforce "an additional term beyond the scope of [the other party's] consent" (citing *Fox v. U.S. Dep't of Housing & Urban Dev.*, 680 F.2d 315, 322 (3d Cir. 1982)). But what NAACP is actually seeking is an interpretation of the word "expeditiously" given that the Modification Agreement imposes no specific time limit for providing the $640,000 of funding.

The question is whether this two-and-a-half year delay

satisfies the obligation to act "expeditiously" as a matter of law. Analysis of the Modification Agreement for purposes of a breach of contract claim or as an effort to obtain an order to enforce a consent decree is essentially the same, since "a consent decree . . . is to be construed for enforcement purposes basically as a contract." *U.S. v. ITT Cont'l Baking Co.*, 420 U.S. 223, 238 (1975). Similarly, "[w]hen interpreting the terms of a consent decree, the court applies general contract principles using the law of the state where the agreement was made." *Collins v. Thompson*, 8 F.3d 657, 659 (9th Cir. 1993). In Massachusetts, when a contract fails to provide a specific time limit, "the law will impute a reasonable time limitation." *Micromuse, Inc. v. Micromuse, PLC*, 304 F. Supp. 2d 202, 210 n.9 (D. Mass. 2004).

Reasonableness is best evaluated in light of the behavior of all the parties. HUD is a large federal agency that is, for the most part, not in the business of micro-managing local housing authorities. It made the $640,000 available to BHA and was waiting for BHA and the City to finish their negotiations. Although City files indicate an original implementation schedule with program start-up in January 2001, the schedule also indicated there were significant funding issues that needed to be resolved. In September 2001, BFHC presented NAACP with two proposed counseling plans, a basic option and a full-service option. NAACP did not respond until December 2001 when it

indicated that it preferred the basic option. A two-and-a-half year delay seems more reasonable given that it took NAACP some three months to evaluate two completed proposals.

BHA argues that the term "expeditiously" should be interpreted in the context of the obligations and tasks that were undertaken. While a draft housing choice counseling plan had already been prepared and attached as an exhibit to the Modification Agreement, the basic option housing choice plan that was ultimately adopted incorporated changes to the self-sufficiency workshop, landlord outreach, and post-occupancy services.

Two-and-a-half years may seem a relatively long time to wait; however, the relevant question is whether it was an *unreasonably* long time. One can share NAACP's frustration with the lengthy process, which appears to have involved some leisurely bureaucratic wrangling, but the record shows that it also involved lengthy discussions and resolution of funding issues. As BHA notes, if NAACP felt so strongly that the Litigation Vouchers program should start before the end of 2000, it should have negotiated to include such a precise deadline in the Modification Agreement. Alternatively, it could have moved for relief at that time. Other provisions of the agreement are quite time-specific, such as the requirement that all vouchers be issued within twenty-seven months of funding. Based on these facts, I find that HUD, BHA, and the City acted reasonably given the circumstances and, as a matter of law, did not breach the

Modification Agreement to "promptly take any other steps necessary to expeditiously make [the] funding available." Thus, I will deny NAACP's motion for summary judgment as to this contention and correspondingly grant summary judgment to each Defendant.

b. The Litigation Voucher Contentions

NAACP presents two contentions focusing on the Litigation Vouchers: that HUD, BHA and the City breached an obligation to restrict the Litigation Vouchers to eligible families as described in the Joint Motion and Modification Agreement; and that HUD, BHA and the City breached their obligation to complete distribution of the Litigation Vouchers within the time prescribed by the Modification Agreement. The claims are interrelated, and I address the latter issue first.[10]

i. Compliance with the twenty-seven month deadline

NAACP argues that failure to complete Litigation Voucher issuance before December 2004 is a breach of the Modification

[10] I note that BHA raises the affirmative defense that any breach of contract claim brought by NAACP is barred by the statute of limitations. Under Massachusetts law, a plaintiff has six years from the date of the alleged breach to bring a breach of contract claim. Mass. Gen. Laws ch. 260, § 2. As to the obligation only to issue Litigation Vouchers to eligible families, however, a breach could not have occurred until after the funding of the $640,000 housing counseling grant in August 2002. Therefore, this particular breach of contract claim is not barred by the statute of limitations. Moreover, any breach of contract claim based upon lack of timeliness in funding of the housing counseling grant before August 2002 is foreclosed by my determination of the housing counseling grant contention in Part II.C.3.a., *supra*.

Agreement. The relevant language in the Modification Agreement states:

> All four hundred Section 8 tenant-based subsidies will be issued to minority families desirous of making an integrative move into a predominantly white community by no later than twenty-seven months after 1) the BHA and HUD execute a contract to fund the housing choice program, 2) the City and the BHA take all necessary steps to make this funding available to the [BFHC], and 3) the funds can be drawn upon by the BFHC.

(Modification Agreement at 12.) NAACP states that the BHA did not begin issuing Litigation Vouchers until June 2003, nearly ten months after the counseling grant was released. NAACP contends that there was "minimal activity in distributing vouchers in 2004" and the final distribution was not completed until the very end of the year. NAACP dismisses as inadequate the reasons for the slow progress, including BHA's problems with over-leasing and the diversion of the Litigation Vouchers for use by ineligible families.

I find NAACP's allegations state at most an immaterial breach under the timing provision of the Modification Agreement. Unlike other provisions of the Modification Agreement that use flexible terms such as "promptly" and "expeditiously," the timing provision for distribution specifically imposes a twenty-seven month window for the issuance of all four hundred Litigation Vouchers. The twenty-seven month period starts when "the funds can be drawn upon by the BFHC." It is undisputed that the funds

were made available to BFHC on August 26, 2002. Twenty-seven months from this date would be November 26, 2004. All four hundred vouchers were issued by December 31, 2004. Understandably, NAACP does not argue that a one-month delay in meeting the full issuance obligation represents a material breach of the Modification Agreement.

Rather, NAACP argues that the delay in releasing the $640,000 to BFHC caused the twenty-seven month window to be shifted back, as a consequence of which the true window of time should be measured from December 2000 through March 2003. But this is merely a reiteration of its contention that HUD, BHA, and the City breached the Modification Agreement by failing to release the funds to BFHC expeditiously, a contention I have already discussed and rejected in Part II.C.3.a., *supra*. How a party would perform ideally is not the same as how a party is legally obligated to perform. The Modification Agreement language is clear: The subsidies will be issued "no later than twenty-seven months after . . . the [$640,000 of] funds can be drawn upon by the BFHC." There was no requirement for BHA to complete issuance prior to this time, nor was there an obligation for HUD to hold BHA to an earlier completion time. Exceeding by one month the issuance of some vouchers was not a material breach. Thus, I will deny NAACP's motion for summary judgment and correspondingly grant summary judgment to the Defendants as to this contention.

ii. Restoration to eligible minority families

NAACP raises the separate contention that HUD, BHA and the City breached their obligation to restrict the availability of the Litigation Vouchers to minority families desirous of making an integrative move to a predominantly white neighborhood. In the Joint Motion, the parties asked the Court to modify the Original Consent Decree such that the subsidies "will be made available *only* to minority families, and for the first 120 days, may be used by such families only for housing located in predominantly white neighborhoods, as more fully described in the attached [Modification Agreement]." (Joint Motion at 1 (emphasis added).) The Modification Agreement directed that BHA's three hundred newly designated tenant-based vouchers were to be "provided *exclusively* to minority families on the [BHA] waiting list desirous of making an integrative move to a predominantly white neighborhood." (Modification Agreement at 5 (emphasis added).) In addition, BHA's original one hundred Section 8 tenant-based subsidies were to be provided to minority families who were already living in predominantly white neighborhoods or who wanted to move to predominantly white neighborhoods. (*Id.* at 5-6.)

It is undisputed that BHA sought HUD's approval regarding use of the Litigation Vouchers for individuals not eligible under the Modification Agreement, and did in fact use the Litigation Voucher subsidies to issue vouchers to ineligible individuals and

families. From 2001 to 2003, BHA used the Litigation Voucher subsidy to issue vouchers to homeless families living in emergency shelters "with the intention of replacing such funding through attrition."

When BHA began experiencing problems with over-leasing in 2003, HUD and BHA worked together on a plan to address the problem, including the possibility of deferring issuance of the Litigation Vouchers beyond the twenty-seven month window. In December 2003, HUD questioned BHA regarding the impact of the deferral and one month later, it told the BHA that it "must contact" NAACP to discuss BHA's need for deferral and that deferral "without the knowledge and approval of all parties to the [Modification] Agreement would be ill-advised."

As of April 30, 2004, 260 Litigation Vouchers had been issued. BHA issued the remaining 140 vouchers by December 2004.

NAACP alleges that these facts show a violation by HUD, BHA and the City of their obligation to ensure that the Litigation Vouchers were issued *only* to minority families desirous of making an integrative move. This characterization appears overdrawn, however, given the fact that BHA issued substantially all of the Litigation Vouchers to those eligible within the twenty-seven month window provided by the Litigation Modification Agreement. To be sure, certain of the Litigation Vouchers were used before the deadline for housing of persons not eligible under the Modified Consent Decree and the Modification Agreement until

eligibility was established. But this short-term parking arrangement, benefitting others in need of housing, does not seem altogether unreasonable while eligibility was established under a new and ambitious program. Nevertheless, interpretation of the Modified Consent Decree and Modification Agreement are governed by basic contract law. *Citation Ins. Co. v. Gomez*, 688 N.E.2d 951, 953 (Mass. 1998). The language in the Modification Agreement and Joint Motion is unambiguous. The Joint Motion states that the "subsidies . . . will be made available only to minority families" and the Modification Agreement states that the converted Section 8 "subsidies . . . will be provided exclusively to minority families . . . desirous of making an integrative move to a predominantly white neighborhood." HUD and BHA failed for a time to restrict the availability and use of the Litigation Vouchers as required.

That being said, I find NAACP has failed to demonstrate harm significant enough to establish a material breach.

c. Alleged Harms

NAACP identifies two possible harms from the breach of the duty to restrict availability: harm to the families who were forced to wait unnecessarily for their vouchers; and harm to renewal funding in 2005 and 2006 as a result of the deviations in distribution. Neither can be said to constitute a material breach.

i. Harm to families

NAACP argues that the breach of the exclusivity provision harmed eligible families who were forced to wait longer than they otherwise would have for their vouchers. The Plaintiff has failed to demonstrate cognizable harm to these families. NAACP has stated that twenty families had completed the BFHC counseling program, and were referred to the BHA for Litigation Vouchers in February, March, and April 2004. All twenty of those families had been issued Litigation Vouchers by August 2004. This delay of four to six months in obtaining the vouchers, experienced by twenty families, may have caused some cognizable harm, but what type, e.g., economic harm in the form of higher interim housing costs, or more generally a dignitary harm from delay in vindication of the right to an integrated housing experience, is not specified. NAACP, in any event, has not presented facts that demonstrate such consequences. Moreover, all twenty families had their vouchers provided well before the deadline of November 2004.

ii. Harm to renewal funding

The second harm identified by NAACP is said to be reduction in renewal funding for the Litigation Vouchers in 2005 and 2006. The 2005 budgets were based on the 2004 Snapshot of leasing and cost data. NAACP argues that because the Litigation Vouchers should have been leased up by mid-2004, there was a reduction in

the average voucher subsidy to BHA. For their part, the Defendants argue that NAACP's reasoning is flawed and counter that BHA's over-leasing problem led to receipt of funding in excess of what it would otherwise have received had Litigation Vouchers been left unassigned. At a minimum, whatever the effect upon BHA's overall subsidy, the assignment of Litigation Vouchers, albeit in certain cases to non-eligible families, assured the Litigation Vouchers were counted in the Snapshot in some form. NAACP has based its calculations of funding on the hypothesis that all four hundred Litigation Vouchers would have been leased up during the Snapshot. There is no evidence, however, how many Litigation Vouchers would actually have been leased up during this time period, had BHA not distributed some of the vouchers to non-eligible families. More to the point, HUD provided funding to BHA as a fixed, dollar-based budget that encompassed all of BHA's Section 8 voucher programs. Any shortfalls, had they occurred, would have arisen in BHA's lump-sum allotment from HUD, rather than in specific funding for the Litigation Vouchers. NAACP therefore cannot demonstrate any cognizable harm in terms of funding shortfalls.

d. Remedies

As a cross-check against my determination that no material breach of and no cognizable harm for the Modification Agreement and Consent Decree has been demonstrated, I will analyze the

purported harms from the perspective of the fit between the remedies the NAACP seeks and the harms it has claimed. I find that none of the remedies sought fit the harms asserted. Rather, it appears that relatively insignificant harms are being used as a spring board to seek substantial and arguably unauthorized modifications in the Consent Decree.

NAACP's remedies, whether characterized as injunctive relief for breach of contract or as a modification of the Consent Decree, must match the harms or circumstances that have occurred. As a general proposition, injunctive relief must be "properly tailored to remedy the specific harm shown." *Pino v. Protection Maritime Ins. Co., Ltd.*, 599 F.2d 10, 16 (1st Cir. 1979) (internal citations omitted). Further, the relief sought by NAACP is more than general injunctive relief. It seeks a substantial modification of the Consent Decree.

As explained in *Rufo*, a modification of a consent decree must be "suitably tailored" to a significant change in circumstances. 502 U.S. at 383; *see also Ricci*, 544 F.3d at 21 (finding that no significant change in factual circumstances or the law had occurred that would justify reopening the consent decree). The First Circuit, citing *Rufo*, has held that a consent decree must be changed "no more than necessary to resolve the problems created by the change in circumstances," and "must not defeat the core purpose of the consent decree." *King v.*

Greenblatt, 149 F.3d 9, 15 (1st Cir. 1998). The courts have policed the narrow tailoring obligation sensitively. For example, in *Thompson v. U.S. Dep't of Housing & Urban Dev.*, 404 F.3d 821 (4th Cir. 2005), the court permitted a modification that extended the period of jurisdiction over HUD because doing so would "ensure that the Decree can be efficiently enforced," and the extension was "no more than was necessary." *Id.* at 831-32. Yet in *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141 (6th Cir. 1992), where a board of education sought an increase in Ohio state funding to cover the costs of a consent decree's desegregation plan - which explicitly capped state liability at $1 million - the court found that the state had committed no constitutional violation, and its assumption of liability in a different city "does not in any way justify the judicial modification" to increase the state's liability cap under the consent decree. *Id.* at 1152.

With these legal principles in mind, I turn to the three general categories of relief requested by NAACP: specific requirements for HUD in seeking appropriations from Congress; a transfer of authority over the Litigation Vouchers from the BHA to the MBHP; and requests for additional HUD funding that are collateral to the transfer of authority to the MBHP.

i. HUD appropriations

First, NAACP seeks a declaration that HUD must fulfill new obligations in its appropriation requests to Congress: to make a separate line-item request for the renewal of Litigation Vouchers; to specify that the subsidies for the Litigation Vouchers are court-required; to seek an appropriation for renewing the Litigation Vouchers, regardless of whether all were under lease during any period; and to seek appropriations that would be sufficient to assure that the subsidized housing units have an average of three bedrooms. (Suppl. Compl. ¶ C.)

This complex remedy is well beyond the scope of the Consent Decree, imposing additional, and until now unrequested, burdens on HUD. These burdens include seeking further appropriations for the Litigation Voucher program, which indirectly acts as a funding request. The Consent Decree explicitly states that "no additional funding obligations not explicitly contained in this Decree shall be imposed on HUD." NAACP's request is plainly a request to modify these terms of the Consent Decree, and it therefore must be "suitably tailored" to a "significant change in circumstances." *Rufo*, 502 U.S. at 383.

NAACP, however, has not argued or established a change in circumstances that would warrant a modification; the only alleged harms are a delay in distributing the Litigation Vouchers, and a distribution to non-eligible families during a discrete period of

time. NAACP has failed to demonstrate any relevant ongoing or significant effects from this conduct. For example, NAACP alleges that the incomplete leasing of Litigation Vouchers during the Snapshot in 2004 resulted in a shortfall of BHA funding for the Vouchers. NAACP expresses concern that if BHA made up for these shortfalls, it has done so by creating shortfalls for other housing funds. But shortfalls elsewhere in BHA's allocations are beyond the scope of the Consent Decree, and thus are not significant for purposes of a modification request. There is no demonstration that shortfalls exist in the Litigation Voucher program that is the subject of the Consent Decree.

Furthermore, even if NAACP had shown a significant change in circumstances, NAACP's requested relief is not "suitably tailored" to these alleged harms. NAACP's preferred remedy--requiring HUD to satisfy new obligations in seeking congressional appropriations--bears no readily apparent relation to the agencies' former distribution errors. NAACP requests that HUD be required to submit line-item appropriations requests, with special designation given to the Litigation Vouchers. But NAACP has not provided an account of how future appropriations requests would remedy shortfalls in 2005 and 2006, especially given the complexities of the congressional appropriations process.

A similar disjunct between harms and remedies occurs with NAACP's request that HUD seek appropriations sufficient to assure

subsidies for three-bedroom units. While the Modification Agreement does call for subsidies of units having "as an average, 3 bedrooms of Section 8 family housing" (Modification Agreement at 1), NAACP has made no allegation that the BHA has failed to provide three-bedroom units as an average in its administration thus far. This request runs counter to the requirement that a modification to a consent decree do "no more than necessary." *King*, 149 F.3d at 15.

ii. Rescission of BHA's awarded vouchers

NAACP's second set of requests involves removing BHA's authority to administer its assigned Litigation Vouchers. NAACP requests that HUD rescind the award of four hundred subsidies to BHA, and then award these subsidies instead to the DHCD, on the condition that DHCD contract with the MBHP to administer the four hundred vouchers in accordance with the Modification Agreement. (Suppl. Compl. ¶¶ D.2, D.3.) NAACP also requests that HUD, BHA, and the City provide $295,000 to MBHP to fund housing search counseling services in conjunction with its administration of the four hundred vouchers. (*Id.* ¶ D.5.) This is in direct contravention that "no additional funding obligations" be imposed on HUD.

Altering the agency responsible for administering the Litigation Vouchers plainly qualifies as a major modification to the Consent Decree. And again, NAACP fails to establish either a significant change in circumstances or a suitable tailoring

between these circumstances and the transfer of vouchers to MBHP. The only basis for the request seems to be that MBHP has implemented its one hundred allotted vouchers with greater speed and effectiveness than BHA. Although NAACP has shown that some instances of tardiness and non-compliance occurred with the availability restriction in the ramp up to the deadline for full award of Litigation Vouchers, NAACP has not demonstrated that any error in administration is occurring now, or is threatening to occur. Consequently, NAACP has not shown that transferring authority over the vouchers to the MBHP would make any difference for the current or future administration of the Litigation Vouchers. Without demonstration by NAACP that BHA is currently in noncompliance - or is reasonably likely to be in future noncompliance - with the Consent Decree or Modification Agreement, I cannot grant a request for this considerable modification.

iii. Funding adjustments

A third set of requests involves funding adjustments related to the transfer of Vouchers to the MBHP. NAACP asks that if the Litigation Vouchers transferred to MBHP are insufficient to fund the subsidies at HUD's Fair Market Rent rates, HUD shall provide additional funding from its available resources to correct the shortfall. (Suppl. Compl. ¶ D.3.) If HUD's resources are insufficient to renew the Litigation Vouchers' funding, NAACP

asks that HUD provide the maximum funding available and use its best efforts to obtain an appropriation for the shortfall. (*Id.* ¶ D.4.) These are clearly new funding obligations placed on HUD, requiring an abandonment of the limitation on such obligations found in Part IV.A of the Consent Decree. Because I have determined that the transfer of authority to MBHP is not tailored to HUD's and BHA's past distribution errors, these related requests for additional funding also fail to comply with the *Rufo* tailoring requirement.

iv. Lack of fit to the remedy

Refracting NAACP's allegations of harm through the lens of its proposed remedial modification requests confirms that the Defendants, though deviating from their formal obligations at particular times, have not committed a material breach of the Consent Decree. Even if NAACP had demonstrated such a breach, it would not be entitled to relief because none of its requested remedies are tailored to its allegations of harm.

e. Conclusion

In sum, as to each of the counts in the Supplemental Complaint, I will deny NAACP's motion for summary judgment, I will grant the BHA's and the City's motions for summary judgment on the Supplemental Complaint. I will grant summary judgment to HUD sua sponte. Although HUD has not moved for summary judgment, the two requirements for entering summary judgment sua sponte have been satisfied. First, discovery on the Supplemental

Complaint has permitted the parties to "glean the material facts." *Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 29 (1st Cir. 1996). Second, NAACP has had "a chance to present its evidence on the essential elements of the claim" through discussion in its own motion for summary judgment and in its responses to the City's and BHA's motions for summary judgment. *Id.*

4. BHA's Motion for Summary Judgment on its Counterclaim

BHA has moved for summary judgment on its remaining counterclaim against NAACP: that NAACP breached the Modification Agreement in failing to follow the dispute resolution procedures therein. The Original Consent Decree contains language unchanged in the Modified Consent Decree requiring that "prior to submission of any dispute under this Decree to the court, counsel for the parties shall consult in an effort to resolve the matter informally." BHA argues that NAACP failed to initiate discussions, solicit responses, and schedule meetings to discuss the progress of satisfying the Modified Consent Decree's objectives.

As NAACP notes, however, the record demonstrates NAACP contacted BHA numerous times regarding its concerns. In addition, NAACP argues that BHA withheld information on the diversion of the Litigation Vouchers, preventing NAACP from utilizing the informal mechanisms to resolve its concerns. This

casts considerable doubt on whether BHA itself engaged in meaningful efforts to resolve the matter informally, as required by the Consent Decree. In these circumstances, BHA cannot demonstrate as a matter of law that NAACP failed to comply with the Consent Decree's consultation obligations. The Decree's language that the parties "shall consult in an effort to resolve the matter informally" is quite open-textured, and on my reading of the language and the record before me, NAACP satisfied its consultation requirement as a matter of law. The pre-litigation development as to efforts at consultation is sufficient to justify summary judgment for NAACP as to BHA's counterclaim. I will deny BHA's motion for summary judgment as to its counterclaim, and grant summary judgment to NAACP sua sponte. *Berkovitz,* 89 F.3d at 29.

III. CONCLUSION

For the reasons stated more fully above, I DENY HUD's Motion for Judgment on the Pleadings or, in the alternative, suggestion to the Court that it lacks Subject Matter Jurisdiction (Docket No. 120); I DENY the City's Motion for Judgment on the Pleadings but GRANT its Motion for Summary Judgment (Docket No. 122); I DENY NAACP's Motion for Summary Judgment as to all of its claims against all Defendants (Docket No. 124); I GRANT BHA's Motion for Summary Judgment as to NAACP's Supplemental Complaint, but DENY BHA's Motion for Summary Judgment as to its Counterclaim against

NAACP (Docket No. 127). Correspondingly, I GRANT summary judgment sua sponte to HUD as to NAACP's Supplemental Complaint, and to NAACP as to BHA's Counterclaim.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE