

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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ROBERT CALLAHAN, et al., ) Index No.: 42582/79  
)  
Plaintiffs, )  
)  
-against- )  
)  
HUGH L. CAREY, as Governor of the State of )  
New York, et al., )  
)  
Defendants. )  
)  
-----X

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION  
FOR AN ORDER ENFORCING THE CONSENT DECREE**

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Plaintiffs, homeless adult men and women, respectfully ask this Court to enforce the final judgment the Court entered on August 26, 1981, by consent of the parties.<sup>1</sup> The Consent Decree requires the City of New York to provide shelter from the elements to each man and woman who is homeless by reason of physical, mental or social dysfunction or who meets the need standard for public assistance. As evidence on this motion demonstrates, defendants are failing to provide lawful shelter to homeless men and women, in violation of the plain terms of the 1981 consent decree. Because the City's shelter system is out of capacity, the City is forcing homeless men to wait through the night without any shelter at all. In addition, the City is busing homeless women in the middle of the night to a special night-only dormitory, in direct contravention to prior enforcement relief that prohibits the City from using shelter space that is not operated on a 24-hour basis.

## **BACKGROUND**

### **A. The Consent Decree Recognizes a Right to Shelter**

Homeless services for homeless women and homeless men in the City of New York are in an extreme crisis. Partly as a result of the crushing economic situation, the number of homeless individuals has increased significantly over the past year. Affidavit of Patrick J. Markee ¶¶ 16-26 & Exh. G ("Markee Aff."). The City has not provided enough lawful shelter to address the rising number of homeless adults, with the result that on a number of nights the City has relegated homeless men to sleep on benches, on the floor or on tables. Affidavit of Diana Olaizola ¶ 11 ("Olaizola Aff."); Affidavit of Giselle Routhier ¶¶ 14, 21 ("Routhier Aff."). The

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<sup>1</sup> On that date, this Court entered a Consent Decree regarding the City's provision of shelter to homeless men in *Callahan v. Carey*. The terms of that Decree have since been extended to women, in the case *Eldredge v. Carey*, Index No.: 41494/82, *see infra* 3, and New York trial and appellate courts have issued enforcement orders in both cases. *E.g. Callahan v. Carey*, 12 N.Y.3d 496, 498 (N.Y. 2009). The parties and the courts have treated the two cases as consolidated although no formal consolidation order has been issued. For the sake of clarity, plaintiffs have filed separate but identical papers in the two actions.

City has also run out of lawful shelter for homeless women and is busing women to a temporary dormitories open only for a few hours of sleep at night. Markee Aff. ¶¶ 39, 43; Routhier Aff. ¶¶ 15, 19. The situation for both homeless women and homeless men will only worsen as the weather becomes colder and the demand for shelter continues to increase.

Thirty years ago, in hard economic times in New York City, Plaintiff Robert Callahan and others commenced this litigation and claimed that the City and State of New York have an obligation, under Article 17 of the State's Constitution, to provide lawful shelter to New Yorkers in need. Plaintiffs documented the suffering and sometimes death from exposure of those who were forced to live on the street for lack of shelter, and this Court granted a preliminary injunction requiring the City to provide a certain minimum number of shelter beds. *See Callahan v. Carey*, Decision, Index No. 42582/79 (N.Y. Sup. Ct. N.Y. County Dec. 5, 1979) ("P.I. Order"). Subsequently, after weeks of trial, the City consented to a judgment under which it would be required to provide shelter and board to each homeless man who requested it. This Court entered the resulting judgment, retaining jurisdiction over enforcement of the judgment ever since. *Callahan v. Carey*, Final Judgment by Consent, Index No. 42582/79 (N.Y. Sup. Ct. N.Y. County Aug. 26, 1981) ("Consent Decree") (Exh. A attached to Affirmation of Steven Banks).

The Consent Decree has been the bedrock for the City's provision of shelter for homeless, single adult men since 1981 and for homeless, single adult women since 1983. In that year, this Court agreed with the plaintiffs in this case that, as a matter of equal protection under the U.S. and New York Constitutions, the Consent Decree "is equally applicable to women's shelters." *Eldredge v. Koch*, 459 N.Y.S.2d 960, 961 (N.Y. Sup. Ct. 1983). Since that time, New

York courts have enforced the Consent Decree in *Eldredge* as in *Callahan*. *E.g. Callahan v. Carey*, 12 N.Y.3d 496, 498 (N.Y. 2009).<sup>2</sup>

The Consent Decree has four main elements. First, the City “shall provide shelter and board” to each person in need who applies for it. Consent Decree ¶ 1.<sup>3</sup> Second, the decree sets forth substantive standards that shelter space must meet. *Id.* ¶¶ 2-3. This Court very early concluded that the Consent Decree requires “full service” facilities to which homeless clients have access during the day as well as at night. *Callahan v. Carey*, Order, at 8 (Dec. 20, 1982) (“1982 Order II”). Third, the City must inform the Legal Aid Society (“LAS”), plaintiffs’ counsel, thirty days in advance of opening any new shelter. *Id.* ¶ 3. Fourth, the City must report data on the usage of shelters on a daily basis and allow LAS or Plaintiff Coalition for the Homeless (“Coalition”) access to shelter facilities to monitor compliance with the judgment. *Id.* ¶¶ 11-12.<sup>4</sup>

The City has occasionally violated the Court’s judgment since 1981, and the Court has ordered the City to take remedial actions. Most significantly for present purposes, the Court has made clear that the very practice the City is now engaged in, the “transshipment by bus” of homeless individuals to *ad hoc*, night-only shelter space, is not permitted under the Consent Decree. *Callahan v. Carey*, Order, at 8 (Nov. 5, 1982) (“1982 Order I”). Such treatment is dangerous to the health and safety of these homeless New Yorkers, and it denies them the stability they need in order to rebuild their lives.

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<sup>2</sup> On the original motion in 1983, the Appellate Division “of course agree[d] . . . that homeless women are constitutionally entitled to treatment equal to that accorded to homeless men,” but it observed that the facts in evidence did not require injunctive relief at the time. *Eldredge v. Koch*, 469 N.Y.S.2d 744, 744 (1st Dep’t 1983).

<sup>3</sup> Under the Consent Decree, the City must provide shelter to each homeless person who requires shelter because of a physical, mental, or social dysfunction or who meets the State’s “need standard” for public assistance. Consent Decree ¶ 1.

<sup>4</sup> The Coalition for the Homeless is a plaintiff-intervenor in this litigation.

## **B. The City's Current Violations Are Persistent and Ongoing.**

The City's shelter system has run out of beds. Although the demand for shelter has been growing predictably for over a year, the City has made insufficient preparations to meet the current need. Markee Aff. ¶¶ 16-26. As a result, the City is unable to provide lawful shelter to homeless women and men who need it and cannot meet even the minimum standards established by *Callahan*. Repeatedly over the last three months, a number of homeless New Yorkers have received no bed at all after waiting into the early morning hours.<sup>5</sup>

In the early hours of October 9, there were 52 men waiting for shelter—some asleep on the floor or in chairs—in a crowded room at the City's Bellevue Shelter. Markee Aff. ¶ 48. The last bus took only 14 of them away, leaving the rest to sit for the night. *Id.* Such has been the situation for at least the last two months. For example, on October 21, 2009, at least four women were sleeping on a dining room table at a shelter at 2:30 a.m. Olaizola Aff. ¶ 12. As of late November, the City has been busing women back and forth between a shelter intake location and a faraway overnight dormitory where they get a few hours of sleep before returning. On December 6, 2009, the City treated at least 57 women in this way; that number represents the minimum scale of the system's undercapacity, because such midnight dormitories do not meet the City's obligations under the Consent Decree. *See* Consent Decree ¶ 1 ("The City shall provide shelter and board to each homeless man who applies for it . . . ."); *id.* ¶ 2 ("The City defendants shall provide shelter at facilities operated in accordance with the standards set forth in this paragraph . . . ."). On the night of December 6, more than 50 homeless men were sleeping on the floors and in chairs in waiting rooms at the Bellevue Shelter after 1 a.m., while the City's shelter census report for that night showed no vacant beds for homeless men. Markee Aff. ¶ 45 & Exh. F10; Routhier Aff. ¶ 21.

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<sup>5</sup> Markee Aff. ¶¶ 28-45; Olaizola Aff. ¶¶ 4-12; Routhier Aff. ¶¶ 5-21.

The Consent Decree requires that shelter must be available when a person first seeks shelter from the elements. *See* Consent Decree ¶¶ 5–7 (requiring 24-hour intake operations and immediate shelter for one night to new applicants). The Consent Decree does not permit the City to relegate homeless New Yorkers to waiting through the night for shelter; the risks of exposure from sleeping outside, especially in the cold winter months, necessitate immediate access to shelter, *see* P.I. Order (“[E]very public official . . . is vitally concerned that no New Yorker . . . freeze to death by reason of exposure to the cold of the winter”; “[T]here is no reason why these homeless and indigent men cannot be lodged and fed at institutions wherever available in the State.”).

The City’s publicly reported monthly averages of shelter usage show that the number of homeless New Yorkers in City shelters has increased steadily over the last year, Markee Aff. ¶ 51 & Exh. G1, and the detailed daily reports that the City provides to the Coalition pursuant to the Consent Decree document the immediate problem, Exhs. F1 – F11 to Markee Aff. These data show that the short-term shelter system is literally full. The reports indicate the actual bed capacity of the various shelters in the City’s system on any given night and the number of men and women using them. Markee Aff. ¶¶ 16-26. On September 30, 2009, the City’s data indicated that the shelter system was at 100 percent capacity. *Id.* ¶ 6. Every bed listed as available was occupied. *Id.* The City reported that the system reached its capacity again repeatedly throughout October and November and now in December as well. *Id.* ¶¶ 17-26 & Exhs. F3 – F11.

Although the data may appear to show that the system is exactly at capacity, in fact the system is not providing lawful shelter to all eligible individuals seeking it. First, the data only report the number of people actually occupying City shelter beds; they do not report those who

have not been able to receive a bed. Markee Aff. ¶ 5. Even when demand exceeds 100 percent of capacity, the City will only report 100 percent usage of capacity. Indeed, the daily reports indicate that not everyone who arrives at a City intake site seeking shelter receives it, and they show that late at night the City transports scores of homeless people, including 69 women on November 18, because the City's shelters are full. *Id.* ¶¶ 16-26.<sup>6</sup> Second, even when the census reports that there are a few beds available, there are often scores of men and women waiting without shelter, far more than the few beds could handle anyway. The census does not report how many are waiting. *Id.* ¶ 14.

Coalition staff visit shelters periodically, and on nearly every visit in the last month they have seen people waiting for beds well past 1 a.m.

- On September 29, 2009, at least 15 men had not received beds late in the night at the two shelters the Coalition inspected, and shelter staff at one declared that there were no available beds. *Id.* ¶¶ 28-30.
- On October 21, thirty-five men were still waiting for beds late in the night at the three shelters the Coalition inspected, and four women had not received beds. Olaizola Aff. ¶¶ 8-12. Two of the women were sleeping on a dining room table. *Id.* ¶ 12. Meanwhile, women were being double-bunked at one shelter, *i.e.* women who worked night shifts were forced to give up their allotted shelter spaces to other women during those shifts. *id.* ¶ 8; Routhier Aff. ¶ 8.
- On November 19, sixty-two men were waiting for beds late in the night at the two men's shelters the Coalition inspected. Markee Aff. ¶¶ 36-38; Routhier Aff. ¶¶ 13-14. These men were sleeping in chairs, on benches, or on the floor. At the Bellevue Shelter, 35 men

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<sup>6</sup> The reports indicate to which shelters the City transports these people, but the reports do not say whether they actually receive beds. Markee Aff. ¶ 13.

were in a crowded room, sleeping on the floor and in chairs late at night. Markee Aff. ¶ 36.

- On November 22, at the Bellevue Shelter, 23 men were waiting on chairs and on the floor of a crowded waiting room after 1:30 a.m. Markee Aff. ¶ 42; Routhier Aff. ¶ 18.
- On December 6, more than 50 homeless men were sleeping on the floor and in chairs in crowded waiting rooms at the Bellevue Shelter after 1 a.m., while the City's shelter census report for that night showed no vacant beds for homeless men. Markee Aff. ¶ 45; Routhier Aff. ¶ 21.

On all these occasions, the City's daily reports (Exhs. F1-F11) show that there were not enough beds to provide shelter for the people the Coalition saw waiting. In short, as the Coalition has witnessed first-hand, the City's shelter system is bursting.

Affiants Reynaldo Maldonado, Israel Martell, and Manuel Rodriguez are particular victims of the City's failure to comply with the Consent Decree. The City denied each of these men shelter on the night of December 6. Affidavit of Reynaldo Maldonado ¶ 9 ("Maldonado Aff."); Affidavit of Israel Martell ¶ 11 ("Martell Aff."); Affidavit of Manuel Rodriguez ¶ 5 ("Rodriguez Aff."). Each of these men has waited patiently in an attempt to get help, and each of them has spent the last few nights sitting in a chair at the City's Bellevue Shelter.<sup>7</sup> On the night of December 6, Kaisha Harris and Crystal Davis were also victims of the City's non-compliance with the Consent Decree. The City denied both of these women shelter on that night. Affidavit of Kaisha Harris ("Harris Aff."); Affidavit of Crystal Davis ("Davis Aff."). On the night of December 8, the City denied lawful shelter to all the individuals named in Exhibits J and K. Markee Aff. ¶¶ 47-48.

The City's haphazard efforts to deal with the situation have been insufficient.

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<sup>7</sup> Maldonado Aff. ¶¶ 6-10; Martell Aff. ¶¶ 7-10; Rodriguez Aff. ¶¶ 5-6.



*First*, it has crammed beds into inadequate facilities. The Consent Decree provides clear physical standards to protect health and safety, guarantee adequate fire safety, and prevent the spread of contagious diseases like tuberculosis or H1N1 flu. Yet in early October, the Atlantic Armory Shelter crowded men into a hastily assembled dormitory in a recreational area. Routhier Aff. ¶ 11. The City acknowledged that this arrangement violated the Consent Decree, Markee Aff. ¶ 32, which prohibits using recreational areas as dormitories, Consent Decree App’x A ¶ 2. The City subsequently converted that space into a full-time dormitory and moved the recreational area into a lobby on a different floor. Olaizola Aff. ¶ 7. The new arrangement was unsafe and violates the Consent Decree, because that lobby, crowded with furniture for the recreational area, was also the exit route for those sleeping in beds on that floor. *See* Consent Decree App’x A ¶ 8(vii) (“Bedrooms shall open directly onto exit corridors.”).<sup>8</sup> The City has now moved the recreation area back to the third floor, sharing space with the 20-bed dormitory, still in violation of the Consent Decree. The City has informed the Coalition that it recognizes that the situation at the Atlantic Armory is out of compliance with the Consent Decree. Markee Aff. ¶¶ 32-33. At the Bellevue Shelter, a dining area on the second floor has been converted into a crowded dormitory with almost no space to move between the beds, Olaizola Aff. ¶ 10, an arrangement that also violates the Consent Decree, Consent Decree App’x A ¶ 8 (setting minimum standards for space around and between beds). Even with these make-shift arrangements at the Bellevue Shelter, on one recent visit on December 6, more than 50 men were waiting for beds at that shelter in the early hours of the morning. Markee Aff. ¶¶ 43-45. Thus, despite violating the Consent Decree’s substantive standards by its extreme measures, the City *still* does not provide shelter for all who need it.

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<sup>8</sup> Both the prior and the current arrangement also violate New York State regulations. 18 N.Y.Comp. Code R. & Regs. § 490.11(m)(3) (sleeping areas not to be used as recreational areas); *id.* § 490.11(m)(14) (egress from bedrooms).

*Second*, in the City’s program of busing women around in hope of finding a bed, the City now regularly sends some unfortunate women to a new 54-bed night-only dormitory at the HELP Women’s Shelter in East New York. Markee Aff. ¶¶ 39, 43. This shelter has, in the past, had enough staff and equipment for only 175 women. The City has not hired any additional staff for the facility, and it cannot lawfully accommodate more clients. See Consent Decree ¶ 2(f) (prescribing minimum ratio of staff to residents). Instead, the City does not operate the 54 extra beds during the day. Consequently, the City puts that number of women on buses late in the night, drives them for one to two hours to the HELP Women’s Shelter, and allows them to sleep only briefly. Affidavit of Kelvin Troncoso (“Troncoso Aff.”). These women receive beds at 1-3 a.m., Harris Aff. ¶ 4; Troncoso Aff. ¶ 5; then at 6 a.m., shelter staff force them to wake up so that the City can close the night-only beds, Davis Aff. ¶ 4; Troncoso Aff. ¶ 5. The transshipment process is brutal and wearing. Women wait for hours for these buses, only to get a few hours of sleep on the other end. Troncoso Aff. ¶ 10; Davis Aff. ¶¶ 3-6; Harris Aff. ¶¶ 4-7.

The City’s resort to such unlawful stopgap measures demonstrates its failure to plan for the entirely predictable increase in demand. The Coalition and LAS have watched with increasing concern as the City has closed shelters and ignored the growing numbers of homeless men and women. The Coalition warned the City about the problem repeatedly over the summer. Markee Aff. ¶¶ 32-33. In June, the City closed the 150-bed Peter Young shelter for homeless men, further reducing the adult shelter system’s capacity. Markee Aff. ¶ 55. Then, on October 6, LAS wrote to the City to ask specifically what plans it had to provide shelter in the near term. Affirmation of Steven Banks ¶ 6 (“Banks Aff.”). The City’s response included just a few added beds at various shelters, many of which are not compliant with the Consent Decree. Olaizola

Aff. ¶ 14.<sup>9</sup> Later, on November 30, 2009, the City notified LAS that it planned to add 40 beds for men at an existing shelter in Brooklyn. Not only would this belated attempt not solve the overcapacity problem for men or women, but all 40 beds are not available yet (Markee Aff. ¶ 25) and the City has not said when the rest of the 40 beds will actually be ready for occupancy. The City has not indicated that it has made any other efforts to increase capacity compliant with the Consent Decree. Banks Aff. ¶¶ 6-10. Indeed, on December 7, 2009, the City denied yet again that it was out of compliance with the Decree. Banks Aff. ¶ 12.

### ARGUMENT

“A consent decree is in the nature of a contract,” *Callahan v. Carey*, 12 N.Y.3d 496, 502 (2009), and it “is legally enforceable according to its terms,” *19th St. Assocs. v. State*, 79 N.Y.2d 434, 442 (1992). *See also State v. Town of Wallkill*, 572 N.Y.S.2d 758, 759 (3d Dep’t 1991) (holding it was error not to order a party’s compliance with fine specified in consent order, as that party “had contractually bound itself”).

“The clear language of the decree” in *Callahan* “acknowledges plaintiffs’ right to temporary shelter,” and it “obligates the defendants to provide temporary shelter to homeless individuals” who meet the relevant criteria. *Callahan v. Carey*, 307 A.D.2d 150, 153, 155 (1st Dep’t 2003). “Shelter,” in turn, is an unambiguous term in the consent decree. 1982 Order, at 5. It requires, among other things, a *bed* of a minimum size, clean linens, storage space, full access in and out of a shelter, and a minimum number of toilets and showers. Consent Decree ¶ 2 & App’x A ¶ 7; 1982 Order, at 5-6. This is precisely what the City is now failing to provide. A chair in which to sit simply is not shelter. Homeless men and women in need have ended up sleeping—or not—on benches, floors or tables. *Supra* at 2, 7. Some, after waiting for hours in

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<sup>9</sup> On its inspections, the Coalition has found many such beds crowded together with less than three feet between beds. Such overcrowding violates the Consent Decree. Consent Decree App’x A ¶ 8(iii).

hope of a bed, may give up and retreat to the streets in the early hours of the morning. Others suffer sleepless night after night as they wait in chairs. Maldonado Aff. ¶¶ 6-10; Martell Aff. ¶¶ 7-10; Rodriguez Aff. ¶¶ 5-6.

The City's half-measures, such as shipping women to a midnight dormitory, also do not provide "shelter." As this Court has already held, the Consent Decree does not permit the City to impose on homeless clients the "long and dreary waits" before busing, 1982 Order I, and to deprive them of the basic elements of adequate shelter mandated by the Consent Decree, 1982 Order II, at 7-8. "[I]f the sole purpose of a particular bus trip is to furnish class members with a dormitory bed for the night, the trip is in violation of the judgment." 1982 Order II, at 8.

Although the City's use of midnight dormitories is a serious violation in itself, the underlying problem is yet graver. If the City had lawful beds available, it would use them, and its use of unlawful, temporary beds therefore proves it does not have enough proper shelter capacity to meet the need. The Coalition has seen the City's failure to provide enough shelter firsthand in other ways; it has found women literally sleeping on tables, and men on the floor. These are the conditions in November and thus far in December, and the demand for shelter will only grow as the weather gets colder. Markee Aff. ¶¶ 53-54.

Lack of shelter is dangerous. The City itself acknowledges that "[a]n obvious health risk for homeless individuals is excessive exposure to natural elements or extreme weather . . . , and unsheltered homeless individuals are particularly at risk" of "[e]xposure deaths."<sup>10</sup> Consequently, as plaintiffs have pointed out to this Court before, "the failure to . . . provide such relief will cause serious and permanent injury" to some homeless individuals "and possibly death to others during the winter cold." P.I. Order. The situation is grave today. And it is neither new

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<sup>10</sup> N.Y. City Dep't of Health & Mental Hygiene & Dep't of Homeless Servs., *The Health of Homeless Adults in New York City*, at 12 (Dec. 2005), at [http://www.nyc.gov/html/dhs/downloads/pdf/homeless\\_adults\\_health.pdf](http://www.nyc.gov/html/dhs/downloads/pdf/homeless_adults_health.pdf) (Exh. D to Markee Aff.).

nor surprising—the need for shelter has been growing steadily for the last year and a half, just as one might expect in an economic recession, Markee Aff. ¶ 52. The need will predictably increase even further in the coming weeks, as it usually does during cold weather. *Id.*

For the City’s shelter system to be full as early as October was alarming. Clearly, on the City’s present course, the available shelter will continue to be insufficient for the existing number of homeless adults, much less the coming, predictable winter increase. Markee Aff. ¶ 53. Despite having had months of warning of the increase in demand, the City has done little. In fact, the City *closed* the Peter Young men’s shelter on June 30, 2009, eliminating 150 beds. Markee Aff. ¶ 54. The City has an obligation, under the consent decree, to notify LAS before adding a new shelter to the system, Consent Decree ¶ 3(b), and LAS has received no such notice from the City, aside from a November 30 letter promising a single 40-bed shelter for men, inadequate to solve the problem for homeless women or for homeless men. Banks Aff. ¶ 10.<sup>11</sup> Moreover, LAS has asked the City specifically how it plans to meet the current unsatisfied demand for shelter. The City responded at first by denying the problem existed and then by propounding general proposals to add shelter capacity soon. *Supra* at 8-10. Those proposals have yet to result in any significant additional shelter space—even the promised 40-bed shelter is not fully available (Markee Aff. ¶ 25)—and men and women are *still* suffering for lack of shelter. Meanwhile, the City has resorted to the brutal practice of midnight transports to night-only dormitories for homeless women, a practice this Court already declared twenty-seven years ago to be unlawful.

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<sup>11</sup> The consent decree requires 30 days prior notice to LAS. Under the current urgent circumstances, LAS has agreed to waive the full 30-days notice period for a particular space, provided that plaintiffs receive sufficient prior notice to enable them to verify that a proposed space complies with the terms of the Consent Decree. Banks Aff. ¶ 10.

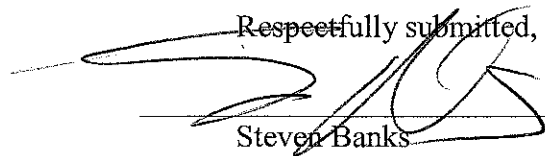
Unless this Court intervenes, the City will continue to deny homeless men and women the lawful shelter that it must provide.

### **CONCLUSION**

For these reasons, plaintiffs respectfully request that the Court enjoin defendants from failing to comply with the Consent Decree of August 26, 1981, by failing to provide sufficient lawful shelter, at facilities operated in accordance with the standards set forth therein, to each homeless woman and each homeless man who seeks such shelter. Given the urgent need for this relief, the plaintiffs also respectfully request issuance of a temporary restraining order enjoining the City from failing to comply with the Consent Decree, enjoining the City to submit a remedial plan within one week setting forth how it will comply with the core Consent Decree requirement to provide lawful shelter to homeless New Yorkers, and granting relief to particular individuals who have been denied lawful shelter.

Dated: December 9, 2009

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