UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SANDRA BUTLER; RICKY GIBSON; O'BRIEN MORRIS; RICHARD EMMETT; ROSELLE DIAZ; KEVIN FAISON; SHANIQUA JACKSON; CENTER FOR INDEPENDENCE OF THE DISABLED, NEW YORK AND COALITION FOR THE HOMELESS,

Case No. 15-CV-3783

Plaintiffs,
for themselves and on behalf of all others similarly situated

- against -

CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES and STEVEN BANKS, as Commissioner of the New York City Department of Homeless Services,

Defendants.

- X

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, AND TO ENFORCE THE STIPULATION OF SETTLEMENT

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PRELIMINARY STATEMENT

In Plaintiffs' request for a pause of Defendants' hurried moves of thousands of individuals out of single- and double-occupancy hotel rooms into congregate shelters, they set forth dozens of examples of violations of the Stipulation of Settlement (the "Stipulation") including: individuals with disabilities being moved without notice of their right to request a Reasonable Accommodation ("RA"); individuals being moved to congregate shelter despite having significant disabilities that would make living in that congregate shelter placement untenable or increase their heightened risk from COVID-19; and individuals who were told they would not be considered for an RA on the basis of their mental health conditions, among others. *See, e.g.*, ECF No. 76 ("Pls. Br.") 10–21. Plaintiffs discovered these violations through the tireless work of their staff and their non-profit partners—who, after filing, continue to discover additional violations—but are not equipped or tasked with counseling or assessing the thousands of individuals being moved in days' time, and sought relief from this Court to pause the process to ensure compliance with the Stipulation.

In their opposition brief (ECF No. 85, "Opp. Br."), Defendants do not rebut these numerous, specific instances of Defendants' violations of the Stipulation. Rather, they set forth the framework of a process that is intended to govern the return to congregate shelter. Defendants carefully outline directives that issued from leadership to staff but do not address at all whether these directives or guidance are being followed. They are not. Plaintiffs set forth considerable evidence, which Defendants do not rebut, that Defendants' procedures and guidelines are not being followed on the ground, in large part due to their hurried implementation. In fact, Defendants *admit* that of the 88 individuals who Plaintiffs cited in their motion papers alone, at least 71 indeed warranted separate placements as RAs pursuant to the Stipulation[1]—71 people who, absent

[1] This represents approximately ten percent of the population that the City reportedly granted RAs.

Plaintiffs' speedy and round-the-clock efforts, would have been placed in inappropriate congregate settings in violation of the Stipulation. Many of those that have been moved have been moved in contravention of the procedures that Defendants outline in their brief. Defendants' rushed and flawed process will lead to similar violations for the thousands of others left to be moved if the moves are not paused until the Defendants can fix the process and ensure that each resident is properly screened and provided an appropriate accommodation prior to moving. This Court should grant Plaintiffs' requested relief so that Defendants may grant the appropriate RAs and schedule moves with the appropriate notice as required by the Stipulation.

Plaintiffs have satisfied all of the elements required for the issuance of a temporary restraining order and preliminary injunction. Plaintiffs' Class Members have suffered and will suffer irreparable harm from Defendants' violations of the Stipulation, due to the violations of their constitutional rights as incorporated into the Stipulation, the physical, emotional, and psychological harm incurred from being moved to a placement that is unsuitable for their disability, and the heightened risk of severe consequences from COVID-19. Defendants' main response to these myriad harms is to argue that Plaintiffs should have filed this motion sooner. But as Defendants know, and as described in more detail in this reply, Plaintiffs' counsel has consistently engaged with Defendants to improve clear deficiencies in the process and prevailed upon Defendants to forestall these moves until they could be addressed. Plaintiffs filed the motion only when it was clear that they would not do so without court intervention.

Plaintiffs have also demonstrated a likelihood of success on the merits. In their opposition to this point, Defendants cite procedures they intended to follow in the abstract, but effectively admit that those procedures were not followed for the vast majority of individual cases brought forward by Plaintiffs. And the violations continue. Additional violations occurred during the hotel

move-outs that followed Plaintiffs' filing of this motion. *See generally* Diamant Second Decl., Strom Second Decl., Torres-Lorenzotti Second Decl. Defendants' argument that they may incur some costs, if the federal government does not reimburse them, is not a permissible counterpoint to systemic violations of the Stipulation in this case. The public interest therefore favors pausing the implementation of Defendants' flawed process to ensure compliance with the Stipulation.

Finally, Plaintiffs' motion to enforce the Stipulation should be granted. Defendants' argument that Plaintiffs' counsel did not provide notice pursuant to the Stipulation is flat wrong; as cited in Plaintiffs' brief, Plaintiffs provided such formal notice to Defendants on June 22, 2021. *See* Pls. Br. 33. Defendants had constructive notice even earlier, and their attempt to force Plaintiffs to wait 30 days before filing would lead to the inequitable result of Defendants completing their rushed moves before Plaintiffs could file this motion.

For the reasons argued in Plaintiffs' opening papers and herein, Plaintiffs respectfully request that the Court restrain Defendants from involuntarily moving class members from density hotels until Defendants can provide the notice and make the individualized determinations required by the Stipulation.

ARGUMENT

I. MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendants' opposition brief is long on the written framework that govern the moves back to congregate shelter; however this is a case study of theory over practice. Defendants' rushed moves of thousands of individuals with potential disabilities within two weeks' time has led and is leading to repeated and systemic violations on the ground. Based on these unrebutted and recurring violations, Plaintiffs satisfy the applicable standards for emergency relief.

A. Plaintiffs Will Suffer Irreparable Harm

Defendants do not substantively contest that the constitutional, physical and mental harms identified by Plaintiffs in their opening brief fully satisfy the threshold showing of harm, *see* Pls. Br. 22–26—and indeed, the showing of harm has strengthened since the initial filing. Instead, Defendants assert that if there were a "true risk," Plaintiffs would have brought this action "well before the half-way point of the return plan." Opp. Br. 18. In reality, as discussed below, Plaintiffs raised concerns about the harm likely to be caused by Defendants' actions immediately upon learning about the plan. *See infra* Section II. Plaintiffs attempted to negotiate with DHS for weeks and brought this action only when it became clear that DHS refused to halt its re-densification efforts until shelter staff and partners were appropriately trained on the RA process, an assessment of each individual client was conducted, and appropriate notice was given before any moves.

Defendants further claim that their recently announced procedures are a sufficient safeguard against irreparable harm, but this argument relies on the same fiction as the others: that the process works in practice as they say it does. Defendants claim that the two notices they sent to residents, along with posters at shelter facilities, alerted residents that they could "meet with case managers and request RAs," and that this protected against irreparable harm. Opp. Br. 18. Defendants' notices, however, have been jumbled and confusing. One notice on June 17 was sent to all residents indicating that they would be moved, with no reference to those with accommodations remaining in less-dense shelter. Pls. Br. 11-12. Two corrective notices were sent out, without personalized information, to those with approved RAs, and then a third revised notice was sent to all residents and failed to make any reference to the reasonable accommodation procedure. *Id.* at 12-13. These notices fall far short of alleviating the harm that has resulted and will result from Defendants' violations of their Stipulation obligations, and the dozens of instances

identified by Plaintiffs in their opening motion and in this reply are proof positive that these notices, and Defendants' other procedures, have not prevented those violations.

Defendants' final argument is that providers screen all residents before and after transfers, and that in practice they grant almost all RA requests, and these practices prevent harm. Opp. Br. 18. But as Plaintiffs demonstrated in their opening brief, Defendants are in fact not screening many residents even once, let alone twice. Pls. Br. 19-21. And that Defendants claim to grant all RA requests ignores the many shelter residents who indicated they were unaware they could request accommodations or who were deterred from doing so. *Id.* at 20. Defendants also ignore the many individuals who were transferred despite having an approved RA, not to mention those who were transferred while their RA requests were pending. *Id.* at 14-16.

Plaintiffs have more than cleared the threshold for showing irreparable harm, through the risks of constitutional, physical, and mental injury from DHS' failures of process and to accommodate individuals' disabilities. *Id.* at 22-26. Defendants assert that 71 of the shelter residents Plaintiffs identified in the opening brief have now received appropriate accommodation, but only *after* substantial advocacy by Plaintiff organizations. Opp. Br. 12. The remedying of some Class Members' harm does not eradicate the systemic nature of the ongoing violations or the harms faced by Class Members who remain to be moved or have been moved already.

Indeed, since initially filing their motion on July 8, Plaintiffs have identified numerous additional individuals who have not received appropriate accommodations. *See generally* Diamant Second Decl., Strom Second Decl., Torres-Lorenzotti Second Decl. For example, Resident NAR wanted an RA but had not been provided any information or assistance in processing a request. Diamant Second Decl. ¶ 4(a). LS received provisional approval for an RA but was nevertheless told she would be moved to a congregate facility. *Id.* ¶ 4(c). NV, who uses a wheelchair, asked

her case manager about placement in an ADA-compliant room after being told she was moving to a congregate facility, and she was told she could not request such accommodations. *Id.* ¶ 4(d). At a Queens hotel, a case manager handed a Coalition member a list of five clients who had been moved to congregate shelter without screening or being offered assistance with requesting an RA, and the two the Coalition has identified thus far include one with a weakened immune system and agoraphobia, and another with multiple sclerosis who uses a walker. *Id.* ¶¶ 9-10. Plaintiffs' showing of irreparable harm has thus only become stronger in the since their initial filing.

B. Plaintiffs Are Likely To Succeed On The Merits

Defendants all but concede that Plaintiffs raised violations of the Stipulation in their opening papers. Defendants' meritless assertion that Plaintiffs failed to carry the burden of persuasion on the specific violations of the Stipulation is belied by the facts outlined in Plaintiffs' memorandum of law and each declaration attached thereto. Each of Defendants' responses to Plaintiffs' allegations of Defendants' violations are fatally flawed. Instead of engaging with the on-the-ground facts set forth in Plaintiffs' opening papers establishing the violations, Defendants try to direct the court's attention to the process as it is *supposed* to work, not as it is working (or not working in this case). Not only is that insufficient to satisfy Defendants' obligations under the Stipulation, but the process that Defendants claim to have in place now is not the same process that Defendants had in place for the first days and weeks of the moves to congregate shelter.

Defendants cite to the 800 clients who have been granted reasonable accommodations and placed in alternative locations—one-fifth of the 3,685 total clients who have already been moved—as somehow evidencing the success of their screening process. Yet that proportion pales in comparison to the nearly *70 percent* of single adults that DHS itself estimates are living in shelters with some kind of disability—many, though not all, of which may require an RA. Pls. Br. 6 n.4. Even so, that Defendants provided RAs to *some* clients is welcome news, but it does not

remedy Defendants' ongoing and systemic violations of the Stipulation.

Defendants' assertion that almost all of the 88 people that Plaintiffs' counsel and other organizations brought to DHS's attention were "promptly addressed" also does not resolve Defendants' systemic violations of the Stipulation. First, it is DHS's obligation, not Plaintiffs' counsel or other organizations, to identify clients who need reasonable accommodations and to address their needs. That DHS failed to do so in at least 71 instances establishes Defendants' failure to comply with the terms of the Stipulation. *See Etuck v. Slattery*, 936 F.2d 1433, 1442 (2d Cir. 1991) (although "some members of the class" received relief, "nothing ensures" that others would receive similar relief). Second, Plaintiffs' counsel and the other organizations did not complete a comprehensive review of every client being moved back to congregate shelter, nor could they. New clients are found each day whose experiences evidence Defendants' failure to comply with the Stipulation, and it is likely that many more have not yet been identified. In any case, the systemic violations have not been resolved, and any further moves back to congregate shelter before DHS can implement the required changes to comply with the Stipulation will likely produce dozens more clients whose rights under the Stipulation were violated.

Defendants claim that they have not "failed to screen for RAs" in violation of Paragraph 21 of the Stipulation because "Administrator Carter's May 19 letter *directed* . . . not-for-profit shelter providers to assess each client" and "case managers . . . are *instructed* to determine if the client" has any reasonable accommodation needs or requests. Opp. Br. 14-15. However, those directions and instructions do not satisfy Defendants' obligations under the Stipulation where numerous clients were not in fact screened. *See* Pls. Br. 27.

Defendants' posting of flyers and Administrator Carter's May 19 letter has clearly been insufficient to inform clients of their ability to submit RA requests. *See* Opp. Br. 15; Pls. Br. 27.

By the same token, Defendants' claim that "clients who are scheduled to return to congregate shelter receive a notice 5 days in advance of the move" telling the clients about their ability to request a reasonable accommodation is contradicted by the numerous examples of clients who did not receive such notice. *See* Pls. Br. 27.

Defendants also claim that the Stipulation does not require individual interviews with clients. Opp. Br. 15-16. However it does mandate the DHS RA process to be interactive. Defendants have repeatedly failed to meet that standard. *See* Pls. Br. 27. Further, any directions that shelter staff received "to speak with each client scheduled to move to congregate shelter" was patently insufficient given that clients reported these conversations did not occur. *See* Pls. Br. 27. Defendants' assertion that they are not violating Paragraphs 25 and 30 of the Stipulation, Opp. Br. 16, also falls flat against the cited instances in which clients were denied RAs for lack of medical documentation even though they had submitted documentation. Pls. Br. 19.

These violations have only continued. *See generally* Diamant Second Decl., Strom Second Decl., Torres-Lorenzotti Second Decl. In light of the prior, continuing, and systemic violations of the Stipulation, Plaintiffs have shown a likelihood of success on the merits.

C. Granting the TRO and Preliminary Relief Is in the Public Interest

Pausing Defendants' moves of Class Members is in the public interest, because it would help prevent additional violations of the Stipulation, and reduce harm to Class Members and the risk of public spread of COVID-19. *See* Pls. Br. 30. Defendants identify no countervailing public interest to justify their rushing of this process and continued violations of the Stipulation.

Defendants emphasize the potential costs of housing individuals in the hotel program. Opp. Br. 18–19. This response is insufficient and misleading, for several reasons. Defendants note that reimbursement by FEMA is "far from assured," *id.* at 19, but Defendants' submissions and the public record indicate that Defendants may still be reimbursed going forward. The Blanco

Declaration notes that FEMA may still reimburse Defendants for costs incurred as a result of their "reasonable accommodation process," ECF No. 88, Blanco Decl. ¶¶ 6–7, which is exactly what Plaintiffs seek to enforce.[2] Moreover, Defendants greatly exaggerate the potential costs they may face; they cite the costs of housing 9,000 individuals in hotel rooms per month, Opp. Br. 19, a far greater number than the Class Members who will require continued placement pursuant to an RA.

Finally, the procedural rights Plaintiffs seek to enforce pursuant to the Stipulation encompass their constitutional rights, as set forth above, and courts regularly hold that defendants may not shirk their constitutional obligations on the basis of cost alone. *See*, *e.g.*, *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 218–19 (E.D.N.Y. 2000), *aff'd sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003) (holding that where conditions violate an individual's constitutional rights, "defendants cannot argue that the failure to alter those conditions is justified by lack of staff or facilities"); *Klostermann v. Cuomo*, 463 N.E.2d 588, 594 (N.Y. 1984) (rejecting City's defense in the homeless shelter context that there "simply is not enough money to provide the services that plaintiffs assert are due them"). The limited, potential costs that Defendant may incur did not justify the violations that occurred in this action prior to Defendants' enhancement of the Stipulation during the COVID-19 pandemic, and they do not justify those violations now.

II. MOTION TO ENFORCE THE STIPULATION OF SETTLEMENT

Based on the violations of the Stipulation demonstrated in Plaintiffs' papers, Plaintiffs' motion to enforce the Stipulation should be granted. *See* Pls. Br. 31–34. Defendants' rebuttal to

[2] In addition to the possibility for reimbursement indicated in Defendants' opposition papers, FEMA officials have stated publicly that they may continue funding based on a "demonstrated need due to an ongoing threat to public health and safety," which Plaintiffs submit is applicable for the Class Members who still require single- or double-occupancy rooms pursuant to the Interim Guidelines and the Stipulation. *See* David Brand, *As they Return to Group Shelters, Homeless New Yorkers Make Vaccine Choices*, City Limits (Jul. 8, 2021), https://citylimits.org/2021/07/08/as-they-return-to-group-shelters-homeless-new-yorkers-make-vaccine-choices/.

Plaintiffs' claims relies almost entirely on the notice provision of the Stipulation, which requires that written notice of Defendants' failure to comply with the Stipulation be provided at least thirty days prior to any motion to enforce. *See* Stipulation ¶ 76. Defendants state that Plaintiffs' counsel has not provided that notice at all, but that is not true; as set forth in Plaintiffs' opening brief, Plaintiffs provided Defendants with formal notice of violations on June 22. *See* Pls. Br. 33; ECF No. 79, Torres-Lorenzotti Decl. ¶ 16, Ex. 12. Prior to that notice, Defendants had constructive notice as Plaintiffs' counsel engaged with Defendants for weeks regarding the deficiencies with Defendants' possible move-out plans. *See* Torres-Lorenzotti Second Decl. ¶¶ 6–13.

As Plaintiffs argued in their opening brief, and as Defendants appear to concede, the 30-day notice provision should be no barrier to this Court's granting of a TRO or preliminary injunction preserving the status quo by putting Defendants' planned moves on hold. It should also be no barrier to Plaintiffs' motion to enforce the Stipulation, as Defendants had constructive notice of their failure to comply with the Stipulation within the 30-day window. *Brockhaus v. Gallego Basteri*, 188 F. Supp. 3d 306, 317 (S.D.N.Y. 2016) (holding that a party satisfied a 30 day's written notice provision of a contract despite the absence of a formal written notice, because the party had conveyed its intention clearly by other informal communications). Accordingly, the Court should grant Plaintiffs' motion to enforce the Stipulation and require Defendants to abide by its terms when returning Class Members to congregate housing.[3]

CONCLUSION

For the foregoing reasons, the Court should award the relief requested in Plaintiff's Order to Show Cause.

[3] Alternatively, if the Court denies the motion to enforce the Stipulation on this basis, Plaintiffs request that the denial be without prejudice to Plaintiffs' re-filing of the motion, if necessary, at the appropriate time following the Court's granting of the emergency relief sought in this motion.

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New York, New York

Respectfully Submitted,

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