

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-and-

THE VULCAN SOCIETY, INC., *for itself and on
behalf of its members*, JAMEL NICHOLSON, and
RUSEBELL WILSON, *individually and on behalf of a
subclass of all other victims similarly situated seeking
classwide injunctive relief*,

ROGER GREGG, MARCUS HAYWOOD, and
KEVIN WALKER, *individually and on behalf of a
subclass of all other non-hire victims similarly
situated*; and

CANDIDO NUÑEZ and KEVIN SIMPKINS,
*individually and on behalf of a subclass of all other
delayed-hire victims similarly situated*,

Plaintiff-Intervenors,

-against-

THE CITY OF NEW YORK,

Defendant.
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07-cv-2067 (NGG) (RLM)

MONITOR'S TWENTY-EIGHTH PERIODIC REPORT TO THE COURT

TABLE OF CONTENTS

I.	Executive Summary	1
II.	Recruitment and Attrition Mitigation	6
A.	Candidate Processing	7
1.	Statistics from the First Round of Candidate Processing.....	7
2.	Processing for the Second Round of Candidates	9
B.	Attrition Mitigation.....	12
1.	Training and Outreach to Candidates Called for Processing	13
2.	Attrition Mitigation Initiatives for Candidates Beyond the Current Processing Group	18
3.	Use of Data in Attrition Mitigation Initiatives.....	20
C.	After Action Analysis	23
D.	Assignment Issues.....	24
E.	Working Group	26
III.	EEO.....	28
A.	Overview	28
B.	EEO Staffing.....	28
C.	Policies, Messaging, and Training	29
D.	Compliance and Accountability.....	35
1.	Increased Accountability within the Chain of Command.....	35
2.	Climate Survey.....	38
3.	Inspections	40
E.	Investigations	42
1.	The Monitor's Report on FDNY EEO Investigations	42
2.	EEO Database	43
3.	Review of Investigations.....	44

IV.	Medical Exam-Related Issues	45
A.	Disparate Impact Analyses of Medical Exam Outcomes	45
B.	Attrition Metrics as of May 15, 2019	46
C.	Psychological Exam	48
D.	Validation of the Stairmill Test	50
1.	Validation Study	51
2.	Stairmill Study Technical Report	53
E.	Other Issues Related to BHS Testing	54
V.	Character Screening by the CID and PRB	55
VI.	Firefighter Exam	60
A.	Open Competitive Exam	60
1.	Current Milestone: Technical Report	60
2.	Optional Survey Administered to Exam 7001 Candidates	62
VII.	Additional Issues	63

I. Executive Summary

This report summarizes activities relating to compliance by the City of New York (the “City”) with the Modified Remedial Order during the period from May 16, 2019, the date of the Monitor’s Twenty-Seventh Periodic Report (Dkt. # 1910), to September 19, 2019. The report also summarizes activities relating to the implementation of the Parties’ settlement of Plaintiffs-Intervenors’ disparate treatment claims (the “Disparate Treatment Settlement”), which the Parties agreed would fall within the Monitor’s authority as defined in the Modified Remedial Order. *See* Stipulation and Order dated June 5, 2015 (Dkt. # 1599); *see also* Memorandum & Order dated June 5, 2015 (Dkt. # 1598) at 10.

Part II of the report summarizes activities relating to the ongoing FDNY hiring process for candidates on the eligible list for Exam 7001 (the rank-ordered list from which candidates are called into the hiring process). The first Fire Academy class to include Exam 7001 candidates began May 13, 2019; and the second round of candidates called off the list for processing (approximately 3,000) has gone through CPAT¹ orientation, training, practice, and testing over the past several months. This round of CPAT testing concluded in the first week of September.

Candidates’ preparation for the CPAT has been a major focus since the last periodic report. Such preparation is especially important because attrition at the CPAT stage continues to be a major factor driving differences in attrition rates between white candidates and black or Hispanic candidates, and data from Exam 2000 show that preparation increases the chance of

¹ The Candidate Physical Ability Test, administered by the City’s Department of Citywide Administrative Services (“DCAS”), is the first phase of candidate screening following the written examination. DCAS invites candidates to take two “practice” CPAT tests before taking the final test, and a candidate is deemed to have passed the CPAT by achieving a satisfactory performance on either of the two practice tests or on the final test.

passing the CPAT for all candidates. Most notably, after discussion among the Parties through the Monitorship process, and in accordance with the Court's direction at the July 9, 2019 status conference, the City for the first time formulated and implemented plans for a second CPAT training site at FDNY headquarters in Brooklyn, supplementing the FDNY's Randall's Island site. The additional site offered training sessions from August 7 until the most recent round of CPAT testing ended on September 7. In addition, along with its own initiatives, the City implemented a number of Monitor recommendations for enhanced messaging, encouraging candidates to take advantage of CPAT training offered by the City, and providing them with information to help them prepare for the test. However, while the City previously committed to providing candidates with updated and improved CPAT-focused fitness tips, this effort was not completed in time for the more than 5,000 candidates who have already been called up for the CPAT to be provided with the updated resources before undergoing testing.

More generally, the FDNY's Office of Recruitment and Retention ("ORR") has continued its outreach to candidates – including those who have been called off the list for processing and those who have not; and the Monitor has continued to request information about the City's messaging plans and to offer suggestions. In previous periodic reports, the Monitor has noted the need for diversified messaging specific to candidates with different list numbers, whose wait times for processing and potential appointment may vary by a period of years. Since the last periodic report, in response to Monitor requests, the City has provided a somewhat expanded long-range plan for messaging directed to candidates who will enter different phases of processing at different times in the four-year life of the eligible list. But the specific timing and content of messages remains unclear in some areas, and the Monitor has issued follow-up requests for more detail on the messaging plan.

On June 18, 2019, the City shared with the Monitor and the Parties a report on attrition rates for the first round of candidates to be called off the Exam 7001 list. The City plans to provide further updated and expanded attrition analyses this month – addressing recommendations that the Monitor and the other Parties offered before the last periodic report. The City has also committed to providing a revised version of its after action analysis of the Exam 7001 recruitment campaign, which will include some essential components that were not provided in the first version of the after action analysis.

Part III reports on activities relating to the FDNY's EEO function. As discussed at the July 9, 2019 status conference, the City has continued to move forward with plans for the FDNY's EEO climate survey. The target date for the launch of the survey is now early October, revised from June to allow for further discussions about the survey instrument and the City's plan for administering the survey (which was provided to Monitor and the other Parties May 13). The survey instrument and plans for administration and messaging are expected to be finalized shortly (with the City agreeing to many suggestions by the Parties and Monitor, while declining to adopt others).

Part III also reports on developments in the FDNY's EEO messaging and training. In this area, the City recently responded to longstanding Monitor requests (dating back to at least mid-2017) for a detailed, comprehensive EEO messaging plan by providing a document that describes, at a high level, types of messaging (*e.g.*, "live," "multi-media and posters"), who will be responsible (*e.g.*, "EEO Office/Counselors"), and some of the general topics to be covered (*e.g.*, the EEO policy and "What EEO can do for you"). However, with the exception of one subject area, the brief plan does not describe the content or subject matter of planned communications, or their timing, in detail. Most notably, although the City's plan indicates some

provision for the in-person delivery of EEO messaging by officers, which the Monitor has long advocated, the plan does not include important information, including the exact levels of command involved, and the timing and content of the communications officers will be asked to deliver. The City has indicated that it plans to identify additional messaging topics based on the results of the climate survey. The Monitor intends to follow up with the City to expedite further work on the plan and its implementation.

Since the last periodic report, the Monitor has also continued to obtain and review information on key initiatives relating to officer reporting and accountability. These include the continuing implementation of the EEO metric for officer performance reviews, which was first employed in reviews for Captains and Lieutenants in 2018 (assessing performance in the previous year) and the FDNY's system of reporting on workplace professionalism. The Monitor has also continued providing comments on the FDNY's EEO investigations,² for which the Monitor typically receives intake reports and, after the investigation is completed, draft closing memoranda.³ Based on its review of the materials provided, the Monitor has previously shared with the City comments on specific ways in which the Monitor believes the FDNY's investigative practices could be improved. The City has disagreed with the Monitor's observations in a number of areas, and has declined to adopt certain changes the Monitor suggested. The Monitor plans to meet with the City within the next few weeks to discuss these

²The Monitor does not prescribe outcomes or make determinations in individual EEO cases under the Modified Remedial Order, and accordingly decisions regarding whether complaints are substantiated are made by the City alone.

³ In some instances, at the Monitor's request, the City has also provided full investigative files. These typically include investigator notes and copies of evidence, but not transcripts of interviews, which are not prepared as a matter of FDNY EEO Office practice. The Monitor also does not attend EEO Office witness interviews.

issues further. Although materials from recent investigations generally reflect some improvements in the EEO Office's investigative practices, the Monitor has continued to note concerns that it plans to discuss with the City at the upcoming meeting. The Monitor also has received comments from the Parties on an updated draft of the report requested by the Court regarding FDNY EEO Office operations and the duration of investigations.

Part IV reports on efforts to analyze and reduce disparate impact on black and Hispanic candidates in the Medical Exam and to ensure that the FDNY's medical screening process is job-related and otherwise compliant with applicable laws.⁴ In particular, the Monitor has been regularly updated on the City's efforts to validate the stairmill component of the Medical Exam, the Monitor's expert has participated in meetings of City and Party experts, and the City has indicated that the validation process is nearing conclusion.

Part V reports on efforts by the Monitor and the Parties to determine whether the FDNY's character review process (conducted by the Candidate Investigation Division ("CID") and the Personnel Review Board ("PRB")) has an adverse disparate impact on black and/or Hispanic candidates; and it reports on the City's progress in implementing changes in the process. As previously reported, while the City accepted some of the Monitor's proposed changes in character review procedures and in the information and instructions provided to candidates, it largely rejected any further changes in the substantive criteria that govern the CID's referral of candidates to the PRB. Since the last periodic report, the City circulated revised draft materials reflecting the changes to which it had agreed, and the Monitor and the other Parties have offered comments.

⁴ The Medical Exam is administered by the Bureau of Health Services ("BHS").

The Parties and the Monitor have also continued to discuss statistical analyses of the character review process. Since the last periodic report, the City circulated a memorandum providing a more detailed statement of its views on the Monitor's statistical analysis of the process. The Monitor is evaluating the City's positions and intends to respond soon.

As it has previously, the Monitor reminds the City that, in light of its position, it must, and has agreed to, conduct analyses as Exam 7001 candidates undergo character review – sufficient to establish whether the process has an adverse disparate impact on black or Hispanic candidates. And if such a disparate impact is found, the City will be required to implement further changes or validate the process as job-related.

Part VI discusses the draft Technical Report produced by the City's testing experts, PSI Services LLC ("PSI"), which describes the development, administration, and analysis of the results of Exam 7001 (the open competitive exam given in September and October 2017).

Part VI also includes an update about plans to re-administer the Exam 7001 survey.

Part VII lists a range of additional issues addressed by the Monitor and the Parties during the period covered by this report.

II. Recruitment and Attrition Mitigation

Since the Monitor's last periodic report, the City has continued to process candidates from the Exam 7001 eligible list for the upcoming classes of entry-level firefighters. And the Monitor has continued to discuss with the City and the other Parties how to reduce candidate attrition among non-traditional candidates, as well as data analyses used to guide the City's attrition mitigation efforts. On June 20, 2019, the Parties and Monitor held a special-purpose meeting (the "June 20 Meeting") to discuss the City's attrition mitigation activities, its

assessment of candidate attrition to date, and its plans for continuing attrition mitigation efforts and communications.

A. Candidate Processing

1. Statistics from the First Round of Candidate Processing

The first Fire Academy class from the Exam 7001 eligible list began May 13, 2019. On June 18, 2019, the City provided the Monitor and the other Parties with a set of metrics assessing candidate attrition in the hiring process through the appointment of this first Academy class, showing rates of voluntary attrition⁵ and disqualification at each stage of the process for the first round of candidates to be called off the eligible list. The City's report included the following figures for candidate attrition overall and for the CPAT stage of the hiring process:

a) Candidates called off the list for processing (beginning with CPAT)

- (1) Black: 340 (15.3%)
- (2) Hispanic: 536 (24.1%)
- (3) White: 1,224 (55.1%)
- (4) Total: 2,220⁶

b) Representation in first Academy Class (candidates who have successfully completed processing and were appointed)⁷

- (1) Black: 31 (10.3%)
- (2) Hispanic: 62 (20.6%)
- (3) White: 191 (63.5%)

⁵ "Voluntary attrition" means that a candidate did not proceed to the next required step for some reason, as opposed to being disqualified by the FDNY.

⁶ Figures do not include candidates who have temporarily declined appointment or are ineligible.

⁷ It should be noted that the group of candidates *not* appointed includes candidates who continue to undergo processing and who may be appointed to later classes, in addition to those who have dropped out of the process or been disqualified.

- c) *Total voluntary attrition (candidates who dropped out at any stage of the process, including the CPAT)*
 - (1) Black: 121 (35.6%)
 - (2) Hispanic: 166 (31%)
 - (3) White: 331 (27%)
- d) *CPAT voluntary attrition (candidates who did not appear for the CPAT)*
 - (1) Black: 105 (30.9%)
 - (2) Hispanic: 148 (27.6%)
 - (3) White: 301 (24.6%)
- e) *CPAT failures (among candidates who appeared for the test)*
 - (1) Black: 28 (11.9%)
 - (2) Hispanic: 54 (13.9%)
 - (3) White: 56 (6.1%)

These figures reflect several important trends and signal key challenges that the City must address in its efforts to mitigate attrition among non-traditional candidates. Most critically, the numbers show substantial disparities in both voluntary attrition and disqualifications between black and white candidates – especially in the CPAT, where preparation and familiarity with what to expect on the task are, according to the Monitor’s experts, significant factors.⁸ The rate of total voluntary attrition for black candidates was more than 30% higher than the rate for white candidates. As it was for Exam 2000 candidates, the CPAT is the largest cause of attrition among all candidates so far for Exam 7001, and the dominant factor in the disparity in attrition between black and white candidates. Non-appearance for the CPAT was more than 25% higher for black candidates than for whites. And among candidates who took the CPAT, although pass

⁸ Although figures for both voluntary attrition and disqualifications are somewhat better for all groups compared to overall figures for the entire life of Exam 2000, this comparison is imperfect because candidates called up early in the life the list are presumably more likely to appear for each stage of processing than those called off the list later.

rates for all groups were high, the rate of failures for black candidates was almost double the rate for white candidates.⁹

As discussed at the July 9, 2019 status conference, these figures demonstrate the urgent need for the City to take all practicable steps to address disparities in candidate attrition, especially at the CPAT stage. As discussed below, relevant data analyses bear out the Monitor's experts' view that preparation is a driver of success. Accordingly, encouraging candidates to work on their fitness in advance of the CPAT and attend CPAT training sessions should continue to be a particular focus of the City's efforts.

2. Processing for the Second Round of Candidates

The City has begun processing the second round of candidates to be called off the Exam 7001 list. This second group includes just under 3,000 candidates, of whom 18.7 percent are black, 27.4 percent are Hispanic, and 48 percent are white.

CPAT information sessions for this second round of candidates took place May 28 through June 1, 2019. CPAT Orientation began June 25 and ran through July 13. CPAT Training sessions began June 3 and were offered through September 7 (the last day of testing). And CPAT Practice began July 16 and ran through August 29. CPAT Testing was administered September 3-7, 2019. The second class from the Exam 7001 list will enter the Academy on November 12, 2019.

⁹ On September 17, the City provided the Monitor and the Parties with some additional figures showing CPAT training attendance and CPAT pass rates for the second round of candidates called off the Exam 7001 list. These figures also appear to indicate that white candidates passed successfully through the CPAT stage of processing at a higher rate than black or Hispanic candidates. But further analysis, follow-up inquiries, and additional information will be needed before the significance and sources of the disparity can be determined.

Now that CPAT testing for this second group of candidates has concluded, the City has completed CPAT testing for approximately two thirds of the candidates it expects to call off the Exam 7001 eligible list.¹⁰

The City has indicated that it expects to complete CPAT testing in 2020 for all the remaining candidates expected to be called off the list for processing and potential appointment. This schedule calls for Exam 7001 candidates to be invited off the list for CPAT testing in larger groups, and earlier in terms of the overall hiring process for the life of the list, than Exam 2000 candidates. After the July 9 status conference, the Monitor and the other Parties inquired about the apparent difference in timing; the City provided an initial explanation in an August 29 message, and Plaintiffs-Intervenors and the United States have asked further follow-up questions (on September 9 and 12 respectively). The Monitor will continue to discuss the issue with the Parties and seek a further explanation for the City's approach to the processing timeline. Given the potential implications of CPAT scheduling for candidate attrition, it is important for the Monitor and the other Parties to fully understand the factors considered in the timing of candidate processing.

In its August 29 email, the City also clarified the implications of the CPAT testing schedule for post-CPAT processing, explaining that the later phases of processing (beginning

¹⁰ At the June 20 Meeting the City advised the Monitor and the other Parties of its current estimate that it expects to call candidates off the Exam 7001 list with adjusted final average ("AFA") scores of 99 and above. This "reachable score" projection is based on the City's estimate of the number of candidates that will need to enter processing in order to fill Fire Academy classes during the life of the list – calculating for the estimated rates at which candidates are disqualified or drop out of the process and the projected number of available positions. The City subsequently confirmed on August 9, 2019 that it continues to estimate the reachable score for the Exam 7001 eligible list will be an AFA score of 99. The City's estimate may be subject to revision based on further, ongoing analyses by the City's consultant, PSI, and/or based on the data that accumulates as processing for the Exam 7001 list proceeds. The reachable score for Exam 2000 was an AFA of 98.

with intake by the Candidate Investigation Division) will proceed differently from the initial CPAT phase – with CID inviting smaller groups of candidates for intake based on its estimate of the pool of candidates needed to enter screening to fill each upcoming Academy class.

Because most CPAT testing for Exam 7001 candidates is projected to take place early in the life of the list, it has been and continues to be critical for the City to act as energetically and expeditiously as possible to ensure that candidates, especially non-traditional candidates, prepare sufficiently for the test and appear for testing. The importance of these efforts is magnified by the dominant role that attrition at the CPAT stage of the process plays in candidate attrition as a whole, and by the effect that CPAT training has been shown to have on candidate success. As discussed in previous periodic reports, data analyses from the Exam 2000 eligible list show that attrition at the CPAT stage (combining voluntary attrition and disqualifications) is the largest single contributor to candidate attrition, and that CPAT training – especially attendance at multiple training sessions – greatly increases the probability that a candidate will pass the test.¹¹ Monitor's Twenty-Sixth Periodic Report (Dkt. # 1896) at 14-16. As just discussed, figures for the first round of Exam 7001 candidate processing confirm that CPAT attrition apparently continues to be a major driver of overall attrition and of disparities between groups. Accordingly, as discussed in detail below, the Monitor has continued to press the City to maximize its efforts to provide CPAT training and encourage candidates to take advantage of it. However, because most of the candidates the City expects to process from the Exam 7001 list

¹¹ The CPAT training and pass rate figures provided by the City on September 17 also indicate that candidates who attended CPAT training in Round 2 of Exam 7001 processing were more likely to pass through the CPAT stage of processing successfully than those who did not.

have already undergone CPAT testing, any new initiatives or resources will be too late to impact CPAT attrition for the majority of Exam 7001 candidates.

In addition to increasing the urgency of CPAT training and related measures, the CPAT testing schedule presents the FDNY with a different set of challenges in maintaining candidates' commitment to the hiring process from those it faced with Exam 2000 candidates. On the one hand, as the City has asserted, a front-loaded process may cause more candidates to feel more engaged and invested at an earlier stage than they would if the City waited longer to call them off the list; and it will also diminish the risk that those candidates who are well prepared for the test now, or can prepare sufficiently for the test in time, will lose interest or suffer a decline in their fitness while waiting to be called up. In addition, once candidates' list numbers are reached and CPAT information sessions begin for the group in which they are called up, they will be eligible for the mentor program and invited to connect to the candidate portal – which will provide further means of engagement. On the other hand, the process envisioned by the City will reduce the time that many candidates in lower positions on the list have to prepare for the CPAT; and more candidates who pass the CPAT will wait an extended period of time (in some cases years) before they enter the further stages of processing. The FDNY will need to develop messaging specific to candidates in such situations. In addition, as the United States has noted, to the extent that early CPAT testing lengthens the time between the CPAT and the Medical Exam for some candidates, it will be critical for the FDNY to convey to candidates the importance of maintaining their fitness even after they pass the CPAT, as the Medical Exam includes a component (the stairmill) that requires substantial physical exertion.

B. Attrition Mitigation

The Monitor has continued to oversee the City's efforts to mitigate attrition among entry-level firefighter candidates in the various stages of candidate processing. As noted by the

Monitor in prior periodic reports, the eligible list for Exam 7001 will be active for four years, and it is essential for the City to remain in contact with candidates on the list, maintain their interest, and keep them connected to the Fire Department as the hiring process continues.

Since the last periodic report, CPAT training and preparation have been a major focus of the City's efforts, and of the Monitor's oversight and input. The Monitor has also continued to receive reports and offer recommendations on a range of attrition mitigation activities and plans, including the FDNY's development of enhanced fitness tips for candidates, its current communications with candidates and outreach to candidates; and its longer-range plans for communications with candidates on the Exam 7001 list.

1. Training and Outreach to Candidates Called for Processing

a) *CPAT Preparation*

At the July 9, 2019 status conference, the Court urged the City to consider launching an additional site for CPAT training, to increase candidates' access to training by offering more than one location; and it directed the City to inform it of potential alternate locations for CPAT training by July 12. In its subsequent July 12 letter to the Court, the City announced plans to run two additional training sessions per week at FDNY headquarters in Brooklyn from August 7 through the end of CPAT testing on September 7 – providing training on all the components of the test, some in adapted form. The additional training sessions ran for four hours each and could accommodate up to 200 trainees. On September 17, the City provided the Monitor and the other Parties with attendance figures from training at FDNY HQ, showing that a total of 40 candidates attended one or more of the training sessions.

Following up on the City's commitment, on July 25 the Monitor also offered a number of additional recommendations. **First**, the Monitor recommended that the City maximize its use of FDNY Mobile Academy events as opportunities for additional CPAT training¹² (to the extent it had not already done so). In response, the City confirmed that, since September 2018, Mobile Academy events had been altered to include elements of the CPAT. As previously reported, candidates are invited to Mobile Academy events before being called off the list for processing. (For example, while processing of Round 1 candidates for hiring, the City invited Round 2 candidates to participate in Mobile Academy events.) The events thus provide an initial opportunity for candidates to gain some direct experience with the components of the test, and they provide an opportunity to emphasize the need for preparation and to inform candidates of the resources available. **Second**, the Monitor recommended that the City include in its communications messages that specifically direct candidates (with links) to CPAT-related resources available on JoinFDNY and the candidate portal. The City responded that it planned to ensure that, going forward, it would include communications that refer candidates to links to the candidate portal, JoinFDNY, and/or the FDNY's social media stories. The City reports that it has created a video to encourage fitness preparation prior to the CPAT, which is shown during ORR's information sessions and can be accessed via the candidate portal.¹³ Also during information sessions and via the candidate portal, the City provides a fitness Planning Card – which includes stairmill training, running, and resistance training in a general list of planning

¹² These are events at which candidates (typically up to a few dozen at an event) can experience some of the activities associated with firefighting and firefighter training, and interact in person with current members of the FDNY.

¹³ ORR encourages candidates (by e-mail, text, and outreach by Recruitment Coordinators) to log into the candidate portal .

items, and recommends the number of CPAT training sessions the candidate should attend.

Third, the Monitor suggested that the City emphasize the importance of preparation for the stairmill component of the CPAT in its messaging, as the City has indicated that lack of preparation for this element of the test is the most common source of CPAT failures; and the City confirmed it would do so. **Fourth**, the Monitor urged the City to complete and disseminate an improved and expanded set of fitness tips that the City had previously indicated was in development. In part this recommendation followed up on the Monitor's longstanding suggestion that the City explore ways to expand and leverage its Fitness Awareness Program ("FAP") and provide candidates with resources to help them assess, improve, and maintain their fitness, Monitor's Twenty-Fifth Periodic Report (Dkt. # 1877) at 21; and the City previously reported that it was developing a video based on the FAP to inform candidates about the level of physical fitness required for the job and provide guidance on how to achieve and maintain it. *Id.* In its July 25 message, the Monitor asked the City to complete the new set of fitness tips by August 8 or state the reason for further delay. On August 9 the City advised the Monitor that the new materials were still in development, and to date neither the FAP video nor the fitness tips have been provided to Exam 7001 candidates. Consequently, the majority of the candidates the City expects to process, who have already gone through CPAT testing, will not have been able to use those materials to help them prepare for the test.¹⁴

In connection with the City's development of fitness tips and other guidance on fitness, the Monitor also noted that the guidance currently available via JoinFDNY does not appear to include quantitative goals or benchmarks (*e.g.*, target pace for runs or suggested weights for

¹⁴ The City notes that it now invites candidates who have passed the CPAT to participate in the FAP earlier than it did during processing for the Exam 2000 list.

progressive resistance training). The Monitor suggested that, if the FDNY knows (at least approximately) what levels of preparation are likely to increase the candidate's chance of passing the CPAT and what training tasks are roughly equivalent to CPAT levels of exertion, the City should consider specifying those levels in the guidance on CPAT preparation. The City is considering the Monitor's suggestion.

b) Other Communications and Programs

The City confirmed prior to and at the June 20 Meeting that the FDNY has continued its outreach efforts to candidates called off the Exam 7001 list for processing. ORR has continued to communicate with these candidates by text, e-mail, and phone – reminding them of appointments for training, practice sessions, and testing; following up with candidates who fail to appear for processing; and publicizing recruitment resources and events. These efforts are tracked and managed using the FDNY's ARCS system. *See* Monitor's Twenty-Seventh Periodic Report at 7. Responding to suggestions by Plaintiffs-Intervenors, the City has also indicated that its vendor, Vanguard, continues to work on adding capabilities to its automated communications systems, including the ability to leave voice messages for candidates and maintain records of robocalls in its ARCS database. As most recently reported, the voicemail feature was expected to be operational September 16, 2019. The FDNY's robocall tracking feature is projected to be available by January 2020.

As previously reported, ORR's outreach to candidates includes the activities of Recruitment Coordinators, including the African-American Coordinator, targeting particular demographic groups. At the July 9 status conference, the City stated that the African-American Coordinator's role is currently performed by two full-time staff members and by additional

recruiters who rotate through the office.¹⁵ Among other activities, the City has confirmed that the African-American Coordinator calls each black candidate who was scheduled for a CPAT practice session after that session. In addition, responding to suggestions by Plaintiffs-Intervenors and the United States, the City has arranged for results from CPAT practices to be communicated to ORR on the following day – so that ORR personnel calling candidates are aware of their results and can adjust the messages they deliver on the calls accordingly. Communication about the CPAT by ORR is especially important because CPAT testing occurs before the mentor matching process is complete, and the City has advised the Monitor that mentors are accordingly not involved in efforts to encourage candidates to prepare for the test.

The FDNY continues to offer its mentorship program to all candidates once they are called off the list and can be matched (a process that takes several weeks); and information on program usage is kept in a dedicated database. *See* Monitor’s Twenty-Seventh Periodic Report at 10. As previously reported, among candidates in the first round of processing, more than 90% (overall and in each key demographic group) accepted the offer of a mentor.

The FDNY also continues to maintain its candidate portal, which assists candidates in tracking and managing their progress through the hiring process, as described in detail in previous reports. *See* Monitor’s Twenty-Seventh Periodic Report at 11. Candidates are invited to access the portal once they are called off the list for processing. *Id.*

¹⁵ Subsequently, in a July 18, 2019 call with the Parties, the Monitor asked the City for an estimate of the staff-hours contributed by these additional recruiters – seeking a more precise understanding of the resources devoted to the Coordinator role. But the City has been unable to provide an estimate – noting that the additional recruiters perform a combination of roles each day, working with the Coordinator and assisting in other areas.

2. Attrition Mitigation Initiatives for Candidates Beyond the Current Processing Group

As discussed in previous reports, the Monitor has expressed concerns regarding the need for a long-range communications plan targeting candidates who will not be eligible for appointment until late in the four-year life of the list. *See, e.g.*, Monitor's Twenty-Seventh Periodic Report at 13-14; Monitor's Twenty-Sixth Periodic Report at 18-19; Monitor's Twenty-Fifth Periodic Report at 19. In February 2019, the City provided the Monitor with its plan for communications and events for candidates on the Exam 7001 list, which included some events for candidates with lower scores on the eligible list. *See* Monitor's Twenty-Seventh Periodic Report at 13-14. While noting that this communications plan represented an improvement over the previous iterations, the Monitor advised the City that the plan was also deficient in certain areas, including its lack of planned communications with candidates after the fall of 2019, and the failure to tailor messaging to candidates that may be differently situated on the list. *Id.*

On May 30, 2019, the City provided the Monitor with the FDNY's updated communications plan for candidates on the Exam 7001 list and samples of some of the messages included in the plan. This updated plan expanded the communications in certain respects, incorporating some new events and communications targeting candidates who will be processed later in the life of the list. However, the Monitor believes further improvements are necessary for the City to show that its messaging is appropriately tailored to candidates who will begin processing at different times, pass through it on different schedules, and (if appointed) enter Academy classes at different times.

As in previous iterations of the City's plan, the principal communications targeting these later candidates relate to Mobile Academy events, "Worth the Wait" videos, and Fitness Tips (the last of which, as discussed above, are still in development). The plan also includes

“reflection activities,” intended to reinforce candidate commitment and help generate plans by having candidates connect to the reason they took the Firefighter Exam. The City’s plan identifies the hiring step to which the message pertains and identifies types of communication (*e.g.*, “text” or “email”) but otherwise does not describe or provide examples of the content of communications or how the message content will vary or be designed to accomplish different goals over time.

The Monitor believes the FDNY’s plan should include (and specify the content of) more frequent and more varied messaging specific to candidates at different levels on the list. And it has asked the City to provide additional detail, including additional samples or descriptions of the content of planned communications, which will enable the Monitor to assess how messages change over time and fit into overall plans. On August 2, 2019, the City advised the Monitor that it believes that ORR is already providing timely communications specific to candidates at different levels on the list, but that it would review the communications plan to identify where it could include more. In addition, on an August 29 call with the Parties and the Monitor, the City acknowledged that the timing and content of the communications listed in the plan will need to be adjusted to account for the schedule of CPAT testing and the City’s estimate of the lowest reachable score on the Exam 7001 list.

The Monitor has also suggested that the City expand and improve communications directing candidates to resources available on its website, JoinFDNY (such as videos, FAQs, and informational materials). The Monitor recommended that the City consider adding text and/or e-mail communications at relevant times directing candidates to specific information on JoinFDNY about particular stages of processing, and that communications should include links,

where appropriate, to ensure that candidates access potentially useful information at appropriate times and remain engaged.

The Monitor will continue to seek and review updates on the City's long-term messaging plan. In particular, the Monitor will also expect updates from the City specifying how developments in the City's plans for processing of candidates – including the projected schedule for completion of CPAT testing – will impact its messaging plans and attrition mitigation efforts.

3. Use of Data in Attrition Mitigation Initiatives

The Monitor and the other Parties have continued to emphasize the need for the City to analyze data from both the Exam 2000 and the Exam 7001 processes, and to extract information from Exam 2000 to inform decision making for Exam 7001. The Monitor and the other Parties have also continued to follow up with the City on analyses of candidate attrition. *See* Monitor's Twenty-Seventh Periodic Report at 16-18.

In October 2018, the City provided the Monitor with a set of attrition metrics for Exam 2000 that contained calculations of, among other things, the rates at which candidates dropped out or were disqualified at different stages of the hiring process, the rates of participation in programs such as the mentorship program, and the impact of selected initiatives such as CPAT training on attrition. *See* Monitor's Twenty-Seventh Periodic Report at 15. As previously discussed, however, the City's Exam 2000 attrition data did not seek to identify the reasons that candidates dropped out of the hiring process, and did not provide details on how the City planned to use its findings in formulating new strategies. *See id.* at 15-16; *see also* Monitor's Twenty-Sixth Periodic Report at 20-21. The City's analysis also did not include findings regarding the statistical significance of disparities in attrition. The analyses also contained only limited, high-level assessments of attrition in different time frames in the life of the list.

In November 2018 the City also provided a very brief list of analyses it planned to conduct on the Exam 7001 hiring process. Monitor's Twenty-Seventh Periodic Report at 16. As discussed in detail in the Monitor's previous report, on May 14, 2019 the Monitor communicated a series of recommendations to the City regarding the planned analyses of the Exam 7001 hiring process. *Id.* at 16-17. The Monitor recommended that the Exam 7001 analyses should include all the principal components in the City's analysis of Exam 2000 attrition – including rates of voluntary and involuntary attrition for each group at each hiring step and for participants (and non-participants) in each of the FDNY's retention programs (*i.e.* the FAP, CPAT training, and other initiatives). The Monitor also recommended more time-frame-specific or list-number-specific analyses of voluntary attrition, disqualifications, and the impact of attrition mitigation initiatives – to facilitate comparisons between Exam 7001 processing rounds and comparable rounds of processing for Exam 2000. Along with the United States and Plaintiffs-Intervenors, the Monitor also suggested that the City include calculations of statistical significance where it found disparities in attrition between demographic groups. The Monitor also suggested that the City's analysis should include additional, and more detailed, examinations of the effect of training and other attrition mitigation measures – including correlations between the number of training or practice sessions attended, or the time elapsed since the last session attended, and success on a given screening test. Monitor's Twenty-Seventh Periodic Report at 16-17.

On June 18, 2019, the City provided the Monitor and the other parties with a set of attrition metrics covering the candidate processing to date for Exam 7001 (*i.e.* from the first group of Exam 7001 candidates through the appointment of the May 2019 class). These figures show voluntary attrition and disqualifications for candidates at each step in the hiring process. But they do not include some elements of the Exam 2000 analysis that the Monitor had asked the

City to provide for Exam 7001 (*e.g.*, analyses correlating attrition rates with initiatives such as CPAT training and the FAP), which could provide useful guidance for the FDNY's attrition mitigation efforts. The City also did not perform any of the additional analyses suggested by the Monitor and the other Parties.

In an August 8, 2019 email, the City advised the Monitor and the Parties that it planned to provide responses to the requests for additional attrition analyses in September. The Monitor looks forward to receiving those responses soon. The Monitor has repeatedly emphasized that the City's recruitment and attrition mitigation efforts must be informed by a full range of relevant data analyses; and the Monitor is concerned that the City's current approach may omit some elements that would help it track the effectiveness and manage the deployment of its attrition mitigation efforts. The Monitor hopes that the City's updated responses, and additional analyses, will resolve at least some of those concerns.

Relatedly, the Monitor has also emphasized that analyses must be performed frequently enough to enable timely adjustments to attrition mitigation initiatives and/or the candidate screening process if the analyses support such changes. The City has advised the Monitor that it plans to issue attrition metrics at least annually after the appointment of the first Academy class. However, the Monitor continues to believe that more frequent assessments are warranted, and it has asked the City to provide attrition analyses twice per year – after each Academy class is appointed from the Exam 7001 list.

The City has advised the Monitor that it has constructed a “dashboard” to allow ORR to monitor attrition on an ongoing basis and to assess the correlation between attrition mitigation initiatives and rates of voluntary and involuntary attrition. The City advised that a version of the dashboard was provided to ORR in July 2019 and has been used to provide weekly attrition

tracking to ORR. It reports that additional edits to the dashboard are ongoing. As the Monitor understands it, the attrition “dashboard” is not necessarily designed for generating reports or sharing results of queries outside ORR; however, the Monitor intends to work with the City to ensure that the Monitor also has access to information about attrition on a regular basis, with the goal of making revisions (if needed) on an ongoing basis rather than waiting to identify problems in completed analyses. The Monitor has requested a detailed description of the data fields in the dashboard, and the City has promised to provide one; but it has not yet done so. The Monitor has also requested a demonstration of the dashboard to gain a better understanding of the ways ORR plans to use it to assess and guide its attrition mitigation efforts, and understand how the data can be reported to the Monitor.

C. After Action Analysis

As described in the Monitor’s Twenty-Sixth Periodic Report, the City provided the Monitor and the Parties an “After Action Report” in November 2018, which contained information and analyses on the FDNY’s recruitment activities for Exam 2000. *See* Monitor’s Twenty-Sixth Periodic Report at 22-23. The report summarized data relating to the effectiveness of ORR’s in-person recruitment activities for Exam 7001; however, as previously noted, it did not include an analysis of budgeting, costs, and benefits for the various recruitment initiatives; an examination of the recruitment campaign’s digital advertising and outreach; an assessment of the FDNY’s radio and outdoor advertisements; or an analysis showing whether recruitment efforts have successfully targeted candidates who ultimately obtain reachable scores on the Exam. *See id.* at 22-24. Accordingly, on May 1, 2019, the Monitor provided the City with detailed comments and recommendations on specific analyses for the City to incorporate into a more comprehensive report on its recruitment campaign. *See* Monitor’s Twenty-Seventh Periodic

Report at 19. The United States and Plaintiffs-Intervenors have also provided the City with comments.

The City has advised the Monitor and the Parties that it is continuing to address their recommendations regarding additional analyses. On August 8, 2019, the City advised the Monitor and the other Parties that it would provide them with the cost-effectiveness portion of its After Action Report in early September, to be followed in mid-September by additional analyses based on the comments it received on the initial After Action Report. The Monitor continues to expect the updated analysis to be delivered by the end of this month.

D. Assignment Issues

As discussed in detail in the Monitor's previous periodic report, Plaintiffs-Intervenors have raised issues regarding the City's compliance with Paragraph 1(d) of the Disparate Treatment Settlement, which requires the City to give "New York City residents who graduate from the Fire Academy first priority for placement into a fire company within the Division in which they live, to the extent reasonable, practicable, and consistent with operational needs"; and the Monitor has undertaken an investigation of Plaintiffs-Intervenors' concerns. Monitor's Twenty-Fourth Periodic Report (Dkt. # 1861) at 18. The investigation has proceeded through a series of Monitor requests for information and responses from the City, attempting to verify the specific operational reasons the City relied upon in denying such requests from probationary firefighters in the classes that were the subject of Plaintiffs-Intervenors' original inquiry. Monitor's Twenty-Seventh Periodic Report at 20. The City responded most recently to the Monitor's inquiries on June 25, 2019, and the Monitor plans to conduct further discussions with the Parties regarding the City's compliance with the home-division requirement of the Disparate Treatment Settlement.

In connection with these discussions, the City indicated that it was in the process of preparing revised and expanded guidelines for probationary firefighter appointments, and committed to provide them to the Monitor. *See* Monitor's Twenty-Seventh Periodic Report at 20. It provided the updated guidelines to the Monitor and the other Parties on June 24. Plaintiffs-Intervenors have raised certain objections to the guidelines, and the Monitor also has some concerns about their content. The Monitor is continuing to discuss these issues with the Parties, and will advise the Court and Parties pursuant to the Disparate Treatment Settlement if the dispute cannot be resolved.

As previously reported, Plaintiffs-Intervenors have raised additional concerns relating to firefighter assignments, including assignments to engine and ladder companies and to busier fire companies – allegations which Plaintiffs-Intervenors contend demonstrate potential unlawful discrimination or retaliation under the Modified Remedial Order, and which are also relevant to the Order's focus on the importance of an effective EEO office within the FDNY. *See* Monitor's Twenty-Fourth Periodic Report at 18-19. On July 16, 2018, the Monitor remanded the issues to the FDNY EEO Office based on the City's assertions that the EEO office should handle such investigation, with instructions to complete an investigation within 90 days (including certain topics specified by the Monitor) and to report to the Monitor on the outcome of the investigation within 120 days. That 120-day period expired on November 13, 2018. In follow-up communications, the Monitor asked the City to provide the complete report of its investigation to the Monitor by January 10, 2019. But the City failed to provide the report by the requested date. After repeated reminders and further queries, the Monitor set a deadline of May 24, 2019 for the City to provide the requested report; and the City complied – providing the Monitor with a memorandum detailing its findings and conclusions on one set of issues (whether objective

factors support the view that some fire company assignments identified by Plaintiffs-Intervenors are preferable to others), but not describing any investigation or findings regarding the Plaintiff-Intervenors' claims of discriminatory disparities in assignments. On August 29, 2019, the City also provided a one-paragraph summary of its investigation of the company-assignment issue to the Plaintiffs-Intervenors and the United States.

In a July 25, 2019 message to the Parties, the Monitor proposed to schedule a meeting to discuss issues relating to the City's compliance with the home-division requirement of the Disparate Treatment Settlement, and the City's investigation of Plaintiffs-Intervenors' allegations regarding fire company assignments. Although initially it raised no objection to the Monitor's plan for a meeting, in an August 28 email the City objected, contending that Plaintiffs-Intervenors and the Monitor seek to "add assignment path issues to the Monitor's jurisdiction." The Monitor continues to believe that a meeting is warranted and has continued to communicate with this City on this subject.

E. Working Group

The Monitor has continued to receive updates regarding the City's work on initiatives undertaken by the Working Group Committee, which was created pursuant to the Disparate Treatment Settlement for the purpose of "creat[ing] educational and other opportunities that will enhance the ability of New York City students to pursue careers as New York City firefighters." Monitor's Twelfth Periodic Report (Dkt. # 1603) at 7-8 (citing Proposed Stipulation and Order (Dkt. # 1291-1) ¶ 1(e)). These initiatives include the implementation of the Fire Cadet title and the continued operation and expansion of the FDNY's Explorer Program. The City previously provided an updated timeline for its preparations for the launch of the Fire Cadet program, which brought forward the timing of some of the key steps. Monitor's Twenty-Sixth Periodic Report at 25-26. The City's current timeline sets out milestones for additional staffing and training (in

2019), recruitment (June 2019 through February 2020), an application period (March/April 2020), and selection and investigation of prospective Fire Cadets (April 2020 through April 2021), with the anticipated start of the first class in April 2021. *Id.* The City reports that the new Uniformed Academy Director was hired in April 2019, that it expects a new Civilian Academy Director to start on October 15, 2019, and that several recruiting events have been held. As reported by the City, the Department has also completed testing for a new web-based application and engaged in the award process for vendors responsible for test administration and test creation. The Monitor will continue to obtain updates on the City's progress in implementing the program.

The City has also continued to operate the FDNY Explorers Program, which provides training and mentoring at posts associated with City high schools in diverse neighborhoods.¹⁶ The City previously advised that it selected 18 new Post Advisors in July 2018 for a total of 52. Monitor's Twenty-Fifth Periodic Report at 27. And as of February 1, 2019, it reported that the program was near capacity, with 207 Explorers enrolled in the program. Monitor's Twenty-Sixth Periodic Report at 26 (citing Monitor's Twenty-Fifth Periodic Report at 27). Currently, as reported by the City, there are 45 active Post Advisors with another 15 in the process of joining the program, and there are currently 146 Explorers. The City has noted that the number of Post Advisors and Explorers is cyclical, as the program is re-chartered annually, inactive Explorers are removed, and the City holds Open Houses in September to recruit new Explorers. Several Open Houses are being held during September 2019, where the City is looking to accept approximately 100 additional Explorers.

¹⁶ The Explorers Program has been described in detail in previous periodic reports. *See, e.g.*, Monitor's Nineteenth Periodic Report (Dkt. # 1761) at 17-18.

III. EEO

A. Overview

The Monitor has continued to work with its experts, the City, and the other Parties on initiatives connected to the FDNY's EEO-related obligations under the Modified Remedial Order. Current initiatives include those relating to EEO messaging and training, officer accountability and reporting requirements, the FDNY workplace climate survey, and the Monitor's continuing evaluation of the EEO Office's investigative practices. Progress has continued in most of these areas since the last periodic report. But in some areas (notably the climate survey), timelines have had to be extended to resolve disagreements or develop solutions; and in others, important projects and reforms have not yet been completed, or their effectiveness remains to be confirmed. Notably, for example, the City's EEO communication plan, recently circulated to the Monitor and the other Parties, includes some provision for the delivery of messaging by operational commanders – responding to longstanding Monitor recommendations and the Court's direction; but important details regarding the timing and content of those communications have not yet been disclosed. Similarly, although the FDNY has begun to employ a new EEO metric in officer performance evaluations and reported the resulting ratings to the Monitor, the effectiveness of the metric in capturing officers' performance and contributing to accountability remains to be demonstrated.

B. EEO Staffing

The City reports that the FDNY EEO Office is now fully staffed – comprising 16 attorneys (including the Assistant Commissioner, two Deputy Directors, Investigative Attorneys and contract attorneys) and six non-attorney staff. The City has now filled all the new EEO Office positions that were established in 2018. As reported by the City, most of those positions were filled by the end of 2018, and the last remaining position, for a Deputy Director, was filled

in June of this year. Before the last periodic report, the City advised the Monitor and the other Parties that the current active caseload for investigators was approximately 10 to 12 cases per investigator – reduced from a caseload of 15 to 20 cases reported by the City approximately one year ago, before the staffing increases. Monitor’s Twenty-Seventh Periodic Report at 24. On September 18, the City reported that investigators currently have a further reduced caseload of five to 10 cases.

The City has also continued to provide the Monitor and the other Parties with updates on progress towards bringing the EEO Counselor program up to full strength. The program was launched in January 2018 with the appointment of a group of 18 Counselors and with plans for a total of 25-30 Counselors from Fire Operations. Monitor’s Twenty-Fourth Periodic Report at 29. Since the last periodic report, the City has continued the hiring process for additional Counselors. The posting for the new positions closed in April, and interviews began the week of May 6. Monitor’s Twenty-Seventh Periodic Report at 25. The City initially planned to hire 15 to 25 new Counselors, but in a July 12 update it reported that, based on the quality of the applicants, it anticipated bringing on as many as 40. As previously reported, the new group of Counselors is expected to include firefighters, addressing a concern expressed by the Monitor and the other Parties that the initial group included Fire Operations officers but no firefighters. *Id.* Training for the new Counselors was originally scheduled for this summer but was subsequently re-scheduled to take place this month.

C. Policies, Messaging, and Training

The Monitor has continued to encourage the City to develop additional EEO messaging, and to disseminate a wider variety of EEO messaging more frequently and via a variety of channels. It has continued to urge the City to develop a comprehensive, integrated, and robust plan for EEO messaging and training. And it has also pressed the City to follow through on

several specific messaging and training initiatives to which the City had previously committed, including plans for the delivery of EEO messages by operational commanders, the development of further voice announcement messages (video announcements on EEO issues delivered at roll call), and the rollout of a new online training platform with new training content. The City has made progress on some of these initiatives since the last periodic report, but its plans still lack some essential details, and the content for new messaging and training largely remains to be developed.

The City provided an initial draft of the FDNY EEO messaging plan on August 13, 2019¹⁷; and the plan includes some general provisions for the delivery of EEO messages by FDNY Chiefs. However, the plan (a two-page chart) does not specify the timing of messaging by operational commanders, or exactly which officer ranks will be involved; and it describes the subject matter of planned messaging in only general terms – identifying the topics of two sets of planned messages, and providing sample communications for the first topic that the FDNY plans to address (the FDNY’s social media policy).

The City has indicated that it plans to develop additional, more specific plans for messaging content using the results of the climate survey. The Monitor recognizes that it will be important for the City to use the results of the survey to guide future messaging. Nevertheless, for the Monitor to properly evaluate the City’s EEO messaging program, ultimately it will be necessary for the City to provide a more detailed account of its planned communications. In directing the City to provide the plan, the Monitor had asked that it include a schedule for regular

¹⁷ As noted in the previous periodic report, the Monitor had asked the City to provide a draft of the EEO communication plan by May 29, with a view to finalizing the plan in June, in line with the City’s projections. But it extended the delivery date in response to City requests for more time. The City attributed the delays to consultations with internal stakeholders.

communications on EEO issues – including the timing, substantive descriptions, and examples of content for posters and other EEO communications the City planned to issue.

The Monitor has asked the City to provide more details regarding the scheduling, the format, and the content of planned messages and the role of officers in delivering them. As discussed in the past several periodic reports, the Monitor believes it is essential for operational commanders to personally communicate the FDNY's commitment to EEO compliance, diversity, and inclusion – and to connect those policies to operational effectiveness and professionalism. For the Monitor to evaluate the FDNY's use of this important channel for EEO messaging, it will be necessary for the City to provide more information on the levels of command involved, and the timing and content of the communications officers will be asked to deliver.¹⁸

The Monitor has also requested and plans to evaluate the specific content of other periodic communications listed in the City's draft plan. As the Monitor has previously noted, based on its consultations with experts, it is essential for the FDNY to create and communicate fresh messaging through an array of different channels on an ongoing basis. To determine whether the FDNY's plans are sufficient in this regard, the Monitor will require additional information on the subject matter and format of the FDNY's planned messages.

In connection with its continuing review and evaluation of the City's plans, the Monitor will also follow up on the suggestion (by the Monitor and the other Parties) that the FDNY periodically update members about the activities of the EEO Office, including investigations and

¹⁸ The City previously advised the Monitor that battalion commanders routinely visit firehouses on a bi-weekly basis to communicate with firefighters about various departmental developments and priorities, and that division commanders do so monthly. The Monitor has previously suggested that in some of those visits the officers should be directed to deliver EEO-related messages – including, for example, reminders regarding aspects of EEO Policy or information regarding EEO resources such as the Counselor program. Monitor's Twenty-Seventh Periodic Report at 26.

disciplinary actions. The City's draft plan includes a line for messaging titled "What EEO Can Do For You," and it also includes a general reference to communications regarding "Statement[s] of Discipline for violations of EEO Policy"; but the plan does not describe what the FDNY plans to convey within these general topics. As discussed in the Monitor's previous periodic report, the Monitor and the other Parties believe that the FDNY could boost confidence in the EEO Office by keeping members informed of its activities, without breaching the confidentiality of individual investigations. Monitor's Twenty-Seventh Periodic Report at 27.

Pursuant to a pending request, the Monitor also expects to obtain and review additional video messages developed for the FDNY's program of "voice announcement messaging" as they become available. The program was launched in September 2018 with a video message from the Commissioner in support of the EEO Policy, and the City committed to developing additional content. Monitor's Twenty-Sixth Periodic Report at 29; Monitor's Twenty-Seventh Periodic Report at 26. The City reported in November 2018 that additional videos for the program were in production, Monitor's Twenty-Sixth Periodic Report at 29; and the Monitor has a standing request for any additional messages as they are created.

The Monitor has also continued to request updates from the City regarding its plans to develop a new online training platform and related content. The City initially outlined plans for the new platform in a March 10, 2018 message; and earlier this year, it anticipated that the new system would be launched in the Spring of 2019. Monitor's Twenty-Sixth Periodic Report at 30. Before the Monitor's last periodic report, the City had revised that projection to the summer of this year. Monitor's Twenty-Seventh Periodic Report at 26-27. But the system still has not been implemented, and the FDNY's draft EEO communications plan continues to contemplate the use of its existing "DiamondPlate" system to provide access to online materials. The Monitor will

continue to follow the City's efforts to develop and launch the new system; it will request a demonstration of the system once launched (including mechanisms for verifying firefighter attendance and retention of program content); and it has requested that content for the new platform be provided to the Monitor as it is created. Monitor's Twenty-Seventh Periodic Report at 27.

Also in the area of training, the Monitor is currently conducting a re-assessment of FDNY officer training on EEO topics. Since the last periodic report, the Monitor requested and received the FDNY's current EEO training materials for officers, and the Monitor and its experts are reviewing the materials to determine whether they should be modified or supplemented in view of the larger, proactive role and increased accountability that the Monitor has recommended for officers in EEO messaging and compliance. The Monitor's re-assessment of officer training is intended in part to address concerns expressed by counsel for the officers' union, the UFOA, in discussions with the Monitor (held at the Court's suggestion since the last periodic report). As the Monitor reported to the Court at the July 9, 2019 status conference, UFOA counsel has indicated that officers would welcome additional training to help them fulfill their increased responsibilities and effectively manage increasingly diverse FDNY workplaces.

In addition to EEO communications and plans discussed above, on July 25, 2019 the City provided the Monitor and the other Parties with a summary report covering the activities of the FDNY's Chief Diversity and Inclusion Officer ("CDIO"), and staff.¹⁹ Additions to the CDIO office during 2019 include a Director of Policy Initiatives hired in January 2019, a Diversity and Inclusion Coordinator hired in March 2019, and a Diversity and Inclusion Manager hired in July

¹⁹ The CDIO's position was created by the Disparate Treatment Settlement.

2019. Among other items, the summary of activities lists two CDIO newsletters, which include messaging in support of diversity and inclusion; diversity and inclusion messages on a “D & I Intranet”; a poster featuring diverse department personnel (which has been distributed on an ongoing basis since August 2018); various items (*e.g.*, posters and screen savers) highlighting “Inclusive Culture Tenets” (such as “Authentic Trust” and Supporting Relationships”); lobby displays at Headquarters publicizing commemorative “months” or events devoted to particular groups; and stories distributed via newsletters and the FDNY’s online “DiamondPlate” system. The City reports that the CDIO has also met on several occasions with officers and the Fire Commissioner’s Committee on Diversity and Inclusion,²⁰ as well as the leadership of affinity groups and FDNY unions; attended Citywide diversity events; held a retreat for the Diversity and Inclusion team; and conducted a training in spring 2019 for FDNY officers. The City also advised that all probationary firefighters in the May 2019 class received Diversity Advocate Resource Cards; and information about the Diversity Advocate was included for the first time, as a sticker, in the Handbook for class members. The City reports that the CDIO also meets with probationary firefighters at the Academy, and with firefighters in individual firehouse visits and at Headquarters.

While the list of CDIO activities includes communications with FDNY personnel, many activities are described only in general terms (*e.g.*, as supporting diversity and inclusion) or address topics (such as mindfulness, trust, or diversity in areas other than race and ethnicity) that are not directly related to the Modified Remedial Order or the Disparate Treatment Settlement.

In order to evaluate the CDIO’s contribution to messaging that addresses the concerns reflected

²⁰ The Committee is composed of Firefighters and other uniform and non-uniform members and discusses issues of messaging, mentoring, community engagement, mindfulness, and education.

in the Court's Orders, the Monitor will need to examine the content of various items listed. The Monitor has asked the FDNY to provide the materials referenced in the account of CDIO activities (to the extent not already provided), and the City has begun to produce the requested materials.

D. Compliance and Accountability

1. Increased Accountability within the Chain of Command

a) Performance Evaluations

Beginning with performance reviews conducted in 2018, the FDNY has included a metric for EEO performance in officer performance evaluations.²¹ Since the last periodic report, the Monitor has continued to receive information from the City regarding the initial round of evaluations, the information considered in them, and the sources from which it comes. As previously discussed, the Monitor believes it is essential for the EEO Office to provide input for EEO performance evaluations in every case where it possesses relevant information about an officer's performance (including his or her communication of EEO messages, relevant information from firehouse inspections, failures to report violations or potential violations, failures to cooperate with the EEO Office, or negligent oversight and supervision of firefighters within his or her command). *See* Monitor's Twenty-Sixth Periodic Report at 33; Monitor's Twenty-Seventh Periodic Report at 29. The City has previously represented that the EEO Office would provide input in such cases. Monitor's Twenty-Sixth Periodic Report at 33; Monitor's Twenty-Seventh Periodic Report at 29. More generally, the Monitor intends to review how the

²¹ The metric was first introduced for Lieutenants' reviews in February 2018, and later in 2018 as a component of performance reviews for Captains. Monitor's Twenty-Fourth Periodic Report at 32; Monitor's Twenty-Third Periodic Report (Dkt. # 1844) at 29.

EEO-related criteria that the FDNY has identified as contributing to evaluations and included in its instructions to raters have factored into performance evaluations in practice.

In connection with its assessment, the Monitor has requested and received from the City several categories of relevant materials, including a compilation of EEO rating data from officer performance evaluations conducted in 2018, a set of sample evaluations, and the instructions given to raters. Monitor's Twenty-Seventh Periodic Report at 29-30. The Monitor is considering this information in conjunction with information about EEO matters (EEO complaints and inquiries directed to the EEO Office, updated by the City as of July 5), to identify instances where the EEO Office might have been expected to have information relevant to the EEO performance metrics, and to assess how the EEO Office provided input based on that data in officer evaluations. The Monitor expects to follow up with the City within the next few weeks – to request additional information and/or offer comments or recommendations on the process. The Monitor has also asked the City to provide data from evaluations performed in 2019, for which the rating process has concluded. As discussed in the Monitor's previous periodic report, in the 2018 round of evaluations, approximately 500 officers (out of approximately 1,600 evaluated) mistakenly received evaluations on obsolete forms that did not include the EEO metric. Monitor's Twenty-Seventh Periodic Report at 30. Accordingly, the 2019 round will be the first evaluation cycle from which the Monitor expects to receive a complete set of evaluations for all officers in the Department. The Monitor expects that further review of additional rounds of evaluations will also be necessary for it to confirm the effectiveness of the system.

In connection with its ongoing evaluation of officer performance reviews, the Monitor has also continued to facilitate discussions concerning what categories of data the City should

regularly record and maintain relating to performance reviews. At the July 9 status conference, the Court directed the City to respond to a longstanding proposal by the United States, which suggested a series of data fields that it believed the City should track and produce to the Monitor relating to officer performance reviews (including identifying information, assignments, and demographics). The City responded to the proposal on July 12, accepting some of the proposals but rejecting others. At the Monitor's request, the United States responded to the City's counter-proposal on August 29. The Monitor plans to discuss the issues further with the Parties, circulate its own views, and seek agreement on a plan for regular data tracking.

b) "Workplace Professionalism" Reporting

The Monitor has pursued plans discussed in the last periodic report to obtain and review materials generated by the FDNY program in which officers meet regularly with their superiors to discuss issues (including EEO issues) affecting workplace professionalism. Monitor's Twenty-Seventh Periodic Report at 30-31. As previously reported in detail, in response to Monitor recommendations and the Court's direction, the City modified the program in December 2018 to provide officers with more detailed instructions and require that chain-of-command conferences regarding workplace professionalism be memorialized on reporting forms. On July 2, 2019, the Monitor asked the City to produce records generated by the reporting system to date. The Monitor gave the City the option of producing either (1) all such records to date or (2) all records reflecting EEO or hazing concerns identified in the conferences and reports, plus a sample of 30 additional reports. The Monitor's original request called for production by the end of July. On August 26, the City advised the Monitor that workplace professionalism reports to date did not include "reports of EEO violations or of a similar nature," but it was not clear from the City's response whether the City's search included reports reflecting all "EEO or hazing

concerns,” which the Monitor had requested. The Monitor has asked the City for further confirmation and renewed its request for sample reports.

Following up on inquiries referenced in the last periodic report, the Monitor has also confirmed that workplace professionalism reports, provided to the Assistant Commissioner for EEO, are cross-referenced with data from EEO inspections on a quarterly basis. The Monitor has also suggested that the reports be cross-referenced with EEO complaints and inquiries from the same workplaces. *See* Monitor’s Twenty-Seventh Periodic Report at 31. Such cross-referencing would enable the EEO Office to identify any discrepancies that might suggest either a failure to observe or a failure to report conditions or conduct that may constitute or be conducive to EEO violations.

2. Climate Survey

Since the last status conference, the City has continued work on the workplace climate survey, and the survey content and plans for its administration are expected to be finalized very shortly.²² The survey incorporates many suggested changes from the Parties and Monitor. And in addition to the City, the United States, along with its expert, played a major role in drafting the survey and integrating comments, with substantial input and comments from the Monitor and Plaintiffs-Intervenors. The City plans to use its own resources (including resources from the Mayor’s Office of Data Analytics (“MODA”) and from DCAS), along with a commercially available survey tool, to administer the survey. Monitor’s Twenty-Sixth Periodic Report at 34. The FDNY will not have access to raw data and will receive analyses prepared by MODA that ensure anonymity is protected. Personnel from all the relevant City agencies have participated in

²² The Parties and the Monitor are engaged in testing and related discussions to ensure that the survey instrument functions properly when delivered in electronic format, as intended.

the development of plans for the survey, and the senior uniformed leadership of the FDNY has also contributed input regarding survey administration and messaging.

The City plans to administer the survey in early October.²³ Since the last periodic report, the Parties and the Monitor have exchanged a series of emails and conducted a series of calls to address questions and disagreements regarding survey administration and messaging.

Discussions focused particularly on efforts to estimate the rate of responses needed for the survey to be statistically useful and a credible reflection of opinions and experiences within the Department, on how frequently to track and analyze response-rate data while the survey is open, and on provisions for supplementary messaging and other steps that may be taken to encourage participation if response rates fall short of expected levels.²⁴ Concurrently, the Parties and the Monitor also discussed a small number of remaining disagreements regarding survey questions.

These discussions have been productive, and the City expects to move forward with its messaging plan and survey administration very soon. Although the Monitor and the other Parties continue to disagree with some of the City's decisions regarding survey questions and administration, in the interest of moving forward with the survey, they are prepared to allow the City to implement those decisions in the survey content and administrative plan. Similarly, although the City has disagreed with some of the suggestions of the Monitor and the other Parties, it has adopted them in the interest of completing the survey.

²³ The last periodic report had predicted the survey would begin in June, but the date was pushed back to permit discussion of the City's draft messaging and administration plan circulated on May 13, and concerns raised by the other Parties and the Monitor regarding the plan and the survey instrument.

²⁴ The United States, assisted by its survey expert, has played a leading role in formulating and proposing plans for mid-survey analyses and decision making.

The City plans to administer the survey in stages – dividing the Department into groups of battalions and inviting firefighters in each group to take the survey within a fixed time frame. The survey will be supported by a messaging campaign including an announcement from the Fire Commissioner, a video announcements by senior management, a poster, handouts, and messages delivered personally by officers within the firehouses and via the FDNY’s internal electronic platform.

While the analysis of survey data will be conducted primarily by MODA, the City has confirmed that the EEO Office will be involved in setting the goals of the analyses and have the opportunity to pose follow-up queries, Monitor’s Twenty-Sixth Periodic Report at 34; but the EEO Office will not have access to raw survey data and will not be able to link answers to specific individuals within the Department. The Monitor and Parties will discuss mechanics for sharing data and analyses during the analysis phase and also expect to be involved in setting the goals of analysis.

3. Inspections

Since the last periodic report, the City has provided additional information on the results of firehouse inspections, along with the current checklist used by EEO Office personnel performing inspections, and it has responded to suggestions from the Monitor and the other Parties regarding inspection procedures. Figures for inspections conducted in 2018 (provided by the City on May 28, 2019), show that only two of more than 200 firehouse inspections revealed violations of policy. The Monitor has asked the City to provide updated figures for inspections to date in 2019.

As previously recounted, the EEO Office conducts two series of inspections per week, with each series covering several firehouses at diverse locations. Monitor’s Twenty-Seventh Periodic Report at 34. Inspections are generally conducted by teams of three inspectors, when

personnel are present in the firehouse. *Id.* One inspector typically remains with firefighters in the firehouse kitchen (and available to respond to questions or discuss issues) while the others conduct the inspection. *Id.* At an April 17, 2019 meeting on EEO issues, Plaintiffs-Intervenors and the Monitor suggested that the EEO Office develop talking points for the inspectors who remain with firehouse personnel during inspections, and in a July 12 response, the City indicated that it was considering a short introduction and explanation of compliance inspections. Plaintiffs-Intervenors had also suggested that the FDNY consider conducting some inspections while personnel are not present in the firehouse. But the City has rejected that suggestion, asserting that the benefits of having inspectors interact with firehouse personnel outweigh any benefit of conducting inspections in their absence. The Monitor and Plaintiffs-Intervenors also suggested that the City record the results of inspections in the EEO case management database. The City has responded that inspection results are maintained in a separate Excel spreadsheet and has declined to add a field for inspections to the EEO database. The Monitor plans to make further inquiries regarding the feasibility of adding this feature.

With regard to the inspection checklist and instructions used by EEO personnel, the Monitor notes that while the checklist itemizes the various locations within a firehouse that an inspection must cover, it does not include any examples of materials or conditions that would constitute or indicate potential violations of EEO Policy. While some types of violation (such as facially offensive displays) may be obvious, other indicia (such as the defacement or removal of firefighter photographs from company displays) may not be. In connection with its program of workplace professionalism reporting, at the Monitor's recommendation, the FDNY issued instructions listing examples of behavior or conditions that should trigger reports. Monitor's Twenty-Sixth Periodic Report at 32. The Monitor believes that the inspection process could

benefit from an analogous set of more detailed instructions, and it plans to make further inquiries with the City regarding the instructions given to inspectors and possible improvements.

E. Investigations

1. The Monitor's Report on FDNY EEO Investigations

In accordance with the plan outlined in its previous periodic report, on August 1, 2019, the Monitor circulated to the Parties a revised draft of the report the Court has requested summarizing the workings of FDNY's EEO investigative function, and analyzing the duration of investigations.²⁵ The draft accounted for two sets of updated data on EEO investigations, which the City had provided on April 17 and July 18, 2019. The Parties have offered comments on the latest draft, which the Monitor is considering as it prepares a final version of the report for the Court.²⁶

²⁵ Pursuant to the Court's November 17, 2017 Order, the report covers the FDNY EEO Office, its staffing, its investigative procedures, and its performance in the completion of EEO investigations – with a particular focus on the duration of investigations as measured against the presumptive 90-day time limit for investigations set forth in the City's EEO guidelines and the FDNY's own EEO Policy. In relevant part, the Court's Order stated as follows:

The court monitor is respectfully DIRECTED to provide the court with a report on the New York City Fire Department's Equal Employment Opportunity ("EEO") Office. This report should address, in particular, (1) how the EEO Office investigates and resolves complaints; (2) how the staffing of the office has changed over time; and (3) the speed with which the office investigates and resolves complaints.

In addition to the topics specified in the Court's November 17, 2017 Order, the report includes a discussion of data produced by the City, in response to the Court's direction at the March 13, 2018 status conference, showing the rate at which complainants and respondents in EEO investigations have been reassigned to desk duty, and the duration of those assignments.

²⁶ As recounted in the Monitor's Twenty-Seventh Periodic Report at 35, the Monitor had previously provided two drafts to the Court, with analyses based on earlier data sets.

2. EEO Database

Before the last periodic report, at an April 17, 2019 meeting on EEO issues and initiatives, the City provided a demonstration of version 2.0 of the FDNY's EEO case management database, which incorporated several new features addressing suggestions by the Monitor and the other Parties, as well as improvements devised by the City. Monitor's Twenty-Seventh Periodic Report at 36-37. The new features include improved planning tools that generate some deadlines automatically and enable investigators and supervisors to view and manage a number of standard tasks across multiple cases. *Id.* In its current form, the database is also capable of providing search results based on a variety of criteria including types of alleged violation, workplaces, or the names of individual personnel. *Id.* at 37. However, some important categories of information (for example, interim remedial measures) are maintained only in a free-text activity log, and documents uploaded to the database are not internally searchable given the technical limitations of the current platform. *Id.* The database also does not include any information on inspections or officer performance reviews. In response to suggestions from the Monitor and the other Parties, the City is considering whether to create additional standard fields for some categories of information currently maintained in activity logs – including interim actions and some types of correspondence. It has rejected the suggestion to add information on inspections and performance reviews to the case management database. The Monitor will continue to follow up with the City regarding these further improvements in the database's capabilities.

3. Review of Investigations

The Monitor has continued to receive, review, and comment on intake documents and closing memoranda from EEO investigations that the City has identified as requiring substantial investigative activity in fire suppression matters.²⁷ The goal of such review is to comment on the FDNY EEO Office's investigative process, as the Modified Remedial Order does not provide for Monitor relief in individual EEO cases. Since the previous periodic report, the City has produced closing memoranda for three additional cases, which the Monitor is currently reviewing.

As noted in previous reports, in a June 6, 2017 set of recommendations, the Monitor identified a number of deficiencies in the FDNY's EEO investigative practices, based on an historical review of complete investigative files. *See, e.g.*, Monitor's Twenty-Second Periodic Report at 32-33. Although the EEO case materials reviewed since the June 6, 2017 memorandum generally reflect some improvements in the EEO Office's investigative practices, the Monitor has continued to observe, and comment on, some of the same deficiencies in recent cases. Monitor's Twenty-Seventh Periodic Report at 39-40. The City has disagreed with the Monitor's evaluation of its investigative practices, contending that the problems identified by the Monitor either never existed or have been cured by recent improvements. In order to resolve the

²⁷ In an initial, retrospective production of multiple cases, provided in 2017, and more recently in response to a December 12, 2018 request, the City has also provided the Monitor with full investigative files in addition to intake and closing documents. A complete, updated summary of the City's productions of EEO case materials appeared in the Monitor's Twenty-Seventh Periodic Report at 39-41. As previously noted, the Monitor's comments and suggestions on draft memoranda are intended to provide the EEO Office with guidance in adhering consistently to investigative best practices; and the Monitor does not dictate results in particular cases or require the City to obtain Monitor approval before issuing findings. *See* Monitor's Twenty-Third Periodic Report (Dkt. # 1844) at 31. However, in some instances, the City has conducted additional investigation based on comments made by the Monitor. Monitor's Twenty-Fifth Periodic Report at 49.

disagreement and develop any necessary solutions, the Monitor plans to meet with the City on September 27 to discuss case evaluations in detail and work on appropriate steps to further improve the EEO Office's investigative practices.

Regarding the duration of investigations (addressed in detail in the Monitor's EEO Report), based on the case materials and data provided to the Monitor, including the most recent data set provided on July 18, the City has shown improvement in its ability to complete investigations within 90 days, as required by City policy – particularly since staffing increases in 2018. However, because the sample size is small and a full complement of staff has only been in place for less than a year, it will be important for the Monitor to continue to review data going forward.

The Monitor is also continuing the process of contacting a selection of complainants to gather information regarding their experiences with the EEO Office, as discussed in previous reports. *See* Monitor's Twenty-Fourth Periodic Report at 37.

IV. Medical Exam-Related Issues

Pursuant to the Modified Remedial Order, the Monitor continues to address concerns raised by Plaintiffs-Intervenors and the United States that certain steps in the Medical Exam may have a disparate impact on black and Hispanic candidates. *See, e.g.*, Monitor's Nineteenth Periodic Report at 29-37; Monitor's Fifteenth Periodic Report (Dkt. # 1669) at 17-23; Monitor's Thirteenth Periodic Report (Dkt. # 1636) at 11-17 (citing Modified Remedial Order ¶¶ 15, 19); *see generally* Monitor's Eleventh Periodic Report (Dkt. # 1575) at 13-15.

A. Disparate Impact Analyses of Medical Exam Outcomes

As reported in the Monitor's Twenty-Fourth Periodic Report, an analysis completed by the Monitor and shared with the City on May 8, 2018 confirmed that the Medical Exam

administered to Exam 2000 candidates had a disparate impact on black and Hispanic candidates. *Id.* at 38-41. On March 25, 2019, the City provided a brief written response but did not provide any alternative disparate impact analysis of the Medical Exam data. The Monitor does not believe the City's response adds to, changes, or undermines the Monitor's findings.

In its analyses of candidate attrition from the Exam 2000 eligible list, however, the City reported that the Medical Exam was responsible for the greatest number of disqualifications among Exam 2000 candidates; that black candidates failed the Medical Exam at twice the rate of white candidates; and that Hispanic candidates failed it at a rate that was 50% higher than the rate for white candidates.²⁸ Special attention must therefore be paid to this step in the hiring process.

The Monitor, aided by its experts, Manitou, Inc., is continuing statistical analyses to identify which specific components are responsible for the disparate impact of the Medical Exam. This type of analysis is essential to developing potential mitigation strategies specific to those components that are found to be causing the disparate impact, and the City will need to show that it has the capacity and an established plan to continue to conduct these kinds of analyses in the future.

B. Attrition Metrics as of May 15, 2019

In its June 17, 2019 document, "Fire Department of New York City: Metrics to Assess Applicant Attrition From the Hiring Process For Exam 7001" (the "June 2019 Attrition Metrics

²⁸ The City reported that 9% of white candidates, 14% of Hispanic candidates, and 20% of black candidates failed the Medical Exam. The City has indicated that it is conducting disparate impact analyses of the stairmill and weight components of the exam, which are the most likely drivers of these disparities.

Report” or the “Report”), the City provided medical testing data for the first group of Exam 7001 candidates, as of May 15, 2019.

The Report includes data for candidates who have “voluntarily attritted,” who have been qualified or disqualified, or whose results are pending. The data represents combined outcomes of the three parts of the Medical Exam (the physical, the psychological, and the drug and alcohol tests). Only candidates who have been qualified on all three steps are considered to be “qualified,” and candidates whose results are pending for any one of the three tests are considered “pending.” Candidates disqualified on any one of the three tests are included in the “disqualified” data.

These results are necessarily preliminary, as only a portion of the first group of candidates had been processed at the time of the June 2019 Attrition Metrics Report and some candidates’ status may change as processing continues through the life of the list.²⁹ As of May 15, 2019, of the 1,157 candidates called for medical testing:

- *voluntary attrition*: 23 did not appear for at least one of their appointments (1.2% of white candidates, 4.3% of black candidates, and 2.7% of Hispanic candidates failed to report or left the process);
- *pending*: slightly more than half were still waiting for final results (55.9% of white candidates, 64.7% of black candidates, and 59.7% of Hispanic candidates remained in pending status);
- *qualified*: less than half had passed all parts of the medical testing (43.9% of white candidates, 34% of black candidates, and 39.1% of Hispanic candidates have passed the medical step of the hiring process); and
- *disqualified*: 6 failed at the medical step (0.2% of white candidates, 1.3% of black candidates, and 1.2% of Hispanic candidates).

²⁹ The City notes that metrics will be definitive only upon expiration of the Exam 7001 list, as candidate status can change because candidates who fail to appear for processing may later reschedule and/or respond to a Notice of Proposed Disqualification.

Although these numbers are preliminary and very few candidates of any race/ethnicity have either been disqualified or failed to appear for testing, there are nevertheless discrepancies in the numbers showing that, at every status, white candidates are doing better, black candidates are doing worse, and Hispanic candidates are somewhere in between. As they stood on May 15, the figures show that the pass rate for black candidates is only 77% of the pass rate for white candidates. While, again, the numbers are small and many candidates remain in processing, attention is warranted given that this current disparity violates the 80 percent rule. Although the numbers may improve as more of this group is processed, there is already a negative trend that, if amplified as more candidates are processed, could lead again to the disparate impact seen in Exam 2000 medical testing overall.

In addition to providing the figures for the three combined parts of medical testing, the City provided separate metrics for the physical and psychological tests. Although the same general trend can be seen in the rates at which white, black, and Hispanic candidates appear in pending status for the Psychological Exam, the trend is much more muted, indicating that the physical portion of the Medical Exam is driving the discrepancies that seem to be emerging in the medical testing process overall. It is critical that the City do what it can, now, to improve these results, beginning by focusing on stemming black and Hispanic attrition and helping black and Hispanic candidates move more quickly from pending to qualified status. It is also likely that these numbers will improve after the new stairmill protocol comes into use. That protocol is discussed below.

C. Psychological Exam

As previously reported, the City has revised its Psychological Exam protocol for Exam 7001 candidates. *See* Monitor's Twenty-Fifth Periodic Report at 56; Monitor's Twenty-Sixth Periodic Report at 50. The City now uses a new, shorter preliminary questionnaire, the SAMH,

that candidates take at BHS on the same day as the Medical Exam. The Monitor informed the City on November 14, 2018 that it would not object to the City's use of the new protocol, provided that the City develop a plan for conducting adverse impact analyses of future Psychological Exam outcomes. *See* Monitor's Twenty-Sixth Periodic Report at 51-53. The Monitor also requested that the City apply these analyses retrospectively to Exam 2000 psychological evaluation results to provide a baseline for comparisons with Exam 7001 results as Exam 7001 candidates move through the new protocol. *Id.*

On December 6, 2018, the City sent the Monitor its "FDNY Firefighter Candidate BHS Testing Psychological Exam: Attrition Metrics and Adverse Impact Analysis Plan" (the "December 6 Plan"), which sets out the various analyses that will be conducted with the establishment of each firefighter class. *Id.* at 53. The City shared the December 6 Plan with the other Parties on February 13, 2019.

On July 3, 2019, the City circulated an email containing data about Psychological Exam results, as follows.

First, citing the June 2019 Attrition Metrics Report, the City reported that, of the first group of Exam 7001 candidates to be processed, only two had been disqualified as of the date of that Report.³⁰ The City stated that, because the number of disqualifications was so low, a further detailed analysis as outlined in the December 6 Plan was unwarranted. The United States expressed concern that both disqualified candidates are Hispanic, believing this could be an indication of disparate impact traceable to the new protocol. The Monitor did not ask the City to perform a detailed analysis based on the two disqualified candidates but did reiterate that, as with

³⁰ It is possible that the City meant as of May 15, 2019, which is the "as of" date referenced in the Report.

all medical testing results, the City must regularly monitor results and act immediately if irregularities of greater amplitude appear. It is the Monitor's understanding that the City will continue to perform the disparate impact analyses outlined in the December 6 Plan after every Academy class is filled, including the class drawn from candidates whose data is reported in the June 2019 Attrition Metrics Report. The United States has requested that these analyses be performed both on a class-by-class and on a cumulative basis, and the Monitor agrees that that is appropriate.

Second, in response to the Monitor's request for a comparison between Exam 2000 and Exam 7001 Psychological Exam outcomes, the City reviewed some Exam 2000 data and some preliminary Exam 7001 data and wrote that more candidates were disqualified based on the old Exam 2000 psychological testing process than under the new, current protocol. The Monitor responded on July 22, 2019, cautioning the City that such a conclusion could not fairly be drawn because the Exam 2000 data the City used showed where candidates stood at the end of the entire four year life of the list, whereas the Exam 7001 data showed where candidates stood after only a few months. As of the time of the City's email, a very high percentage of Exam 7001 candidates were still in pending status, and the City cannot know yet how many of these candidates will eventually be disqualified. The Monitor therefore asked again that the City compare Exam 2000 and Exam 7001 results, this time using metrics more likely to reveal any meaningful differences, including the relative voluntary attrition rates, referral rates, and pending status rates. The City has not yet responded to this request.

D. Validation of the Stairmill Test

The stairmill test has historically been administered by BHS to ensure that entry-level firefighters possess adequate cardiopulmonary fitness to perform safely as firefighters. Because that test was not validated and statistical analyses indicated that it had a disparate impact, the

City hired PSI to either validate the stairmill test or identify another validated screening test for cardiopulmonary fitness.

1. Validation Study

After discussions with BHS and experts for the Monitor, the United States, and Plaintiffs-Intervenors, PSI initiated a study to determine the oxygen consumption (*i.e.* energy cost) required to successfully perform the Fire Academy's Functional Skills Test ("FST") and to ascertain the step rate and time period on the stairmill that would require an oxygen consumption similar to the energy cost of the FST.

The City's experts, Joel Stager and PSI, along with collaborators from Rutgers University, collected data during physiological testing of Academy trainees on December 7-9 and 14-16, 2018 and February 11-22, 2019. Testing involved using a portable device to collect oxygen consumption data from trainees performing three different activities: (1) a stairmill test at three different step rates, (2) an incremental exercise test to maximum VO₂ expenditure on a treadmill, and (3) a timed trial of the FST. After reviewing the data and data analyses, the experts arrived at a preliminary conclusion that performing a one-minute warm-up at Level 4 on the stairmill (~50 steps/minute) and four minutes at Level 5 (~58 steps/minute) required an oxygen consumption level similar to the mean value for performing the FST for individuals who were able to successfully pass the test with times near the cutoff. Level 5 on the stairmill is the same level (*i.e.* step rate) currently being used by BHS for the 5 minute 12 second stairmill test.

The experts' preliminary view that this five-minute stairmill test would be appropriate for use in candidate screening was also based on stairmill testing data (provided by Dr. Prezant of BHS) from Exams 2000, 2500 and 0001 (combined) and from Exam 7001, and on the understanding that heart rate measurement would not be a component of the test. The data that Dr. Prezant provided for Exams 2000, 2500 and 0001 revealed that the disparate impact on black

and Hispanic candidates seen in those stairmill results would have been reduced – though still statistically significant – had heart rate not been considered during testing. The data on Exam 7001 test-takers as of July 22, 2019 shows a statistically significant disparate impact on black candidates when heart rate is considered, but no disparate impact on black candidates when heart rate is excluded from consideration.

Candidates who do not pass the stairmill test during their initial visit to BHS are “reserved” and must return for additional testing, and the majority of candidates reserved for stairmill would have been qualified had heart rate not been part of the test. The BHS data shows that, as of July 22, while only one Exam 7001 open competitive candidate (white) had been medically disqualified as a result of failing the current stairmill test, 115 candidates were in reserved status for the stairmill test at that date. The Exam 7001 data shows that 10% of white candidates, 12.3% of Hispanic candidates, and 28.3% of black candidates who had appeared for the Exam 7001 Medical Exam were in reserved status for stairmill as of July 22. According to BHS, only 15 of these candidates would have been reserved for the stairmill were it not for the current use of heart rate during testing. Without heart rate as a condition of passing the initial stairmill test, the rates of qualification across all race/ethnicities for these candidates would be very high, with black candidates achieving a higher pass rate than either white or Hispanic candidates.³¹

Based on (i) the data from physiological testing of Academy trainees discussed above, (ii) the evidence provided by BHS that disparate impact among Exam 7001 candidates tested as of

³¹ Although the data show that Hispanic candidates would have continued to be reserved at slightly higher rates than white candidates, the pass rate would have been 98.5% for white candidates and 97.5% for Hispanic candidates. (The pass rate for black candidates would have been 99.2%.)

July 22 would disappear if heart rate were disregarded, and (iii) the fact that all but two trainees were able to complete the stairmill test at the current step rate, the experts agreed that a stairmill protocol similar to the current test, minus the measurement or consideration of heart rate, would be a reasonable test for BHS to use.

2. Stairmill Study Technical Report

On July 12, PSI circulated the first draft of its “Validation Study of the Bureau of Health Services Stairmill Test for FDNY Entry-level Firefighter” (the “Stairmill Technical Report”). Comments from Dr. Prezant and the experts for Plaintiffs-Intervenors and the United States were provided on July 15, July 25, and August 9, respectively. The Monitor and the Monitor’s expert have reviewed the report, as well as all comments made to date. While there appears to be a good deal of consensus about the recommended protocol, there are several issues on which the experts have important differences of opinion with respect to the meaning of the data, the best way to present the data, and the most appropriate language for describing the results of the study. The experts will have their next meeting on October 9. The Monitor believes it likely that this will be the last such meeting before the Stairmill Technical Report can be finalized.

One broader issue that remains to be resolved is the overall process for screening for cardiopulmonary fitness. Current BHS practice is to allow three stairmill test attempts, with the requirement that a candidate failing the second attempt obtain a negative methacholine challenge test and a normal echocardiogram before being permitted to make a third attempt. It is also current practice for BHS to permit a candidate to demonstrate adequate aerobic fitness by taking and passing an exercise stress test to 12 METs, in lieu of a third stairmill test. The current draft of the PSI Stairmill Report indicates that BHS will continue to offer candidates three attempts to pass the stairmill test. The report is silent, however, on the requirement of a methacholine challenge test or an echocardiogram after the second failure, and the exercise stress test option.

The Monitor believes these issues should be addressed directly by the experts at their October 9 meeting.

In ongoing candidate processing, BHS has been testing Exam 7001 candidates using the current stairmill protocol. The City has agreed that, if the stairmill protocol that emerges from the validation study differs from the stairmill protocol currently in use, the City will review the status of Exam 7001 candidates disqualified or reserved by the current stairmill, which will continue to be used until the new protocol comes into use at BHS.

The City will also need to update materials that include a description of the stairmill test, such as the BHS Guidance document and the FAQs.³²

E. Other Issues Related to BHS Testing

Heart rate on the stairmill test had historically been used by BHS as a preliminary screen to determine which candidates were required to get a methacholine test (to rule out asthma and other respiratory problems) and an echocardiogram (to rule out underlying cardiac disease). While the City has agreed that the new stairmill protocol will not use heart rate to determine whether a candidate passes the stairmill test, it has indicated that it may continue to screen for these underlying conditions because they carry an unacceptable risk of sudden incapacitation during firefighting. The City recently indicated that, while heart rate may not play a role in this screening, other measures may be used. This issue will continue to be discussed by the Monitor and the Parties, along with their experts.

³² The Monitor understands that these materials are also being updated because of numerous other recent changes to the Medical Exam process, including the Psychological Exam and the drafting, with input from the Monitor and other Parties, of new forms and notices.

The City also indicated at one point that it was at least considering using a candidate's body fat percentage as a tertiary way of identifying candidates at risk of cardiovascular issues, but the Monitor now understands that the City has decided not to pursue this idea.

The Monitor has made clear, and the City has acknowledged in other situations (for example, with respect to the proposed 120-day limit on medical testing and the use of the SAMH for psychological screening), that any change in the hiring process must be approved by the Monitor. Specifically, any new screen or limitation leading to medical disqualification or even follow-up medical testing would need to be validated before it could be considered for use in connection with the medical examination of candidates.

V. Character Screening by the CID and PRB

The Parties and the Monitor, with the assistance of their expert consultants, have continued to discuss further potential reforms in the character review portion of the FDNY's hiring process and to exchange and discuss related statistical analyses.³³

As described in detail in the Monitor's Twenty-Fifth Periodic Report, the Monitor's most recent analysis of character review outcomes for Exam 2000 candidates indicated that the process in its current form may continue to have an adverse disparate impact on disqualification rates for black and Hispanic candidates compared to white candidates – although the sample size for candidates who passed through the process after the most recent round of revisions was too

³³ As previously reported in detail, beginning in 2012, in consultation with the Monitor and the other Parties, the City issued a series of guidelines for the CID and PRB; the most recent modifications to the guidelines were issued in mid-2016. Monitor's Sixteenth Periodic Report (Dkt. # 1694) at 29-31; Monitor's Seventeenth Periodic Report (Dkt. # 1714) at 29-30. As noted in prior periodic reports, the revisions were agreed upon by the Parties with the understanding that they might be subject to additional changes based on further analysis. *Id.* at 30.

small to support a definitive conclusion.³⁴ *See* Monitor's Twenty-Fifth Periodic Report at 59-60; Monitor's Twenty-Sixth Periodic Report at 57. The Monitor's analysis also showed statistically significant disparities between the rates of PRB referral for black candidates compared to white candidates and for Hispanic candidates compared to white candidates under the current rules. *Id.* It also concluded that, in the period since the current procedures and standards were implemented, the rate at which black candidates were either (1) disqualified or (2) hired with extended probation (combining the percentages for both results) exceeded the same rate for white candidates to a statistically significant degree. *Id.* at 57-58. The Monitor also found differences between the processing times for candidates who had been referred to the PRB and for those who had not. *Id.* at 58.

Over the past two years, the Parties and the Monitor have exchanged a series of communications and held meetings to consider additional potential reforms in the character review process – first proposed by the Monitor at a meeting on July 27, 2017, based on consultations with its expert, Alison Wilkey of John Jay College. *See* Monitor's Twenty-Sixth Periodic Report at 55. Although the City agreed to adopt some of the changes proposed by the Monitor in character review procedures and in the instructions given to candidates, it substantially rejected the Monitor's suggestions for further changes in the criteria governing the

³⁴ As the Monitor reported in September 2015, analyses of the character review process as it existed at that time, which reflected a number of reforms under the Modified Remedial Order but pre-dated the most recent round of changes, showed that minority candidates were referred by the CID to the PRB for further, discretionary screening (and potential disqualification) at a higher rate than white candidates. Analyses of the same data set also showed that minority candidates referred to the PRB were disqualified by the PRB at higher rates than white candidates who had been referred. *See, e.g.*, Monitor's Thirteenth Periodic Report at 20-21 (discussing findings).

CID's referral of candidates to the PRB,³⁵ and it also rejected a set of detailed recommendations by the Monitor for procedures designed to encourage and structure PRB deliberations and to record the reasons for all PRB decisions.

The respective positions of the City and the Monitor were discussed in detail in prior reports. *See* Monitor's Twenty-Sixth Period Report at 58-61; Monitor's Twenty-Seventh Periodic Report at 50-54. In the Monitor's view, given the potential for the character review process to produce an adverse disparate impact on black and/or Hispanic candidates, it makes sense for the City to take steps now to minimize the risk of disqualifications that are not based on demonstrably job-related factors, and to introduce all feasible mechanisms to ensure that the process is consistent and that decisions are driven by job-related considerations. For its part, the City notes that substantial reforms have already been implemented; and it takes the position that the analyses conducted to date have not demonstrated the need for further changes, and that changes in PRB referral criteria are not necessary because PRB review ensures that disqualifications are job-related. Monitor's Twenty-Sixth Periodic Report at 50.

In addition, as previously reported, although the Monitor's analysis already shows statistically significant disparities between the rates of PRB referral for black candidates compared to white candidates and for Hispanic candidates compared to white candidates, the City contends that referral to the PRB, in itself, does not disadvantage candidates (for example,

³⁵ The Monitor had suggested that a number of minor offenses be dropped from the list of offenses that trigger PRB referral. The City ultimately agreed to drop three – jaywalking, operation of a bicycle on sidewalks, and operation of roller skates / in-line skates and skateboards. The City also rejected the Monitor's proposal of limited look back periods for criminal convictions – analogous to the look back periods that the FDNY already uses for arrests. The current rules call for PRB referrals for any misdemeanor conviction, for a felony arrest within the past five years, and for two or more misdemeanor arrests within the past three years. A felony conviction automatically disqualifies a candidate unless he or she has obtained a Certificate of Good Conduct.

by materially slowing their progress through the hiring process or by increasing rates of voluntary attrition). Monitor's Twenty-Sixth Periodic Report at 61. Similarly, the City believes that the disparity in rates of extended probation (applied to black candidates at a significantly higher rate than to white candidates) does not warrant further changes in the criteria for PRB referral. *Id.*

Since the last periodic report, the City has proceeded with some of the changes it agreed to implement in the character review process. On June 19, the City circulated a draft revised version of the manual governing CID procedures, along with additional drafts of instructions and informational material intended to assist candidates in obtaining, reviewing, and if necessary correcting criminal records. The Monitor and its expert provided an initial set of comments and questions on the materials on July 15, and the City circulated revised drafts on July 22, along with responses to the Monitor's comments and questions. Following a series of communications among the Monitor and the Parties, in which the Parties also recommended changes, some of which the City adopted, on August 19 the Monitor approved the revised materials for use in current candidate processing. On July 25, the City also circulated a draft revised version of the manual governing the PRB, along with draft revised versions of relevant appendices. Although the proposed revisions did not eliminate any additional offenses (beyond the three that the City had agreed to drop) as triggers for PRB referral, it proposed changes in the instructions given to the PRB in the assessment of criminal histories. The Monitor transmitted comments to the City on August 27; the City provided responses on September 6; and the Monitor sent a further response on September 19, approving the materials for use in current processing, subject to two further revisions, which the City accepted.

Also since the last periodic report, on June 14, the City circulated to the Monitor and the other Parties a memorandum containing statistical analyses and related explanations intended to support some of its positions regarding the impact of PRB referral on candidates – including its view that referral to the PRB, standing alone, does not impose a material burden on candidates.³⁶ (The memo did not address the Monitor’s analyses and concerns regarding disparate rates of extended probation. The City reports that it is working on that response.) The City’s analysis includes assessments of candidate processing times offered as support for the City’s assertion that PRB referral does not materially increase candidate processing times. The Monitor and its experts are currently reviewing the City’s analyses and plan to respond with comments and follow-up questions soon.

As noted in previous reports and in numerous communications among the Monitor and the Parties, the Monitor has made it clear that if further analysis, based on sufficient statistical samples,³⁷ shows that the process has an adverse disparate impact on black or Hispanic candidates, the City will be required either to make further changes in the process (and show they are effective in eliminating disparate impact) or to validate the process as job-related; and in either case the City’s timeline for establishing compliance with the Modified Remedial Order will be extended. *See, e.g.*, Monitor’s Twenty-Sixth Periodic Report at 56. Also as previously noted, the City has agreed to continue to maintain and analyze data as Exam 7001 candidates go

³⁶ The City had committed to provide the analysis at a December 12, 2018 meeting on character review issues.

³⁷ It remains to be determined whether an appropriate sample could combine data from Exam 7001 candidates with data from the Exam 2000 candidates who went through the process under the current criteria, or whether it will be necessary to wait until enough Exam 7001 candidates have passed through character review to provide a sufficient sample from the current eligible list.

through the character review process, to identify any adverse disparate impact on black or Hispanic candidates, and to enable identification of the specific factors in the process that are producing such impact. *Id.* The Monitor expects to continue discussions with the Parties regarding some of the components of that analysis, following up on the Monitor's analyses and the City's June 14 memorandum.

VI. Firefighter Exam

Pursuant to Paragraph 7 of the Modified Remedial Order, the Monitor is charged with overseeing the computer-based test ("CBT") for the position of entry-level firefighter. Consistent with the provisions of the Modified Remedial Order, the City and its testing consultant PSI have continued to work in coordination with the Monitor, the other Parties, and their respective experts to analyze and report on the examination process. The Monitor continues to be assisted by its testing expert, Dr. Shane Pittman.³⁸

A. Open Competitive Exam

The Exam 7001 scores were released on June 13, 2018. The City established the Exam 7001 list on February 27, 2019, and the first class drawn from the list entered the Academy on May 13, 2019.

1. Current Milestone: Technical Report

The current step in the exam analysis and reporting process (Step 204, "Technical Report") requires PSI to complete a report documenting all the steps taken in the development, administration, scoring, and analysis of Exam 7001. PSI circulated its first draft of the report to

³⁸ As of July 8, 2019, Dr. Pittman's firm, The Pittman McLenagan Group, L.C., was merged with the Human Resources Research Organization (HumRRO), an HR consulting firm located in Alexandria, Virginia, and Dr. Pittman's affiliation is now with HumRRO. The Monitor's contract with Dr. Pittman remains otherwise unchanged.

experts for the Monitor and the other Parties on July 23, 2018. Previous periodic reports provide a description of PSI's report on its work, including its confirmatory job analysis, development of new exam forms, equivalency testing, exam administration, scoring, and analyses of results. *See* Monitor's Twenty-Fifth Periodic Report at 61-62; Monitor's Twenty-Sixth Periodic Report at 62-65. The Monitor and other Parties submitted comments on the report in August 2018. These comments are also summarized in the same previous periodic reports. On December 24, 2018, PSI circulated a second draft of the Technical Report, and the Monitor and Parties circulated further suggested edits in February and March of 2019. PSI circulated the latest draft of the report in April 2019.

The Monitor and other Parties may provide another round of edits to the Technical Report; but they cannot do so, and the report cannot be finalized, until PSI circulates its final calculation of the "selection ratio" – the ratio between the number of Exam 2000 open competitive test-takers who underwent some FDNY processing and the number of those candidates who ultimately made it through all the hiring steps and were appointed to an Academy class. Once the Exam 2000 selection ratio has been determined and agreed upon, PSI will apply that ratio to the Exam 7001 list to project the lowest list number likely to be reached and the lowest adjusted final average score ("AFA score") likely to be reached. Although there is no way to know exactly which candidate will be the last to be reached or which AFA score will be the lowest reached, it is important to make these projections so the Monitor and the Parties can calculate the projected adverse impact associated with the exam. The City has reported that it expects the ratio to be approximately 1:2.72 and the lowest AFA score to be 99, and PSI continues to work with the City to confirm those numbers.

It is probable that the City will not consider all Exam 7001 candidates with the lowest AFA score reached, and it is possible that there will be a large number of such candidates. An AFA score of 98 was the lowest Exam 2000 score reached, but only some of the candidates at that score were considered before the Exam 2000 list expired. Because PSI is able to put candidates in specific rank order, including within AFA scores, it will be possible for the City to determine the exact racial/ethnic makeup of all candidates projected to be reached.³⁹ Using the demographic information associated with all candidates down to this last projected list number – rather than using information for all candidates at the lowest AFA score – will give the most accurate picture possible of the racial/ethnic mix of those who will move from the CBT to next steps in the hiring process and will permit the most accurate possible calculation of adverse impact ratios.

2. Optional Survey Administered to Exam 7001 Candidates

As reported in the last periodic report, an optional survey was administered to Exam 7001 test-takers at the time of testing. Their responses have been aggregated and analyzed and have already been used by the City, including in its first draft of the After Action Report. Because the survey was performed on a confidential and anonymous basis, however, the City is not able to tie back specific answers to specific individuals. The City has determined that this more specific information would be useful in informing attrition mitigation efforts and future recruitment and has decided to re-administer the survey to all test-takers. The Monitor and other Parties agree

³⁹ All candidates with the same AFA score are put in a rank order using nine-digit numbers created from the last five digits of each candidate's social security number followed by the first four digits of that number. This determines the exact order in which candidates are called for processing, bearing in mind that the order can change slightly over time if, for example, a candidate is unable to provide adequate proof to support a claim for residency credit.

that this is a valuable undertaking. The City's current plan is to send the survey to test-takers via email, with text and email reminders sent weekly to individuals who have not responded during the first thirty days after launch. After the initial thirty-day period, the City proposes to make the survey available to candidates currently being processed, via a link on the candidate portal.

Since the last periodic report, the City has incorporated in the survey two rounds of edits requested by the Monitor and the other Parties; and it is the Monitor's understanding that all now agree with the content of the survey. The City has also responded to questions about the administration of the survey, and it is the Monitor's understanding that there are no further such questions. The issues still under discussion are the City's plans for use of the survey results, including how they will inform the City's after action reporting and attrition mitigation plans, and the City's plan for sharing survey data with the Monitor and the other Parties.

VII. Additional Issues

On an ongoing basis, the Parties and the Monitor consider a range of issues and perform an array of additional tasks relating to enforcement of the Modified Remedial Order. During the period covered by this report, these activities have included the following:

- Discussions regarding individual candidates who are or claim to be entitled to relief under the Court's Orders, including their interactions with the FDNY, documents they have received, and their rights and remedies;
- Addressing questions and disagreements among the Parties regarding the status of specific candidates and other issues that are not addressed elsewhere in this report and that fall within the Modified Remedial Order or Disparate Treatment Settlement;
- Frequent calls, meetings, and correspondence with the Parties regarding the full range of issues related to implementation of and compliance with the Modified Remedial Order; and

- Performing the remaining duties of the Special Master appointed by the Court in its Order filed May 22, 2012 (Dkt. # 883). The Court assigned these duties to the Monitor in an order dated August 17, 2016.

Dated: September 20, 2019
New York, New York

/s/
Mark S. Cohen