

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 TWENTIETH PERIODIC REPORT TO THE COURT**

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## **I. Executive Summary**

This report summarizes activities relevant to compliance by the City of New York (the “City”) with the Modified Remedial Order during the 100 day period from March 13, 2017, when the Monitor’s Nineteenth Periodic Report (Dkt. # 1761) was filed, to June 20, 2017. The report also summarizes the Monitor’s 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 purview. *See* Stipulation and Order dated June 5, 2015 (Dkt. # 1599); *see also* Memorandum & Order dated June 5, 2015 (Dkt. # 1598) at 10.

Over the past 100 days, working with the Monitor, the United States, and Plaintiffs-Intervenors, the City and the FDNY have continued to make progress in several areas where the Modified Remedial Order mandated reforms. That said, considerable work remains to be done across the topics covered by the Court’s Order. For example, the past 100 days encompassed the application period for the next open competitive firefighter exam – the culmination of months of recruitment activities devoted to attracting interest, and ultimately applications, from firefighter candidates in historically underrepresented groups. Those efforts were largely successful, as applications from black and Hispanic candidates increased significantly by comparison with the applications for the previous open competitive exam. Nevertheless, in order for those applications to mature into test-takers and, ultimately, firefighters, the FDNY must now embark on intensive, broad-based efforts to maintain applicants’ interest and to prepare them for the examination and the other phases of the hiring process. Similarly, in the area of EEO, the FDNY has undertaken a number of initiatives to communicate and enforce its EEO and anti-hazing policies, and has been cooperating with the Monitor in efforts to improve its compliance and

investigation functions. But many of these initiatives are only in their early stages. Given the reported persistence of hazing, bullying, and racial and ethnic antagonism in some quarters within the Department, the Monitor believes the FDNY will need to engage in extensive, consistent, sustained efforts to confront continuing challenges.

Part II of this report provides an update on the City's recruitment campaign up to the application deadline for the next entry level firefighter exam. The application period for the next open competitive examination began on April 5 and continued through June 9, 2017. During that period (and in the weeks immediately preceding it) the FDNY engaged in an intensive effort to gather applications from black and Hispanic candidates – employing a combination of radio, digital, and outdoor advertising (including social media ads), and engaging in extensive in-person recruitment activities. During the application period itself, the FDNY's in-person recruitment efforts included multiple filing sites at selected locations throughout the City, along with mobile teams of recruiters taking applications from candidates. The City met frequently with the other Parties and the Monitor over the past 100 days to report on its progress and hear suggestions for improvements in its tactics – many of which it implemented.

As previous Periodic Reports described in detail, under the Disparate Treatment Settlement, the City agreed to use its “best efforts to recruit black test-takers in proportions closely approximating the representation of age eligible blacks in the New York City labor market, plus an additional 3%.” Prior to the campaign the Parties estimated that in order to achieve this goal for test takers, the FDNY should endeavor to collect enough applications from African-American candidates to represent 30% of all applications. The City came close to achieving that goal. By the end of the application period June 9, it had collected 20,514 applications from black candidates, or 28.26% of the total – a substantial increase over the

corresponding figures for the previous examination, both numerically and as a percentage of total applications.

With the application period completed, the City now progresses to the next, equally important, phase of its recruitment and hiring process – in which it must maintain contact with applicants, continue to encourage them to take the upcoming examination, and provide and publicize the resources that will help them achieve the best possible scores on the examination and navigate the hiring process. With these goals in mind, the City has developed, and shared with the other Parties and the Monitor, plans for exam logistics, exam preparation resources (including live and web-based instruction), and continued communications with applicants (including both informational messages and continued encouragement to maintain their interest in taking the test). The effectiveness of the FDNY’s recruitment campaign cannot be fully evaluated until the numbers of actual test-takers in relevant groups have been determined.

Once the recruitment campaign is concluded and complete data from the open competitive examination becomes available, the City will also need to conduct a detailed analysis of all aspects of its recruitment and attrition mitigation efforts so that it will be able to make evidence-based decisions for future campaigns.

Part III of this report discusses the status of three data management and analysis systems relevant to the Modified Remedial Order: a comprehensive system designed to manage data from all phases of the recruitment and hiring process; the interim Candidate Tracking Spreadsheet (“CTS”), which contains periodically updated data from the hiring process for

candidates who took Exam 2000 and Exam 2500<sup>1</sup>; and a recruitment database that the City has used to manage data from the ongoing campaign.

The City previously reported that development of the comprehensive, end-to-end data management system is complete and that the system is ready to receive data from the December 2016 promotional exam – as well as the data that will be collected following the next open competitive exam. It has committed to demonstrate the operation of the database to the other Parties and the Monitor once candidates from the promotional list begin to work their way through the post-exam stages of the hiring process.

The City circulated the most recent updated version of the CTS on January 24, 2017. That updated version remedied some inconsistencies and deficiencies that had affected prior versions, and the Monitor and the Parties have been working with the CTS data in several areas relevant to the Modified Remedial Order, including the Medical Exam and the character review process. The City plans to produce a further updated version of the CTS after the expiration of the Exam 2000 list this month.<sup>2</sup> The newly updated CTS will provide full details of the hiring process for all the Fire Academy classes filled from the hiring lists for Exams 2000 and 2500, and will accordingly provide a comprehensive picture of the impact of each step in the process on key demographic groups.

The Parties and the Monitor have also continued to discuss an attrition metrics analysis, based on CTS data, that the City circulated on October 5, 2016, as well as a revised analysis dated March 28, 2017 based on updated data. Using the same CTS data, the Monitor, the United

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<sup>1</sup> Respectively, these are the open competitive examination and the promotional examination that produced lists of candidates from which Fire Academy classes were drawn from July 2013 through June 12, 2017, the start date of the most recent class.

<sup>2</sup> The Civil Service list for Exam 2500 expired in December 2016. The Civil Service list for Exam 2000 Priority Hires expired on June 19, 2017, and the list for open competitive candidates expires on June 26, 2017.

States, and Plaintiffs-Intervenors have also proceeded with their own analyses of hiring decisions and attrition in various stages of the hiring process, including analyses of potential causal factors.

The City's recruitment database – designed by its consultant, Vanguard Communications – has been operational since September 2016 and has been used to manage data and contacts with potential candidates during the current recruitment campaign. The system appeared successful in a number of areas, as it was used to compile and report on data from the FDNY's recruitment activities, and to manage a variety of communications with prospective applicants before and during the application period. The City will continue to employ its recruitment database as it transitions to the next phase of the recruitment campaign leading up to the open competitive examination. The Monitor also anticipates that the recruitment database will be used to generate retrospective analyses of the targeting and tactics of the current recruitment campaign.

Part IV reports on the status of activities relating to the FDNY's EEO function. Over the past 100 days, following up on feedback from the Court, the Monitor and the other Parties, the City has begun or continued several initiatives intended to communicate EEO messages more effectively and systematically, ensure EEO compliance, and improve its performance in investigating and disciplining violations of the FDNY's EEO and anti-hazing policies. The initiatives include new messaging focusing on leadership and professionalism, which the City is developing in consultation with military personnel who have produced similar messaging for the U.S. Army.

The City has also confirmed plans to complete web-based EEO training for officers by September of this year, and to begin employing EEO metrics in officer performance evaluations at the start of 2018. (The Department will also conduct live EEO training for officers, which it



plans to complete in early 2018.) The EEO metric will provide an important incentive to ensure that FDNY officers comply with and help to enforce EEO laws and policies, as EEO performance will be considered alongside operational factors in decisions that affect officers' careers. The FDNY has also begun efforts to implement enhanced regular reporting procedures requiring officers to report on the EEO climate within their commands, and it has continued to provide the Monitor with materials on new and ongoing EEO investigations. On June 6, 2017, the Monitor communicated a series of recommendations to the City regarding its investigative practices – based on a review of investigative files provided by the City; and the FDNY has scheduled a follow-up meeting with the Monitor to discuss those recommendations. If the FDNY is to effect the necessary improvements in its EEO climate, it must pursue investigations thoroughly and fairly, so as to inspire confidence in victims of discrimination; and it must not hesitate to impose discipline where misconduct is found to have occurred.

On May 2, 2017, the Monitor met with the senior leadership of the FDNY and representatives of the U.S. Army to discuss the ongoing initiatives and ways to adapt Army materials for use in some aspects of FDNY messaging and training. On June 7 the Monitor met with all Parties to provide a comprehensive update on the new initiatives.

The Department has acknowledged the continuing need to effect fundamental changes in the climate and culture of many of its workplaces. And its recognition of the need for additional reforms and intensified efforts in this area is encouraging. However, precisely because the required reforms concern attitudes and practices that have been allowed to take root in the FDNY's culture over a long period, bringing those reforms about will require strenuous, long-term effort.

Part V reports on efforts to ensure that the various components of the City's medical screening for entry-level candidates (the "Medical Exam") do not have an unlawful disparate impact on black and Hispanic candidates.<sup>3</sup>

As previously reported, although it has not been possible to isolate causes of disparate impact with precision using past data, the City implemented a number of initiatives that were intended to mitigate some possible causes of disparate impact related to the Medical Exam. In addition, for some time the City has also planned to undertake a study to validate the stairmill component of the Medical Exam as job-related and consistent with business necessity. Before the previous Periodic Report, the City advised the Monitor that it had engaged PSI Services LLC ("PSI"), which has assisted the City with validation of the written examination and the Functional Skills Test, to conduct a validation study of its current stairmill test. On June 9, 2017 the City provided the Monitor with a statement of work for PSI that sets forth the questions the City intends to address in the validation effort. The Monitor is currently evaluating the City's statement of work.

The City has recently produced data from its newly constructed Electronic Medical Record ("EMR") database<sup>4</sup> – intended to assist the other Parties and the Monitor in assessing any disparate impact associated with the Medical Exam.

Part VI discusses recent developments relating to the FDNY's character review process, administered by the Candidate Investigation Division ("CID") and the Personnel Review Board ("PRB"). The Monitor and the Parties have continued to analyze and discuss the impact of the character review phase of the hiring process on applicants from different racial and ethnic

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<sup>3</sup> The Medical Exam is administered by the Bureau of Health Services ("BHS").

<sup>4</sup> Previous Periodic Reports referred to this database as the "BHS" database.

groups, and are considering additional improvements. The City is currently compiling data from the latest round of PRB decisions. Once that data is available, the City, the other Parties, and the Monitor will be better able to evaluate the effect of the reforms implemented thus far in the character review process; and they will be in a better position to make informed decisions regarding the need for further changes. The City is also in the process of responding to suggestions the Monitor and the other Parties have made concerning the training materials for FDNY personnel who make character review decisions.

The Monitor has continued its consultations with its expert, Alison Wilkey, and with the Parties to examine further potential reforms in the character review process. The Monitor plans to meet with the City within the next few weeks to discuss additional recommendations to the City based on its consultations with Ms. Wilkey.

Part VII discusses issues related to Exams 7501 (the promotional exam given in December 2016) and Exam 7001 (the next open competitive exam, to be given in September and October 2017).

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

## **II. Recruitment and Attrition Mitigation**

### **A. Recruitment for the Next Open Competitive Examination**

The 100 days since the last Periodic Report have been one of the most critical periods of the entire recruitment campaign, as they encompassed the application period for the next open competitive examination for firefighter candidates – scheduled for September 2017. The application period opened April 5, 2017, originally with an April 25 deadline for applications. That deadline was subsequently extended four times – to May 10, May 17, May 31, and finally

to June 9, the date on which the application period ultimately closed.<sup>5</sup> Including the extensions, the application period spanned the same number of days as the application period for the previous open competitive exam.<sup>6</sup> The FDNY's drive to collect applications during this period represents the culmination of the initial phase of the recruitment campaign, in which the City has deployed a wide variety of resources to attract firefighter applicants from historically underrepresented demographic groups. Throughout the application period, the City continued to pursue recruitment activities including radio, transit, outdoor, and digital advertising; social media outreach; phone calls; and in person-recruitment. It also engaged in extensive follow-up communications with potential candidates for whom it had gathered contact information. Over the past 100 days the Parties and the Monitor communicated frequently about the progress of the campaign – holding three special purpose meetings on March 30, April 20, and June 6, along with numerous conference calls during the application period, in which they evaluated the status of the campaign and discussed adjustments in strategy. During the application period the City also provided the Monitor with daily updates showing the number and percentage of applications collected in each major demographic group; and it produced more detailed weekly updates (for the other Parties and the Monitor) containing additional information including the geographic distribution of applicants and data from specific filing sites. The Parties also updated the Court on the City's recruitment efforts at status conferences held April 12 and May 3, 2017.

At the end of the application period, the FDNY had collected a total of 72,596 applications, of which 28.26% were from black applicants, and 27.14% from Hispanic

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<sup>5</sup> Each extension was announced by the issuance of an Amended Notice of Examination. The Amended Notices of Examination also included a revision specifying an additional type of document that would be acceptable as proof of New York City residency for the purpose of obtaining residency credits on exam scores.

<sup>6</sup> The Vulcan Society encouraged the City to extend the application period beyond June 9, but the City rejected the proposal, citing (among other factors) the need to proceed to the next phase of the recruitment process, discussed below.

applicants. Additional details regarding the FDNY's collection of applications are set forth below in Part II.A.1.

With the application period concluded, the FDNY has transitioned to the next phase of the recruitment process, in which it will seek to maximize the number of applicants who go on to take the open competitive examination, and in which it will endeavor to provide candidates with the resources and guidance they need to achieve exam scores high enough for them to be hired from the civil service list produced by the exam.<sup>7</sup> The City described its plans for this phase of the recruitment process, which is also highly significant, at the most recent special purpose recruitment meeting held on June 6, 2017.

It is important to note that of necessity, this campaign proceeded based on the City's best estimates of its needs and the most effective ways to recruit, with input at times from the other Parties and the Monitor. While many successes were achieved, the Monitor cautions that it may not be optimal to simply replicate the approaches and methods used in this campaign for future campaigns. Going forward, as the City has noted at recruitment meetings, it will be able to make use of data from this campaign and future campaigns to better pinpoint which efforts had greatest success, better predict financial and other needs based on historical trends, and otherwise improve and refine the process based on empirical evidence.

#### 1. Progress toward Recruitment Goals

The Monitor and Parties have worked with the City to expand and improve recruitment of black and Hispanic applicants pursuant to the Modified Remedial Order.<sup>8</sup> Under the Disparate

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<sup>7</sup> The lowest score for candidates appointed from the current hiring list was 98 (including bonus points awarded for NYC residency and other reasons).

<sup>8</sup> The Modified Remedial Order requires the City to refrain from discrimination in any portion of the hiring process, including recruitment, and to eliminate any policy or procedure that has an unlawful disparate impact on black or Hispanic firefighter candidates or perpetuate the effects of such disparate impact. Modified Remedial Order ¶¶ 18-

Treatment Settlement, in addition, the City is required to “use its best efforts to recruit black test-takers for open-competitive firefighter entrance exams in proportions closely approximating the representation of age eligible blacks in the New York City labor market, plus an additional 3% to remedy a history of underrepresentation of blacks in the New York City firefighter ranks.”

Before the active phase of the current recruitment campaign began, the Parties agreed that the target figure for the City’s “best efforts” in recruiting black test takers should be 28% of all test takers for the open competitive examination.

The results from the application period indicate that the City has made considerable progress in its recruitment of black and Hispanic candidates. The following table provides a detailed breakdown of applications by race and ethnicity, and provides a comparison to figures for the previous recruitment campaign (for Exam 2000).<sup>9</sup>

<b>RACE/ETHNICITY</b>	<b>2017 COUNT</b>	<b>2017 PERCENTAGE</b>	<b>EXAM 2000 COUNT</b>	<b>EXAM 2000 PERCENTAGE</b>
ASIAN	3,339	4.60%	1,841	3.12%
BLACK	20,514	28.26%	12,660	21.48%
HISPANIC	19,701	27.14%	13,441	22.80%
TWO OR MORE RACES	2	0.00%		
NATIVE	420	0.58%	277	0.47%
UNKNOWN	2	0.00%	1	0%
WHITE	28,618	39.42%	30,730	52.13%
<b>Grand Total</b>	<b>72,596</b>	<b>100.00%</b>	<b>58,950</b>	<b>100%</b>

As the table shows, applications from black candidates and from Hispanic candidates have increased substantially by comparison with the FDNY’s last recruitment campaign – both numerically and as percentages of total applications. Applications from black candidates

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19. It also requires the City to identify best practices in recruitment and specify plans for implementing them. *Id.* ¶¶ 25-30.

<sup>9</sup> Figures for Exam 2000 applications are taken from an Attrition Metrics analysis provided by the City.

accounted for 21.48% of total applications for Exam 2000, and they account for 28.26% of the total filed during the recent application period for Exam 7001. The Hispanic percentage of total applicants has also increased – from 22.8% to 27.14%.

These results are encouraging: if the black and Hispanic percentages of test takers ultimately match the percentages for applicants, the City will have achieved the quantitative goal agreed upon under the Disparate Treatment Settlement, and the black and Hispanic shares of test takers for the upcoming examination will be substantially higher than they were for Exam 2000.<sup>10</sup>

The challenge the City now faces is to ensure that as many applicants as possible become actual test takers, and that they are appropriately prepared for the examination. Based on experience and data from Exam 2000, the challenge may be particularly acute with respect to black applicants who may not have had as much familiarity with the benefits of a firefighting career, as the rate of attrition between application and exam among black applicants for Exam 2000 was higher than for other groups.<sup>11</sup>

The FDNY's figures for total applications include both completed applications and 9,986 applications (across all demographic groups) considered "pending" – typically because an application fee or fee waiver has not yet been processed. The City estimates that at least 50% of these pending applications will be completed, as prospective candidates resolve payment issues or remedy other deficiencies. To permit the completion of as many pending applications as possible, the City is permitting pending applicants to finalize their applications after the

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<sup>10</sup> According to figures provided by the City, black test takers were 19.4% of all test takers for Exam 2000; Hispanic test takers were 22.8% of the total.

<sup>11</sup> Also according to figures provided by the City, 36% of black applicants for Exam 2000 did not take the examination, compared to 26% of whites. Black applicants were 21.5% of total applicants for Exam 2000, but only 19.4% of test takers.

application period has closed. The FDNY also plans an intensive effort to follow up with pending applicants and urge them to complete their applications.

2. Components of the Campaign before and during the Application Period

In-Person Recruitment. From the date of the previous Periodic Report (March 13, 2017) through the start of the application period April 5, 2017, the FDNY continued to hold in-person recruitment events at a variety of locations throughout the City, and it continued to operate “street teams” of mobile recruiters to collect expressions of interest (“EOI”) from prospective applicants. During the application period, the FDNY’s in-person recruitment efforts transitioned to the collection of applications, as it set up filing sites at schools and colleges, shopping malls, transit hubs, churches, and other public places throughout the City. The FDNY operated approximately 30 filing stations per day throughout the application period – deploying approximately 90 recruiters. It also staged several open house events at firehouses and ran “mobile academy” events showcasing training activities. The Department also continued to operate mobile street teams of recruiters as “mobile filing sites” capable of collecting applications at multiple locations each day. The City reported that it generally fielded 8-10 such mobile teams each day. Staff at filing sites collected applications by assisting applicants with online filing and fee payment via the system run by the Department of Citywide Administrative Services (“DCAS”).

Online Campaign. As reported by the City’s consultant Hodes (at meetings March 30 and April 20), in the weeks preceding the start of the application period, the FDNY continued efforts to reach prospective applicants with digital advertising, social media advertising, and email communications directed to existing EOIs and contacts; and those efforts continued throughout the application period. Once the application period began on April 5, 2017, the focus



of the online campaign transitioned from the collection of EOIs and contact information to an effort to drive applications.

As of the last Periodic Report, the digital and social media advertising components of the campaign had already been successful in “reaching”<sup>12</sup> a high percentage of individuals in target groups, and penetration of the target audiences in digital advertising was close to the maximum achievable level. In subsequent weeks, the digital advertising campaign achieved an even higher level of saturation in the target audiences, and paid social media promotions continued to reach a high percentage of the continually expanding target audience available through the leading social media platforms. For example, between approximately March 30 and April 20 (based on Hodes’s reports on those dates) the FDNY’s social media advertising reached more than 40,000 additional individuals in an African-American target audience of approximately 270,000<sup>13</sup> – bringing its total of unique “reaches” in the target group to more than 248,000, or 92% of the available audience.

Radio and Outdoor Advertising. The FDNY continued its radio advertising campaign during the weeks leading up to the application period and into the application period itself, running ads on four radio stations popular within targeted demographic groups. As with the digital advertising campaign, at the start of the application period the message of the FDNY’s radio and outdoor advertising shifted from an effort to solicit interest to a specific call to action: notifying the target audience that the application period was open and urging prospective candidates to apply. Radio advertising continued to perform well in attracting the interest of

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<sup>12</sup> A contact is “reached” if he or she views a digital advertisement, whether or not he or she acts on it.

<sup>13</sup> The target audience was also identified (and accordingly narrowed) by other criteria in addition to race, such as interests and age.

potential applicants. As of April 20, Hodes reported that radio ads had generated more than 6,000 “text to join” responses, including more than 2,200 from African-Americans.

With respect to outdoor advertising, although the City’s purchase of advertising space ran only through the end of April, many of its ads remained on display during the extended application period in May, and the FDNY also continued to display banners on its firehouses and other Department facilities.

Direct Communications with Potential Applicants. During the application period, in addition to continuing its advertising and in-person recruitment activities, the FDNY engaged in intensive follow-up communications with prospects who had submitted EOIs and/or provided contact information in an effort to persuade them to file applications. The FDNY sent emails to prospects almost daily, along with frequent text messages, encouraging them to complete the process – with increasing urgency as each of the deadlines set during the application period approached.

The City also ran a phone bank operation making calls to prospective applicants throughout the application period. Acting on suggestions by the Plaintiffs-Intervenors, and on the urging of the Court, the City expanded its phone operations considerably in the course of the application period – adding personnel and increasing its volume of calls from 6,400 to 14,000 per day. The City also added a “robocall” system in late April and employed staff to field the return calls it generated. While the FDNY decided against taking applications over the telephone (citing legal and practical concerns), phone bank staff were also trained to walk applicants through the online application process if they chose to apply immediately while remaining on the phone.

### 3. Plans for the Next Phase

At a meeting held on June 6, 2017, the Parties and the Monitor discussed the City's plans for the post-application phase of the recruitment and hiring process. Before the meeting the City had circulated many of its plans in writing, and had set forth its position on certain suggestions, requests, and questions offered by the other Parties and the Monitor. Some proposals that the City did not accept based on its internal decision-making included continuing social media outreach to applicants, urging family members to encourage the applicants to take the exam, working with school counselors at selected schools, and expanding call center capacity.<sup>14</sup> The City also indicated that because of the need for frequent modification of messaging and the time that would be required for comments, it will not be sharing messaging with the other Parties in advance of sending messages to filers.

As it did leading up to the previous open competitive examination, the City plans to continue communicating with applicants to ensure that pending applicants finalize their applications, and that all applicants receive complete and accurate information concerning test dates, locations, and procedures. For the upcoming exam, the FDNY has obtained information for all applicants from DCAS and combined it with data in the newly created ARCS system, which was used to manage contacts with prospective applicants before and during the application period. The ARCS system will be used to manage and maintain communications with applicants via email, text, live phone calls, and robocalls – confirming that applicants have received notices of test dates and locations, checking whether they need to reschedule, and encouraging them to take the exam. The Vulcan Society has requested contact information and, when available, test

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<sup>14</sup> The City expressed the view that direct outreach to candidates is substantially more effective in producing test takers than communications with family members or other potential influencers; and it concluded that its existing call capacity, which it asserts provides for 250,000 calls over a two month period, is sufficient.

date, location and time information for black applicants, and the City is reviewing that request. Communications will also inform applicants about exam preparation resources and provide information about the job of an FDNY firefighter. In addition, the Department plans to host a series of at least five “Mobile Academy” events, which will enable applicants to learn more about the written and physical testing process, and generally about the FDNY.

Also as it did before Exam 2000, the City will offer a variety of exam preparation instruction and materials. The FDNY plans to provide approximately 55 live exam preparation classes per week, with classes five days per week, from June through October. The live classes will take place in various venues such as school auditoriums throughout the City, with locations concentrated in the areas that produced the most applicants. The City has agreed to provide the Monitor and the other Parties with a list of test prep dates and locations. Each class will be run by a trained uniformed officer, accompanied by two firefighters. Recorded portions of the live classes will also be made available online, along with training videos and other exam preparation materials including practice questions. The City plans to share the exam preparation materials with the Monitor and the other Parties. For those candidates interested, the FDNY’s exam prep offerings will also be supplemented, as in the past, by exam prep classes sponsored by the Vulcan Society.

The success of the City’s efforts during the post-application period will hinge on its ability to establish and maintain contact with applicants, and maintain their commitment to take the open competitive examination. Accordingly, the Monitor plans to follow the City’s efforts closely and obtain frequent updates on its success in reaching applicants through the diverse channels it employs, and in confirming their intentions to take the examination.

## **B. Post-Campaign Analysis**

Once the recruitment campaign for the upcoming open competitive examination is completed, it will be essential for the City to conduct a thorough analysis of the campaign – including staffing, budgeting, targeting, tactics, and the emphasis placed on each medium of advertising and communication – to determine which components were effective, where improvements may be needed, and make data-driven decisions in designing future campaigns. The City will need to examine data gathered from its in-person and online recruitment activities, along with data from the post-application, pre-examination period that will show its success in converting applicants into test takers and preparing them for the exam. The City will also need to include in the analysis data from the upcoming exam results and from the surveys that it plans to administer to the new group of test takers and to candidates called up for the hiring process from the list for Exam 2000. (*See infra* Part VII.C.)

## **C. Working Group**

The Monitor has continued to facilitate the efforts of the Working Group Committee – established by 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)). Over the past 100 days, with the Parties focused on maximizing the FDNY’s recruitment efforts during the weeks immediately before and during the application period for the upcoming open competitive exam, the Parties’ monthly recruitment meetings have been dedicated to exam recruitment efforts. However, the City has continued to work on activities that were previously developed in conjunction with the Working Group during this time. With the application period concluded, the Monitor expects to work

with the City and the other Parties more intensively on the substantial work that remains to be done in implementing the programs developed to achieve the goals of the Working Group.

Several Working Group initiatives are being advanced in large part by the Department's Youth Workforce and Pipeline Programs Unit (the "Youth Workforce Unit"), which leads youth-focused FDNY programs including the FDNY High School and the FDNY's Explorer Program. Both of these programs are intended to introduce a diverse array of young New York City residents to the prospect of careers as firefighters and EMTs.

The FDNY has also continued with efforts to reinforce and expand its Explorers Program, which has been a focus of the Working Group. As described in the Monitor's previous Periodic Report, the EMS Explorers Program, operated through posts located in high schools in diverse neighborhoods, provides training and mentoring intended to encourage and enable participants to join the EMS and potentially obtain promotion from EMS into the firefighter title. *See* Monitor's Nineteenth Periodic Report at 17-18. The City previously identified certain staffing and resource deficiencies in the program, and has begun to address them, staffing up existing posts and planning for expansion into new posts. The Monitor plans to place renewed emphasis on a continued expansion of this program now that the application period has concluded.

Since the previous Periodic Report, in coordination with DCAS and the FDNY, the Youth Workforce Unit has also continued to work on the rollout of the newly established EMS Trainee title, described in detail in the Monitor's previous Periodic Report. *See* Monitor's Nineteenth Periodic Report at 17. The title establishes an additional pathway into EMS for qualified candidates, which will be open to FDNY High School graduates and FDNY Explorers.

Once in EMS, these young people will have the opportunity to become firefighters via the promotional exam.

The Parties and the Monitor have also continued to discuss the FDNY's efforts to implement the new Fire Cadet title based on the program that was developed by the FDNY and the Working Group and approved by the New York State Civil Service Commission (the "CSC") at a public hearing held on June 16, 2016. *See* Monitor's Seventeenth Periodic Report (Dkt. # 1714) at 11-12. This position was created to fulfill a specific goal of the Disparate Treatment Settlement: "the creation of a Fire Cadet title or special credit for completion of job-related fire science courses." Monitor's Twelfth Periodic Report at 7-8 (citing Proposed Stipulation and Order (Dkt. # 1291-1) ¶ 1(e)). On May 31, 2017, in response to long-standing requests from the other Parties and the Monitor, the City circulated a summary of its work to date and a timeline for the implementation of the program. The City reports that a Uniformed Director for the program has been identified and took up the position in March; that the City is in the process of engaging a new consultant to develop selection criteria for Cadets; and that the Commissioner has appointed the members of the Cadet Review Committee. According to the City, several elements of the program have been developed, including the physical training program and components of the recruitment and selection process. As set forth in the City's timeline, the recruitment process for Cadets will take place in August and September 2017; the application period will run from October 2 to October 13, 2017; the selection and screening process (incorporating background checks and medical and psychological screening) will take place from October 2017 through July 2018; and instruction will begin in September 2018. An important factor in the success of the Fire Cadet program is likely to be its timing relative to the Department's promotional exam for the firefighter position: Cadets must remain in the title of

Cadet in order to be able to take the promotional exam to qualify as firefighters. Accordingly, as the application period for the open competitive examination closes, the Monitor plans to work with the City and the other Parties to consider when the relevant promotional exams will take place, and how best to ensure that Cadets emerging from the program take the exam and become firefighters.

### **III. Data Collection and Analysis**

Over the past 100 days, in consultation with the other Parties and the Monitor, the City has continued to develop, implement, and work with an array of data systems intended to support its recruitment and hiring activities and to facilitate analysis of the effectiveness and impact of those activities with respect to key demographic groups.

Over the course of the Monitorship, the City has pursued three main data management projects: (1) a comprehensive recruitment database; (2) an end-to-end database that will track candidates through the recruitment and hiring processes; and (3) a Candidate Tracking Spreadsheet (“CTS”) containing available data from each step in the hiring process for candidates who took Exams 2000 and 2500. The status of those projects is discussed below.

#### **A. Comprehensive Recruitment Database**

As described in previous Periodic Reports, the City hired Vanguard Communications to build a comprehensive database that would track recruiting contacts and applicants throughout the recruitment campaign. *See, e.g.*, Monitor’s Fifteenth Periodic Report (Dkt. # 1669) at 6-10. The database retains and manages a variety of data including contact and demographic information and the history of the FDNY’s contacts with each recruit, from the first point of contact with the Department through the written examination. It is used not only as a tracking system but also to manage communications with contacts via a variety of channels.



Throughout the campaign, the City has used the database, known as “ARCS,” to provide reports to the Monitor and the Parties containing information on the results of its recruitment efforts. Before the application period, these reports showed the number of EOIs collected from specific demographic groups within certain time frames, as well as the types and locations of events at which the EOIs were collected. ARCS was also used to manage follow up communications with potential applicants, urging them to apply and providing information on the process. During the application period, applications were filed via the City’s “OASys” system, maintained by DCAS; and reports on the collection of applications were drawn primarily from that system. The City provided daily reports to the Monitor showing the numbers and percentages of applications from relevant demographic groups. Additional weekly reports, which the City provided to the other Parties and the Monitor, showed detailed breakdowns by date, gender, ethnicity, and zip code. These weekly reports also compared application data to EOI data maintained in ARCS. Both before and during the application period, ARCS was also employed to conduct surveys of contacts assessing their intentions to file and (once the application period began) their filing status. These reports have assisted the Monitor and the Parties in analyzing the effectiveness of the City’s recruitment efforts and in formulating suggested modifications.

In the next phase of the recruitment effort, ARCS will be used to manage communications with applicants to provide information about the exam, advise applicants about test prep sessions and online resources, and encourage them to follow through and take the open competitive exam. Accordingly, contact information and other data for applicants has been obtained from DCAS and added to ARCS to provide the FDNY with complete and fully updated

information for all applicants (including those who did not contact the Department or submit EOIs before they applied).

The ARCS system will also provide data for future retrospective analyses of the FDNY's recruitment activities – allowing the City to assess in detail the effectiveness of particular strategies with particular groups, and facilitating more refined, informed targeting of the FDNY's efforts in future campaigns.

#### **B. Department-Level Databases and the End-to-End Hiring Database**

The City continues to develop its end-to-end hiring database, called the Comprehensive Candidate Tracking System, (“CCTS”), to track candidates' progress throughout the hiring process. In connection with that work, it has also continued efforts to develop or improve department-level databases that feed data into the CCTS.

As described in detail in the Monitor's Nineteenth Periodic Report, the end-to-end database is a central repository of high-level data from several different department-specific FDNY databases, and will also incorporate data from external sources, such as DCAS. *See* Monitor's Nineteenth Periodic Report at 21-24; *see also* Monitor's Sixteenth Periodic Report (Dkt. # 1694) at 11. Data from the internal department-level databases will automatically populate appropriate fields in the end-to-end database. Data from DCAS, such as information regarding candidates' application status and examination results, will be imported into the CCTS at specified intervals.

The database is intended to enable FDNY personnel to track the progress of candidates through the entire recruitment and hiring processes. To that end, the system includes an interface, or dashboard, that allows users to filter and run reports for certain categories of data – for example, showing the status of candidates in a particular demographic group, or identifying

candidates disqualified at a particular step in the hiring process. An important aspect of this comprehensive data management project is the development and improvement of department-level databases, such as the databases serving CID and BHS, where data is captured in the first instance. In the past 100 days, the FDNY's technology team has continued to make progress on improving department-level databases and on automating the transfer of data from those databases to the CCTS. At a meeting with the other Parties and the Monitor on March 30, 2017, the City demonstrated an improved version of the CID database, which manages data from candidate intake, scheduling, and investigations.

Some features of the end-to-end database still remain to be implemented, and adjustments will likely continue as the database is populated with data for candidates on the upcoming civil service lists. The City has stated that all essential functions of the system are now in place and are undergoing testing; and the database has already received data from the most recent administration of the promotional examination, results from which are now published. The Monitor expects to view a demonstration of the database using the promotional data once promotional candidates begin to go through the hiring process.

### **C. Candidate Tracking Spreadsheet**

As detailed in previous Periodic Reports, the CTS was developed to serve as a compilation of data for candidates on the hiring lists produced by Exams 2000 and 2500, as well as Priority Hire candidates, showing their progress through each phase of the hiring process from written examination through intake and the additional screening tests (*e.g.*, medical, character review) that candidates must pass to become firefighters. Early versions of the CTS were marred by gaps and anomalies that limited their usefulness for the Parties and the Monitor. But the two most recent versions, produced August 5, 2016 and January 23, 2017, appear to have remedied

the majority of the problems that affected previous iterations of the CTS. The City has advised the other Parties and the Monitor that it intends to generate a further, final version of the CTS after the Exam 2000 and Exam 2500 lists expire, which will include complete hiring-process data for all candidates on those lists.

#### **D. Data Regarding Recent and Upcoming Hiring**

On April 18, 2017, the most recent Fire Academy class graduated and became probationary firefighters. According to data provided by the City, the class included a total of 304 candidates, of whom 49 are black and 53 are Hispanic, together representing 33.6% of the class. The table below shows the proportion of black and Hispanic Academy graduates as well as the number of Priority Hire candidates in each of the recent Academy classes. With the addition of these recent graduates, over 1,750 firefighters, representing approximately 22% of the force, are now black or Hispanic.

	<b>Black</b>		<b>Hispanic</b>		<b>Priority Hire</b>		<b>Total</b>
	<b>#</b>	<b>%</b>	<b>#</b>	<b>%</b>	<b>#</b>	<b>%</b>	
<b>July 2013</b>	58	24.0%	87	36.0%	77	31.8%	242
<b>Jan. 2014</b>	48	16.8%	72	25.2%	31	10.8%	286
<b>July 2014</b>	41	14.6%	56	20.0%	7	2.5%	280
<b>Dec. 2014</b>	50	16.4%	70	23.0%	9	3.0%	305
<b>June 2015</b>	52	17.6%	58	19.7%	4	1.4%	295
<b>Dec 2015</b>	53	17.0%	62	20.0%	2	0.0%	310
<b>June 2016</b>	46	15.6%	66	22.4%	1	0.0%	295
<b>Dec 2016</b>	49	16.1%	53	17.4%	5	1.6%	304

The current, final Academy class began on June 12, 2017. Of the 313 candidates who were appointed, 22.68% are black and 25.88% are Hispanic. The Monitor and the Parties are evaluating the processing of candidates for this most recent class as part of the overall review of the hiring process as set forth in the Modified Remedial Order.

#### **IV. EEO Compliance, FDNY Culture, and Retaliation Investigations**

##### **A. Overview**

The Monitor has continued to work with the City, in consultation with the other Parties, on the various aspects of EEO compliance. Following recent published reports recounting troubling allegations of hazing and discrimination within the FDNY, over the past 100 days the Monitor has begun to work with the City even more closely than previously in this area, convening several meetings with City representatives and key FDNY leadership to address a broad array of EEO issues and activities – including new and ongoing initiatives in the areas of policies and messaging; training and accountability; and investigations and discipline. The Monitor met with the City on March 20 and May 2, 2017 to receive updates and offer recommendations in all these areas; and it convened a general meeting of all Parties on June 7, 2017 in order to update the Plaintiffs-Intervenors and the United States on the City's current efforts to address continuing EEO issues.

Also in the months since the last Periodic Report, the Monitor has assumed a more active role in reviewing and commenting on the FDNY's investigations of alleged EEO and hazing violations – reviewing files from past and ongoing investigations and formulating recommendations regarding the FDNY's investigative practices based on the review.

From discussions with the City and the other Parties, and from the Monitor's own analyses, it is clear that effective reforms in the FDNY's EEO function call for a multi-faceted approach, which the City has begun to implement. Through a combination of messaging, training, accountability mechanisms, investigations, and discipline, the FDNY must make it clear that all aspects of EEO compliance are essential job requirements for all personnel. Although the City has made considerable progress in some areas, including staffing and the development of

policies, extensive work remains to be done on multiple components of the FDNY's EEO function.

As the City has acknowledged, while it believes progress has been made, the FDNY's EEO and anti-hazing communications have not yet fully succeeded in driving home a message of zero tolerance for EEO violations and hazing to all FDNY members. The Monitor has advised the City that it believes a revised, intensified messaging campaign is needed to effect essential changes in the Department's culture. This is particularly true given that changes in training and performance evaluations will take time to complete.

In the area of investigations, although the City has worked hard to improve its handling of EEO complaints and inquiries, it has not yet demonstrated with consistency the ability to conduct investigations in an expeditious and thorough fashion – or to analyze complaints taking into account all relevant evidence, applicable legal standards, and the appropriate burden of proof. The Monitor has recently communicated a number of specific observations and recommendations to the City, which the City and the Monitor plan to discuss in detail at an upcoming meeting. The City must continue to work on improving its handling of EEO matters so that any victims of misconduct will feel confident in coming forward, and so that potential perpetrators will be deterred by the prospect of disciplinary action.

#### **B. Policies and Messaging**

As recounted in detail in previous Periodic Reports, in November 2016 the FDNY finalized and issued a revised EEO Policy and a revised EEO Investigations Manual. *See, e.g.*, Monitor's Nineteenth Periodic Report at 26. Earlier this year the Parties also reached agreement on a statement of principles regarding the FDNY's treatment of EEO complainants. *See id.* That

statement, which reinforces the FDNY's policy against retaliation in cases where complainants are transferred to a new workplace, was formally issued by a Department Order on April 6, 2017.

With the policies in place, it is critical for the FDNY to ensure that it effectively delivers EEO and anti-hazing messaging to all personnel – making it clear that violations of law and policy will not be tolerated, and also that inclusiveness and mutual respect within a diverse FDNY are essential to the mission of the Department. With this goal in mind, in consultation with the Monitor, the FDNY has committed to an intensified and updated campaign of internal messaging. EEO posters and policies were posted in May, and the FDNY plans to post additional anti-hazing messaging this month. More broadly, the FDNY is also planning to develop materials integrating the values of diversity, equity, and inclusiveness into the traditional professional values of the Department. As part of that effort, the FDNY and the Monitor have met with representatives of U.S Army Center for Army Profession and Ethic (“CAPE”) and reviewed CAPE materials to identify themes and strategies that may assist the FDNY in communicating an integrated message of diversity and professionalism to its members. At the Monitor's suggestion, the FDNY also plans to revise its EEO training program for probationary firefighters to include messages based on new policies.

Also as part of its renewed effort to communicate rigorous anti-hazing, anti-bullying, and anti-discrimination messages, the FDNY followed through on plans (discussed in the Monitor's prior Periodic Report) for Commissioner Nigro to deliver these messages to officers personally in a series of meetings. *See* Monitor's Nineteenth Periodic Report at 28. Those meetings were completed soon after the previous Periodic Report was filed. As reported by the City at the June 7 meeting, the CDIO has also followed through on plans to meet with all FDNY officers – to

convey the Department's EEO message, to hear feedback, and to gather information on EEO concerns.

The FDNY's renewed efforts in this area are encouraging, but for those efforts to achieve the desired effect on the culture of the Department, it is vital for them to be sustained over the long term. Accordingly, the Monitor urges the City to expedite work on its new anti-hazing materials, and its development of messaging that integrates EEO and anti-hazing principles into a broader message of professionalism and the ethic of the Department. The Department's messaging should also be communicated in a consistent, systematic fashion through a variety of authoritative channels – including not only posters and general announcements but also firehouse visits by senior officers and frequent emphasis at roll calls and in other regular communications.

### **C. Training and Accountability**

Since the last Periodic Report, the City has continued work on EEO training, with particular emphasis on officer training. Responding to concerns expressed by the Monitor and the Court, the City has confirmed plans to begin an online version of officer training this month (June 2017) and complete it by September 2017. By developing and providing an online version of the training, the FDNY will be able to complete EEO training for officers more quickly than it could with live training,<sup>15</sup> which will allow the FDNY to implement the newly designed performance metric for officers as soon as possible. Officers will be specifically trained on their EEO obligations; they will be evaluated on EEO performance along with other operational criteria; and EEO evaluations will be a factor in assignments and promotions, creating a strong incentive for officers to fulfill their obligations under EEO laws and FDNY policy. The City has advised the Monitor that the new performance metric will be effective upon publication in

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<sup>15</sup> The FDNY will also provide officers with live training, to be completed by January 2018.



October 2017, and that the metric will be employed for the first time in Lieutenants' evaluations in February 2018.

The Department also plans to implement a regular reporting process requiring officers to report on the EEO and anti-hazing climate within their commands. Officers at each level of command will be asked to report not only on potential violations of law or policy (as already required), but also on more general interpersonal or inter-group conflicts and antagonism that create an environment in which violations of policy are more likely to occur.

#### **D. Investigations and Discipline**

In early March, shortly before the most recent Periodic Report, the City provided the Monitor with a production of records from investigations of alleged EEO violations and hazing incidents since 2014. The records included several thousand pages of materials from more than 70 investigations conducted by both the EEO Office and the Department's Bureau of Investigations and Trials ("BITS").<sup>16</sup> Over the past 100 days the Monitor completed an assessment of those records, and on June 6 it transmitted a series of recommendations to the City based on that assessment. The Monitor identified several suggested improvements in a variety of areas including legal standards, burdens of proof, communications with complainants, credibility determinations, identifying and evaluating patterns of misconduct, gathering and analyzing evidence, and addressing failures to cooperate in investigations. The City is considering the Monitor's recommendations, and the Monitor expects to engage further with the City in efforts to further improve and refine its investigative practices. The City and the Monitor have scheduled a meeting to discuss the Monitor's recommendations. The Monitor has also requested

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<sup>16</sup> The records came from investigations conducted both before and after the FDNY implemented recent changes in its investigatory procedures.

and received materials from ongoing investigations, and has provided comments to the City based on those materials. The Monitor's comments on ongoing investigations are not intended to prescribe outcomes in particular cases, but rather to assist the FDNY by identifying potential additional sources of relevant evidence, or possible improvements in standards and procedures.

It is vital that the FDNY conduct prompt, thorough, and fair investigations in EEO matters – not only for the benefit of complainants who may have been victimized, but also because effective investigations and (where appropriate) disciplinary action will help make it clear that the Department stands behind its EEO policies and supports victims of discriminatory conduct.

#### **V. Medical Exam-Related Issues**

Pursuant to the Modified Remedial Order, the Monitor continues to address allegations by Plaintiffs-Intervenors and the United States that certain steps in the Medical Exam 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 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 13-14. These allegations appear to be borne out by the Monitor's own analyses. The Monitor continues to work with the City, the other Parties, the Monitor's expert Dr. Denise Smith, and the Monitor's expert consultants Manitou, Inc., to examine possible causes of disparate impact and to implement a series of adjustments to the Medical Exam with the goal of minimizing the potential for disparate impact while maintaining the FDNY's rigorous hiring standards. *See, e.g.*, Monitor's Fifteenth Periodic Report at 23. Many of the proposed initiatives and adjustments conceived by the Parties and the Monitor, and discussed in prior Periodic Reports, have already been implemented by the City.

*See, e.g.*, Monitor's Fifteenth Periodic Report at 23; Monitor's Seventeenth Periodic Report at 27; Monitor's Nineteenth Periodic Report at 30-33. Initiatives that are still in process are discussed below.

#### **A. The Stairmill Test**

Plaintiffs-Intervenors and the United States have expressed concern that the stairmill portion of the Medical Exam has a disparate impact on black and Hispanic candidates. In part because of the way the City kept data about stairmill failures in the past, it is difficult to determine whether the disparate impact the other Parties observed should be attributed to candidates' underlying medical conditions, or to non-medical factors such as the way the stairmill test was administered by BHS. Although past data management made it impossible to predict with certainty the results of any initiatives that might reduce disparate impact, the City has implemented a number of measures with the aim of mitigating any adverse impact from the stairmill that might result from a lack of information about the test or from the manner of its administration. *See* Monitor's Nineteenth Periodic Report at 30-32; Monitor's Eighteenth Periodic Report (Dkt. # 1734) at 32-33. The stairmill test will also be subject to a validation study to be undertaken by outside consultant, PSI.

##### **1. Stairmill Test Protocol**

As previously reported, in 2016 the City revised its protocol for the stairmill test to permit a greater number of candidates to pass the test in one visit to BHS rather than two. This change was made to address the possibility that the need for return visits was a cause of disparate impact in this portion of the Medical Exam – for example if applicants were unable to take time off from work or make childcare arrangements for multiple visits to BHS. Giving more candidates the chance to demonstrate their qualification without returning to BHS a second time

may reduce voluntary attrition. *See* Monitor's Nineteenth Periodic Report at 30; Monitor's Eighteenth Periodic Report at 32-33. The City also continues to adhere to changes it previously adopted, including, as previously reported, random observation of stairmill testing by the Diversity Advocate; making the candidate's heart rate visible to the candidate during testing; and providing better guidance, through written and video materials, to help candidates prepare for and take the stairmill test. *See* Monitor's Eighteenth Periodic Report at 33; Monitor's Seventeenth Periodic Report at 27; Monitor's Sixteenth Periodic Report at 23-26; Monitor's Fifteenth Periodic Report at 19-21.

## 2. Validation

Responding to concerns regarding potential disparate impact, the City has considered a number of methods for validating the stairmill component of the Medical Exam. *See, e.g.*, Monitor's Thirteenth Periodic Report at 14; Monitor's Fifteenth Periodic Report at 19. On February 13, 2017, the City advised the Monitor that it planned to engage PSI to conduct a validation study showing that the BHS stairmill test accurately gauges a candidate's ability to safely achieve 12 METs – a measure of exercise intensity based on oxygen consumption, which the City asserts is correlated with the exertion required for firefighting. The City says PSI will examine the National Fire Protection Association's ("NFPA") research and studies as support for the job-relatedness of the 12 METs standard. The United States and the Vulcan Society have previously expressed the view that the NFPA standard is not sufficient by itself to prove that the 12 METs standard is job-related and consistent with business necessity for the FDNY. However, reserving that disagreement, they have stated that they do not object to the City's taking steps to validate the stairmill test.

On June 9, 2017, the City sent the Monitor PSI's stairmill validation study outline. PSI's document states that the purpose of the study is to examine the job-relatedness and validity of the stairmill test as it is used by BHS. PSI sets out four research questions the study will address: (1) the extent to which the current BHS stairmill test is job-related; (2) whether the BHS stairmill protocol accurately reflects the NFPA 12 METs standard; (3) the job-related basis for the NFPA standard; and (4) what changes, if any, to the stairmill protocol would make the exercise and scoring of the test more closely job-related. The PSI document describes the scope of the study in broad terms, but the Monitor has asked the City for a more detailed description of what PSI will do to answer the questions it has identified. In particular, the Monitor has asked the City to provide specific details showing how it will address PSI's question 2 (whether the BHS stairmill protocol accurately measures 12 METs). Those details include, for example, the population PSI will test and whether there will be a need for IRB review.<sup>17</sup> The Court and the Monitor have also asked the City to provide a timeline for the validation study.

The Monitor's team, along with Dr. Smith, will meet with the City and its experts to discuss the specifics of the City's validation protocol. The other Parties will then have an opportunity to review and comment on the validation protocol. The Monitor expects the City to begin the validation study as soon after these discussions as possible and for the study to be completed – including all analyses, reports, and conclusions – no later than the end of April 2018.

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<sup>17</sup> Under FDA regulations, an Institutional Review Board ("IRB") must review and approve all biomedical research involving human subjects to ensure that it is conducted in accordance with all federal, institutional, and ethical guidelines.

## **B. Retesting Some Previously Disqualified Candidates**

Over the past three months, the City completed the medical retesting of eligible candidates. *See* Monitor's Nineteenth Periodic Report at 32-33; Monitor's Sixteenth Periodic Report at 26. According to the City, 184 candidates were invited to retest. Of these, roughly 32% were white, 35% were black, and 30% were Hispanic. Intake processing for medical retesting candidates began in June 2016. Eight retesters were appointed to the December 2016 class, and eleven were appointed to the June 2017 class. Of these 19 retesters appointed to Academy classes, 7 are white, 6 are black, and 6 are Hispanic.

In November 2016, at the request of the United States and Vulcan Society, the City agreed to retest 29 more candidates who were medically disqualified for reasons that would have made them eligible for retesting but who were also disqualified for failing to appear for their scheduled Candidate Physical Ability Test ("CPAT"). These candidates were offered retesting on the theory that they might have appeared for the CPAT had they not already been informed of a medical disqualification. The City offered a medical retest to these candidates, to be followed by a CPAT test. The City has informed the Monitor that, of the 29 candidates invited to retest, approximately 18% were white, 41% were black, and 41% were Hispanic. Seven of these candidates accepted the offer to retest. One of these, a black candidate, was appointed to the June 2017 class. The retesting period has now ended.

## **C. Tracking and Analyzing Data from the Medical Exam**

As described in previous Periodic Reports, the City's prior record-keeping practices with respect to the Medical Exam, as well as inherent complexities in the processing of candidates through the Medical Exam process, made it difficult for the Monitor to identify and analyze root causes of medical disqualification for black and Hispanic candidates as compared to white

candidates, as well as to analyze disparities in rates of disqualification among the groups. *See* Monitor's Nineteenth Periodic Report at 34-35; Monitor's Fifteenth Periodic Report at 23; Monitor's Thirteenth Periodic Report at 16-17; Monitor's Twelfth Periodic Report at 17-18.

Following sustained discussions with the Monitor about the need for improved data to enable systematic analysis of hiring procedures, the City created the Electronic Medical Record ("EMR") database. The EMR database is intended to collect a full range of data points related to the Medical Exam and to permit the tracking of relevant medical information about each candidate and his or her every interaction with BHS, including the date of any measurement, test, subtest, and retest; the result of each such measurement or test; follow-up appointments within BHS and with outside providers; and the results of such follow up appointments. Going forward, the EMR database is expected to equip the City, the Monitor, and the other Parties with information needed to conduct a wide variety of important analyses, including disparate impact analyses of every component and sub-component of the Medical Exam.

On June 16, 2017, the City sent the Monitor and Parties a set of spreadsheets showing the current contents of the EMR database. The Monitor, with the assistance of experts led by Dr. Smith, will use these spreadsheets and other EMR reports it has requested, along with the CTS and individual medical files previously produced by the City, to identify and assess trends in results of the Medical Exam since approximately 2012, as well as the effects of changes made to the process since that time. Analyses of the EMR database, into which BHS has been entering information since approximately November 2015, will show whether and to what extent no-cost testing, the new stairmill protocol, informational videos and documents, and other initiatives undertaken to reduce potential disparate impact have been successful and what other changes might be needed to address any stages of the process that cause any unlawful disparate impact.

## **VI. Character Screening by the CID and PRB**

Since the last Periodic Report, the Parties and the Monitor, with the assistance of its expert consultants, Manitou, Inc., have continued to analyze the effect of reforms previously implemented in the character review process, and to develop and discuss additional potential reforms. While substantial reforms have already been enacted over the course of the Monitorship, further work remains to be done. The Parties and the Monitor must complete their analyses of the impact of the reforms that have been put into place, particularly with respect to referral to the PRB, and they must consider whether additional changes in CID and PRB standards and procedures are warranted.

### **A. Enhancements in the Character Review Process**

In 2012, the City issued initial sets of interim guidelines for the CID and PRB, formulated in consultation with the Monitor and the other Parties; and subsequently, as previously reported in detail, the Parties and the Monitor agreed on several rounds of changes in the criteria triggering referral of candidates to the PRB, and in CID and PRB procedures. *See* Monitor's Sixteenth Periodic Report at 29-31; Monitor's Seventeenth Periodic Report at 29-30. The most recent revised criteria and related instructions were approved by the Monitor in the summer of 2016, and they were employed for the first time in the processing of candidates for the class that entered the Fire Academy in December 2016.<sup>18</sup> The same standards and procedures have continued to be used in processing the class that entered the Fire Academy on June 12, 2017. The City has also developed materials for use in training relevant FDNY staff on the revised guidelines, and the Monitor and the other Parties have transmitted comments to the

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<sup>18</sup> As noted in prior Periodic Reports, the revisions were agreed upon by the Parties with the understanding that they may be subject to additional changes based on further analysis. *See* Monitor's Seventeenth Periodic Report at 30.



City suggesting additional refinements in those materials. *See* Monitor's Nineteenth Periodic Report at 38.

In addition to the changes discussed above, the Monitor and the Parties have continued to consider further potential changes in the character review process. The Monitor has received input in this process from its expert, Alison Wilkey<sup>19</sup> – taking into consideration concerns and suggestions offered by the United States and Plaintiffs-Intervenors. *See* Monitor's Nineteenth Periodic Report at 38. The Monitor plans to meet with the City within the next few weeks to discuss Ms. Wilkey's recommendations.

## **B. Analysis of Potential Disparate Impact**

The Monitor and the Parties have continued to analyze data generated by the character review process – to assess whether the process or either of its component parts (referral to the PRB and PRB decision making) has a disparate impact on black or Hispanic candidates. As previously recounted, a preliminary analysis by the Monitor of data through the end of 2014 indicated that minority candidates were referred to the PRB at a higher rate than white candidates, and that among candidates referred to the PRB, a higher percentage of minority candidates than white candidates were disqualified by the PRB. *See, e.g.*, Monitor's Thirteenth Periodic Report at 20-21. Following that initial analysis, the Monitor requested additional, updated data from the City to assess whether later developments in the character review process mitigated or eliminated the apparent disparities. In response to the Monitor's requests, the City referred the Monitor to data contained in a series of Candidate Tracking Spreadsheets. *See* Monitor's Nineteenth Periodic Report at 39-41. Although early versions of the CTS included gaps and inconsistencies that made them unreliable bases for analysis, the two most recent

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<sup>19</sup> Ms. Wilkey's qualifications and expertise are summarized in the Monitor's Eighteenth Periodic Report at 39.

iterations, produced August 5, 2016 and January 23, 2017, provided enough reliable data in key categories to support analysis of PRB referrals and outcomes.<sup>20</sup> Since receipt of the updated data the Parties and the Monitor have continued to generate and compare such analyses using the 2016 data.

The United States circulated an analysis of PRB data and outcomes on January 5, 2017, that its expert, Dr. Bernard Siskin, prepared. Dr. Siskin based his analysis on data in the August 5, 2016, CTS and the spreadsheet that the Monitor prepared based on its review of PRB files. The City transmitted comments and posed questions regarding that analysis and the conclusions set forth therein<sup>21</sup>; and the United States is planning to produce an updated and expanded version, which will take account of additional data in the January 23, 2017 version of the CTS and additional PRB data that the City has provided and will provide in the near future. The City has also performed its own assessment of certain aspects of the character review process, and on March 31, 2017, it circulated an updated and revised analysis of candidate attrition, which included calculations showing rates of PRB referral and disqualification for relevant demographic groups.

Based on the Monitor's own analyses to date, the rates of PRB referral for all the largest demographic groups (black, white, and Hispanic) have decreased over time as changes in referral criteria and procedures have been implemented. In particular, the referral rates for all groups

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<sup>20</sup> The CTS produced by the City in August included data through July 26, 2016; the CTS produced in January 2017 included data through December 2016. In addition to the data produced by the City, the Monitor also prepared a spreadsheet showing the results of its own review of PRB Files and circulated it to the Parties on March 24, 2016; the data compiled by the Monitor in that review include classifications based on the events and types of conduct in each candidate's history that are associated with PRB referrals and disqualifications. *See* Monitor's Sixteenth Periodic Report at 31.

<sup>21</sup> The United States has prepared responses to the City's questions; however, the Parties are working on an amended protective order to submit to the Court in order to make clear that the Parties consider secondary analyses and summaries of confidential data to be covered by the protective order as well.

declined following the most recent changes in 2016. However, referrals for white candidates have fallen more than referrals for black candidates, and consequently black candidates continue to be referred to the PRB at a higher rate than whites.<sup>22</sup> Based on data in the most recent CTS, the rate of PRB disqualifications for both black candidates and white candidates has also fallen. However, because of the timing of the January 2017 CTS, and the small number of PRB decisions it captured for the most recently referred candidates, the significance of the decline in disqualifications in the latter half of 2016 is not clear: the January 2017 CTS (which covered data through the end of December 2016) includes data for a number of candidates who had been *referred* to the PRB late in 2016 but who had not been *considered* by the PRB when the CTS was compiled. Many of those candidates' cases have come before the PRB since December. Accordingly, on a call with the Parties May 4, the Monitor asked the City to provide further updated data showing the resulting PRB decisions. This additional data will allow the Monitor and the Parties to perform a better informed evaluation of the impact of the 2016 reforms in the character review process. The City agreed to produce the data as soon as all the PRB meetings assessing candidates for the upcoming Fire Academy class were complete. Those meetings have now concluded, and the City plans to produce the additional requested data by the end of June.

In addition to analyzing rates of referral and disqualification, the Monitor also plans to examine the effect, if any, that referral to the PRB has on the timing or terms of employment for candidates who are not disqualified. Plaintiffs-Intervenors have suggested that even if rates of disqualification are too low to produce an unlawful disparate impact on hiring outcomes for black or Hispanic candidates, discrepancies in the rates of referral to the PRB may still impose

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<sup>22</sup> This is not entirely surprising, because as the Court noted in its Findings of Fact, black firefighter candidates are considerably more likely than white candidates to have arrest records. *See* Findings of Fact at 54-55. These facts underscore the importance of ensuring that referral criteria bear a relationship to the firefighter position and of ensuring that decisions are made based on an analysis of the candidate as a whole person.

substantial disadvantages on minority candidates. The Monitor is exploring ways of determining whether PRB referral has such a detrimental effect. Relatedly, the Monitor plans to examine whether disproportionate percentages of black or Hispanic candidates are hired with extended probation or stipulations requiring drug and alcohol testing, and whether such conditions have a material effect on their careers once appointed to the FDNY.

Once final data from the recent round of PRB meetings becomes available, the Monitor will update and expand its analysis of the impact of the character review process and convene with the Parties to discuss and compare the analyses they have performed, and to consider what further changes, if any, may be warranted in CID and PRB standards and procedures.

### **C. Reconsideration of Candidates**

As previously reported, the Parties had agreed that candidates previously disqualified by the character review process would be reconsidered using recently revised standards and procedures. *See* Monitor's Seventeenth Periodic Report at 30-31. On June 16, 2017, the City provided the Monitor with a final update on the results of that process.

According to the City, 80 candidates were processed for character reconsideration. Four candidates were found not to be subject to PRB referral under the revised standards. Those candidates, accordingly, proceeded to the next stages of the hiring process without further character review. Two of those four candidates were appointed to the June 2017 class, one was medically disqualified, and one failed to report for the medical exam. Of the remaining 76 candidates, 20 ceased processing for various reasons and 56 were referred for reconsideration by the PRB. Within the group of 56 candidates referred for reconsideration by the PRB, 23 were disqualified following reconsideration by the PRB, and 33 were approved for appointment (subject to successful completion of the other components of the hiring process). Of the 33 that

were approved for appointment by the PRB (subject to the remainder of the hiring process) 11 were appointed to the December 2016 class; 19 were appointed to the June 2017 class; 1 failed to report for the Medical Exam; and 2 were disqualified at the run. Therefore, a total of 32 character reconsideration candidates, including the two who were found not be subject to PRB referral under the revised standards, were appointed to the December 2016 and June 2017 classes (9 white, 16 black, and 7 Hispanic).

## **VII. Next Firefighter Exam**

Pursuant to Paragraph 7 of the Modified Remedial Order, the Monitor is charged with overseeing the next 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 and the other Parties on the development of the next examination. The Monitor continues to be assisted by its testing expert, Dr. Shane Pittman of The Pittman McLenagan Group, L.C.

### **A. December 2016 Promotional Exam**

The City’s recent promotional Exam 7501 was taken by 1,489 candidates, most of whom will be appointed to the next two classes to enter the Academy. The first of these classes is likely to begin in either December 2017, and the second will begin in approximately June 2018. The last candidates on the promotional list will probably fill a portion of a third class. Although oversight of the promotional exam is not within the scope of the Court’s Modified Remedial Order, the City agreed to provide demographic data from Exam 7501 to facilitate analysis of any issues that may relate to the upcoming open competitive exam.

PSI circulated its “Analysis of Pass Rates and Adverse Impact” report for Exam 7501 on April 20, 2017.<sup>23</sup> The following Table 1 shows, for each race/ethnicity, the number of promotional candidates who took the exam and their percentage within the total testing group, the number who passed and failed, the pass rate, adverse impact ratio (AI Ratio), and standard deviations (SD’s). The figures in Table 1 do not include 204 candidates who took the exam but did not provide their race/ethnicity data to PSI.

Table 1. Exam 7501 Promotional Candidate Pass Rates and Adverse Impact Ratios by Race/Ethnicity

<b>Race/ Ethnicity</b>	<b># of Candidates</b>	<b>Pass</b>	<b>Fail</b>	<b>Pass Rate</b>	<b>AI Ratio<sup>24</sup></b>	<b>SDs<sup>25</sup></b>
White	624 (49%)	622	2	99.68%	0.997	-1.06
Hispanic	348 (27%)	348	0	100.00%	-	-
Black	229 (18%)	228	1	99.56%	0.996	-1.23
Asian	77 (6%)	77	0	100.00%	1.000	-
Native American	7 (<1%)	7	0	100.00%	1.000	-
<b>Total</b>	1285	1282	3	99.77%		

Only four people failed the exam, two of whom were white, one of whom was black, and one of whom was an individual who did not provide race/ethnicity data. PSI found no evidence of adverse impact in the pass rate, which was well below two standard deviations, and the AI ratios were all near 1.0, reflecting no significant disparate impact.

In accordance with DCAS procedures, candidates with passing scores (*i.e.*, scores above 70) may be entitled to bonus points: 2.5 points for veterans, 5 points for disabled veterans.

Candidates will be called from the list in rank order, which is determined by the adjusted final

<sup>23</sup> The City circulated an updated version on June 1, 2017, reflecting the final DCAS determination regarding bonus points. The results are identical to those reported by PSI on April 20.

<sup>24</sup> The AI Ratio is computed by dividing the subgroup pass rate by the highest pass rate, which in this case is the Hispanic pass rate of 100%.

<sup>25</sup> Standard deviations reflect the degree to which differences in pass rates for different demographic groups are likely due to chance or (conversely) are significantly correlated with race or ethnicity. The Second Circuit has held that a disparity of two standard deviations is statistically significant and establishes a *prima facie* showing of disparate impact. *See, e.g., EEOC v. Joint Apprenticeship Comm. of Joint Indus. Bd. Of Elec. Indus.*, 186 F.3d 110, 120 (2d Cir. 1998).

score (final score + veteran or disabled veteran credit), with tied scores ranked using the candidates' social security numbers. (DCAS uses the last five digits of the SSN followed by first four digits and ranks candidates with the lowest resulting numbers first.)

PSI has projected promotional candidate selection rates on an annual basis, using the DCAS top-down selection rules, and assuming that (a) there are 320 candidates per class and two classes per year and (b) the attrition rate for promotional candidates is consistent with the historical rate of 2:1 (*i.e.*, half the candidates called from the list get through all subsequent testing and screening and into the Academy). PSI's projected promotional candidate selection rates on an annual basis are shown in Table 2.

Table 2. Projected Annual Candidate Selection Rates<sup>26</sup>

	<b>Number of Positions Open</b>	<b>Number of Candidates Still on List</b>	<b>Number Called for Processing</b>	<b>Number Appointed to Academy</b>	<b>Lowest Score Reached</b>
Year 1	640	1485	1280	640	85
Year 2	640	205	205	103	71
Total Over 2 Years	1280		1485	743	71

PSI projects that the promotional list will be exhausted within a year and a half; the first two Academy classes drawn from the new exam will consist only of promotional candidates and the third Academy class will include approximately 103 promotional candidates, the rest to be chosen from the new open competitive list.<sup>27</sup>

<sup>26</sup> The figures in Table 2 are based on the total number of passing candidates, whereas the numbers shown in Table 1 include only those for whom PSI had race/ethnicity data.

<sup>27</sup> PSI notes that these estimates may not reflect the actual number of promotional candidates selected because it is not possible to predict exactly how many candidates will pass subsequent steps in the selection process.

PSI also performed an adverse impact analysis of the projected yearly selection rates. This analysis is summarized on Tables 3.a. (showing adverse impact ratios) and 3.b. (using a standard deviation analysis).<sup>28</sup>

Table 3.a. Adverse Impact Ratio

	<b>No. Positions Open</b>	<b>No. of Candidates Still on List</b>	<b>Cumulative No. Called for Processing</b>	<b>Lowest Score Reached</b>	<b>Asian-White AI Ratio<sup>29</sup></b>	<b>Black-White AI Ratio</b>	<b>Native American-White AI Ratio</b>	<b>Hispanic-White AI Ratio</b>
Year 1	640	1485	1280	85	0.891	0.865	0.948	0.903
Year 2	640	205	1485	71	1.003	0.999	1.003	1.003

Table 3.b. Standard Deviation Test

	<b>Asian-White SDs</b>	<b>Black-White SDs</b>	<b>Native American-White SDs</b>	<b>Hispanic-White SDs</b>
Year 1	-2.64	-4.72	-0.42	-3.93
Year 2	0.50	-0.25	0.15	1.06

The PSI report concludes that “overall pass rates were comparable among racial/ethnic . . . subgroups, as evidenced by AI Ratios near 1.0 and pass rate differences well below two standard deviations.” As the report also notes, the standard deviation figures indicate that the “differences in selection rates exceeded chance levels in year one for all subgroups except Native Americans.” But “none of the selection rate differences exceeded chance levels for the 2-year period.”

<sup>28</sup> Although the adverse impact ratio and standard deviation figures in Table 3 are necessarily based on only those candidates for whom PSI had race/ethnicity data, the figures for Number of Positions Open, Number of Candidates Still on List, Cumulative Number Called for Processing, and Lowest Score Reached are based on all test takers.

<sup>29</sup> Whites were used as the reference group for the AI ratios and standard deviation figures in Tables 3.a. and 3.b. because, in the projections by class/year, whites were selected at the highest rate. The AI ratios in the second year do not quite reach 1.00 because the numbers include test-takers who identified their race/ethnicity but did not pass.



## **B. Open Competitive Exam**

As reported in the Monitor's Eighteenth Periodic Report, the next open-competitive CBT, Exam 7001, is scheduled to take place in September and October 2017. The City expects to appoint the first open competitive candidates from that exam to the Academy in December 2018 or June 2019, depending on the number of promotional candidates who are appointed. *Id.* at 42.

Open-competitive test-takers will be given new test forms developed by PSI from the approved "Form A," in consultation with the Monitor and with input from the United States. *See* Monitor's Eighteenth Periodic Report at 42-43; Monitor's Seventeenth Periodic Report at 33; Monitor's Sixteenth Periodic Report at 33-34. PSI has confirmed, and the United States agrees, that the new test forms are "equivalent" to one another and to the previously validated Form A. *See* Monitor's Eighteenth Periodic Report at 43. Accordingly, Exam 7001 retains all the material attributes of the validated Exam 2000.

## **C. Exam Survey**

The City intends to ask individuals who take Exam 7001 to respond to an optional survey that will be given immediately after the CBT, while test takers are still at testing centers. The City says that data from the optional survey will be used to build statistical models to predict and explain candidate attrition (both voluntary and involuntary) and identify interventions and/or program modifications to support candidates who have lower odds of success, in order to promote the FDNY's diversity goals. For the analysis, the City plans to combine the survey data with other data the FDNY has previously obtained, or plans to gather by other means, about candidates' demographic characteristics, motivations, barriers, and outcomes.

The Monitor has endorsed data collection and information gathering about the firefighter candidate population throughout the Monitorship. However, the Monitor expressed several

concerns about the draft survey the City shared with the Monitor, including that (a) candidates may believe that failure to participate will have a negative impact on their candidacy, (b) some of the City's questions (about such things as marital status, household income, and number of dependents) might be seen as overly intrusive, and (c) the survey could undermine public trust that the test and other hiring processes are fully transparent and unbiased. The City will address these concerns by explaining clearly to test takers that the survey is optional, that their answers will be used only to improve the City's hiring processes, and that they will have no effect on individual hiring decisions. The Monitor has approved the City's proposed use of the survey on this basis, with the understanding that a separate survey – with somewhat different questions, to be worked out – will be administered by May 2018 to all individuals who (a) were hired by the FDNY from the Exam 2000 list or (b) were called off the list for further processing but voluntarily dropped out at some point. The survey for these two groups of individuals will be administered by a third party. The Monitor believes that this information may help the FDNY to better understand which candidates succeeded in the hiring process and the reasons for their success.

The Monitor has requested a written plan describing the projected methodology and timetable for analyzing the survey data. The Monitor and the Parties will then work together to discuss how the data collected via the survey, along with recruitment-related data the City has been collecting through its ARCS system and through Hodes, will be analyzed. The objective will be to build a recruitment plan that considers whether there are any characteristics shared by applicants who are likely to make it through to appointment and whether the City's hiring efforts could benefit from targeting such applicants.

### **VIII. 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 Priority Hire 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: June 21, 2017

New York, New York

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/s/

Mark S. Cohen