

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*,

**07-cv-2067 (NGG) (RLM)**

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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**MONITOR'S FOURTEENTH PERIODIC REPORT TO THE COURT**

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This report summarizes activities relevant to compliance by the City of New York (the “City”) with the Modified Remedial Order from September 16, 2015, when the Thirteenth Periodic Report (Dkt. # 1636) was filed, to December 15, 2015. This 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.

During the past 90 days, the Parties have continued to work toward the implementation of a range of reforms and initiatives intended to give effect to the Modified Remedial Order and the Disparate Treatment Settlement. Several of those reforms, such as those affecting FDNY’s upcoming recruitment campaign and its ongoing processing of Priority Hire candidates, are highly time-sensitive; others, such as reforms in the Department’s procedures and practices for EEO complaints, are long awaited. In all of the areas subject to the Modified Remedial Order and the Settlement, the Monitor has emphasized that positions should be identified for comment, and ensuing reforms should be decided upon and implemented, as expeditiously as possible.

The City has implemented a number of reforms and agreed at least in principle to adopt others. Viewed over the course of the Monitorship since its commencement in November 2011, however, the pace of change in some areas has been slower than expected, and projected time frames have slipped. In some cases, even where the Parties and the Monitor have agreed on reforms, the City has not yet implemented them. During the most recent reporting period, the Monitor has worked with the City to set deadlines, including interim deadlines, for mission-critical tasks, with the understanding that the dates will not be further extended absent unusual

circumstances. The Monitor believes that this will not only lead to the resolution of some items that have been outstanding for some time, but will also help with overall planning.

Since the last Periodic Report, the FDNY's Chief Diversity and Inclusion Officer (CDIO) (Pamela Lassiter) was reassigned, and her duties have been assumed by First Deputy Commissioner Robert Turner and others within the Department leadership. The Department is currently in the process of searching for a new CDIO. In the interim the Department has been proceeding with the discussion and implementation of proposed reforms. The City is beginning to move forward with planning for its upcoming recruitment campaign, with input from Plaintiffs and the Monitor. In this area the Monitor has emphasized the need for clear targets, concrete plans, and data management that will enable the Department to track the performance of its recruiting efforts and, if necessary, adjust them to meet its goals.

The Monitor has also stressed the need for expedited implementation of long-awaited improvements in the FDNY's EEO function. In consultation with the City, it has established a timetable for the completion of several key tasks, including the preparation of an investigations manual, and the design and activation of a database for tracking EEO complaints, investigations, and resolutions.

The Parties and the Monitor have also continued to work on reforms relating to the processing of candidates who took Exam 2000 for the next Fire Academy class, including evaluation and modification of the medical exam component of the screening process ("Medical Exam") and further reforms in the character screening process.

Part I of this report discusses the status of the FDNY's effort to recruit black and Hispanic applicants as entry-level firefighters pursuant to the Modified Remedial Order – including notes that emerged from the Department's recent planning "retreat." The initiatives in

this area include the efforts of a working group established pursuant to the Disparate Treatment Settlement (including its proposal for a Cadet Program, currently under review by the New York State Civil Service Commission); measures to limit attrition by supporting minority candidates through the hiring process; and the City's implementation of a data management system to track candidates and assess the effectiveness of its recruiting efforts.

Part II reports on the progress of reforms in the FDNY's EEO function. This section reports on the Monitor's discussions with the City and the Parties regarding proposed improvements in several areas – including the development of an EEO complaint database and the drafting of an investigations manual. The Monitor also has continued receiving updates on the City's investigations of instances of alleged retaliation during weekly calls. The City also advised the Monitor on recent disciplinary actions taken against violators of the FDNY's EEO policy and/or other policies.

Part III provides an update on the steps being taken to ensure that the Medical Exam does not have an unlawful disparate impact on black and Hispanic candidates. Those steps include efforts to validate as job-related key components of the testing, along with improved guidance and support for candidates undergoing testing, and continuing efforts to gather data showing any impact of the testing on hiring. Part III also reports on discussions among the Parties regarding plans for re-testing of certain candidates previously disqualified.

Part IV provides an update on recent developments relating to the FDNY's character review process, including efforts to identify and eliminate any unlawful disparate impact. This section summarizes communications between the Monitor and the Parties on proposed changes in the process, and reports on the Monitor's audit materials relating to conflicts and external communications involving the Personnel Review Board ("PRB").

Part V discusses issues related to the next computer-based exam for prospective firefighter candidates.

Part VI reports on the demographics of the most recently graduated class from the Fire Academy.

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

#### **I. Recruitment and Attrition Mitigation**

The FDNY's recruitment campaign for the next open-competitive entry-level firefighter examination is scheduled to begin in March 2016, and planning and preparations for that campaign are underway. Over the past 90 days, the Monitor and the Parties have intensified their focus on the efforts of the FDNY and specifically its Office of Recruitment and Diversity ("ORD") to develop and execute detailed recruitment plans, with timeframes and deadlines for the completion of discrete projects, and with tools for data collection and analysis to enhance the effectiveness of recruitment initiatives. The Monitor has held several meetings and calls and exchanged substantive proposals and other materials with the Parties. Progress has been slower than hoped for in some areas, particularly the establishment of concrete plans and schedules for the upcoming recruitment campaign and appropriate data gathering and analysis tools. However, the City, in conjunction with the Monitor and the other Parties, has recently made important progress toward these goals. The Monitor will continue to work with the City and the other Parties to solidify these plans. The Monitor anticipates that the City will work diligently and with appropriate transparency to carry out the recruitment-oriented mandates and goals of the Modified Remedial Order and the Disparate Treatment Settlement.

**A. Creating and Implementing Recruitment Plans**

Based on the Court's findings in this case and the Modified Remedial Order, the Monitor has long stressed the importance of careful and comprehensive planning and budgeting for efforts to recruit higher proportions of black and Hispanic firefighter candidates. *See, e.g.*, Monitor's Recruitment Report to the Court (Dkt. # 1464) at 49 ("Monitor's Recruitment Report"); Monitor's Fifth Periodic Report (Dkt. # 1198) at 54-55; Monitor's Sixth Periodic Report (Dkt. # 1249) at 32-45. In addition, the Modified Remedial Order requires the City to obtain the Monitor's approval for each "step in [the] process for the selection of entry-level firefighters," including recruitment efforts, and empowers the Monitor to impose schedules for such steps, to obtain "any information" and require the City to show that it has satisfied conditions specified by the Monitor relating to such steps in the selection process. Modified Remedial Order ¶¶ 16, 22-23.

Accordingly, the Monitor has consistently asked the City to provide a detailed, step-by-step recruitment plan, with deadlines for the completion of interim steps in the process. *See, e.g.*, Monitor's Recruitment Report at 49; Monitor's Thirteenth Periodic Report at 5-7. The City provided some of this information on an ongoing basis, including in a series of single-purpose recruitment meetings with ORD and other City representatives. The most recent of these meetings is discussed below. At the same time, the City has stated that it would provide more comprehensive and detailed recruitment plans closer to the launch of the next campaign. *See* Thirteenth Periodic Report at 5-7. As noted, that campaign is rapidly approaching, and the time has come to complete these tasks.

On September 16, 2015, the Monitor held a single-purpose meeting with members of ORD, ORD's consultants, and the Parties to discuss recruitment issues and planning for the next



recruitment campaign.<sup>1</sup> The bulk of the meeting consisted of presentations by ORD's consultants, Vanguard Direct ("Vanguard") and Hodes LLC ("Hodes"), regarding their plans for the upcoming recruitment campaign. As discussed in further detail below, Vanguard's role is to build a customized database and communication system to gather data regarding prospective applicants and entry-level firefighter candidates. This comprehensive recruitment database system will also enable ORD to communicate and follow up with prospective applicants at every step in the recruitment process in a targeted way. ORD believes this tool will significantly enhance its overall recruitment efforts and its ability to focus on particular communities and populations. Further, this database is being designed with the capacity to receive information from systems maintained by the Department of Citywide Administrative Services ("DCAS"). This feature will provide ORD with easier access to application data, which will enable it to focus its efforts during the limited application window. Plaintiffs-Intervenors have proposed using the promotional exam (scheduled for 2016) to road test the system and this capability. This City is currently considering their proposal.

The City's other recruitment consultant, Hodes, described its proposals for branding and messaging as part of ORD's efforts to recruit a diverse workforce. Hodes also provided the Monitor and the Parties with details on its plan to provide a consistent, defined brand message across a range of communication channels.

ORD held a Planning Retreat with its staff and consultants on November 9 and 10, 2015. The stated purpose of the retreat was to solidify and formalize plans for the recruitment campaign, and in advance of the retreat the City stated that it would be better able to comply with the Monitor's request for information about these plans after the retreat took place. On

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<sup>1</sup> As previously discussed, the FDNY's CDIO was reassigned, and her duties with regard to oversight of recruitment initiatives are currently being performed by others within the Department.

December 3, 2015, the City provided notes of the ORD planning retreat to the Monitor and the other Parties. The notes describe a broad range of topics discussed at the retreat, many of which have been the subject of intensive focus by the Monitor and the Parties for approximately two years. However, the City's notes do not yet include the kind of detailed, step-by-step plans and schedules for the recruitment campaign that the Monitor has requested.

The Monitor will work with the City and the other Parties in the coming weeks to set an appropriate deadline for creating a more comprehensive recruitment plan and for executing the most pressing portions of that plan. With approximately three months before the launch of the next recruitment campaign, it will be critical for the City to set, and adhere to, a clear schedule, as well as to provide information requested by the Monitor on a timely basis. The goal is to enable the Monitor and the City to carry out their duties under the Modified Remedial Order while ensuring that ORD's resources are not diverted from recruitment tasks.

In the interim, the Monitor, the City, and the other Parties have created an initial timeline of certain milestones in the recruitment development process at which the Parties will receive updated reports and information from ORD, and the Monitor and the Parties will be able to provide contemporaneous feedback to ORD. The Monitor initially provided its recommendation for this timeline to the City on November 5, 2015, and circulated the proposal to the City and the other Parties on December 9, 2015. While the exact milestones in the proposal may be adjusted and additional detail added to the timeline as the recruitment campaign gets off the ground, the Monitor believes that the proposal will serve as a useful framework for all of the Parties, and will provide the Monitor and the Parties with specific, defined opportunities to check-in and monitor progress in ORD's recruitment campaign development.

Additionally, the Modified Remedial Order requires the City to establish “measurable short-term and long-term goals for the recruitment of black and Hispanic entry-level firefighter candidates.” Modified Remedial Order ¶ 26(e). The Disparate Treatment Settlement further requires the City to use its best efforts to reach specific recruiting goals. *See* Disparate Treatment Settlement at 2. In the past few months, the City, the other Parties, and the Monitor have continued to discuss how to best establish interim goals and measure progress as the FDNY moves forward with its next recruitment campaign. As these discussions move closer to a resolution, the Monitor anticipates that these goals will be reflected in the timelines and plans provided by the City in the near future.

**B. Data Collection and Analysis**

The need for thorough, systematic tools for collecting and analyzing data regarding the FDNY’s recruitment activities and processes for selecting entry-level firefighters has been a longstanding and consistent theme in the litigation and the remediation process. The Court emphasized the need for relevant data in its findings and the creation of the Modified Remedial Order. *See* Monitor’s Recruitment Report to the Court at 3-7 (summarizing the Court’s findings of fact regarding recruitment and the Modified Remedial Order). Moreover, from the very outset of the Monitorship, the Monitor has stressed the importance of creating mechanisms through which data can be collected and analyzed with regard to recruitment initiatives. *See, e.g.,* Monitor’s Recruitment Report at 40; Monitor’s First Periodic Report (Dkt. # 823) at 20; Monitor’s Second Periodic Report (Dkt. # 892) at 16; Monitor’s Thirteenth Periodic Report at 7. The Parties’ Disparate Treatment Settlement likewise focused on the need for data in seeking to recruit a more diverse workforce to the FDNY. *See* Stipulation and Order dated June 5, 2015 ¶ 1; *see also* Memorandum & Order dated June 5, 2015.

As discussed in prior reports, many of the FDNY's data analysis initiatives were delayed or abandoned, largely because of significant turnover within the FDNY's Data Analytics Unit. *See* Monitor's Thirteenth Periodic Report at 8. Several years after the Court issued the Modified Remedial Order and appointed the Monitor, the FDNY still has not developed a sufficiently robust set of tools for gathering and analyzing data regarding the recruitment and hiring processes. However, activity over the past 90 days and plans for the upcoming period indicate that significant and sustainable progress is finally underway.

Over the past 90 days, the Monitor, the City, and the Parties have focused on two data initiatives related to the entry-level firefighter selection process: (1) the FDNY's new comprehensive recruitment database system and (2) its end-to-end hiring database. Each of these initiatives is discussed in further detail below.

### **1. Comprehensive Recruitment Database**

The City and its consultant, Vanguard, have worked in recent months to develop a new data system, which will be capable of compiling and analyzing data on prospective applicants and candidates for the position of entry-level firefighter from the point of first contact through the written examination. Vanguard presented a conceptual overview of the system at the September 16, 2015 meeting with the Monitor and the Parties. In brief, Vanguard indicated that the system will consolidate data relevant to the recruitment process, including information from EOI cards and other sources; demographic data and information on how prospective applicants became interested in the entry-level firefighter position; information on whether ORD has followed up through phone calls, emails, or other outreach efforts; whether the applicants have filed applications or registered to take the exam; whether they have registered for or attended exam tutoring sessions; and other information. The goal is to allow ORD to identify in real time the methods and tools that have been most successful in attracting and retaining minority

candidates and to make ground-level adjustments in response to this data over the course of the recruitment campaign.

At a conceptual level, the new system promises to be a powerful tool for enhancing the FDNY's ability to recruit black and Hispanic firefighter candidates and to make its overall recruitment efforts more efficient. Accordingly, since the initial demonstration of the new system, the Monitor has repeatedly asked the City to provide regular updates on its development. The Monitor's goal has been to ensure that progress is being made and that the system will be adequate for its purpose. The City provided updates concerning recruitment following the meeting on September 16, 2015 but did not provide a substantive update between the September meeting and early December concerning the progress of the Vanguard system. However, it appears from the first substantive update provided by the City on December 8, 2015 that the development of the system is on track. Going forward, the Monitor has requested, and expects to receive, regular updates on the design and implementation of the database on a contemporaneous basis.

## **2. The End-to-End Hiring Database**

In addition to data regarding recruitment, the Monitor has consistently stressed the need for the FDNY to develop an end-to-end database that will allow careful analysis of each stage of the recruitment and selection process. *See, e.g.*, Monitor's First Periodic Report at 20; Monitor's Ninth Periodic Report (Dkt. # 1462) at 13; Monitor's Twelfth Periodic Report (Dkt. # 1603) at 28.

At various points over the past several years, the City has appeared to be on the verge of developing such an end-to-end database. In the course of the first recruitment campaign under the Monitorship in 2012, the City created a "candidate tracking spreadsheet" with information regarding the progress of entry-level firefighter candidates from the written exam through the

beginning of the Fire Academy. This information has enabled the Monitor and the Parties to assess the process as a whole, track the status of individual Priority Hire candidates, and determine whether – and, importantly, at what stage – black and Hispanic candidates were being disqualified or dropping out in disproportionate numbers. However, the initial candidate tracking spreadsheet was created by the City’s Law Department through a laborious process of manually collating data from a variety of FDNY and City databases. The Monitor has encouraged the City to create a system within the FDNY that would capture and update the data on a more automated basis. In addition, the Monitor has recommended that the database include not just information regarding the processing of candidates who have taken the written examination but also recruitment data. This would enable the FDNY to identify the most effective ways of attracting prospective applicants who are likely to perform well on the examination and succeed in the selection process.

As an interim measure, the FDNY will be creating and updating the candidate tracking spreadsheet initially prepared by the Law Department. The City provided an updated version of this candidate tracking spreadsheet on October 22, 2015. The updated spreadsheet lacked important information and did not provide the basis for thorough analysis of potential disparate impact and other issues. The City has advised the Monitor that it will provide a complete candidate tracking spreadsheet for all classes of entry-level firefighters by January 8, 2016.

Importantly, the current candidate tracking spreadsheet (including the updated version that the City will provide in January) lacks key functions that the Monitor has consistently recommended, including the ability automatically to gather and integrate data from various sources on an ongoing basis. Accordingly, the City has represented that work is underway on a more comprehensive and functional end-to-end database. The Monitor and the other Parties

have worked with the City to finalize the fields to be included in the database, and have discussed ways to integrate various sources of data on a regular, automated basis. As with the City's new recruitment data system, the Monitor has requested regular and substantive updates on the development of the database and a clear schedule for finalizing the database and bringing it on line. The City has provided some information but has not yet provided all of the requested information.

**C. Settlement Working Group**

As discussed in prior periodic reports, the City and the Parties have formed a Working Group committee comprising representatives from the City's Law Department, the Department of Education, and the Department of Citywide Administrative Services, along with representatives from the FDNY, the Vulcan Society, the United States, and the City University of New York ("CUNY"). The Working Group was formed pursuant to the terms of 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 at 7-8 (citing Proposed Stipulation and Order (Dkt. # 1291-1) ¶ 1(e)).

The Disparate Treatment Settlement identified "the creation of a Fire Cadet title or special credit for completion of job-related fire science courses" as a specific area of focus for the Working Group. Over the past 90 days, the FDNY and Working Group have continued to pursue the process of creating a Fire Cadet title that would qualify candidates for promotion to firefighter upon passage of a promotional exam. The program has been designed to attract, select, mentor and retain a diverse cadre of cadets in accordance with the terms of the Disparate Treatment Settlement. The City submitted a proposal for the Fire Cadet title, which described the selection process, job duties, and instructional curriculum for the Fire Cadet title, for public

consideration on August 19, 2015. This submission was followed by a public hearing held on August 24, 2015 to discuss the proposal. Following the closing of the period for public comments and testimony, the proposal was submitted to the Office of the Mayor for formal approval by the City and then submitted to the New York State Civil Service Commission for final approval. The proposal is currently awaiting the scheduling of a public meeting of the State Civil Service Commission to review and approve the proposal. The proposal has received several expressions of public support, including a number of editorial endorsements of the program and the support of the 1199 SEUI United Healthcare Workers East, the largest local of the Service Employees International Union.

The Working Group is also continuing to formulate additional high school and college-based initiatives. Participants from CUNY and the New York City Department of Education, in consultation with the FDNY's recruitment and instructional departments, are working to develop further initiatives to attract and mentor high school and college students, along with other potential candidates who have successfully completed a high school equivalency diploma program. The intent of such initiatives is in part to develop networks and opportunities similar to "friends and family" networks that have, as the Court found, historically benefited white candidates by providing informational support and encouragement throughout the FDNY's lengthy and complex application, testing, screening and hiring process. *See, e.g.*, Findings of Fact (Dkt. # 741) at 13-14. The Monitor anticipates that the Working Group will continue to refine and implement additional proposals for other initiatives in addition to the creation of the Fire Cadet title.



## II. EEO Compliance and Retaliation Investigations

### A. Overview

As noted in prior Periodic Reports, the Monitor has recommended strengthening of the FDNY's EEO operations and related record-keeping. In August 2015, the Monitor presented the City with a list of key EEO recommendations, which was intended to summarize and prioritize previous recommendations made by the Monitor, the Monitor's experts, Plaintiffs-Intervenors, and the Department of Justice. The summary included recommendations that the City develop an investigations manual, create an electronic means to track EEO complaints, revise annual EEO training, and undertake periodic disparate impact analyses of steps in the entry-level firefighter hiring process. On October 8, 2015, the City responded with proposed dates to provide materials in response to these recommendations, and the City has subsequently provided the Monitor with a number of policy revisions, a draft manual for investigators, revised EEO training materials, and a date by which the City will have developed an electronic database to track EEO complaints. The Monitor expects to provide its comments on the draft manual and revised policies shortly, and will also seek comments from the other Parties on the manual and policy changes. Discussions are ongoing regarding these areas and the Monitor intends to meet with all the Parties to discuss the proposed revisions and further suggested changes.

The FDNY's EEO compliance activities continue to be a significant concern for the Monitor. As discussed below, many of the most critical impediments to the proper functioning of the EEO office, including the lack of adequate staffing, resources, and effective data tracking, have been raised since the inception of the litigation. The FDNY's efforts to remediate these issues have progressed slowly at best, with numerous false starts (*see* Monitor's EEO Report to the Court (Dkt. # 1463) at 19). However, the Monitor has observed a coordinated effort to substantially revamp and implement new procedures for the performance of these compliance

activities, including the assignment of new senior personnel within the FDNY and the City to carry these initiatives through to completion. These developments are discussed more fully below.

**B. EEO Compliance Activities**

**1. Personnel and Staffing**

With the departure of Deputy Commissioner Lassiter, the compliance activities of the EEO Office have been undertaken by several other members of the FDNY and the City's Law Department pending the hiring of a new Assistant Commissioner for EEO. The FDNY hired a new Deputy EEO Director in August, who was promoted to Acting Assistant Commissioner of EEO one week ago. In addition to this hiring, the City has also made additional staff available on an interim basis to assist in these efforts, among other tasks required to be performed under the provisions of the Modified Remedial Order.

The Monitor has previously acknowledged the impediments that staffing deficiencies imposed on implementation of initiatives to improve the FDNY's performance of its EEO compliance activities. But the Monitor has also noted that limited resources were identified as critical several years ago, including in the Court's detailed discussion of the lack of resources devoted to the EEO Office in particular. *See* Findings of Fact at 60. Accordingly, while the temporary allocation of staff from other departments within the FDNY and the City is a positive step, the hiring of additional permanent staff for the EEO Office remains a critical outstanding item for lasting and meaningful improvement of the FDNY's EEO compliance activities. The Monitor urges the City to move expeditiously to identify additional staff and allocate the resources required to enable the FDNY to fulfill its EEO duties and obligations on a permanent basis.

## **2. Complaint Intake and Investigation Processes**

With respect to the Department's EEO complaint and investigation process, the Parties have held several meetings to address the FDNY's process for investigating EEO-related complaints (*see* Monitor's Twelfth Periodic Report at 25). The Monitor, along with its EEO consultant, has made a number of recommendations intended to establish more consistent and effective procedures for a variety of EEO functions, including (1) the intake process for EEO complaints; (2) facilitating discussions among complainants and commanding officers; (3) investigative practices; (4) analysis of evidence and investigative findings; and (5) communications with complainants.

## **3. Diversity and EEO Training**

The FDNY has also commenced diversity training for the uniform firefighting force, with Commissioner Nigro publicly explaining the need and expressing support for the diversity training program.<sup>2</sup> The City engaged the Kaleidoscope Group, a diversity consulting company, to deliver training to FDNY personnel on issues relating to diversity and inclusion within the firefighter force. Senior personnel received eight hours of training and firefighters received four hours. The City has also provided the Monitor with updated EEO training materials in connection with its development and implementation of revised EEO compliance procedures for the EEO office in particular and the FDNY as a whole. These EEO training materials provide FDNY employees with information regarding the department's EEO policies, including information regarding each employee's EEO rights and responsibilities and training on how these policies might be administered in specific situations. The Parties continue to discuss

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<sup>2</sup> *See* "FDNY Starts Diversity Training for All Firefighters," Wall Street Journal , October 6, 2015, available at <http://www.wsj.com/articles/fdny-starts-diversity-training-for-all-firefighters-1444179604>

refinements to the program, including consistent messaging and supplemental training and accountability for commanding officers, in accordance with the FDNY's EEO policies.

#### **4. EEO Data Collection and Analysis**

As noted above, the Monitor has recommended that the City implement an improved data collection and analysis system for EEO complaints and other relevant EEO data. After the City advised in October that it accepted this recommendation and planned to develop this system using internal resources, the Monitor developed a list of data fields that the Monitor recommends should be collected during various stages of the EEO complaint intake, investigation, and resolution process and should be tracked for effective case management, compliance with applicable law and regulations, and disparate impact analysis. The City has advised that it anticipates bringing the system online for limited data collection use by the end of this year, and implementing fully-functional data analysis features and systems by the spring of 2016, which will include all of the data fields the Monitor identified for tracking as well as additional information.

#### **C. EEO Retaliation Investigations**

Over the past 90 days, the City has continued to apprise the Monitor and the Parties of the status of ongoing EEO retaliation investigations being conducted by the EEO Office, which have in certain instances been jointly conducted with the FDNY's Bureau of Investigations and Trials ("BITS"). These updates have included discussions of concerns raised by the United States and the Plaintiffs-Intervenors regarding the investigation and resolution of specific complaints and allegations. Some of these investigations concern the disclosure to media outlets of medical and other sensitive information. The Parties continue to work cooperatively to address these concerns both with respect to specific allegations of EEO retaliation and at a more systematic level through revisions to the FDNY's EEO training and complaint investigation process, as

described above. The Monitor has advised the City of the need for effective and timely EEO investigations, as well as the need to impose appropriate discipline where violations of the equal protection laws are found, up to and including termination if warranted to carry out the broad remedial scope of Title VII.

Regardless of any retaliatory motive, the City has indicated that it intends to vigorously enforce provisions safeguarding confidentiality of personnel information and prohibiting wrongful disclosure of that information, although the City has also pointed out that some media reports purporting to disclose facts about individual firefighters do not in fact contain genuine confidential information, but rather inaccuracies. The FDNY also sought and obtained budget approval on its own initiative to retrofit existing FDNY systems to enhance security of employee data, for example by creating an electronic trail of which personnel have accessed employee records.

The Monitor remains very concerned about reports of conduct regarding Priority Hire candidates and minority candidates that may have had a retaliatory motive. In addition to monitoring ongoing investigations, the Monitor will continue to work with the Parties to develop recommendations for new policies aimed at reducing or eliminating such incidents.

### **III. Medical Exam Related Issues**

Pursuant to applicable provisions of the Modified Remedial Order, the Monitor has continued to address allegations that certain steps in the City's Medical Exam have a potential disparate impact on black and/or Hispanic candidates. *See* Monitor's Thirteenth Periodic Report at 11-17 (citing Modified Remedial Order ¶¶ 15, 19); Monitor's Twelfth Periodic Report at 13-18; Monitor's Eleventh Periodic Report (Dkt. # 1575) at 13-16; Monitor's Tenth Periodic Report (Dkt. # 1533) at 13-16; Monitor's Ninth Periodic Report at 3-6. As previously reported, Plaintiffs-Intervenors have raised concerns regarding the seeming disparate impact of the

Medical Exam on black candidates, and the United States has raised the same concerns with respect to both black and Hispanic candidates. *See* Monitor's Eleventh Periodic Report at 13-14; Monitor's Tenth Periodic Report at 13; Monitor's Ninth Periodic Report at 4-5. The Monitor is engaged in a comprehensive analysis of these issues, and has requested relevant data from the City. *See* Monitor's Thirteenth Periodic Report at 12-13; Monitor's Twelfth Periodic Report at 13-14; Monitor's Eleventh Periodic Report at 14-15; Monitor's Tenth Periodic Report at 13-14; Monitor's Ninth Periodic Report at 5-6.

In part because of limitations in the City's record-keeping practices for prior medical examinations, it has been difficult to determine which factors have contributed to racial imbalances in exam results. *See id.* Nevertheless, based on available information, the Monitor and the Parties are continuing to pursue initiatives intended to address likely contributing factors to the racial imbalance in the Medical Exam results. The status of the implementation of each of those initiatives is discussed below in Subsection A.

The Monitor's in-depth analysis of the Medical Exam is ongoing; these efforts are described in Subsection B.

**A. Implementation of Agreed Initiatives Regarding the Medical Exam**

The Monitor has worked with the Parties to develop, agree upon, and begin to implement measures to mitigate possible causes of the imbalance. Early this year, the Monitor and the Parties agreed in principle that the City will:

- Conduct a validation study of the stairmill portion of the Medical Exam;
- Provide candidates with more information about the Medical Exam;
- Pay for additional testing that may be necessary following a second failure on the stairmill test;
- Fund other diagnostic testing;

- Allow the Diversity Advocate to observe the stairmill exam;
- Track and record specific data regarding the Medical Exam; and
- Retest some candidates, in appropriate circumstances.

Monitor’s Thirteenth Periodic Report at 13; Monitor’s Twelfth Periodic Report at 13-14;

Monitor’s Eleventh Periodic Report at 15.

Over the past three months, the Monitor and the Parties have worked to further the FDNY’s implementation of these initiatives. Some of the initiatives are already underway, while others, such as the validation study for the stairmill exam, require further evaluation and discussion and are still in process. The following table summarizes the current status of each initiative.

**Status of Medical Exam Initiatives**

<b>Initiative</b>	<b>Status</b>
<p>Conduct a validation study of the stairmill test</p>	<p>The United States and Plaintiffs-Intervenors have indicated that, while they do not object to the City proceeding with a stairmill validation protocol the City proposed on June 17, 2015, they do not agree that the City’s validation methodology can establish that the stairmill test and the metric it measures are job related and consistent with business necessity. The United States advised the Monitor and Parties that it does not believe that the dispute over validation methodology must be resolved at this time and noted that other initiatives being undertaken with respect to the Medical Exam – including better information about, preparation for, and monitoring of the stairmill test – may mitigate the disparate impact associated with the Medical Exam. Plaintiffs-Intervenors joined this position.</p> <p>The City has told the Monitor that it will shortly provide a timeline for its proposed validation study. The validation may take a few months or longer to complete.</p>

Initiative	Status
Provide candidates with more information	<p>The Monitor and the Parties have worked cooperatively to develop several means of providing candidates with more information about the Medical Exam. The Monitor and Parties continue to discuss the most effective way to transmit this information to candidates to help them prepare for the Medical Exam. These include the following:</p> <ol style="list-style-type: none"> <li>1. The “BHS Guidance for Firefighting Candidates Concerning Medical Assessment,” a document being prepared pursuant to the Disparate Treatment Settlement, which includes a description of (1) the forms and the various tests involved, (2) how best to prepare for them, and (3) post-exam follow-up steps. The City has posted this guidance document with Fire Academy materials on the FDNY website, and it will also be included in the FDNY hiring process introductory materials.</li> <li>2. A set of frequently asked questions (“FAQs”) that provides similar information to that contained in the guidance document, presented in question and answer format. The City has agreed to provide the Monitor with a plan for circulating this document.</li> <li>3. A video explaining each step in the Medical Exam and demonstrating some steps that can be better understood by watching than by reading. Although the City had been indicating that production of the video was imminent, the videos produced were unsatisfactory, and the City recently decided to begin the process anew, delaying the date on which it will be made available for viewing on the FDNY website.<sup>3</sup></li> </ol>
Pay for follow-up diagnostic testing	Several components of the medical exam, including the stairmill and BHS-required follow-up diagnostic testing, had statistically

<sup>3</sup> The Monitor expects the FAQs and the video to work in tandem with the BHS guidance document to provide enhanced information about the Medical Exam to all candidates.



Initiative	Status
	<p>significant disparate impact on black and Hispanic candidates. For various reasons – including cost – some candidates may have been deterred from complying with BHS requests for follow-up testing. To address these issues, the FDNY has undertaken two parallel initiatives. The FDNY has begun providing certain required follow-up blood tests to candidates free of charge at BHS. The FDNY has also obtained funding to subsidize other kinds of follow-up diagnostic testing that must be conducted by outside providers. The FDNY has identified providers for this outside testing and has been discussing with the Monitor and Parties its plan for scheduling appointments and making payments to, and tracking results from, these outside providers.</p>
<p>Allow certain FDNY personnel to observe the stairmill exam</p>	<p>With the agreement of all Parties, the Diversity Advocate was designated to observe the administration of the stairmill portion of the Medical Exam periodically, on a random basis. This initiative is underway.</p>
<p>Track and record specific data regarding the Medical Exam</p>	<p>The City is developing a new database to track certain information about the Medical Exam. The City provided to the Monitor and the other Parties further information about the design of the database, including specific categories of data that will be collected. The Monitor and the other Parties continue to provide comments to the City. The City previously told the Monitor that the database would be up and running by September 30, 2015. The city's delivery date for an initial version of the BHS database was delayed by several weeks. The Monitor and Parties have provided feedback to the City and clarified certain aspects of the database's expected functioning. The City has confirmed that the database will be loaded with candidate medical information for the prior exam as well as upcoming information to be gathered in the next campaign, so as to permit disparate impact analysis. In the meantime, the Monitor will continue to derive and analyze</p>

Initiative	Status
	data as discussed below in Subsection B.
Retest some candidates	<p>The Parties have engaged in detailed discussions about the criteria to be used to determine which previously-disqualified candidates will be eligible for medical retesting, but they have been unable to agree with respect to certain criteria. The Monitor will likely need to submit a Recommendation to the Court on this issue.</p> <p>Candidates eligible for retesting will be offered the option to take advantage of the no-cost diagnostic testing program being offered to new candidates, as described above.</p> <p>Although the retesting criteria have yet to be decided, the Monitor and the Parties continue to work together to draft a letter to be sent to candidates, informing them of their eligibility to be retested. Because time is of the essence, the Parties have agreed that those candidates whom all Parties agree are eligible for retesting should be notified and invited back for testing as soon as practicable.</p>

The Monitor continues to work with the Parties toward full implementation of these initiatives.

**B. Continuing Analysis**

The Monitor has continued to compile and evaluate data relevant to possible disparate impact produced by the Medical Exam. *See* Monitor’s Thirteenth Periodic Report at 16-17; Monitor’s Twelfth Periodic Report at 17-18; Monitor’s Eleventh Periodic Report at 14; Monitor’s Tenth Periodic Report at 14. Specifically, the Monitor has continued to gather and analyze data in the files of candidates who were disqualified based on their failing the Medical Exam. As described in previous Periodic Reports, limitations in the City’s prior record-keeping practices with respect to these disqualified candidates – including the fact that reasons for

disqualification have not always been clearly tracked – have made it difficult for the Monitor to analyze root causes of disparate rates of medical disqualification for black and Hispanic candidates as compared to white candidates. *See* Monitor’s Thirteenth Periodic Report at 16-17; Monitor’s Twelfth Periodic Report at 17-18. Accordingly, the Monitor has requested, and the City is continuing to provide, prior Notices of Disqualification and the full medical files of candidates disqualified because of their failure of the medical exam. The Monitor, with the assistance of experts led by Dr. Denise Smith, is continuing to derive and analyze data from these documents. The Monitor has requested that the City provide these records more quickly so that the analysis may be completed expeditiously.

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

The Monitor has continued to carry out its responsibilities under the Modified Remedial Order related to the character review process for entry-level firefighter candidates, which is administered by the Candidate Investigation Division (“CID”) and the PRB. Since the last Periodic Report, the Monitor has continued to work with the Parties to develop and consider a range of potential enhancements for the process.

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

As previously reported, the Monitor’s analysis of data through the end of 2014 for referrals to the PRB and for PRB outcomes indicates 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. Recently (in response to a request from the Monitor that had been pending since July 1) the City provided updated referral and outcomes data through June of 2015, which the Monitor intends to analyze within the next several weeks. The additional data includes outcomes following the implementation of provisionally approved revised PRB Guidelines in November 2014 and may

provide useful indications whether the reforms reflected in those guidelines have reduced the disparities found in the Monitor's initial analysis. The final results will be incorporated in a report to be prepared in accordance with Paragraph 40 of the Modified Remedial Order.

**B. Potential Enhancements in the Character Review Process**

Following up on earlier discussions regarding reforms proposed by the Monitor, the Parties and the Monitor have continued to discuss further potential changes in PRB standards and procedures that might help minimize any disparate impact on black and Hispanic candidates. The proposals under consideration include changes in the criteria for referral to the PRB, improvements in the information and instructions provided to candidates regarding the PRB process, changes in the form and content of information provided to the PRB, changes in the methods employed by the PRB in making its determinations, and changes in procedures for candidate appeals to the Civil Service Commission.

Following up on a series of recommendations it provided to the City on August 19 of this year, and based on the City's feedback and counterproposals, the Monitor communicated a revised set of recommendations to the City on October 2, 2015. The City provided comments on October 6, 2015, in which it agreed to implement several of the proposed initiatives. The Monitor circulated its list of proposals to the other Parties on October 9, 2015; and on October 29, 2015, the Monitor met with the United States and Plaintiffs-Intervenors to discuss the reforms proposed by the Monitor, the City's positions, and additional changes that the United States and Plaintiffs-Intervenors proposed. The additional reforms proposed by Plaintiffs included some they had put forward in previous communications with the Monitor and some that were raised for the first time at the meeting. At that meeting it was decided that, as a next step, Plaintiffs would formulate an updated list of further proposed reforms, taking into consideration the initiatives already proposed by the Monitor and the City's responses. It is the Monitor's

understanding that since the October 29 meeting the United States and Plaintiffs-Intervenors have communicated with the City in an effort to take further account of the City's input as they formulate their revised list of proposals. The United States circulated a revised list of its proposals on December 8, 2015. Plaintiffs-Intervenors will do so by December 17, 2015.

The Monitor now plans to convene a general meeting of the Parties, at which the Parties and the Monitor will (1) determine which initiatives the City agrees to implement, (2) agree upon the timing and specific plans for implementing the agreed upon initiatives, and (3) determine which additional proposed reforms the other Parties and/or the Monitor will seek to implement through intervention by the Court. The Monitor's goal is for these final determinations to be made, and for any disputes to be submitted to the Court, by the end of January 2016, so that a full set of reforms can be in place and the provisionally approved guidelines updated when the PRB begins to consider candidates for the July 2016 Fire Academy class.

### **C. Audit of PRB Documentation**

Shortly before the last Periodic Report, the City provided the Monitor with requested documentation created or collected by the FDNY under subsections of the PRB Guidelines intended to ensure that the PRB process is protected from outside influence, including communications with friends or family of any candidate reviewed.<sup>4</sup> The documentation includes reporting of prohibited contact or communication with PRB members, as well as any conflicts of interest for PRB members with respect to particular candidates reviewed since the guidelines went into effect. The documentation provided by the City in response to the Monitor's request covers PRB sessions from March 12, 2012 through June 4, 2015.

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<sup>4</sup> The relevant subsections are B, C, D, F, and G of Section V of the PRB Guidelines (titled, respectively, Prohibition on Communications Outside of PRB Process, Reporting Unsolicited Communications Outside of PRB Process, Conflicts of Interest, Declaration Concerning Contacts, and Gifts).

Based on the Monitor's audit, it appears that the City has consistently documented compliance with the requirements of the PRB Guidelines regarding outside communications and conflicts. The documents include "Appendix E" forms (affirming compliance with rules regarding outside communications and conflicts) executed by PRB members for all meetings except one in that time frame; two documents recording outside communications; and one recording a recusal based on a PRB member's recognizing the identity of a candidate from the facts in his or her file.

## **V. Next Examination**

### **A. Current Status**

The next open competitive examination for entry-level firefighters is scheduled to begin in September 2017, with an application period opening in April 2017. Pursuant to Paragraph 7 of the Modified Remedial Order, the Monitor is responsible for oversight of the next examination. Accordingly, the City and its testing consultant, PSI Services LLC ("PSI"), continue to work in coordination with the Monitor and the other Parties on the development of the next examination. *See, e.g.*, Monitor's Thirteenth Periodic Report at 25; Monitor's Twelfth Periodic Report at 10; Monitor's Eleventh Periodic Report at 10. The Monitor continues to be assisted by its testing expert, Dr. Shane Pittman of The Pittman McLenagan Group, L.C.

Over the course of the past 90 days, the Monitor has continued to consult with Dr. Pittman regarding the development of the next examination. In September 2015, the Monitor and Dr. Pittman reviewed the videos that will be used in conjunction with the written materials as part of the next computer-based examination. Dr. Pittman has provided the Monitor's comments to the City, PSI, and the other Parties. In November 2015, Dr. Pittman reviewed the completed drafts of the computer-based examination in the form in which they will be presented to candidates; and the Monitor and Dr. Pittman provided comments on the drafts to the City, PSI,

and the other Parties. The Monitor and Dr. Pittman are currently analyzing the pilot study participant sampling plan, which sets out the target demographic mix for the individuals who will be hired to pilot test the computer-based examination. Additionally, Dr. Pittman has continued discussions with PSI to provide oversight and assistance in the test development process.

In keeping with his practice regarding oversight of the examination process, the Monitor will continue to communicate with a sub-group composed of counsel and experts for each of the Parties as the development of the next examination moves forward.

#### **B. Next Steps**

The City has reported to the Monitor that it plans to administer a promotional examination for firefighters in December 2016 and appoint probationary firefighters from the resulting promotional list to a class in December 2017 or January 2018. The City has also advised the Monitor that it remains on schedule to administer the next open competitive examination for entry-level firefighters in September 2017 and to appoint the first Fire Academy class from the next open competitive list in December 2018.

Pursuant to the project plan created by the City and PSI (with input from the Monitor and the Parties), the City and PSI will begin pilot testing for the next examination in December 2015 and analyzing the data resulting from the pilot testing in the following months. The pilot testing will be reviewed by the Monitor, and the Monitor and Dr. Pittman will continue to be consulted as the City and PSI make progress in these efforts.

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

The City has provided the following statistics regarding the most recent Fire Academy class and candidate processing.

Fire Academy Graduates -- Since the Monitor filed its Thirteenth Periodic Report to the Court, the Fire Academy graduated a class of 295 probationary firefighters on November 6, 2015, comprising 286 probationary firefighters drawn from the open competitive list, 5 probationary firefighters drawn from the promotional list, and 4 probationary firefighters drawn from the priority hire list. This probationary firefighter class includes 52 black probationary firefighters, constituting 17.63% of the graduates, and 58 Hispanic probationary firefighters, constituting 19.66% of the graduates.

Candidate Processing -- The FDNY is currently processing 1,173 candidates for appointment as probationary firefighters, comprising 1,157 candidates from the open competitive list, 12 candidates from the promotional list, and 4 candidates from the priority hire list. Of these candidates, 221 (18.84%) are black, and 251 (21.4%) are Hispanic. There are 37,175 candidates remaining on the civil service lists, including 5 promotional candidates and 4 priority hire candidates.

## **VII. Additional Issues**

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

- Record-keeping and communications with Priority Hire candidates regarding retroactive seniority benefits, their status as probationary firefighters, and other issues, including firefighters' access to seniority information;
- Issues arising from investigations of specific alleged EEO violations, including alleged instances of retaliation as defined in Paragraph 17 of the Modified Remedial Order;
- Terminations and resignations of Priority Hire entry-level firefighters at the Fire Academy, including the reasons for such terminations and the status of affected candidates at the time of termination;



- Other discussions regarding individual candidates who are entitled to relief under the Court's Orders, including their interactions with the FDNY, documents they have received, and their rights and remedies;
- The development of new forms for Notices of Disqualification and related communications from the FDNY;
- The assignment of firehouses for probationary firefighters including Priority Hire candidates, and the criteria for such assignments;
- The FDNY policy for "recycling" (i.e. the opportunity for candidates to be re-admitted to the Fire Academy after resignation) and the information provided to candidates regarding that policy.

Dated: December 16, 2015  
New York, New York

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/s/

Mark S. Cohen