

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 TWELFTH PERIODIC REPORT TO THE COURT**

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Pursuant to Paragraph 55 of this Court’s Modified Remedial Order and Partial Judgment, Permanent Injunction, and Order Appointing Court Monitor, as modified following appeal, dated June 6, 2013 (the “Modified Remedial Order”) (Dkt. # 1143), Mark S. Cohen, in his capacity as Court Monitor (the “Monitor”) in the above-captioned matter, respectfully submits the Monitor’s Twelfth Periodic Report to the Court.

### **EXECUTIVE SUMMARY**

This report summarizes activities relevant to the compliance by the City of New York (the “City”) with the Modified Remedial Order from March 16, 2015, when the Eleventh Periodic Report (Dkt. # 1575) was filed, to June 16, 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.

Part I of this report discusses the Parties’ and the Monitor’s ongoing review and assessment of the FDNY’s efforts to improve the recruitment of black and Hispanic entry-level firefighters in compliance with the Modified Remedial Order. Part II discusses issues related to the next computer-based exam for prospective firefighter candidates. Part III discusses steps being taken to prevent the medical assessment that is administered to entry-level firefighter candidates as part of the selection process (the “Medical Exam”) from having a disparate impact on black and Hispanic candidates. Part IV summarizes developments relating to the FDNY’s process for reviewing the character and background of firefighter candidates, including efforts to detect and prevent any disparate impact resulting from that process. Part V reports on the demographics of the most recently graduated class from the Fire Academy, as well as the status

of the active Civil Service Lists. Part VI reports on the Monitor's ongoing review and assessment of the FDNY's Equal Employment Opportunity ("EEO") function, including analysis of existing EEO policies and practices, training, and the process for investigating EEO complaints. The Monitor also has continued monitoring the City's investigations of instances of alleged retaliation. Part VII summarizes a range of additional issues addressed by the Monitor and the Parties during the period covered by this Report.

### **I. Recruitment, Attrition Mitigation, and Related Issues**

Over the past three months, the Monitor has continued to review and oversee the FDNY's ongoing efforts to improve its programs for the recruitment of black and Hispanic entry-level firefighter candidates. These efforts fall within the Monitor's ongoing oversight of the City's compliance with the Modified Remedial Order, and within the scope of efforts to facilitate and monitor implementation of recruitment actions set forth in the Disparate Treatment Settlement.<sup>1</sup> As part of the Disparate Treatment Settlement, the City agreed to "use best efforts to recruit African-American test-takers for the firefighter civil service exam in proportions closely approximating the representation of age-eligible African American New Yorkers in the city's labor market, plus 3 percent." Stipulation and Order dated June 5, 2015 (Dkt. # 1599) ¶ 1(a). On June 5, 2015, the Court provided its final approval of the settlement, noting that the Court and the Monitor will have the authority to "administer and enforce" the Disparate Treatment Settlement. *Id.* ¶ 4; *see also id.* ¶¶ 9-10; Memorandum & Order dated June 5, 2015 (Dkt. # 1598) at 10.

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<sup>1</sup> The Court previously provided preliminary approval of a proposed settlement of Plaintiffs-Intervenors' disparate treatment claims on April 23, 2014. *See* Order dated April 23, 2014 (Dkt. # 1293).

The Monitor and the Parties have also worked to coordinate the proposed schedule for the next entry-level firefighter examination. The next promotional examination is scheduled to begin in December 2016, and the next open competitive examination is scheduled to begin in September 2017.<sup>2</sup> The application period for the next open competitive examination is currently scheduled to begin in April 2017. The Office of Recruitment and Diversity (“ORD”) has advised that it plans to commence recruitment outreach events approximately one year before the application period for the next examination begins.

**A. General Efforts to Improve Recruitment and Reduce Candidate Attrition**

The Modified Remedial Order requires the City to report on the FDNY’s strategies for recruiting black and Hispanic firefighter candidates, and for the City, the Monitor, and the other Parties to suggest improvements to those strategies. *See* Modified Remedial Order ¶¶ 26, 29. In the course of the monitorship, the Monitor and the Parties have undertaken a thorough and intensive analysis of existing recruitment programs and have recommended a broad range of enhancements designed to further the goals of the Modified Remedial Order and the Disparate Treatment Settlement. *See generally* Monitor’s Recruitment Report to the Court (Dkt. # 1464). These recommendations apply to all aspects of the recruitment process, from initial outreach through the written exam and beyond to broad-based strategic planning, budgeting, and continued data-driven analysis. The City has decided to adopt many of these strategies and has made progress towards these goals in many respects.

1. Ongoing Recruitment Efforts

ORD has previously advised that it plans to commence recruitment outreach events approximately one year before the application period for the open competitive next examination,

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<sup>2</sup> The ongoing process for creating the exams to be administered to promotional and open competitive candidates is discussed in Part II, below.

which is currently scheduled to begin in April 2017. *See* City of New York's Recruitment Report Pursuant to Modified Remedial Order Paragraph 26 (Dkt. # 1166) at 14-15. Accordingly, ORD will need to begin planning for its recruitment efforts in the near future.

The Monitor has continued to review current efforts and plans for the recruitment campaign. Among other things, the City has retained an outside marketing firm to help with the next recruitment campaign; this firm was previously used by the New York City Police Department to assist in its recruitment efforts.

As the next recruitment campaign and examination cycle draw closer, the City will need to intensify the planning and execution of its efforts to attract a greater number of black and Hispanic candidates who are likely to pass the exam and qualify for further screening by the FDNY. Among other things, ORD must continue its ongoing outreach efforts in relevant communities within the City, as well as work towards the completion of a data-driven analysis of past recruitment techniques and the design and implementation of improvements in the FDNY's ability to gather and analyze relevant data.

At this time, many of ORD's recruitment strategies are still being developed, and the timeline for ORD's recruitment campaign has not yet been finalized. As these plans and schedules become more specific, the Monitor will focus more intently on specific recruitment programs and techniques. Toward that end, the Monitor will convene a meeting regarding recruitment with ORD, the City, and the other Parties on June 23, 2015. The goal of the meeting will be to understand and discuss the details of ORD's plans for its next recruitment campaign, including (1) current marketing and outreach efforts, (2) the details of how ORD will incorporate data analysis in its recruitment campaigns and the metrics by which the recruitment efforts will

be evaluated, and (3) specific activities under consideration for each stage of the recruitment process.

2. Attrition Mitigation Efforts

The Modified Remedial Order requires the City, in consultation with the Monitor and the Parties, to implement a plan to “mitigate and diminish rates of voluntary candidate attrition between different steps of the City’s process for the selection of entry-level firefighters.”

Modified Remedial Order ¶ 31. During the monitorship, the City has initiated several important attrition mitigation programs, including the Firefighter Candidate Mentorship Program, the Communications and Social Media Program, and the Candidate Physical Ability Training Prep Program (the “CPAT Prep Program”). As discussed in prior reports, the Firefighter Candidate Mentorship Program pairs entry-level firefighter candidates with veteran uniformed members of the FDNY, who work with the candidates from the beginning of the hiring process through the Fire Academy. The Communications and Social Media Program was created by ORD to expand outreach and increase communication with candidates and consists of ongoing e-mail alerts, monthly e-mail newsletters, and postings on all Join FDNY social media accounts. ORD’s CPAT Prep Program consists of a free, 12-week physical preparation program offered to entry-level firefighter candidates prior to the administration of the CPAT.

Each of these initiatives will be particularly important during the next recruitment campaign for entry-level firefighter candidates. The Monitor will continue to evaluate the progress made by these programs as the launch of that campaign draws near. In this context, the City is encouraged to consult and collaborate with affinity groups such as the Vulcan Society and the Hispanic Society, who can bring valuable perspectives and information to bear on issues relating to attrition.



The Monitor and the Parties also continue efforts both to minimize voluntary attrition and identify and address errors or improprieties in the selection process for the remaining candidates on the current hiring lists, which include the remaining Priority Hire candidates.<sup>3</sup> There are 57 eligible Priority Hire candidates remaining on the current hiring lists, of whom 32 are black and 25 are Hispanic. There are also 25 promotional hire candidates and 38,570 open competitive candidates who remain eligible for consideration. Based on information provided by the City on an ongoing basis, as well as inquiries from candidates to the United States or Plaintiffs-Intervenors, the Parties frequently raise issues regarding individual candidates who may have been incorrectly disqualified or otherwise negatively impacted by the selection process. The Monitor facilitates discussion and, in nearly every case, resolution of these issues during weekly calls and ongoing correspondence with the Parties. If the Parties are not able to resolve such issues, the Monitor is empowered to file with the Court a recommendation for a formal resolution of the dispute. *See* Modified Remedial Order ¶ 51.

### 3. Data Collection and Analysis

Throughout the course of the monitorship, the Monitor has consistently emphasized the need for thorough collection and analysis of data and the development of clear metrics by which the FDNY's recruitment efforts may be evaluated. *See, e.g.*, Monitor's Eighth Periodic Report (Dkt. # 1412) at 8-10; Monitor's Fifth Periodic Report (Dkt. # 1198) at 9-13; Monitor's Second Periodic Report (Dkt. # 892) at 16; Monitor's First Periodic Report (Dkt. # 823) at 20. The Monitor previously met with members of the FDNY's Data Analytics Unit (also referred to herein as the "Unit") in July 2014, at which time the Unit presented some of its work to the

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<sup>3</sup> The term "Priority Hire candidate" describes candidates who were determined by the Court to be eligible for priority hiring relief pursuant to the Court's Final Relief Order (Dkt. # 1012). To be hired as firefighters, Priority Hire candidates must successfully complete the same screening process as all other entry-level firefighters.

Monitor and the other Parties as part of a broader push to increase the use of data in the FDNY's recruitment process. The City has recently advised the Monitor that there has been significant turnover within the Unit, with many of the previous members of the Unit who had undertaken projects related to attrition mitigation and recruitment departing. Consequently, several new members have recently joined the Data Analytics Unit, and the City plans on hiring additional personnel in the near future.

The Monitor and the other Parties recently met with current members of the FDNY's Data Analytics Unit on May 13, 2015, and will meet with them again on June 18, 2015, to discuss the Unit's ongoing and future projects involving recruitment, attrition mitigation, and EEO issues. Among other things, the Data Analytics Unit remains focused on completing an end-to-end database through which the progress of each entry-level firefighter candidate can be tracked from the initial expression of interest, through the recruitment process, to the Academy. The Monitor will work with the City and the other Parties to set a timeline for this project that will allow the database to be useful in planning the next recruitment campaign. The Data Analytics Unit also expressed its ability to take on other projects with the goal of analyzing and improving diversity within the FDNY, and the Monitor anticipates working closely with the FDNY on those initiatives.

**B. Settlement Working Group**

As discussed in prior reports by the Monitor, the City and the Parties have formed a Working Group pursuant to the settlement of the Plaintiffs-Intervenors' disparate treatment claims agreed to by the Parties on March 18, 2014 and approved by the Court on June 5, 2015 (the "Disparate Treatment Settlement"). *See* Stipulation and Order (Dkt. # 1599) at 2-3; *see also* Memorandum & Order (Dkt. # 1598). The Working Group, which was formed in October of 2014, is comprised of representatives from the FDNY, the City's Law and Education

Departments, the Department of Citywide Administrative Services (“DCAS”), as well as individuals from the FDNY, the Vulcan Society, the United States, and the City University of New York (“CUNY”) 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.” Stipulation and Order ¶ 1(e). These opportunities could include, among other initiatives, “the creation of a Fire Cadet title or special credit for completion of job-related fire science courses.”

*Id.*

Over the last 90 days, the Monitor has facilitated meetings and helped to coordinate the development of a number of specific Working Group initiatives. Much of the focus has been on gaining State Civil Service approval for the creation of a Fire Cadet title, with individuals in that title qualifying for a promotional exam to firefighter. A primary goal of this initiative is to develop a comprehensive program to attract, train, and mentor a contingent of motivated, high-caliber candidates. The Parties have worked hard to finalize the details of this program, taking into consideration factors such as: (i) the size and frequency of Cadet classes needed in order to establish a critical mass of participants that would help fulfill the purposes of the Disparate Treatment Settlement; and (ii) the availability of internal FDNY resources such as facilities and instructors that can be used to administer the program. In addition to the work done by the Parties, DCAS has been instrumental in moving this project forward.

The Working Group is also continuing to consider initiatives at the high school, college, and community college levels that leverage recruitment and faculty resources to attract and mentor students to take a fire science curricula and seek employment with the FDNY. Members of the Working Group from CUNY’s faculty and administration have been instrumental in providing guidance on existing CUNY programs that can be used for these initiatives, and on

additional programs that could be developed in furtherance of these goals. Such initiatives could be helpful in fostering a network of support for qualified and interested individuals who may not have the benefit of the “friends and family” support networks that the Court found lacking in the recruitment, application, and screening process for black and Hispanic entry-level firefighter candidates.

The Monitor anticipates that the Working Group will continue to refine and implement detailed proposals for these initiatives.

**C. Meetings with the CDIO and Diversity Advocate**

The Monitor has continued to engage in meetings and discussions with the FDNY’s Chief Diversity and Inclusion Officer (the “CDIO”), Deputy Commissioner Pamela Lassiter, whose purview includes supervision over the FDNY’s Equal Employment Opportunity office (the “EEO Office”) and ORD. In addition to participating in the Parties’ weekly meetings, the CDIO has also taken a role in the Working Group’s efforts. This has included developing and presenting FDNY proposals for the Cadet Title and other initiatives. The FDNY’s Diversity Advocate, Lieutenant Michael Marshall, who reports to the CDIO, has also been an active participant in meetings with the Monitor and the Parties. Pursuant to the terms of the Disparate Treatment Settlement, the Diversity Advocate is empowered to raise concerns relating to fairness, transparency, and respect for firefighter candidates from the commencement of the hiring process and through their training in the Fire Academy. *See* Stipulation and Order at 2-3. The Diversity Advocate has also participated in Working Group meetings, and taken part in additional “special purpose” meetings concerning specific aspects of the entry-level hiring process.

## **II. Next Examination**

### **A. Current Status**

As discussed, the next open competitive examination is scheduled to begin in September 2017, and the application period for that exam is currently scheduled to begin in April 2017. The City and its testing consultant, PSI Services LLC (“PSI”), in coordination with the Monitor and the other Parties, continue to work on the development of the next examination. Based upon the current project plan for the development of the next examination, the examination forms must be finalized by approximately July 2016.

The most recent open competitive computer-based exam for the position of entry-level firefighters, known as Exam 2000, was given in 2011. Exam 2000 was developed pursuant to the Court’s determination that prior written examinations had a disparate impact on black and Hispanic candidates that was not justified by job-relatedness or consistent with business necessity. *See* Monitor’s Eleventh Periodic Report at 10; Monitor’s Tenth Periodic Report (Dkt. # 1533) at 5-6. Exam 2000 was developed and validated by the City’s testing consultant, PSI, in consultation with the other Parties and their own experts, and the process was overseen by then-Special Master Mary Jo White.

As previously discussed, the next written open competitive and promotional exams for the position of entry-level firefighter will be “equivalent forms” of Exam 2000, meaning they will consist of distinct sets of questions that meet the specifications of the examination that was validated and administered in 2011 pursuant to the Court’s approval. *See, e.g.*, Monitor’s Ninth Periodic Report (Dkt. # 1462) at 7-11. PSI developed several equivalent forms prior to the 2011 examination, two of which were not used at that time. For the next examination cycle, the City plans to use the leftover forms from 2011 and several new equivalent forms that are currently being developed by PSI.

Pursuant to Paragraph 7 of the Modified Remedial Order, the Monitor is responsible for oversight of the next computer-based examination. To assist in that effort, the Monitor retained Special Master White's testing expert, Dr. Shane Pittman of The Pittman McLenagan Group, L.C. Over the past three months, the Monitor has continued to consult with Dr. Pittman regarding the development of additional equivalent forms and other issues relating to the next exam cycle. Dr. Pittman has similarly continued to have discussions with PSI to provide oversight and assistance in the execution of its test development plan.

As the equivalent forms are developed and other steps toward the next written examination move forward, the Monitor will continue to communicate with a sub-group composed of counsel and experts to each of the Parties, with a specific focus on issues related to the development of the examinations.

**B. Next Steps**

As described in detail in the Monitor's previous Periodic Reports, the eligible lists of open competitive and Priority Hire candidates who took Exam 2000 will expire on June 26, 2017, and the last class of entry-level firefighters drawn from the current eligible list will enter the Academy in June or July of 2017. *See, e.g.*, Monitor's Eleventh Periodic Report at 11; Monitor's Tenth Periodic Report at 6. Accordingly, the City, with its testing expert, PSI, has created a plan 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 also continues to anticipate administering the next open competitive examination beginning in September 2017 and appointing the first Academy class from the next open competitive list in December 2018. The Monitor understands that the City's plans for test development and administration for both the promotional and open competitive examinations remain on schedule.

Rather than redevelop new examinations entirely, the City and its testing expert, PSI, plan on developing equivalent forms to the previous promotional and open competitive examinations. Accordingly, the City and PSI have created a detailed project plan, incorporating input from the Monitor and the other Parties, to create a timetable for the development of the next examination. The most recent steps undertaken by the City and PSI include: undertaking a confirmatory review of the FDNY job information; reviewing specifications from previous examinations and developing test specifications for the next examination; and preparing to develop the content of the examination. The City is currently developing the exam content for the next examination, including writing new scripts for the examination, creating new training guides for the examination, and preparing to develop video production and narration components for the next examination. The Monitor and its consultant, Dr. Pittman, have been consulted as the City and PSI have undertaken these efforts.

Additionally, the Monitor and the Parties have continued to work towards reaching a consensus on the level and scope of the involvement of the United States and the Plaintiffs-Intervenors in the test development process. As noted in the Monitor's Eleventh Periodic Report, the United States offered additional suggestions to the City and PSI regarding the examination process and requested that the City update the other Parties at specific junctures in the examination development process. *See* Monitor's Eleventh Periodic Report at 11, n. 4. The City and the Monitor have proposed additional milestones for the involvement of the Parties in the test development process, and the United States and Plaintiffs-Intervenors have responded to that proposal with additional suggestions. The Monitor continues to believe that the City and the other Parties will be able to develop a protocol under which all of the necessary stakeholders

receive substantive updates and are able to provide comments at the relevant milestones in the examination development process, without delaying the completion of the equivalent forms.

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

As discussed in previous Periodic Reports, the Monitor has been engaged over the last year in a review of, and ongoing dialogue with the Parties regarding, allegations that one or more portions of the Medical Exam have a disparate impact on black or Hispanic candidates that is not job related or justified by business necessity. *See* Monitor's Eleventh Periodic Report at 13-16; Monitor's Tenth Periodic Report at 13-16; Monitor's Ninth Periodic Report at 3-6.<sup>4</sup> As the Monitor has previously reported, the Plaintiffs-Intervenors raised concerns regarding the possible disparate impact of the Medical Exam on black candidates, and the United States 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.<sup>5</sup>

As further discussed in prior reports, the Monitor has been engaged in its own intensive examination of these issues, and the initial phases of that investigation have been completed. *See* Monitor's Eleventh Periodic Report at 14; Monitor's Tenth Periodic Report at 13-14; Monitor's Ninth Periodic Report at 5-6. The City's record keeping practices during the relevant periods grouped certain types of disqualifications together in a way that did not permit a complete analysis of what factors contributed to discrepancies in the results on the Medical Exam among

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<sup>4</sup> The Modified Remedial Order requires the City to "with reasonable diligence, take all steps necessary to eliminate all policies and procedures that are not job related or required by business necessity and either have a disparate impact on black and Hispanic firefighter candidates or perpetuate the effects of said disparate impact." Modified Remedial Order ¶ 19; *see also id.* ¶ 15 (forbidding the City to use "as part of any entry-level firefighter selection process, any examination that in any way results in a disparate impact upon black or Hispanic applicants" subject to limited exceptions).

<sup>5</sup> As discussed, in the Monitor's Tenth Periodic Report, the United States and the Plaintiffs-Intervenors also asked for certain information from the City related to the Medical Exam. The City provided most of this information pursuant to an agreement facilitated by the Monitor. Monitor's Tenth Periodic Report at 13.



black and Hispanic candidates. Accordingly, the Monitor requested certain additional information described in the Eleventh Periodic Report to permit more in-depth analysis. The Monitor used the information available at the time to develop a series of measures that appear likely to mitigate the causes of potential disparate impact as well as make the Medical Exam process easier to navigate. Monitor's Eleventh Periodic Report at 15. After a series of meetings and conference calls with all of the Parties (including members of the FDNY's Bureau of Health Services ("BHS")), the Monitor and the Parties agreed on a series of such initiatives. Monitor's Eleventh Periodic Report at 15. Those initiatives, and the status of their implementation, are discussed below in Subsection A.

The Monitor's in-depth analysis of the Medical Exam has continued with respect to certain elements of the Medical Exam. These efforts are discussed in Subsection B.

Finally, the Parties have continued to work on the BHS guidance document to inform candidates about the Medical Exam, which the City is preparing pursuant to the Disparate Treatment Settlement. *See* Monitor's Eleventh Periodic Report at 16; Monitor's Tenth Periodic Report at 14-15; Monitor's Ninth Periodic Report at 14; Stipulation and Order (Dkt. # 1599) ¶ 1(c). An update on the development of that document is provided in Subsection C.

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

As noted above, the Monitor has worked with the Parties to devise, reach agreement upon, and begin to implement measures that (based on the information available), appear likely to mitigate possible causes of disparate impact as well as make the Medical Exam process easier to navigate and complete for all candidates. As previously described in the Eleventh Periodic Report, the Monitor and the Parties agreed in principle, that the City will:

- Conduct a validation study of the stairmill exam;

- Provide candidates with more information;
- Pay for additional testing in connection with the stairmill;
- 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 Eleventh Periodic Report at 15.

Over the past three months, the Monitor and the Parties have worked on implementing these initiatives. Some of the initiatives, such as permitting the Diversity Advocate to observe the stairmill exam, are already underway. Other initiatives, like conducting a validation study with respect to the stairmill exam, require evaluation of more alternatives and are still in process.

The following table summarizes the status of all of the initiatives.

**Status of Medical Exam Initiatives**

<b>Initiative</b>	<b>Status</b>
Conduct a validation study of the stairmill exam	The Monitor has held discussions with the City about the protocol for this study. A draft of the protocol is being developed for circulation to the other Parties for comment in advance of commencing the validation study.

Initiative	Status
Provide candidates with more information	The Monitor and the Parties have developed a set of frequently asked questions (“FAQs”) for candidates regarding the Medical Exam as well as a script for one or more videos to explain and demonstrate portions of the Medical Exam to entry-level firefighter candidates. <sup>6</sup> As noted above, the FDNY also has prepared a guidance document to summarize the stages and tests that make up the Medical Exam.
Pay for additional testing in connection with the stairmill / fund other diagnostic testing	The FDNY has begun providing follow-up blood testing to candidates free of charge when needed. The FDNY is working on obtaining adequate staffing and resolving logistical issues with respect to implementing this testing.
Allow certain FDNY personnel to observe the stairmill exam	The Diversity Advocate was designated to observe the stairmill portion of the Medical Exam with agreement of all Parties and has begun observing administrations of the stairmill exam.
Track and record specific data regarding the Medical Exam	The City is working on developing a new database to track certain information about the Medical Exam. The City has informed the Monitor and the other Parties that information about the design of the database, including the specific categories of data to be collected, will be provided in the near term, and that the database is anticipated to be up and running during the summer or fall of 2015; in the meantime, the Monitor will continue to maintain the database discussed below in Subsection B.

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<sup>6</sup> The Monitor expects that the FAQs and the video(s) will work in tandem with the BHS guidance document being prepared pursuant to the Disparate Treatment Settlement to provide all candidates with sufficient information about the Medical Exam.

Initiative	Status
Retest some candidates	The Parties are discussing the criteria to be used in determining which candidates will be eligible for retesting.

The Monitor is continuing to work with the Parties toward full implementation of these agreed initiatives. The finalization and implementation of the initiatives agreed upon above will likely be a significant focus of the next three months and beyond.

**B. Continuing Analysis**

The Monitor has also been continuing its analysis of the Medical Exam. As discussed in previous Periodic Reports, the Monitor, among other activities, compiled and analyzed data related to the Medical Exam, reviewed detailed information regarding the FDNY’s Medical Exam, met with representatives of BHS, and reviewed national standards and the practices of fire departments in other large metropolitan areas. Monitor’s Eleventh Periodic Report at 14; Monitor’s Tenth Periodic Report at 14. Based on this analysis, the Monitor was able to determine which portions of the Medical Exam black and Hispanic candidates appeared to fail in disproportionate numbers, and suggest potential remedies. Due to FDNY record keeping, however, the Monitor could not conduct a detailed analysis with respect to candidates who received Notices of Disqualification citing a “failure to cooperate” with lab tests (which could connote failing to provide test results at the candidate’s own expense for one of what could be multiple rounds of costly testing or failing one or more tests after taking them) and candidates who received Notices of Disqualification based on pulmonary testing (which likewise did not differentiate among different reasons for receiving a failure notice).

To better understand this issue, the Monitor requested and obtained from the City medical files for the over one hundred candidates who fall into one or both of the two above groups. The

Monitor and its expert consultants reviewed each of these files to determine in greater detail what caused the candidates to receive Notices of Disqualification.<sup>7</sup> The Monitor is currently refining this data to assist in identifying other initiatives that might help reduce any alleged disparate impact arising out of the Medical Exam. The Monitor expects to review the results of this analysis with the Parties in the coming weeks and months.

### **C. BHS Guidance Document**

The Disparate Treatment Settlement requires the City to provide firefighter candidates with complete information regarding the components of the Medical Exam and the standards that must be met to pass each component of the Medical Exam. *See* Stipulation and Order (Dkt. # 1599) ¶ 1(c). Complete and clear information will help firefighter candidates know what to expect regarding the Medical Exam and how to prepare so as to maximize their chances of success. As discussed in the Monitor's Ninth, Tenth, and Eleventh Periodic Reports, the City has prepared a summary of the Medical Exam that is to be included in the intake packet distributed to candidates, to which the Monitor and the other Parties have provided comments. *See* Monitor's Eleventh Periodic Report at 16; Monitor's Tenth Periodic Report at 14-15; Monitor's Ninth Periodic Report at 14. During the last three months, the Monitor and the Parties have continued to work on this document. The City has pledged to use its best efforts to finalize the guidance document so it will be available to provide candidates for the upcoming Academy class with greatly improved information before they take the Medical Exam.

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<sup>7</sup> A limited number of these candidates were either subsequently deemed qualified or allowed to retake part of the Medical Exam.

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

In the three months since the Monitor filed its Eleventh Periodic Report, 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 administered by the Candidate Investigation Division (“CID”) and Personnel Review Board (“PRB”). Prior reports by the Monitor describe the findings of fact that prompted the Court to include certain provisions regarding the character review process in the Modified Remedial Order and remedial efforts undertaken to date. *See, e.g.*, Monitor’s First Interim Report to the Court (Dkt. # 1023); Monitor’s Eleventh Periodic Report at 16-19; Monitor’s Tenth Periodic Report at 16-18.

##### **A. Review of CID and PRB Performance**

The Monitor has neared completion of an intensive statistical and evaluative review of the character review process under the guidelines developed by the Parties and the Monitor pursuant to the Modified Remedial Order. *See generally* Monitor’s First Interim Report to the Court. This analysis will be incorporated into the Monitor’s report on the performance of the CID and PRB pursuant to Paragraph 40 of the Modified Remedial Order. The Monitor’s review has also taken into account the allegation raised by Plaintiffs-Intervenors and the United States that the character review process has had a disparate impact on black and Hispanic candidates. Specifically, as described in the Monitor’s Ninth, Tenth, and Eleventh Periodic Reports, Plaintiffs-Intervenors and the United States assert that the CID and PRB processes for candidates who took Exams 2000 and 2500 has resulted in the disqualification of a statistically disproportionate number of black and Hispanic candidates, as well as Priority Hire candidates. *See* Monitor’s Ninth Periodic Report at 3-6; Monitor’s Tenth Periodic Report at 16-17; Monitor’s Eleventh Periodic Report at 17-18.

The Monitor's ongoing assessment has several components. First, the Monitor has collected a large amount of data regarding the character review process, demographic information for each candidate considered by the CID and each candidate referred to the PRB, CID records regarding the outcome of the CID and PRB evaluations, and the individual candidate files for all candidates referred to the PRB. The Monitor collated and categorized this data to create a database that it recently shared with the Parties. Working with its expert consultants, Manitou, Inc., the Monitor has undertaken a statistical analysis of the data to assess various aspects of the character screening process, including its relative impact on candidates of different racial and ethnic groups.

Further, in accordance with Paragraph 39 of the Modified Remedial Order, the Monitor has attended substantially all meetings of the PRB in the period since the stay of the Court's original Remedial Order was lifted on May 14, 2013. The Monitor's observations of those meetings will be incorporated in the "critiqu[e] [of] the performance of the PRB" and related recommendations in the report on the character review process pursuant to the Modified Remedial Order. Modified Remedial Order ¶ 40. To help ensure that any recommended changes to the CID and PRB process are targeted, effective, and "consistent with the requirements of all applicable equal employment opportunity laws and policies," the Monitor has also conducted a broad review of best practices in character screening used by other fire departments and government agencies. *Id.*

With the same goal in mind, the Monitor recently met with Plaintiffs-Intervenors and the United States, and will meet in the coming weeks with the City and FDNY, to discuss the Monitor's analysis and recommendations and solicit the Parties' input. As part of that process, Plaintiffs-Intervenors and the United States have provided a series of recommendations for the

Monitor's consideration, including recommendations to streamline the Civil Service Commission appeals process and to limit the information that would trigger the initiation of the PRB processes. The Monitor hopes to follow a process similar to that used in addressing concerns regarding the Medical Exam, which yielded a number of concrete initiatives that the City is in the process of implementing.

**B. Audit of PRB Documentation**

The Monitor recently asked the City to provide any documentation created or collected by the FDNY related to subsections 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). Those provisions of the Guidelines were intended to address the Court's directive that the FDNY take steps to ensure that the PRB process is not tainted by any outside influence, including by friends or family of any candidate reviewed. The documentation includes reporting of any incidents relating to prohibited contact or communication with PRB members as well as any conflicts of interest of PRB members with respect to particular candidates reviewed since the guidelines went into effect. The Monitor intends to audit these documents periodically going forward.

**V. Data Regarding Recent and Upcoming Hiring**

This section summarizes demographic and other information regarding candidates who have either graduated from the FDNY Fire Academy in recent classes of probationary firefighters or who took Exam 2000 and remain eligible for consideration on the active civil service list and are likely to be called for further screening.



**A. Recent Academy Classes**

The graduation ceremony for the class of probationary firefighters who entered the Academy in December 2014 (the “December 2014 Class”) took place on May 5, 2015, after eighteen weeks of rigorous training. The class included 305 probationary firefighters, of whom 39.4% were either black or Hispanic and 3% were Priority Hires. FDNY Commissioner Daniel A. Nigro made the following statement regarding the December 2014 class:

The FDNY has thrived for 150 years because young men and women like the outstanding Probationary Firefighters we are celebrating step forward to bravely protect life and property in our great city. This group of Probies joins the Department at a time when we are busier than ever before – responding to 1.6 million emergencies last year alone – and as we continue to better represent the city we so proudly serve.

FDNY Media Advisory, May 2, 2015.<sup>8</sup>

Racial Composition. Table 1 illustrates the proportion of black and Hispanic probationary firefighters in each of the Academy classes that has included candidates who took Exam 2000.

<b>Table 1: Academy Graduates by Race</b>									
	<b>Black</b>		<b>Hispanic</b>		<b>White</b>		<b>Other</b>		<b>Total</b>
	<b>#</b>	<b>%</b>	<b>#</b>	<b>%</b>	<b>#</b>	<b>%</b>	<b>#</b>	<b>%</b>	<b>#</b>
<b>July 2013</b>	58	24.0%	87	36.0%	92	38.0%	5	2.0%	242
<b>Jan. 2014</b>	48	16.8%	72	25.2%	157	54.9%	9	3.1%	286
<b>July 2014</b>	41	14.6%	56	20.0%	176	62.9%	7	2.5%	280
<b>Dec. 2014</b>	50	16.4%	70	23.0%	173	56.7%	12	3.9%	305

Table 2 shows the proportion of each recent Academy class comprised of Priority Hire candidates, promotional candidates (candidates employed by Emergency Medical Services who took Exam 2500), and open competitive candidates (candidates who took Exam 2000 and were not Priority Hires).

<sup>8</sup> Available at [http://www.nyc.gov/html/fdny/html/pr/2015/050415\\_1915.shtml](http://www.nyc.gov/html/fdny/html/pr/2015/050415_1915.shtml).

<b>Table 2: Academy Classes by Category</b>							
	<b>Priority Hire</b>		<b>Promotional</b>		<b>Open Competitive</b>		<b>Total</b>
	<b>#</b>	<b>%</b>	<b>#</b>	<b>%</b>	<b>#</b>	<b>%</b>	<b>#</b>
<b>July 2013</b>	77	31.8%	142	58.7%	23	9.5%	242
<b>Jan. 2014</b>	31	10.8%	19	6.6%	236	82.5%	286
<b>July 2014</b>	7	2.5%	26	9.3%	247	88.2%	280
<b>Dec. 2014</b>	9	3.0%	18	5.9%	278	91.1%	305

The percentages of black and Hispanic candidates graduating from the Academy decreased after the July 2013 Class but subsequently leveled off, and those figures were slightly higher in the December 2014 Class than in the preceding class. At the same time, the proportion of Priority Hires decreased substantially after both the July 2013 Class and the January 2014 Class, and it has remained low.

Resignations and Terminations. While the Academy is in session, the City regularly provides the Monitor and the other Parties with data regarding probationary firefighters who were terminated or resigned from the Academy, including the reasons for the termination or resignation. There were a total of 10 resignations and terminations in the December 2014 class, including 4 white probationary firefighters, 4 black probationary firefighters, and 2 Hispanic probationary firefighters. Four of these probationary firefighters were Priority Hires. Table 3 shows resignations and terminations by race for each Academy class that has included candidates who took Exam 2000.

<b>Table 3: Resignations and Terminations</b>										
	<b>Black</b>		<b>Hispanic</b>		<b>White</b>		<b>Other</b>		<b>Total</b>	
	<b>#</b>	<b>%*</b>	<b>#</b>	<b>%*</b>	<b>#</b>	<b>%*</b>	<b>#</b>	<b>%*</b>	<b>#</b>	<b>%**</b>
<b>July 2013</b>	28	37%	31	41%	14	18%	3	4%	76	23.9%
<b>Jan. 2014</b>	3	12%	14	54%	9	35%	0	0%	26	8.1%
<b>July 2014</b>	0	0%	2	14%	11	79%	1	7%	14	4.8%
<b>Dec. 2014</b>	4	40%	2	20%	4	40%	0	0%	10	3.1%
<b>Combined</b>	35	28%	49	39%	38	30%	4	3%	126	10.1%

\* These columns show resignations and terminations for each racial category as a percentage of all resignations and terminations in each class.

\*\* This column shows the number of overall resignations in each class as a percentage of the number of probationary firefighters who entered the Academy.

The December 2014 class had the fewest resignations and terminations both in absolute numbers (10) and as a percentage of the number of probationary firefighters who entered the Academy. The percentages of black and Hispanic candidates who resigned or were terminated varied by class, although the sample sizes are too small to provide a meaningful basis for comparison.

**B. Civil Service List**

A total of 57 Priority Hires remain on the current active civil service list and are thus still eligible for consideration. Of these 57 candidates, 32 are black and 25 are Hispanic. A total of 57 black Priority Hire candidates and 67 Hispanic Priority Hire candidates have been appointed in the last 4 classes. Twenty-five promotional hire candidates also remain eligible for consideration, and 38,570 open competitive candidates who took Exam 2000 remain eligible for consideration.

**C. June 2015 Class**

The FDNY is actively developing the roster for the next class, which is scheduled to begin at the Fire Academy on June 29, 2015. The Monitor and the Parties are evaluating that selection process on an ongoing basis as part of the overall review of the hiring process as set forth in the Modified Remedial Order.

**VI. EEO Compliance and Retaliation Investigations**

In accordance with the Modified Remedial Order, the Monitor has been conducting an ongoing evaluation of the FDNY's EEO compliance activities; and the Monitor and the Parties have recommended a range of enhancements to the EEO policies and practices. *See generally* Monitor's EEO Report to the Court (Dkt. # 1463). That work is ongoing, although continued changes in relevant personnel within the FDNY have somewhat slowed the implementation of

some of the enhancements. Based on regular reporting by the City and discussions among the Parties, the Monitor also continues to observe and evaluate the FDNY's investigation of a number of alleged instances of retaliation against firefighters who participated in or benefited from the lawsuit in this case.

**A. EEO Compliance Activities**

Prior reports from the Monitor (and the City) have identified several categories of EEO activities affected by the Modified Remedial Order, including training, investigations of EEO complaints, accountability for EEO issues, FDNY culture, record-keeping, and overall strategic planning. *See generally* Monitor's EEO Report to the Court. A number of initiatives and recommendations related to these areas have been under discussion or in development since at least July 2013 and have been the subject of several previous meetings, reports, and recommendations. *See id.*; *see also* City of New York's EEO Report Pursuant to Modified Remedial Order Paragraph 43 (Dkt. # 1167).

On April 22, 2015, Deputy Commissioner and Chief Diversity and Inclusion Officer Pamela Lassiter and other representatives from the City met with the Monitor and the other Parties to provide an update on several topics within her areas of responsibility, including progress on initiatives relating to the key EEO areas described above. At that meeting, Deputy Commissioner Lassiter described efforts to expand diversity and inclusion training, including plans to implement diversity training using an outside consultant hired by the City over the course of the next year. Deputy Commissioner Lassiter also reported that the City intends to work with representatives of FDNY affinity groups to receive input on an ongoing basis.

The Parties and Monitor also asked Deputy Commissioner Lassiter about other long-standing issues and recommendations related to EEO compliance. In addition to diversity and inclusion training initiatives, these include plans and recommendations to enhance accountability

for EEO issues for FDNY officers; to improve record-keeping; to revise the process for investigating and otherwise addressing EEO-related complaints; and, more broadly, to create a strategic plan for department-wide EEO enhancements. *See generally* Monitor's EEO Report to the Court.

Changes in leadership of the EEO Office have slowed progress in some of these areas. The office currently has vacancies in the top two posts in the office – Assistant Commissioner for EEO and Deputy Director for EEO – which the City is seeking to fill. In the interim, Deputy Commissioner Pamela Lassiter is overseeing the EEO Office, having joined the FDNY in January 2015. *See* Monitor's Eleventh Periodic Report at 22; Monitor's Tenth Periodic Report at 4. However, even before the departure of the prior Assistant Commissioner and Deputy Director for EEO, the Monitor expressed concern over the status of the FDNY's compliance with the EEO-related provisions of the Modified Remedial Order and the pace of implementation of various planned initiatives. *See* Monitor's EEO Report to the Court at 3, 32-52.

The Monitor plans to conduct a special purpose meeting on EEO matters as soon as possible after the appointment of a new Assistant Commissioner or Deputy Director. At that time, the Monitor will review the City's progress on its initiatives and develop further recommendations regarding training, accountability, messaging and "tone at the top," investigations, and strategic EEO planning. To help ensure that the planned enhancements are effective and properly targeted, the Monitor has continued to confer with its consultants and survey best EEO practices followed by other fire departments and government agencies. A particular area of recent focus has been potential steps to address the deficiencies and delays that have been identified in the City's investigation process.

**B. EEO Retaliation Investigations**

The City has continued to update the Monitor and the Parties on the status of ongoing EEO retaliation investigations by the EEO Office, including certain investigations jointly conducted with the FDNY's Bureau of Investigations and Trials ("BITS").

The City has provided the Monitor, the United States, and the Plaintiffs-Intervenors with documentation regarding several recent investigations. The City has been responsive to requests for such information from the Monitor, Plaintiffs-Intervenors and the United States, and has been open to receiving comments and suggestions regarding these investigations. However, many of the same concerns previously expressed by the Court, the Monitor, and Plaintiffs persist regarding EEO investigations, including concerns about the length of investigations and negative perceptions of the EEO process among FDNY personnel. *See* Monitor's EEO Report to the Court at 8, 52. The United States and Plaintiffs-Intervenors have also raised concerns regarding the process and outcome of certain specific investigations into alleged instances of retaliation. The need for a meaningful evaluation of the investigative process, and potentially for substantive enhancements, should remain a priority of the EEO Office and its incoming staff.

The City has informed the Monitor and the Parties that it has initiated steps to address some of these concerns, and will provide further detail in the near future. The Monitor will assess these initiatives as part of its ongoing effort to provide specific feedback and recommendations on the FDNY's EEO compliance activities, particularly as they relate to allegations of systemic EEO retaliation in connection with the underlying litigation.

## VII. Additional Issues

In addition to the activities discussed above, the Monitor has been involved in a range of additional issues over the past three months. The most notable of these are described below.

Data Collection and Analysis. One of the main themes in the Monitor's periodic reports has been the importance of collecting and analyzing data regarding the FDNY's recruitment, attrition mitigation, and EEO activities. *See, e.g.*, Monitor's First Periodic Report at 20. It is the Monitor's hope that the City will eventually implement a robust system to track recruitment, attrition, and EEO issues via a single integrated solution that will allow issues to be tracked and understood in real time. As discussed above, the Monitor, together with counsel for all of the Parties, recently met with the FDNY's Data Analytics Unit to discuss these issues. *See supra* § I(A)(3). In the meantime the City has, at the Monitor's request, prepared a series of spreadsheets which track some of this information using information culled from multiple discrete sources of data. *See* Monitor's Ninth Periodic Report at 13. In late February, the City sent the other Parties and the Monitor an updated set of spreadsheets. Over the last few months the Monitor has started analyzing that data to assess the completeness and accuracy of the spreadsheets and to determine what conclusions can be derived using the existing data.

Other Issues. On weekly calls and in correspondence, 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:

- Communications with Priority Hires regarding retroactive seniority benefits, their status as probationary firefighters, and other issues;
- The status of the FDNY's efforts to expedite the processing of candidate appeals;
- Issues about particular candidates' appeals to the Civil Service Commission;
- Terminations of Priority Hires, including the reasons for such terminations and the status of such Priority Hires at the time of termination;

- Other discussions regarding particular claimants, including their interactions with the Fire Department, documents they have received, and their rights and remedies;
- New forms by which the FDNY can rescind previous Notices of Disqualification;
- Information provided to candidates without certificates of good conduct or General Educational Development degrees (GEDs) about how they can restore themselves to the eligible list upon obtaining this required documentation;
- The expected lifetime of the current eligible list;
- The frequency with which both the open competitive and promotional exam will be given going forward;
- Notifications by the City to Plaintiffs-Intervenors and the United States regarding the processing of Priority Hire candidates; and
- Monitoring the resignations of probationary firefighters at the Fire Academy.

Dated: June 16, 2015  
New York, New York

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Mark S. Cohen