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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN W. HUNTER, et al.,

Plaintiffs,

vs.

CITY OF LOS ANGELES,

Defendant.

CASE NOS. CV 92-1897 MMM (CTx)
CV 92-1898 MMM (JGx) ✓

ORDER GRANTING RE INTERVENING PLAINTIFFS' MOTION TO ENFORCE CONSENT DECREE

LATIN AMERICAN LAW ENFORCEMENT ASSOCIATION,

Plaintiff,

vs.

CITY OF LOS ANGELES,

Defendant.

On August 25, 1992, the Honorable A. Wallace Tashima entered a Judgment and Order approving the consent decree and agreement between the plaintiffs in this action and defendant City of Los Angeles ("the City"). On July 25, 2002, the Petersen Law Firm filed an *ex parte* application for an order to show cause why the City should not be held in contempt of the consent decree. The application was filed on behalf of several purported members of the classes protected

(106)

by the consent degree ("the intervening plaintiffs"). The court granted the application and issued an order to show cause on August 12, 2002. Following a hearing on October 21, 2002, the court directed the parties to address the intervening plaintiffs' standing to enforce the consent decree as well as other issues. These were ultimately resolved by stipulation, and the court now proceeds to consider the merits of the application as a consequence.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1992, plaintiffs John Hunter, the Latin American Law Enforcement Association, and the Korean American Law Enforcement Association filed this action against the City of Los Angeles, alleging claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and the California Fair Employment and Housing Act. Plaintiffs contended that the City had discriminated against Hispanic, African American, and Asian American officers employed by the Los Angeles Police Department on the basis of race, color and national origin in promotion, paygrade advancements and assignment to coveted positions, i.e., positions likely to assist in developing the skills and insights necessary to achieve promotion through the ranks.

A. The Consent Decree

On August 25, 1992, Judge A. Wallace Tashima entered a Judgment and Order approving a consent decree and agreement between the parties. The consent decree states that it will remain in effect for fifteen years, unless it is sooner terminated or extended, and provides that the court will retain jurisdiction "until such time as the City's final petition for relief has been granted."[1]

Paragraph 26 of the decree obligates the City to "engage in vigorous good faith efforts to promote African American, Hispanic, and Asian American . . . sworn police officers into position

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[1]Declaration of Gerald M. Sato in Support of Defendant's Response to the O.S.C. Re Contempt ("Sato Decl."), Ex. 1 ("Consent Decree"), ¶ 38. Paragraph 38 provides that plaintiffs may petition for an extension of the fifteen year period "upon a showing that the City has not substantially complied with [the] provisions" of the decree. It further provides that the City "may petition to be relieved of all or part of its obligations under the terms of [the decree] at any time upon a showing of accomplishment of the objectives of the portion of the [decree] from which the City seeks relief." (*Id.*)

openings in the Detective, Sergeant and Lieutenant classifications at or above [stated] annual promotion goals." It establishes, "[f]or each . . . enumerated ethnic group and for each classification," an annual promotion goal of "eighty percent (80%) of the ethnic group's percentage representation among sworn police officers who are in feeder paygrades and who meet then-established minimum requirements for promotion."[2] The decree also imposes on the City a three-year interim promotion goal "to engage in vigorous good faith efforts to promote African American, Hispanic and Asian American . . . officers . . . at a rate equal to or above the mean percentage representation of each enumerated ethnic group within the combined feeder paygrades for each classification during the immediately preceding three-year period."[3] Paragraph 37 specifies, however, that "[n]either the above annual goals, interim goals, nor goal attainment procedures shall be utilized as quotas. Th[e] Consent Decree and Agreement shall not be construed to require or to permit the use of quota relief."[4]

In addition to establishing promotion goals, the decree requires that "[t]he City . . . use its best efforts to secure the consent of the recognized bargaining representative . . . to a modification of the Department's . . . application of the 'Rule of Three Whole Scores.'" The modification was not designed to alter existing practice "[d]uring the first eighteen months of the life of such rosters of eligible candidates," when "the Chief of Police [would] select promotion candidates . . . in order of combined whole score bands, exhausting the candidates in each combined whole score band before selecting candidates from the next lower combined whole score bands."[5] Rather, it was designed to "require the Chief of Police – during the last six months of the two-year life of a roster of eligible candidates for promotion to any of the civil service classifications of Police Detective, Police Sergeant, or Police Lieutenant – to treat as equally

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[2] *Id.*, ¶ 26.

[3] *Id.*, ¶ 27.

[4] *Id.*, ¶ 37.

[5] *Id.*, ¶ 36.

eligible for promotion all applicants certified by the City Personnel Department."[6]

The decree specifies that the City will submit annual reports to plaintiffs on or about September 1 of each year the decree is in effect.[7] The status report is to "consist of a summary which sets forth for each relevant classification, each relevant paygrade, and each category of 'coveted position' . . . the following: (i) the annual goals for each enumerated ethnic group; . . . (iv) the number and percentage of each enumerated ethnic group appointed on an annual and interim basis . . ."[8]

B. The City Charter And The 1993 Meet And Confer Agreement

Section 1010 of the City's Charter, adopted June 14, 1999, is captioned "Three Highest Whole Scores," and provides:

> "The appointing authority of a department shall notify the board when one or more classified positions are to be filled. The general manager of the Personnel Department shall certify to the appointing authority the names and addresses of those eligibles having the three highest whole scores on the register for the class to which the positions belong. The appointing authority shall fill the positions from the names certified by the general manager within 60 days from the date of certification. . . ."[9]

Section 1010 also provides that "[i]f there are less than five available eligibles more than the

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[6] *Id.*

[7] *Id.*, ¶ 42(b).

[8] *Id.*, ¶¶ 42(b)(i), (b)(iv).

[9] Request for Judicial Notice by Asian-American Subclass ("Asian-American Notice"), Ex. B ("Current City Charter"), § 1010(a). An earlier charter, which was in effect from May 2, 1997, to June 30, 2000, stated that the Board of Civil Service Commissioners was to "certify [to the appointing authority of a department] the names and addresses of those eligibles having the three highest whole scores on the register for the class to which said positions belong, and [that] said appointing authority [was to] fill such places from the names certified by said board therefor within thirty days from date of said certification." (*Id.*, Ex. A ("May 2, 1997, City Charter"), §§ 108-109).

number of positions to be filled within a range of three whole scores, the general manager of the Personnel Department shall certify the names and addresses of all available eligibles within such additional number of whole scores as necessary to provide a minimum of five available eligibles more than the number of positions to be filled."[10] It further states that "[i]n consideration of the number of vacancies to be filled and the likely number of available eligibles with a range of three whole scores, the general manager of the Personnel Department may certify the names and addresses of all available eligibles within a range of one or more whole scores whenever a certification is requested by an appointing authority and there are at least five eligibles available with such range over and above the number of positions to be filled."[11]

The Rules of the Board of Civil Service Commissioners provide that "the names of all candidates whose final general average [on a promotional examination] is not less than seventy percent, and who are otherwise eligible, shall be placed upon the register of eligibles for the class for which the examination was given."[12] The Rules further specify that "[e]ligibles in an examination with the same final general average (whole score) will have the same rank in the register of eligibles" and that "all persons with the same whole score will be certified in random order" when the list is certified.[13]

On December 10, 1993, the Los Angeles Police Protective League ("LAPPL") and the Los Angeles Police Department ("LAPD") entered into a Meet and Confer Agreement regarding "Utilization of the Rule of Three Whole Scores for Promotions to Detective, Sergeant and Lieutenant."[14] This agreement, which was intended to carry out the City's obligations under paragraph 36 of the consent decree, governs "the ranking and appointment of candidates certified

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[10]Current City Charter, § 1010(c).

[11]*Id.*, § 1010(d).

[12]Sato Decl., Ex. 3 ("Civil Svc. Commissioner Rules") at 42, § 5.1.

[13]Civil Svc. Commissioner Rules at 42, § 5.3. See also Current City Charter, § 1010(e).

[14]Sato Decl., ¶ 2, Ex. 2 ("Meet and Confer Agreement").

for appointment as a result of [the civil service] examination [process]."[15] It specifies that promotion candidates, after receiving an examination score through the civil service process, will be "rank ordered" within their whole score "on the basis of merit, using job-related criteria applicable to the relevant rank." The ranking is to be accomplished by a three-member review board of active Captains.[16] The agreement specifically notes that it "is not intended to modify the current practice of 'passing over' or failing to appoint an individual who has been found to be unfit for promotion as a result of a Police Department Board of Inquiry."[17]

It also specifies that, for each vacancy occurring during the first eighteen months of a promotion eligibility list, the LAPD will "appoint promotional candidates in rank order from the highest whole score and will exhaust all candidates in a whole score before appointing promotional candidates from the next lower whole score."[18] In the final six months of an eligibility list, however, the agreement states that LAPD "may appoint certified candidates from any whole score in order to meet any lawful, reasonable, articulable and specific Department need."[19] Finally, the agreement provides that LAPD "will not initiate any modification of paragraph 36 of the [Hunter-LaLey] consent decree" during the term of the contract,[20] which runs for the life of the decree.[21]

In *Los Angeles Police Protective League, et al. v. City of Los Angeles, et al.*, Case No. CV 01-10448 SVW (CTx), Judge Stephen Wilson held that the City Charter and the 1993 Meet and Confer Agreement were not in conflict. Specifically, Judge Wilson concluded that "the Rule

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[15]Meet and Confer Agreement at 37, § 1.

[16]*Id.* at 37, § 2.

[17]*Id.* at 37, § 1.

[18]*Id.* at 38, § 3.

[19]*Id.* at 38, § 4(b).

[20]*Id.* at 38, § 6.

[21]*Id.* at 38, § 7.

of Three Whole Scores [set forth in the City Charter] does not require that the three highest scoring candidates fill the promotional vacancies; rather [it] requires [that] the vacancies . . . be filled among the candidates receiving the three highest whole scores."[22] Because the Chief of Police may select the candidates from among those eligibles certified, Judge Wilson concluded that the provision in the 1993 Meet and Confer Agreement that permitted the Chief to Pass over candidates based on the results of a Board of Inquiry was permissible under the City Charter.[23]

C. The 2000-2002 Promotion Eligibility List

1. Vacant Sergeant Positions

On May 29, 2002, LAPPL and officers Jay Vucinich, Don Byeon, Edward Maciel and Roneica McCoy sued the City and LAPD in a case captioned *Los Angeles Police Protective League, et al. v. City of Los Angeles, et al.*, Los Angeles Superior Court Case No. BC 273587 ("the LAPPL action"). The complaint alleged that defendants had ceased making promotions to Sergeant in May 2001 with the intention of allowing the existing promotion eligibility list to expire on January 19, 2002. It further alleged that they had "frozen" or "blocked" sergeant promotions so that they could promote candidates of their choice from the eligibility list that came into being on January 20, 2002.[24]

Plaintiffs in the LAPPL action propounded interrogatories to the City, inquiring how many Sergeant I vacancies at various times, as well as how many promotions were made during those times. The City's responses indicate that LAPD had forty Sergeant I vacancies as of August 26, 2001; forty-eight as of September 23, 2001; sixty-four as of October 22, 2001; sixty-six as of

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[22]Sato Decl., ¶ 4, Ex. 4 (Order Granting Defendants' Motion for Partial Summary Judgment, May 24, 2002, *Los Angeles Police Protective League, et al. v. City of Los Angeles, et al.*, CV 01-10448 SVW ("Wilson Order")) at 8:12-17. Plaintiffs do not dispute the validity or enforceability of the 1993 Meet and Confer Agreement upheld in Judge Wilson's order. (See Plaintiff's Supplemental Briefing Pursuant to Court's Minute Orders of October 21, 2002 and October 31, 2002 at 3).

[23]*Id.* at 8:3-9:4.

[24]Sato Decl., ¶ 6, Ex. 6 (Complaint, May 9, 2002, *Los Angeles Police Protective League, et al. v. City of Los Angeles, et al.*, Los Angeles Superior Court Case No. BC 273587).

November 18, 2001; seventy-four as of December 16, 2001; seventy-six as of January 13, 2002; and eighty-one as of February 10, 2002. They further reflect that the City made five promotions to Sergeant I in September 2001; one in February 2002; and none in any of October, November and December 2001 or January 2002.[25] Following the expiration of the 2000-2002 eligibility list, the City made seventeen promotions in March 2002; twenty-one in April 2002; and ten in May 2002.[26]

2. The City's Efforts To Meet The Promotion Goals Set Forth In The Consent Decree

The City's fiscal year 2000-2001 annual report pursuant to paragraph 42 of the consent decree states that the LAPD appointed eighteen African Americans to the rank of Sergeant I, or 12.7% of the total appointments. The appointment goal set under the terms of the consent decree was 18.4%, and would have been met had approximately eight more African Americans been appointed.[27] The report indicates that forty-one Hispanics were appointed to Sergeant I positions, equal to 28.9% of the total promotions. The appointment goal was 35.3%, and would have been met with the appointment of approximately nine more Hispanics.[28] Finally, the report indicates that ten Asians/Filipinos were appointed to Sergeant I positions, or 7% of the total. The

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[25]Plaintiffs' Reply to Defendants' Response to Order to Show Cause Why Defendant Should Not Be Held in Contempt ("Pls.' Reply"), Ex. B (Response to First Set of Specially Prepared Interrogatories, September 14, 2002, *Los Angeles Police Protective League, et al. v. City of Los Angeles, et al.*, Los Angeles Superior Court Case No. BC 273587 ("Sept. 14 Interrogatories")) at 43-55.

[26]Sept. 14 Interrogatories at 57-62. The interrogatory answers also state that the City made 29 promotions in June 2001. (*Id.* at 40.)

[27]Sato Decl., Ex. 13 (2000/2001 Hunter LaLey Annual Report) at 206. The goal of 18.4% would have been met through the appointment of 26.08 African Americans. The court rounded this number down.

[28]*Id.* The goal of 35.3% would have been met through the appointment of 50.08 Hispanics. The court rounded this number down.

appointment goal, which was also 7%, was therefore met.[29]

The City's annual report for fiscal year 2001-2002 reflects that LAPD promoted nine African Americans to Sergeant I, representing 12.3% of the total number of appointments made. This contrasted with an appointment goal of 18.4%, which would have been met had approximately four additional African Americans been appointed.[30] The report states seventeen Hispanic officers were promoted to Sergeant I; this was 23.3% of the total appointments made. To reach the appointment goal of 36.5%, the City would have had to promote approximately ten more Hispanic officers.[31] Finally, the report indicates that five Asians/Filipinos were promoted to Sergeant I, comprising 6.8% of the total promotions made. Because the appointment goal was 7.3%, and because a goal is considered met if the calculated difference between the goal and performance is less than -0.5, the number of appointments made satisfied the goal.[32]

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[29] *Id.*

[30] Declaration of Walter Cochran-Bond in Support of Memorandum of Points and Authorities by the Asian-American Subclass in Support of a Finding of Contempt ("Bond Decl."), ¶¶ 2-3, Ex. A (2001/2002 Hunter LaLey Annual Report) at 11 (Analysis of Goal Results). The goal of 18.4% would have been met by appointing 13.46 African Americans. The court rounded this number down.

[31] *Id.* The goal of 36.5% would have been satisfied had 26.63 more Hispanics been appointed. The court rounded this number up.

[32] *Id.* The City's report calculates the difference as -0.33, and the 7.3% goal required the appointment of 5.37 Asians or Filipinos. At the hearing on this motion, counsel for the Asian American Subclass argued that this -0.33 differential demonstrated that the promotion goal for Asians/Filipinos had not been met. Noting that paragraph 26 of the consent decree requires that the City promote class members "at or above" agreed-upon annual targets, he argued that any calculation that rounds a goal down, instead of up, is inconsistent with the decree. The decree does not address how goals should be calculated when use of the formula set forth therein generates fractional targets. Because the decree establishes goals rather than quotas, requires only that the City use vigorous good faith efforts to meet those goals, and does not absolutely mandate that they be met, it is not unreasonable to conclude that, when the fractional portion of a promotion goal is under .500, the City can "round down" in determining how many promotions will satisfy its obligations under the decree. Accordingly, the court finds that the City's 2001/2002 Sergeant I promotion goals for Asian Americans were met.

3. Individual Officers Who Were Not Promoted

Most of the intervening plaintiffs have submitted a declaration regarding the fact that they were placed on the 2000-2002 Sergeant I promotion list and were not promoted. In addition, they have proffered the declarations of two officers who communicated directly with Chief Bernard Parks regarding as to why no promotions were being made during the last six months of the list.

Michael Flynn, an LAPD detective, took the Sergeant's Examination and was placed in Band 16 of 2000-2002 Sergeant Promotional Eligibility List ("Promotion List") that was to expire on January 19, 2002.[33] In preparation for his anticipated promotion, Flynn was sent to a four-week Sergeant School, which he completed on November 2, 2001.[34] He sent an e-mail to Chief Parks on December 13, 2001, asking why he was not being promoted. Parks answered that "40+ people that had been DQ'ed blocked the list from moving" and that he had tried to get LAPPL "to assist the Dept. in getting the DQ'ed officers to voluntarily remove their names from the list." Because the officers did not voluntarily remove their names, Parks stated he could not "in good conscience promote office[r]s who[se] discipline records would be of a problem to this city or this dept."[35]

Like Flynn, Officer Carol Allen took the Sergeant's Examination and was placed in Band 15 of the 2000-2002 Promotion List.[36] Allen was sent to Sergeant School, and completed the four-week training on November 2, 2001.[37] She e-mailed Chief Parks on December 2, 2001, asking about her prospects for promotion. Parks told Allen "there are approx 40 plus officers, who have been deemed to be unacceptable, due to a variety of reasons and are blocking the list.

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[33]Declaration of Andrea Weiss, Esq., in Support of Ex Parte Application for O.S.C. Re: Why Defendants Should Not Be Held In Contempt For Violation Of The Consent Decree ("Weiss Decl."), ¶ 5, Ex. 2 (Declaration of Michael Flynn ("Flynn Decl.")), ¶¶ 1-2.

[34]*Id.*, ¶ 3.

[35]*Id.*, ¶ 4, Ex. 1 (Flynn e-mail).

[36]Weiss Decl., ¶ 6, Ex. 3 (Declaration of Carol Allen ("Allen Decl.")), ¶¶ 1-2.

[37]*Id.*, ¶ 3.

This will not allow the Dept. to promote additional candidates, unless the officers remove their names from the list." He advised Allen he did not know if the personnel department would be able to craft a solution before the 2000-2002 promotion list expired.[38]

a. Hispanic Class Members

Detectives Randy Cordobes, Louis Turriaga and Lynet Popper, and Officers Edward P. Maciel, Richard Perez, Chris Ramirez, Frank Ramirez, Dino Angelo, Peter Hopkins, Lucio Velasquez, Joseph R. Vigueras, Adolph Rodriguez, and Raymond Rangel, are Hispanic and thus members of an ethnic group enumerated in the consent decree.[39]

Cordobes took the Sergeant's Examination and was placed in Band 15 of the 2000-2002 Promotion List.[40] He was sent to Sergeant School, which he completed on or about June 29, 2001.[41] Before attending Sergeant School, Cordobes spoke with Sergeant McDaniel of Position Control, who told him Cordobes would be promoted before he was "wheeled" in November 2001. McDaniel also purportedly stated that he would not rank Band 15, but simply promote the entire

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[38] *Id.*, ¶ 4, Ex. 1 (Allen e-mail).

[39] Weiss Decl., ¶ 7, Ex. 4 (Declaration of Randy Cordobes ("Cordobes Decl."), ¶¶ 1-2); ¶ 11, Ex. 8 (Declaration of Edward P. Maciel ("Maciel Decl."), ¶¶ 1-2); ¶ 13, Ex. 10 (Declaration of Richard Perez ("Perez Decl."), ¶¶ 1-2); ¶ 15, Ex. 12 (Declaration of Chris Ramirez ("C.Ramirez Decl."), ¶¶ 1-2); ¶ 16, Ex. 13 (Declaration of Frank Ramirez ("F.Ramirez Decl."), ¶¶ 1-2); ¶ 17, Ex. 14 (Declaration of Louis Turriaga ("Turriaga Decl."), ¶¶ 1-2); ¶ 18, Ex. 15 (Declaration of Dino Angelo ("Angelo Decl."), ¶¶ 1-2); ¶ 19, Ex. 16 (Declaration of Peter Hopkins ("Hopkins Decl."), ¶¶ 1-2); ¶ 21, Ex. 18 (Declaration of Lucio Velasquez ("Velasquez Decl."), ¶¶ 1-2); ¶ 22, Ex. 19 (Declaration of Joseph R. Vigueras ("Vigueras Decl."), ¶¶ 1-2); ¶ 23, Ex. 20 (Declaration of Adolph Rodriguez ("Rodriguez Decl.")), ¶¶ 1-2; Declaration of Terry Schallenkamp in Support of Ex Parte Application for O.S.C. Why Defendants Should not be Held in Contempt for Violation of the Consent Decree ("Schallenkamp Decl."), ¶ 5, Ex. B (Declaration of Raymond Rangel ("Rangel Decl."), ¶¶ 1-2); ¶ 9, Ex. F (Declaration of Lynet Popper ("Popper Decl."), ¶¶ 1-2).

[40] Cordobes Decl., ¶ 3.

[41] *Id.*, ¶ 4.

band.[42] When Cordobes spoke with McDaniel in September or October 2001, he was told there was a "3 in 4 chance" he would not make Sergeant. McDaniel offered no reason for the change.[43]

Maciel took the Sergeant Examination and was placed in Band 16 of the 2000-2002 Promotion List.[44] He was sent to Sergeant School, which he completed in August 2001.[45] Maciel's lieutenant told him he was being considered for promotion, and that a letter had been sent to the Medical Liaison Section of Personnel to determine whether he had any pending personnel complaints.[46] Maciel was not promoted.[47]

Perez took the Sergeant Examination and was placed in Band 17 of the 2000-2002 Promotion List.[48] He completed Sergeant School on November 2, 2001.[49]

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[42] *Id.*, ¶ 5. The City objects that McDaniel's statements are not relevant because the Chief of Police is the only appointing authority for LAPD. The City's interrogatory answers in the state court action, however, concede that McDaniel was involved in determining how many Sergeant I vacancies there were to fill. (Sept. 14 Interrogatories at 69-70). Accordingly, the court overrules the City's relevancy objection.

[43] *Id.*, ¶ 6. The City objects that McDaniel's statements are inadmissible hearsay. The City's admission that McDaniel acted as its agent in the promotion process, however, justifies a finding that his statements are the non-hearsay admissions of a party opponent pursuant to Rule 801(d)(2) of the Federal Rules of Evidence.

[44] Maciel Decl., ¶ 3.

[45] *Id.*, ¶ 4.

[46] *Id.*, ¶ 5. While Maciel asserts there were no complaints in his personnel file, he fails to demonstrate that he has personal knowledge of this fact. Accordingly, the City's objection to this evidence is sustained.

[47] *Id.*, ¶ 6.

[48] Perez Decl., ¶ 3.

[49] *Id.*, ¶ 4. The City objects to Perez's statement that his Sergeant School class was told there were more than 72 Sergeant openings, and that a majority of the Sergeant School instructors said the officers would not have been sent to classes unless LAPD intended to promote them The City contends these statements are hearsay and lack foundation. The court sustains the objection, as Perez's declaration does not demonstrate that Sergeant School instructors had reason to know the City intended to promote the officers attending the course. It also sustains the hearsay

Chris Ramirez took the Sergeant Examination and was placed in Band 15 of the 2000-2002 Promotion List.[50] He completed Sergeant School on July 29, 2001.[51] Personnel Division/Position Control sent an "anticipation letter of promotion" to Ramirez's division captain, Captain Moore, advising of Ramirez' anticipated promotion, which Moore purportedly signed and returned, recommending the promotion.[52] Chris Ramirez was not promoted.[53]

Frank Ramirez took the Sergeant Examination and was placed in Band 16 of the 2000-2002 Promotion List.[54] Ramirez attended Sergeant School, and completed the course on November 2, 2001.[55] Although his commanding officer received an "Anticipation to Promote" form in the late Fall of 2001,[56] Ramirez was not promoted.[57]

Turriaga took the Sergeant Examination and was placed in Band 17 of the 2000-2002 Promotion List.[58] He completed Sergeant School on November 2, 2001.[59] Turriaga, however,

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objection, as there is no basis for concluding that the instructors who taught at the Sergeant School were authorized to make representations on the City's behalf regarding the likelihood that the officers would be promoted.

[50]C.Ramirez Decl., ¶ 3.

[51]*Id.*, ¶ 4.

[52]*Id.*, ¶ 5.

[53]*Id.*, ¶ 6.

[54]F.Ramirez Decl., ¶ 3.

[55]*Id.*, ¶ 4.

[56]*Id.*, ¶ 5.

[57]*Id.*, ¶ 6.

[58]Turriaga Decl., ¶ 3.

[59]*Id.*, ¶ 4. The City objects that statements attributed to Turriaga's immediate supervisor, Detective Charlie Choe, and to Choe's Captain, are hearsay, and inadmissible as a result. The court sustains the objection.

was not promoted.[60]

Angelo took the Sergeant Examination and was placed in Band 16 of the 2000-2002 Promotion List.[61] He was selected for Sergeant School, but did not attend due to a personnel shortage.[62] Although his commanding officer told Angelo he would be promoted by the end of 2001, he was not.[63]

Hopkins took the Sergeant Examination and was placed in Band 26 of the 2000-2002 Promotion List.[64] Position Control told him that few persons would be promoted to Sergeant "due to the lack of new P-1s."[65]

Velasquez took the Sergeant Examination and was placed in Band 18 of the 2000-2002 Promotion List.[66] His captain told him on November 6, 2001, that he would be promoted in the next transfer list and that his promotional package was being prepared for submission to headquarters. His "DIII" also told Velasquez he would be promoted. Velasquez's lieutenant advised him to speak to Position Control about his wish list for "Wheel Divisions."[67] Contrary to these representations, Velasquez was not promoted. Sergeant McDaniel told him the

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[60] *Id.*, ¶ 6.

[61] Angelo Decl., ¶ 3.

[62] *Id.*, ¶ 4.

[63] *Id.*, ¶¶ 5-6. The City objects that the statement of Angelo's commanding officer is hearsay. The court overrules the objection, on the basis that the commanding officer was authorized to speak for the LAPD, and the statement is therefore a party admission.

[64] Hopkins Decl., ¶ 3.

[65] *Id.*, ¶ 5. The City objects that the statements attributed to Position Control are hearsay and lack foundation. Officers working in Position Control were authorized to speak on the City's behalf with respect to the subject of promotions, and specifically the availability of promotional positions. Accordingly, the statement is admissible as a party admission, and the City's objection is overruled.

[66] Velasquez Decl., ¶ 3.

[67] *Id.*, ¶ 4.

promotions would only go as far as Band 17.[68]

Vigueras took the Sergeant Examination and was placed in Band 17 of the 2000-2002 Promotion List.[69] He was slated to attend Sergeant School in September 2001, but was unable to attend due to a scheduled vacation.[70]

Rodriguez took the Sergeant Examination and was placed in Band 18 of the 2000-2002 Promotion List. He was not promoted to Sergeant.[71]

Rangel took the Sergeant Examination and was placed in Band 15 of the 2000-2002 Promotion List.[72] His captain told Rangel in 2000 that he would be promoted on the next transfer list and that his promotional package was being prepared for submission to headquarters.[73] Rangel completed Sergeant School in August 2001,[74] but was not promoted.[75]

Popper took the Sergeant Examination and was placed in Band 15 of the 2000-2002 Promotion List.[76] She completed Sergeant School on November 2, 2001,[77] but was not

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[68] *Id.*, ¶ 5.

[69] Vigueras Decl., ¶ 3.

[70] *Id.*, ¶ 4. The City objects that certain statements allegedly made by Lieutenant Swetzer are inadmissible hearsay and lack foundation. Vigueras' declaration does not identify Swetzer's role within the police department or vis-á-vis Vigueras. The City's objection is accordingly sustained.

[71] Rodriguez Decl., ¶¶ 3-4.

[72] Rangel Decl., ¶ 3.

[73] *Id.*, ¶ 5.

[74] *Id.*, ¶ 4.

[75] *Id.*, ¶ 6.

[76] Popper's declaration asserted that she placed in band 14. (See Popper Decl., ¶ 3.) The City's supplemental filing states that the parties now agree Popper was placed in band 15. This is borne out by the whole score promotion list the City submitted as part of the supplemental filing. (See Declaration of Bruce Bernal ("Bernal Decl."), Ex. C (Report of Examination)).

[77] *Id.*, ¶ 4.

promoted.[78]

b. African American Class Members

Detectives John Goodman, Siage Hosea and Benjamin Jones, and Officers James Lumpkin, Roneica McCoy, Earl Perry, Clarence Perkins, Brian Hillman, Michael Henderson, Eva Perry, and Darryl Brown are African Americans and thus members of an ethnic group enumerated in the consent decree.[79]

Goodman took the Sergeant Examination and was placed in Band 16 of the 2000-2002 Promotion List.[80] He completed Sergeant School on August 25, 2001.[81] After he was deemed eligible for promotion by a Board of Inquiry on February 1, 2000, Goodman's captain told him that his promotional package was being prepared for submission on September 3, 2001.[82] Goodman was not promoted.[83]

Hosea took the Sergeant Examination and was placed in Band 16 of the 2000-2002

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[78]*Id.*, ¶ 5.

[79]Weiss Decl., ¶ 8, Ex. 5 (Declaration of John Goodman ("Goodman Decl."), ¶¶ 1-2); ¶ 9, Ex. 6 (Declaration of Siage Hosea ("Hosea Decl."), ¶¶ 1-2); ¶ 10, Ex. 7 (Declaration of James Lumpkin ("Lumpkin Decl."), ¶¶ 1-2); ¶ 12, Ex. 9 (Declaration of Roneica McCoy ("McCoy Decl."), ¶¶ 1-2); ¶ 14, Ex. 11 (Declaration of Earl Perry ("Perry Decl."), ¶¶ 1-2); Schallenkamp Decl., ¶ 6, Ex. C (Declaration of Clarence Perkins ("Perkins Decl."), ¶¶ 1-2); ¶ 7, Ex. D (Declaration of Brian Hillman ("Hillman Decl."), ¶¶ 1-2); ¶ 8, Ex. E (Declaration of Michael Henderson ("Henderson Decl."). ¶¶ 1-2); ¶ 10, Ex. G (Declaration of Eva Perry ("Eva Perry Decl."), ¶¶ 1-2); ¶ 12, Ex. I (Declaration of Benjamin Jones ("Jones Decl."), ¶¶ 1-2); ¶ 13, Ex. J (Declaration of Darryl Brown ("Brown Decl."), ¶¶ 1-2).

[80]Goodman Decl., ¶ 3.

[81]*Id.*, ¶ 4.

[82]*Id.*, ¶ 5. The City objects that the statements by Captain Smith are hearsay. The court finds that they are party admissions and may, accordingly, be considered.

[83]*Id.*, ¶ 6.

Promotion List.[84] He attended Sergeant School, and completed the course in August 2001.[85]

Lumpkin took the Sergeant Examination and was placed in Band 15 of the 2000-2002 Promotion List.[86] He completed Sergeant School on November 2, 2001.[87] On December 24, 2001, Lumpkin's captain told him his promotional package was being prepared, and he would be promoted on the next transfer list.[88] He was not promoted.[89]

McCoy took the Sergeant Examination and was placed in Band 15 of the 2000-2002 Promotion List.[90] She completed Sergeant School on November 2, 2001,[91] and purchased new uniforms and gear in anticipation of her promotion, but was not promoted.[92]

Earl Perry took the Sergeant Examination and was placed in Band 16 of the 2000-2002 Promotion List.[93] He attended Sergeant School, and finished the course in August 2001.[94] In October 2001 Metropolitan Division Captain Rapoli told Perry "he had received inquiries from

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[84]Hosea Decl., ¶ 3.

[85]*Id.*, ¶ 4.

[86]Lumpkin Decl., ¶ 3.

[87]*Id.*, ¶ 4.

[88]*Id.*, ¶ 5. The City objects to the statements attributed to Lumpkin's captain as hearsay. The court finds that the statements are admissible as party admissions.

[89]*Id.*, ¶ 6.

[90]McCoy Decl., ¶ 3.

[91]*Id.*, ¶ 4.

[92]*Id.*, ¶¶ 5-6.

[93]Perry Decl., ¶ 3.

[94]*Id.*, ¶ 4.

the department about [Perry's] eligibility to be promoted."[95] He was not promoted.[96]

Perkins took the Sergeant Examination and was placed in Band 18 of the 2000-2002 Promotion List.[97] He was not promoted to the rank of Sergeant.[98]

Hillman took the Sergeant Examination and was placed in Band 14 of the 2000-2002 Promotion List.[99] He was directed to complete Sergeant School in May/June 2001, but the Chief of Police then convened a Board of Inquiry to determine his merit for promotion. Accordingly, his area captain delayed sending Hillman to Sergeant School. Although the Board of Inquiry found that Hillman merited promotion in July 2001, he was not rescheduled for Sergeant School.[100] Hillman was purportedly "certified" for promotion in March 2001, as part of Band 14. Position Control told him he was eligible for promotion in November 2001. Hillman was not, however, promoted.[101]

Henderson took the Sergeant Examination and was placed in Band 11 of the 2000-2002 Promotion List.[102] On December 21, 2001, he received a letter from the Department stating that he merited promotion to Sergeant.[103] He was not promoted.[104]

Eva Perry took the Sergeant Examination and was placed in Band 16 of the 2000-2002

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[95] *Id.*, ¶ 5. The City objects that the statements attributed to Captain Rapoli are hearsay. The court finds that the statements are admissible as party admissions.

[96] *Id.*, ¶ 6.

[97] Perkins Decl., ¶ 3.

[98] *Id.*, ¶ 4.

[99] Hillman Decl., ¶ 3.

[100] *Id.*, ¶ 4.

[101] *Id.*, ¶ 5.

[102] Henderson Decl., ¶ 3.

[103] *Id.*, ¶ 4.

[104] *Id.*, ¶ 5.

Promotion List.[105] On December 17, 2001, she received interdepartmental correspondence directing that she be promoted to Sergeant. On January 3, 2002, she received a letter stating she was eligible for promotion. On January 7, 2002, Captain Albanese told Perry she would be promoted on the next list, probably through a "special transfer."[106] She was not promoted, and Albanese later told her that the letter she received was a mistake and that Band 16 would not be promoted.[107]

Jones took the Sergeant Examination and was placed in Band 15 of the 2000-2002 Promotion List.[108] He completed Sergeant School in July 2001,[109] but was not promoted.[110]

Brown took the Sergeant Examination and was placed in Band 15 of the 2000-2002 Promotion List.[111] Brown contacted Position Control in April 2001, and was told that approximately eighteen individuals remained in Band 14.[112] He contacted Position Control again in October 2001, and was told there would be no more promotions to the rank of Sergeant from the current list.[113]

c. Asian American Class Members

Officer Don Montelibano is Filipino and thus a member of an ethnic group enumerated in

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[105]Eva Perry Decl., ¶ 3.

[106]*Id.*, ¶ 4.

[107]*Id.*, ¶¶ 5, 7.

[108]Jones Decl., ¶ 3.

[109]*Id.*, ¶ 4.

[110]*Id.*, ¶ 5.

[111]Brown Decl., ¶ 3.

[112]Brown Decl., ¶ 4.

[113]*Id.*, ¶ 6.

the consent decree.[114] Officer Don Hosik Byeon is a Korean-American and also a member of an ethnic group enumerated in the consent decree.[115] Detective Cindy Sayo Setzer is Japanese and a member of an ethnic group enumerated in the consent decree.[116]

Montelibano took the Sergeant Examination and was placed in Band 17 of the 2000-2002 Promotion List.[117] Montelibano was not promoted to Sergeant.[118]

Byeon took the Sergeant Examination and was placed in Band 16 of the 2000-2002 Promotion List.[119] He completed Sergeant School on November 2, 2001.[120] On or about December 24, 2001, his captain told him that he would be promoted on the next transfer list and that his promotional package was being prepared for submission to headquarters. He also received a letter from the Department stating that he was eligible for promotion to the rank of Sergeant.[121] Byeon was not promoted.[122]

Setzer took the Sergeant Examination and was placed in Band 12 of the 2000-2002

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[114]Weiss Decl., ¶ 20, Ex. 17 (Declaration of Don Montelibano ("Montelibano Decl.")), ¶¶ 1-2.

[115]Schallenkamp Decl., ¶ 4, Ex. A (Declaration of Don Hosik Byeon ("Byeon Decl."), ¶¶ 1-2).

[116]Schallenkamp Decl., ¶ 11, Ex. H (Declaration of Cindy Sayo Setzer ("Setzer Decl."), ¶¶ 1-2).

[117]Montelibano Decl., ¶ 3.

[118]*Id.*, ¶ 5.

[119]Byeon Decl., ¶ 3.

[120]*Id.*, ¶ 4.

[121]*Id.*, ¶ 5.

[122]*Id.*, ¶ 6.

Promotion List.[123] She attended Sergeant School, which she completed on November 2, 2000.[124] Setzer placed a "hold" on her name, however, so that she could complete probation for Detective. The rest of the individuals in Band 12 were promoted by the end of Sergeant School; Setzer was not then because of her "hold." Setzer released the hold on July 18, 2001, when her detective probation was completed.[125] She was not promoted.[126]

d. Damage Suffered

Officers Cordobes, Goodman, Hosea, McCoy, Lumpkin, Perez, Earl Perry, C. Ramirez, F. Ramirez, Turriaga, Hopkins, Montelibano, Vigueras, Byeon, Rangel, Hillman, Henderson, Popper, Eva Perry, Setzer, and Brown did not take the Sergeant Examination for the current list, because they believed they would be promoted. Each states he or she will have to engage in an intensive study program to prepare for the next Examination.[127] Perez asserts he may lose the opportunity to take the Examination because he is a U.S. Navy Reservist with a high possibility of being recalled.[128] Angelo, Rodriguez and Perkins did not adequately prepare for the Examination for the current list, believing that they would be promoted. They too will have to engage in an intensive study program to prepare to take it again.[129] Velasquez did not score

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[123]Setzer Decl., ¶ 3.

[124]Setzer's declaration states that she completed Sergeant School on November 2, 2001. This appears to be a typographical error, however, since she also states that she released the hold on her promotion on July 18, 2001.

[125]*Id.*, ¶ 4.

[126]*Id.*, ¶ 6.

[127]Flynn Decl., ¶ 5; Allen Decl., ¶ 7; Cordobes Decl., ¶ 10; Goodman Decl., ¶ 10; Hosea Decl., ¶ 9; McCoy Decl., ¶ 10; Lumpkin Decl., ¶ 10; Perez Decl., ¶¶ 9-10; Perry Decl., ¶ 10; Ramirez Decl., ¶ 10; F.Ramirez Decl., ¶ 10; Turriaga Decl., ¶ 10; Hopkins Decl., ¶¶ 7-8; Montelibano Decl., ¶¶ 8-9; Vigueras Decl., ¶¶ 10-11; Byeon Decl., ¶¶ 10-11; Rangel Decl., ¶ 10; Hillman Decl., ¶¶ 9-10; Henderson Decl., ¶ 8; Popper Decl., ¶¶ 9-10; Eva Perry Decl., ¶ 9; Setzer Decl., ¶¶ 8-9; Brown Decl., ¶ 9.

[128]Perez Decl., ¶ 11.

[129]Angelo Decl., ¶¶ 10-11; Rodriguez Decl., ¶ 7; Perkins Decl., ¶ 7.

sufficiently on the Examination for the current list to be granted an oral interview, and will have to engage in an intensive study program to prepare for a future Examination.[130] Jones states only that he will have to take the exam again.[131]

D. The Current Motion

On July 25, 2002, the Petersen Law Firm filed an *ex parte* application for an order to show cause why the City should not be held in contempt of the consent decree. The application was filed on behalf of several purported members of classes protected by the degree,[132] and was supported by the declarations summarized above. The court granted the application on August 12, 2002, directed that the City file a response on or before October 11, 2002, and ordered that it appear on October 21, 2002, to show cause why a contempt citation should not issue. The City filed a response as directed, on October 11. That same day, plaintiffs filed the declarations of ten additional LAPD officers who were purportedly placed on the 2000-2002 Promotion List and not promoted.[133] Plaintiffs filed a reply memorandum and additional evidence on October 18, 2002.[134]

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[130]Velasquez Decl., ¶ 8.

[131]Jones Decl., ¶ 9.

[132]The named individuals are Don Hosik Byeon, Edward Paul Maciel, Jr., Raymond L. Rangel, Ronecia L. McCoy, Clarence J. Perkins, Brian Hillman, Peter Dabide Hopkins, Jr., Randall Esteven Cordobes, Michael Henderson, Lynet Popper, John Goodman, Saige Bruce Hosea, Eva J. Perry, Dino Angelo, Richard Honorato Abad, Frank Martin Ramirez, Christopher Montoya, Darryl George Brown, Chris Ramirez, Cindy Sayo Setzer, Isais F. Ornelas, Don Magno Montelibano, Bryon Lumpkin, Lucio Velasquez, Louis M. Turriaga, Earl Jennings Perry, and Adolph Rodriguez.

[133]See Shallenkamp Decl. The City has objected to consideration of these additional declarations, and moved to strike them as untimely. While the declarations concern individuals who were not mentioned in plaintiffs' initial application, the information set forth regarding LAPD's promotional process in 2001 is similar to, and corroborative of, the evidence initially submitted. Because the court has since allowed the parties additional time to brief the issues, it denies the City's motion to strike the declarations.

[134]The City did not object to the filing of this document, and the court finds that it proffers arguments and evidence that are responsive to the arguments and evidence made by the City in its papers.

At the October 21, 2002 hearing, the court concluded that additional briefing was required to determine (1) whether individual class members had standing to sue to enforce the consent decree and (2) whether any collateral estoppel issues were raised by Judge Wilson's summary judgment order in *Los Angeles Police Protective League et al. v. City of Los Angeles et al.*, CV 01-10448 SVW (CTx). These issues had been raised by the City in an *ex parte* application to strike plaintiffs' application for an order to show cause filed September 20, 2002.

The court directed the parties to meet and confer regarding the class members' standing and regarding the collateral estoppel effect, if any, of Judge Wilson's order. The collateral estoppel issue was resolved when the class members agreed in a December 2, 2002, filing that they would not challenge the validity of the 1993 Meet and Confer Agreement addressed in Judge Wilson's order. The parties resolved the standing issue by lodging a stipulation and proposed order on December 5, 2002, that allowed the individual class members represented by the Petersen Law Firm to intervene in the action for the sole purpose of challenging the City's failure to promote officers from the 2000-2002 Sergeant Eligibility List. The court entered the order proposed.[135]

On April 2, 2003, the court set the order to show cause for hearing on April 28, 2003. The court instructed counsel for the plaintiff classes to file briefs setting forth their clients' positions, if any, by April 14, 2003, and allowed the intervening plaintiffs and the City to file replies to those briefs on or before April 21, 2003. The Asian American Subclass filed a brief on April 14, 2003, and the City filed a reply on April 21, 2003. In response to an *ex parte* application by the intervening plaintiffs, the court continued the date for the filing of their reply to May 19, 2003, and continued the hearing to June 9, 2003. The reply was filed on May 19, 2003. On June 2, 2003, the court denied the intervening plaintiffs' oral request to call witnesses at the June 9 hearing, as the proposed testimony did not concern disputed issues of fact. The court also granted an *ex parte* request by the City to quash witness subpoenas served by the

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[135]Given the parties' various stipulations, and the court's order authorizing limited intervention by the individual class members, the City's motion to strike plaintiffs' application for an order to show cause is denied.

intervening plaintiffs in anticipation of an evidentiary hearing.

E. Additional Evidence

At the hearing on this motion, the court directed the City to submit additional evidence regarding the certification of candidates during the life of the 2000-2002 Sergeant I Eligibility List. Specifically, the court instructed the City to provide evidence regarding the dates on which specific whole scores were certified, the dates on which promotional vacancies came into being, and the names of officers on the list who were members of the plaintiff classes.

The City's evidence indicates that whole score band 13 was certified on November 9, 2000, that bands 14 and 15 were certified on February 27, 2001, and that all bands through band 26 were certified two days before the expiration of the list, on January 17, 2002.[136] The City also submitted a list detailing the examination score, gender and race of each officer who took the 1999 Sergeant Examination,[137] as well as a list of eligible officers according to whole score band.[138] Finally, the City submitted evidence reflecting the number of Sergeant I vacancies during the life of the list. This evidence reflects that 76 Sergeant positions were open on January 13, 2002.[139] The lists submitted by the City do not specifically identify the whole score bands of officers who are class members, nor do they state which class members were promoted and which were not.[140]

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[136]Bernal Decl., ¶ 3, Ex. A (Eligible List Certification).

[137]Bernal Decl., ¶ 5, Ex. B (Examination Score Database).

[138]Bernal Decl., ¶ 6, Ex. C (Report of Examination).

[139]Declaration of Mark R. LaBonta ("LaBonta Decl."), ¶ 5, Ex. A (Police Table of Organization and Deployment Summary). Another table submitted indicates that the City "requested" 100 Sergeant I positions on January 17, 2002. (See Bernal Decl., Ex. A). The City's counsel states, however, that the police department has advised him that the number of positions "requested" does not necessarily reflect the number of positions available. (Declaration of Gerald Sato in Response to Court-Ordered Discovery ("Sato Supp. Decl."), ¶ 6-7).

[140]Plaintiff Latin American Law Enforcement Association ("LaLey") notes that counsel for the Asian American subclass has requested that the City supplement its responses to identify those individuals covered by the consent decree who were promoted.

II. DISCUSSION

A. Plaintiffs' Ability To Enforce The Consent Decree

Individual class members, who are not named plaintiffs in a class action suit, generally do not have the ability to enforce a consent decree entered in the action. See, e.g., *Reynolds v. Butts*, 312 F.3d 1247, 1250 (11th Cir. 2002) ("[A]s unnamed, non-intervening members of a class in the litigation, the appellants do not have standing to enforce the consent decree").[141] Class members may enforce the judgment, however, if they intervene in the action pursuant to Rule 24 of the Federal Rules of Civil Procedure. *Id.* ("[C]lass members who disagree with the course of a class action have available adequate procedures through which their individual interests can be protected, such as intervening pursuant to Rule 24. . . . We think these reasons are just as applicable in this case, where the appellants seek to enforce a consent decree through the district court's contempt power"); *Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988) ("Individual members of the class and other prisoners may assert any equitable or declaratory claims they have, but they must do so by urging further action through the class representative and attorney, including contempt proceedings, or by intervention in the class action"). See also *McNeil v. Guthrie*, 945 F.2d 1163, 1166, n. 6 (10th Cir. 1991) ("If, after the *pro se* papers are sent to class counsel, he refuses to examine the papers or inappropriately determines they have no merit, the *pro se* prisoner may file a separate action either seeking to intervene . . . or challenging the adequacy of the representation by class counsel").

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[141]While courts have described the issue as one of standing, the Supreme Court recently clarified that it is not "standing" that unnamed class members lack. Rather, it stated, a class member "has an interest in the settlement that creates a 'case or controversy' sufficient to satisfy the constitutional requirements of injury, causation, and redressability." *Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002). Class members also satisfy the requirements of prudential standing. *Id.* at 7 ("The legal rights he seeks to raise are his own, he belongs to a discrete class of interested parties, and his complaint clearly falls within the zone of interests of the requirement that a settlement be fair to all class members"). The reason that unnamed class members cannot appeal class settlements (or enforce consent decrees), the Court clarified, is that they are not "parties" with the ability to appeal or enforce the judgment. See *id.* ("We have held that 'only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment,' quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam)).

The parties have stipulated to allow the individual class members represented by the Petersen Law Firm to intervene in the action for the limited purpose of challenging the City's failure to promote officers from the 2000-2002 Sergeant Eligibility List. Each of the intervening plaintiffs is a member of a class protected under the decree,[142] and each may therefore move to enforce its terms.

B. Standard Governing District Court Enforcement Of Consent Decrees

"A consent decree is a judgment, has the force of res judicata, and . . . may be enforced by judicial sanction." *Securities and Exchange Commission v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984). See also *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992) ("A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees"); *Stone v. City and County of San Francisco*, 968 F.2d 850, 861, n. 20 (9th Cir. 1992) ("The respect due the federal judgment is not lessened because the judgment was entered by consent. . . . The strong policy encouraging settlement of cases requires that the terms of a consent judgment . . . be respected as fully as a judgment entered after trial," quoting *Badgley v. Santacroce*, 800 F.2d 33, 38 (2d Cir.1986), cert. denied, 479 U.S. 1067, 107 (1987)).

The district court retains jurisdiction to enforce a consent decree during the lifetime of the decree. See *Hook v. State of Ariz. Dept. of Corrections*, 972 F.2d 1012, 1013 (9th Cir. 1992). Consent decrees are therefore distinct from ordinary settlement agreements where "the only penalty for failure to abide by the agreement is another suit." *Randolph*, *supra*, 736 F.2d at 528 (citation omitted).

District courts enforce consent decrees primarily through civil contempt proceedings. See *Local Number 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501,

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[142]Plaintiffs have offered evidence that officers Cordobes, Goodman, Hosea, McCoy, Lumpkin, Perez, Earl Perry, Chris Ramirez. Frank Ramirez, Turriaga, Hopkins, Montelibano, Vigueras, Angelo, Rodriguez, Velasquez, Byeon, Rangel, Perkins, Hillman, Henderson, Popper, Eva Perry, Setzer, Jones and Brown are class members protected under the consent decree.

518 (1986) ("[N]oncompliance with a consent decree is enforceable by citation for contempt of court"); *Randolph*, *supra*, 736 F.2d at 528; *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 533 F. Supp. 869, 880 (E.D. Pa. 1982) ("A party violating a consent decree is . . . subject to the powers by which a court protects its judgments, including, most notably, the power of contempt"); *Equal Employment Opportunity Commission v. CW Transport*, 658 F. Supp. 1278, 1301 (W.D. Wis. 1987) (rejecting an argument that the only appropriate remedy for the violation of a consent decree was a further order enforcing the decree, the court stated: "CWT argues that as a matter of law this consent decree cannot be enforced by contempt. On the contrary, as a matter of law contempt is the proper remedy").[143]

In a civil contempt proceeding or other action to enforce a consent decree, the moving party has the burden of showing by clear and convincing evidence that the defendant violated a specific and definite order of the court. *Balla v. Idaho St. Bd. of Corrections*, 869 F.2d 461, 466

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[143]But see *Cook v. City of Chicago*, 192 F.3d 693, 695 (7th Cir. 1999) (noting that while the violation of a consent decree is punishable by contempt, "more commonly" the remedy "is a supplementary order . . . designed to make the party whole for his or her loss"); *Halderman v. Pennhurst State Sch. & Hosp.*, 901 F.2d 311, 316 & n. 5 (3d Cir. 1990) (affirming the district court's extension of the term of certain parts of a court-approved settlement agreement because of non-compliance by the defendant; the court noted that the district court had considered holding defendant in contempt but opted not to); *Berger v. Heckler*, 771 F.2d 1556, 1569 (2d Cir. 1985) ("[e]nsuring compliance with a prior order is an equitable goal which a court is empowered to pursue even absent a finding of contempt," citing *Alexander v. Hill*, 707 F.2d 780, 783 (4th Cir. 1983)). Whether denominated a contempt order or a supplementary enforcement order, courts wield broad equitable powers when enforcing consent judgments. See *Local Number 93*, *supra*, 478 U.S. 501, 524, n. 13 ("A court that maintains continuing jurisdiction over a consent decree will have a more flexible repertoire of enforcement measures"); *Cook*, *supra*, 192 F.3d at 695 (stating that a consent judgement is an "equitable decree," and that "if it is violated the injured party must ask the court for an equitable remedy"); *Delaware Valley Citizens' Council for Clean Air*, *supra*, 533 F. Supp. at 880 ("Punishment by fine or imprisonment may also be imposed where a court finds that a party is in civil contempt. . . . Moreover, a broad range of equitable powers are available to a court to enforce and effectuate its orders and judgments"); *United States v. Continental Chemiste Corp.*, NO. 87 C 10214, 1994 WL 249553, * 2 (W.D. Ill. June 6, 1994) ("Sanctions for civil contempt may be imposed . . . [and a] court has broad discretion to fashion a remedy based on the nature of harm and the probable effect of alternative sanctions"); *AT&T Corp. v. Petersen*, CIV.A.99-3351(RMUAK), 2001 WL 45780, * 3 (D.D.C. Jan. 10, 2001) ("The determination of whether sanctions should be imposed and the framing of any sanctions for civil contempt is generally left to the discretion of the trial court").

(9th Cir.1989). See also *National Labor Relations Board v. Ironworkers Local 433*, 169 F.3d 1217, 1220 (9th Cir. 1999) (". . . the Union is alleged to be in contempt of a consent decree issued from this court as part of its enforcement of prior NLRB orders. . . . [B]efore the requested fines can be levied, the NLRB must prove, by clear and convincing evidence to a court-appointed special master, that the Union is in contempt of this court's order"); *United States v. Microsoft Corp.*, 147 F.3d 935, 940 (D.C. Cir. 1998) ("A party seeking to hold another in contempt faces a heavy burden, needing to show by 'clear and convincing evidence' that the alleged contemnor has violated a 'clear and unambiguous' provision of the consent decree"); *Gilday v. Dubois*, 124 F.3d 277, 282 (1st Cir. 1997) ("We address these arguments . . . mindful that it was for Gilday to establish by '"clear and convincing evidence[,]"' . . . , the particular defendant violated an unambiguous consent decree 'that left no reasonable doubt as to what behavior was to be expected'" (citations omitted)).

The burden then shifts to the defendant to demonstrate why it was unable to comply. See *Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir.1983), cert. denied, 464 U.S. 1040 (1984). Defendant must show that it took "every reasonable step" to comply. See *Stone v. City and County of San Francisco*, 968 F.2d 850, 856-57 (9th Cir. 1992) (stating, in a case addressing alleged failure to comply with a consent decree governing jail population, staffing, recreation, and prison medical and health care, that "[t]his Circuit's rule with regard to contempt has long been whether the defendants have performed 'all reasonable steps within their power to insure compliance' with the court's orders," citing *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 406 (9th Cir.1976), cert. denied, 430 U.S. 931 (1977)). See also *Harris v. City of Philadelphia*, 47 F.3d 1311, 1324 (3d Cir. 1995) (stating, in contempt proceedings following the entry of a consent decree designed to address jail overcrowding that "the burden is that of the defendant to introduce evidence beyond 'a mere assertion of inability,' and to show that it has made 'in good faith all reasonable efforts to comply'"); *Harris v. City of Philadelphia*, 47 F.3d 1333, 1340-41 (3d Cir. 1995) (stating, with respect to the violation of a consent decree regarding occupancy levels at a drug treatment facility, that "[t]he City may escape contempt by showing that it could not possibly comply with the court's order despite making all reasonable efforts to do so"). Where a "party

has taken 'all reasonable steps' to comply with the court order, [however,] technical or inadvertent violations of the order will not support a finding of civil contempt." *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986).

C. Whether The City Is In Contempt Of The Consent Decree

A finding of "[c]ivil contempt is appropriate only when a party fails to comply with a court order that is both specific and definite." *Balla*, *supra*, 869 F.2d at 465. The intervening plaintiffs contend that the City has violated paragraphs 26 and 36 of the decree by failing to use vigorous good faith efforts to meet the promotional goals established and by failing to abandon the Rule of Three Whole Scores during the last six months of the 2000-2002 Promotion List. The court must examine whether plaintiffs have produced clear and convincing evidence of such violations.

1. Paragraph 36: Best Efforts To Secure Modification Of Rule Of Three Whole Scores

a. Whether The City Violated Paragraph 36

Paragraph 36 of the consent decree obligates "[t]he City . . . [to] use its best efforts to secure the consent of the recognized bargaining representative of the Police Officers Lieutenant and Below Bargaining Unit to a modification of the Department's present application of the 'Rule of Three Whole Scores'" that "require[d] the Chief of Police – during the last six months of the two-year life of a roster of eligible candidates for promotion to . . . the civil service classification[ ] of . . . Police Sergeant . . . – to treat as equally eligible for promotion all applicants certified by the City Personnel Department."[144] Paragraph 36 distinguishes the manner in which promotions are to be made in the last six months of the list from what is to occur during the first eighteen months of the roster, stating: "During the first eighteen months of the life of such rosters of eligible candidates, the Chief of Police will select promotion candidates as he does at present – in order of combined whole score bands, exhausting the candidates in each combined whole

[144]Consent Decree, ¶ 36.

score band before selecting candidates from the next lower combined whole score band."[145]

All parties agree that the City secured the anticipated modification from LAPPL in the form of the 1993 Meet and Confer Agreement. The Agreement provides that during the first eighteen months of a promotion list, LAPD will "appoint promotional candidates in rank order from the highest whole score and will exhaust all candidates in a whole score before appointing promotional candidates from the next lower whole score."[146] indicates that a three member review board will rank-order candidates for promotion to Sergeant "on the basis of merit" within each civil service examination whole score band.[147] In the final six months of the list, however, while the Department "will continue to make appointments by th[is] procedure," it "may appoint certified candidates from any whole score in order to meet any lawful, reasonable, articulable and specific Department need."[148]

To the extent, therefore, that paragraph 36 obligated the City to use its best efforts to negotiate such an agreement with LAPPL, there is no question that it did so, and that it is not in violation of the consent decree. The City argues that this is all paragraph 36 obligated it to do, and thus that no contempt finding can be based on the paragraph. The intervening plaintiffs assert, however, that paragraph 36 requires the City to abandon the Rule of Three Whole Scores during the last six months of any promotion list and to appoint candidates who are on the eligibility list without regard to the band in which they are placed, and without regard to whether they have been certified by the Personnel Department.

The Asian American Subclass offers something of a middle view. It agrees with the City that paragraph 36 required a modification of the promotion procedures in place in 1992. The subclass contends, however, that the paragraph also requires the City to abide by and implement the modified procedure. It further contends that the modification contemplated by paragraph 36

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[145] *Id.*

[146] Meet and Confer Agreement at 38, § 3.

[147] Meet and Confer Agreement, p. 37, § 2.

[148] *Id.* at 38, §§ 4(a), (b).

was intended to be only an initial step, and that nothing in the provision was designed to limit the measures the City could take to satisfy its obligations under the decree. The subclass maintains that the City is obligated to implement such measures as are necessary to satisfy its goals, including abandonment of the Rule of Three Whole Scores or other action, even if such action might violate the City Charter.

Paragraph 36 cannot be read to require only that the City negotiate for a modification of its agreement with LAPPL. Rather, reasonably interpreted, it requires that the City seek a modification, and if successful in obtaining one, that it implement the modification as part of its promotion procedures.[149] The question is what procedure the modification contemplates. The City contends that, under the procedure set forth in paragraph 36, only candidates "*certified by the City Personnel Department*" are to be promoted during the last six months of the list.[150] It argues that, pursuant to the City Charter, the only candidates that can be certified by the Personnel Department are those with the three highest whole scores. Therefore, it interprets paragraph 36 to mean that in the last six months of a promotion list, the Chief need not exhaust all candidates in the highest band score before moving to the next highest band, but may appoint candidates from any of the three highest whole scores. Plaintiffs, as noted, assert that during the last six months of a list, promotions may be made from any band of eligible candidates.

Plaintiffs' interpretation is inconsistent with the plain language of the consent decree, which clearly references the appointment of candidates certified by the Personnel Department.[151]

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[149]See Consent Decree, ¶ 36 ("This modification *will require* the Chief of Police . . . to treat as equally eligible for promotion all applicants certified by the City Personnel Department" during the last six months of a promotion list).

[150]*Id.*

[151]The Rules of the Board of Civil Service Commissioners make it evident that mere placement on the "register of eligibles" for promotion does not constitute "certification." (See Civil Svc. Commissioner Rules at 42, §§ 5.1, 5.3.) The African American Subclass, moreover, presents evidence that the parties' contemporaneous interpretation of the meaning of the consent decree was that the City would promote from candidates having the three highest whole scores during the last six months of any promotion list rather than from candidates having the single highest whole score. (See Brief of *Hunter* Plaintiffs on Issues Raised by Intervenor/Officers'

The City's interpretation, however, misreads the City Charter. While § 1010(a) provides that the Personnel Department "shall certify . . . the . . . eligibles having the three highest whole scores," § 1010(c) requires that the Department certify at least five more candidates than the number of positions to be filled. It then states: "If there are less than five available eligibles more than the number of positions to be filled within a range of three whole scores, the . . . Personnel Department shall certify . . . all available eligibles within such additional number of whole scores as necessary to provide a minimum of five available eligibles more than the number of positions to be filled." The Charter clearly contemplates, therefore, that there will be situations in which more than the three highest whole scores are certified for promotion by the Personnel Department.[152] Under such circumstances, the consent decree contemplates that all certified candidates will be considered during the last six months of any promotion list.

The evidence before the court indicates that the City did not, during the last six months of the 2000-2002 Promotion List, consider all certified candidates equally eligible for promotion as

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Reply to Memorandum of Points and Authorities by Asian American Subclass ("African American Subclass Brief") at 3:10-4:4; Declaration of Kimberly West-Faulcon ("West Faulcon Decl."), Ex. 1, ¶ 5; Ex. 4.) Given the utility of the information to the court in addressing the issues raised by the intervening plaintiffs' application, the court grants the African American Subclass' request to file the brief and supporting declaration, despite the fact that it was untimely.

[152]The Asian American Subclass asserts that § 1010(d) provides general authority to an appointing authority such as LAPD to request that the entire list of eligibles be certified. Section 1010(d) states: "In consideration of the number of vacancies to be filled and the likely number of available eligibles with a range of three whole scores, the . . . Personnel Department may certify . . . all available eligibles within a *range of one or more whole scores* whenever a certification is required by an appointing authority and there are at least five eligibles available within such range over and above the number of positions to be filled." Read in context, this provision appears to permit the certification of *less than three whole scores*, not certification of the entire list of eligibles. Section 1010(c) specifically addresses certification of all remaining eligibles, stating that "[w]here there are remaining on the eligible list less than five available eligibles more than the number of positions to be filled and the . . . Personnel Department finds that it is for the good of the civil service, . . . all available eligibles may be certified and appointments made from among those available eligibles." This provision, and the companion provision in § 1010(c) that permits certification of additional whole scores beyond the highest three to ensure satisfaction of the "positions plus five" formula would not be necessary if § 1010(d) had the meaning ascribed to it by the Asian American Subclass.

required by paragraph 36. Rather, the undisputed evidence shows that the Chief of Police decided to slow and then stop appointing candidates to Sergeant I during the last six months of the list because certain candidates, who were higher ranked, and who had disciplinary problems that had been identified by Boards of Inquiry, would not remove their names from consideration and were, in the Chief's view, "blocking the list." The City has presented no evidence that the Chief was under any legal compulsion to adopt this position;[153] indeed, the 1993 Meet and Confer Agreement between the City and LAPPL specifically recognizes that none of its provisions is "intended to modify the current practice of 'passing over' or of failing to appoint an individual who has been found to be unfit for promotion as a result of a Police Department Board of Inquiry. Notwithstanding any provisions of this Agreement, that practice is to be continued."[154] The only inference that can be drawn from the evidence, therefore, is that, during the last six months of the 2000-2002 Promotion List, the Chief continued to appoint in rank order from the single highest whole score in contravention of the City's obligations under paragraph 36. This suffices to show, by clear and convincing evidence, that the City violated the consent decree.[155]

b. What Remedy Is Appropriate

The next question is which of the intervening plaintiffs, if any, can show that this violation

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[153]In its supplemental filing, the City asserts that § 1012(a) of the City Charter mandates that "[n]o candidate shall lose his or her place on a register of eligible candidates by certification of rejection, except that the board may remove names of candidates from a register after they have remained on the register for more than two years." The City contends that this provision justified the Chief of Police's decision to block the list, as a candidate cannot be removed from the register of eligibles simply because the chief has determined that he or she is not promotable. This argument was not raised during briefing or at the hearing on this motion, and the court declines to consider it as a consequence. Even if it were to be considered, it would not alter the result. Assuming the Chief lacks authority to remove names from the list, this does not prohibit him from "passing over" candidates by promoting officers further down the list.

[154]Sato Decl., Ex. 2 at 37, ¶ 1.

[155]It also suffices to demonstrate that the City did not take every reasonable step to comply, as it was clearly within the City's power to employ the promotion procedure outlined in paragraph 36 during the last six months of the 2000-2002 Promotion List. The City, moreover, has articulated no reason why it was unable to comply.

of the consent decree damaged them. The City initially presented evidence that the lowest band certified for the 2000-2002 Promotion List was band 14.[156] The City Personnel Manager represented that these certifications were "per the City Charter," presumably indicating that they were in compliance with both § 1010(a) and 1010(b), i.e., that the number of candidates certified was the number of available positions plus five. In response to the court's request for supplemental evidence, however, the City proffered evidence that band 15 was certified at the same time as band 14, and that all bands through band 26 were certified two days before the expiration of the list.

The City contends that certifications beyond band 14 were made "so that, in the event candidates d[id] not respond to a certification notice, serial requests for additional names of candidates w[ould] not be necessary."[157] Specifically, it states that band 14 was certified when the number of names remaining in previously certified bands was three short of the number of available positions plus five. Although band 15 was certified at the same time as band 14, the City asserts this was not required by the City Charter, and was done as an accommodation to the police department. It also asserts that promotions could not be made from band 15 under the Rule of Three Whole Scores as a result.[158] The City does not dispute that additional promotional vacancies became available after the certification of band 15. It is thus unclear whether, prior to expiration of the list, it was necessary to certify band 15 and/or subsequent bands to meet the "number of available positions plus five" requirement of the City Charter. Stated otherwise, it is not clear which bands were certified pursuant to City Charter mandate, and which were merely certified as a "courtesy." Had the City Charter been strictly followed, the City's personnel department indicates that it would only have been necessary to certify through band 16 to fill the

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[156]See Defendant's Reply to Memorandum of Points and Authorities by Asian American Subclass (Def.'s Reply"), Ex. 1 (Declaration of Margaret M. Whelan in Support of Defendant's Motion for Summary Judgment, *Los Angeles Police Protective League et al. v. City of Los Angeles et al.*, Los Angeles Superior Court Case No. BC273587 ("Whelan Decl."), ¶ 3.)

[157]Sato Supp. Decl., ¶ 4(a).

[158]Sato Supp. Decl., ¶ 4(b).

76 vacancies that existed at the time the list expired.[159] The City asserts, moreover, that it lacked authority under the Charter to appoint from bands that were certified merely as a "courtesy."[160]

Thus, while all of the intervening plaintiffs were certified for promotion prior to the expiration of the 2000-2002 list, it is unclear on the present record which could actually have been promoted. It is undisputed that candidates in band 14 was certified and eligible for promotion under the City Charter, and it appears likely that both bands 15 and 16 would have been reached had the Chief not determined to block the list.[161] Whether candidates in lower bands were also eligible for promotion – either under the City Charter or because the provisions of the consent decree trumped the City Charter – is an issue that has not been fully briefed by the parties, and that the court does not decide on the present record.

What is clear is that at least some of the intervening plaintiffs may have a legitimate complaint that they were denied promotion as a result of the Chief's decision to continue to appoint candidates in rank order from the single highest whole score and to make no promotions if an unfit candidate blocked the list. As noted earlier, the City met its goals under the consent decree for the promotion of Asian Americans to Sergeant I positions in 2000-2001 and 2001-2002. Thus, intervening plaintiffs in the African American and Hispanic subclasses are the parties who

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[159]Sato Supp. Decl., ¶ 8.

[160]The City notes that Rule 5.8 of the Civil Service Commission mandates that appointments be made only "from among the persons in the whole score that are certified to provide three whole scores or five more than the number of vacancies to be filled." (Sato Supp. Decl., ¶ 4(c)).

[161]Three of the intervening plaintiffs were in band 14 or higher and were not promoted – Henderson (band 11), Setzer (band 12), and Hillman (band 14). Nine of the plaintiffs were in band 15 and were not promoted – Cordobes (band 15), Chris Ramirez (band 15), Angelo (band 15), Rangel (band 15), Lynet Popper (band 15), James Lumpkin (band 15), Roneica McCoy (band 15), Benjamin Jones (band 15), and Darryl Brown (band 15). Seven of the plaintiffs were in band 16 and were not promoted – Edward Paul Maciel (band 16), Frank Ramirez (band 16), John Goodman (band 16), Saige Bruce Hosea (band 16), Earl Perry (band 16), Eva Perry (band 16), and Don Hosik Byeon (band 16). The remaining intervenors were in bands 17 or higher. Henderson, Hillman, Lumpkin, McCoy, Goodman, Hosea, Jones, Earl Perry, Eva Perry, and Brown are African American. Cordobes, Maciel, Chris Ramirez, Frank Ramirez, Angelo, Rangel, Popper are Latin American. Setzer and Byeon are Asian.

may complain that the City's violation of its obligations under paragraph 36 caused them damage.[162]

Both the Asian American and the African American Subclasses contend there is insufficient evidence before the court to determine whether the intervenors or other members of the classes would have been promoted had the City fulfilled its obligations under paragraph 36 of the consent decree during the last six months of the 2000-2002 Promotion List. The court agrees. The record contains no evidence regarding the date on which the Chief of Police concluded that the list was blocked by unfit candidates, and that no further promotions would be made. While the City has now proffered evidence regarding the composition of the list and the dates on which various bands were certified, there is no evidence as to whether and when specific applicants were promoted. Also, as noted, it is unclear which whole score bands were eligible for promotion under the City Charter; whether, to the extent certified bands were not eligible for promotions under the City Charter, the consent decree nonetheless made them eligible; and whether any of the eligibles would have been passed over for promotion for unrelated reasons. The court is therefore unable to determine whether, had promotions been made in a routine fashion, certain class members would have been promoted before others. Absent such evidence, the court cannot determine whether it is appropriate to fashion a remedy that is specific to these plaintiffs, or, if it is, what the proper remedy should be.

Accordingly, the court refers the matter to Judge Dash to oversee limited discovery on the issue of the appropriate remedy, if any, that the court should award to members of the Hispanic and African American Subclasses. Such discovery may encompass which whole score bands were

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[162]The African American Subclass asserts that additional evidence might show that, but for the Chief's decision to stop making promotions from the list, some or all of the remaining intervenors might have been certified for promotion. (African American Subclass Brief at 8:6-20.) Pursuant to the City Charter, however, the Personnel Manager had an affirmative obligation to certify the number of whole scores that would produce "a minimum of five available eligibles more than the number of positions to be filled." (City Charter, § 1010(b).) Given the Personnel Manager's sworn declaration that she "certified per the City Charter" (Whelan Decl., ¶ 3), and in the absence of contrary evidence, the court must presume that certification of bands 1 through 14 provided the requisite number of candidates for appointment.

certified pursuant to the "number of available positions plus five" requirement in the City Charter, whether, under the Charter and/or the consent decree, candidates in bands certified as a courtesy were eligible for promotion, and which African American and Hispanic class members would have been promoted had the City not violated paragraph 36 of the consent decree. Following the completion of discovery, the court directs Judge Dash to set a briefing schedule, hold a hearing, and issue an appropriate remedial order no later than January 2, 2004. Judge Dash should consider not only relief specific to individual members of the affected classes, but broader forms of relief as well. Only clear and unambiguous evidence that a particular member of the African American and Hispanic subclasses would have been promoted but for the City's violation of paragraph 36 will support an order directing such individual's promotion to Sergeant I.[163] Any

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[163]Following the submission of the additional evidence requested by the court, LaLey filed three requests that class members represented by it be included in any remedial decisions enforcing the consent decree. Specifically, it filed requests on behalf of two members of the Hispanic class who were not promoted from the 2000-2002 Sergeant I eligibility list, and a general request on behalf of all Hispanic Subclass members. The court's order envisions that, in fashioning an appropriate remedy, Judge Dash will consider *all* affected members of the Hispanic class, whether or not they are intervening plaintiffs. Accordingly, to the extent LaLey represents such class members, it may participate in the proceedings before Judge Dash. As respects the individual requests LaLey has presented, Ignacio Mendez was placed in Band 14, and was passed over for promotion on June 3, 2001, because he was on injured status at that time. Mendez returned to full duty without restrictions on August 1, 2001, and asserts that he was not promoted thereafter because of the decision to block the list. The information presently before the court suggests that Mendez may be able to adduce clear and unambiguous evidence that he would have been promoted but for the blocking of the list. the court makes no final decision as to whether Mendez is entitled to relief, just as it makes no determination whether the intervening plaintiffs, or any other members of the African American and Hispanic Subclasses, are entitled to relief. This is to be the subject of further proceedings before Judge Dash. The second class member represented by LaLey, Armando Coronado, asserts he was placed in band 13. Coronado's promotion was placed on a temporary hold on March 12, 2001, due to an ongoing personnel investigation; he was allegedly exonerated of misconduct charges on March 15, 2001. Coronado received an official reprimand from the Chief of Police in January 2001, which was overturned on appeal in June 2001; he received an additional reprimand in October 2001, which was overturned on appeal in February 2002. There is currently an ongoing personnel investigation regarding Coronado. The court has recognized that the Chief has discretion to "pass over" candidates certified under the Rule of Three Whole Scores when a Board of Inquiry identifies them as unfit for promotion because of disciplinary issues. The court cannot determine on the current record the impact of the disciplinary inquiries outlined above on Coronado's eligibility for

party dissatisfied with Judge Dash's order may thereafter seek to have this court review Judge Dash's order. The record on review will be limited to those matters in evidence before Judge Dash.

2. Paragraphs 26 And 27: Vigorous Good Faith Efforts To Promote Class Members

a. Whether The City Violated Paragraphs 26 And 27

Paragraph 26 of the consent decree requires that the City "engage in vigorous good faith efforts to promote African American, Hispanic, and Asian American . . . sworn police officers into position openings in the Detective, Sergeant and Lieutenant classifications at or above annual promotion goals."[164] The "annual promotion goal" for each ethnic group and enumerated classification is set at "eighty percent (80%) of the ethnic group's percentage representation among sworn police officers who are in feeder paygrades and who meet then-established minimum requirements for promotion."[165] The decree also imposes on the City a three-year interim promotion goal "to engage in vigorous good faith efforts to promote African American, Hispanic and Asian American . . . officers . . . at a rate equal to or above the mean percentage representation of each enumerated ethnic group within the combined feeder paygrades for each classification during the immediately preceding three-year period."[166] The City's 2000-2001 and 2001-2002 Annual Reports indicate that its goals for those period were set using the greater of the annual or interim goal for each ethnic group.[167] In the case of African Americans, this was the

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promotion, particularly given that one of the charges was pending on the date the list expired, and another has yet to be resolved. The court has directed Judge Dash to consider, *inter alia*, whether any class member who was otherwise eligible for promotion would have been passed over for unrelated reasons. Coronado's eligibility will therefore have to await further discovery.

[164]Consent Decree, ¶ 26.

[165]*Id.*, ¶ 26.

[166]*Id.*, ¶ 27.

[167]Sato Decl., Ex. 13 at 206; Bond Decl., Ex. A.

annual goal; in the case of Hispanics and Asians/Filipinos, it was the interim goal.[168] The court concluded in a prior order on a separate contempt motion that the annual goals established by the consent decree were sufficiently specific and definite to be enforced through contempt. It now concludes that the interim goals are similarly specific and definite, and can be enforced through contempt, because they, like the annual goals, establish a formula that can be used to determine the number of officers within an ethnic group who should be promoted during a given promotional cycle.

The City failed to meet its Sergeant I promotion goals for African American and Hispanic officers in both the 2000-2001 and 2001-2002 fiscal years. Specifically, to meet its goals for the appointment of African Americans to Sergeant I, the City would have had to promote approximately eight additional officers in 2000-2001 and four additional officers in 2001-2002. As respects Hispanic, the City would have had to appoint nine additional officers to Sergeant I in 2000-2001, and ten in 2001-2002 to meet its goals.[169] The City's interrogatory answers in the related Superior Court action indicate that it effectively stopped making promotions to Sergeant from the 2000-2002 Promotion List in August 2001, despite the fact that the number of promotional vacancies continued to grow.[170] The evidence before the court indicates that some of the candidates certified for promotion but not promoted were members of the affected classes.

The City argues there is no "statistical or other probative" evidence that it did not make good faith efforts to comply with the goals set forth in the consent decree. It cites paragraph 37 of the decree, which specifies, however, that "[n]either the above annual goals, interim goals, nor goal attainment procedures shall be utilized as quotas. Th[e] Consent Decree and Agreement shall not be construed to require or to permit the use of quota relief."[171]

In its prior order, the court concluded that "best efforts" means "an obligation to act with

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[168] *Id.*

[169] *Id.*

[170] Sept. 14 Interrogatories at 43-55.

[171] Consent Decree, ¶ 37.

good faith in light of one's own capabilities." See *Bartsh v. Northwest Airlines*, 831 F.2d 1297, 1304 (7th Cir. 1987). The "best efforts" obligation is not an absolute requirement (see *Western Geophysical Co. v. Bolt Associates*, 584 F.2d 1164, 1171 (2d. Cir. 1978)), but it nonetheless presupposes that those things that can be done to meet a goal will be done. See also *Equal Employment Opportunity Commission v. New York Times Co.*, 196 F.3d 72, 78-79 (2d Cir. 1999) (interpreting a consent decree that established a goal of 25% minority and female representation in various categories of union membership, but stated that failure to meet the goals would not constitute a violation so long as defendants made a good faith effort to achieve them, the court defined "good faith" as "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party," citing RESTATEMENT (SECOND) OF CONTRACTS, § 205 (1979)).

In *New York Times*, the court concluded that, in order to demonstrate that its failure to meet percentage goals for union membership did not violate a "best efforts" obligation to satisfy such goals set forth in a consent decree, defendants had to show "some justification . . . in the nature of discernible industrial or commercial needs. . . . The justification may also be found in the CBA between the Times and the Union." *Id.* at 79. Applying this standard, the court held that a "discretionary decision" by defendants to afford work opportunities to certain union members not entitled to them "as a matter of right," which denied the opportunities to intervening class members, "undermined the achieving of the goals expressed in the decree." *Id.* at 79-80. It continued:

> "We have no doubt that, where the sole consideration in a discretionary decision is whether Union members at other papers or Casuals such as the Intervenors are to get work opportunities at the Times, the good-faith-performance obligation of the decree requires that the jobs go to the Casuals until the 25% goals are achieved. The transfer did, therefore, violate the decree." *Id.* at 80.

The Chief's decision to stop promoting officers to Sergeant I during the final six months of the 2000-2002 Promotion List was not based on legal compulsion. Indeed, as noted earlier, the 1993 Meet and Confer Agreement specifically recognized the practice of "passing over"

individuals found unfit for promotion by a Board of Inquiry, and the fact that such practice would continue.[172] Rather, it appears to have been a discretionary decision on his part that accorded officers with disciplinary problems or records a right to which they were not entitled during the last six months of the list, i.e., to have promotions made in rank order from the single highest whole score. It also deprived class members who had been certified by the Personnel Manager of their right under the consent decree to be considered equally eligible for promotion as all other certified candidates. There is adequate evidence in the record to support a finding that this discretionary decision adversely affected the City's ability to achieve the promotion goals set forth in the consent decree. Accordingly, the court finds that the Chief's decision to slow and then stop the appointment of candidates to Sergeant I during the last six months of the list because certain candidates with disciplinary problems, who were higher ranked, were "blocking the list" also violated paragraphs 26 and 27 of the consent decree.[173]

The City contends it cannot be held in contempt for failing to promote the intervening officers because none of them had been certified for promotion by the Personnel Department. This argument is simply not supported by the evidence. Twenty-four of the intervenors are members of the African American or Hispanic Subclass, and were in bands that were certified for promotion before expiration of the 2000-2002 Promotion List. At least three of these officers were in band 14 or above, bands the City concedes were properly certified under the City Charter. There is thus clear evidence that, despite being certified, certain of the intervening plaintiffs were

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[172]Sato Decl., Ex. 2 at 37, ¶ 1. LAPPL filed suit against the City on October 29, 2001, asserting that it was unconstitutional for LAPD to order candidates for promotion to a Board of Inquiry as a prerequisite to considering their appointment. (See Complaint, *Los Angeles Police Protective League et al. v. City of Los Angeles et al.*, Case No. CV 01-10448 SVW (CTx)). The City was apparently served with the state court complaint on November 5, 2001, and removed the action to federal court on December 5, 2001, where the case was assigned to Judge Wilson. The City does not contend that the filing of this action constituted a legal impediment to its ability to comply with the consent decree.

[173]This finding is supported by the fact that the City failed to meet its annual goal for the promotion of African American and Hispanic officers to Sergeant I in each of the two prior years as well. (See Declaration of Walter Cochran-Bond in Support of Reply Memorandum by Asian-American Subclass in Support of a Finding of Contempt ("Bond Reply Decl."), Exs. A-C.)

not promoted.

The evidence is also susceptible of the interpretation that a band or bands below 14 was certified pursuant to the "number of available positions plus five" requirement in the City Charter. Finally, there is evidence that all bands through band 26 were certified two days before the expiration of the promotion list. While the City argues that some bands were certified merely as a courtesy, it is unclear whether promotions could have been made from these whole score bands. Resolution of these questions may result in a finding that additional intervening plaintiffs and class members were certified and eligible for promotion, but were not promoted.

Given the City's admitted decision not to follow the promotion procedure set forth in paragraph 36 during the last six months of the list – a procedure that was designed to facilitate its ability to meet the promotion goals set forth in paragraphs 26 and 27 – and given the large number of vacancies that existed at the expiration of the 2000-2002 Promotion List, the inference to be drawn is that the City did not use its best efforts to meet its goals for promoting African Americans and Hispanics to Sergeant I. In the face of such evidence, moreover, there is no question of imposing a quota requirement on the City. This is not a case, as the City suggests, where there is only evidence that it failed to meet the numerical goals established by the consent decree and an "absence of any other evidence" demonstrating a violation.[174] Rather, there is clear evidence that the City's failure to meet the goal established by the consent decree was caused by its "own lack of concentrated will to achieve substantial compliance." *Aspira of New York, Inc. v. Board of Education of City of New York*, 423 F. Supp. 647, 651 (S.D.N.Y. 1976).[175] Accordingly, the court finds, by clear and convincing evidence, that the City violated paragraphs 26 and 27 of the consent decree, and that it has failed to show it took every reasonable step to

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[174]Defendant's Reply to Memorandum of Points and Authorities by Asian American Subclass ("Def.'s Reply") at 5:12-16.

[175]There is similarly no evidence that, having failed to meet its promotion goals for three years consecutive years, the City employed the "goal attainment procedures" identified in paragraph 34 of the consent decree to enhance its ability to meet the targets. (Consent Decree, ¶ 34.)

comply with these provisions in administering the 2000-2002 Promotion List.

b. What Remedy Is Appropriate

The intervening plaintiffs request that the court enforce compliance with the consent decree by promoting "those candidates who would have been promoted" in the absence of the City's violation of the consent decree. As noted earlier, there is insufficient evidence in the record to determine whether any of the intervening plaintiffs, or other members of the protected classes, would have been promoted had the City fulfilled its obligations under paragraph 26 and 27 of the consent decree during the last six months of the 2000-2002 Promotion List. Accordingly, the court refers the matter to Judge Dash to oversee limited discovery on the issue of the appropriate remedy for the City's violation of paragraphs 26 and 27 of the decree. Such discovery may encompass which whole score bands were certified pursuant to the "number of available positions plus five" requirement in the City Charter, whether, under the Charter and/or the consent decree, candidates in bands certified as a courtesy were eligible for promotion, and which African American and Hispanic class members would have been promoted had the City not violated paragraphs 26 and 27 of the consent decree. Following the completion of discovery, the court directs Judge Dash to set a briefing schedule, hold a hearing, and issue an appropriate remedial order no later than January 2, 2003. In fashioning a remedial order, Judge Dash is directed specifically to consider paragraph 34 of the decree, which details various steps the City must take if it fails to meet its promotion goals in any given year, and to determine whether ordering the City to comply with some, or all, of the provisions of paragraph 34 would afford an adequate equitable remedy. Judge Dash is also directed to ensure that there is sufficiently clear and specific evidence that a particular member of the African American and Hispanic subclasses would have been promoted but for the City's violation of its obligations under paragraphs 26 and 27 before ordering that individual's promotion to Sergeant I. Only a clear and unambiguous record in this regard will support the awarding of this form of relief. The court observes, in this regard, that the consent decree was not intended to serve as a vehicle for individual class members to dispute adverse promotional decisions. Rather, it was intended to secure broad, class-wide relief.

Once Judge Dash has issued his order, any party dissatisfied with it may seek to review

in this court. The record for any such proceeding will be limited to the matters placed in evidence before Judge Dash.

III. CONCLUSION

For the reasons stated, the court finds that the City violated its obligations under paragraphs 26, 27 and 36 in connection with its administration of the 2000-2002 Promotion List for the position of Sergeant I. Because the record is not adequate to permit the framing of an appropriate remedial order, the court refers the matter to Judge Dash to oversee a period of limited discovery on the issue of the appropriate remedy that should be ordered. This discovery may encompass which whole score bands were certified pursuant to the "number of available positions plus five" requirement in the City Charter, whether, under the Charter and/or the consent decree, candidates in bands certified as a courtesy were eligible for promotion, and which African American and Hispanic class members would have been promoted had the City not violated the consent decree.

Following the completion of discovery, the court directs Judge Dash to set a briefing schedule, hold a hearing, and issue an appropriate remedial order no later than January 2, 2004. In fashioning a remedial order, Judge Dash is directed specifically to consider paragraph 34 of the decree, which details various steps the City must take if it fails to meet its promotion goals in any given year, and to determine whether ordering the City to comply with some, or all, of the provisions of paragraph 34 would afford an adequate equitable remedy. Judge Dash is also directed to ensure that there is sufficiently clear and specific evidence that a particular member of the African American and Hispanic subclasses would have been promoted but for the City's violation of its obligations under paragraphs 26 and 27 before ordering that individual's promotion to Sergeant I. Only a clear and unambiguous record in this regard will support the awarding of this form of relief. Based on the record presented in this proceeding, only members of the African American and Hispanic Subclasses may argue that they are entitled to be promoted to Sergeant I because of the City's violation of the terms of the consent decree. This includes members of these classes who are intervening plaintiffs, as well as other African American and

Hispanic Subclass members who would have been promoted had the City not violated its obligations under the consent decree.

Once Judge Dash has issued his order, any party dissatisfied with it may seek to review in this court. The record for any such proceeding will be limited to the matters placed in evidence before Judge Dash.[176]

DATED: August 8, 2003

Margaret M. Morrow
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

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[176]On May 28, 2003, the court was advised that the intervening plaintiffs' attorney had recently sent an *ex parte* communication to Judge Dash, advising him of the bases on which her clients sought a contempt finding from this court, and requesting that Judge Dash indicate the procedure for scheduling an administrative hearing at which plaintiffs could seek a recommendation from him that they be promoted. Counsel is severely admonished for initiating this communication; the intervening plaintiffs' application has, at all times since its filing, been pending before this court. Until entry of the court's order referring the remedial aspects of the issue to Judge Dash, there was no cause to communicate with him regarding it. Furthermore, *ex parte* communications with Judge Dash are inappropriate; the court expects that the parties will communicate jointly with Judge Dash regarding all aspects of the referred proceeding. Finally, as noted, the sole interest of both this court and Judge Dash is proper administration of the class-wide relief secured by the consent decree entered in these companion cases. Neither this court nor Judge Dash exists to provide plaintiffs (or other individual class members) with an alternative administrative forum in which to litigate issues related to LAPD's decisions regarding their promotions.