IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, PLAINTIFF, -AND- THE VULCAN SOCIETY, ET AL., PLAINTIFFS-INTERVENORS, V. CITY OF NEW YORK, DEFENDANT.

CIV. ACTION NO. 07-CV-2067
(NGG)(RLM)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-INTERVENORS' PROPOSED ORDER FOR INJUNCTIVE RELIEF AND SERVICE AWARDS TO CLASS REPRESENTATIVES

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INTRODUCTION

This Court held, in its January 13, 2010 decision, that "the City's use of written exams with discriminatory impacts and little relation to the job of firefighter . . . was part of a pattern, practice, and policy of intentional discrimination against black applicants that has deep historical antecedents and uniquely disabling effects," and noted that "the consequences that this illegal policy will have for the City will be addressed at the remedial stage." *United States v. City of New York*, 2010 U.S. Dist. LEXIS 2506, at *126 (E.D.N.Y. Jan. 13, 2010) ("Intentional Discrimination Opinion"). Thereafter, in its initial remedial order of January 21, 2010, the Court noted that "the Intervenors' intentional discrimination showing with respect to black applicants will likely require supplemental forms of relief, which they should be prepared to brief to the court." *United States v. City of New York*, 2010 U.S. Dist. LEXIS 4509, at *70 (E.D.N.Y. Jan. 21, 2010) ("Initial Relief Order").

Plaintiffs-Intervenors submit this Memorandum of Law in support of its Proposed Order for Injunctive Relief and for Service Awards to the Class Representatives.

The proposed injunctive relief includes: (a) appointment of a Special Monitor to oversee compliance with the Court's Order (Order, ¶¶1-2); (b) frequent and accessible administration of firefighter exams (Order, ¶¶3-5); (c) enhanced recruitment of black and Hispanic firefighters (Order, ¶¶6-7); (d) reinstatement of the FDNY's Fire Safety Cadet Program (Order, ¶8-11); (e) changes to the post-exam candidate screening process (Order, ¶¶12-29); and (f) monitoring to prevent workplace discrimination and retaliation (Order, ¶¶30-39). Plaintiffs-Intervenors also seek service awards for the named plaintiffs for their efforts in furthering this litigation on behalf of the Class (Order, ¶41-42) and funding for the Vulcan Society's future work to monitor and implement provisions of this Order (Order, ¶43).[1]

The relief sought in the annexed Proposed Order is consistent with the Court's desire to employ race neutral corrective measures and with the remedial and prophylactic purposes of Title VII and New York State Human Rights Law, N.Y. Exec. Law § 296, *et seq.*, and the New York City Human Rights Law, Admin. Code §§ 8-101, *et seq*. The Court should therefore adopt Plaintiffs-Intervenors' Proposed Order in its entirety.

FACTS

The facts relevant to the requested relief are set forth in the affidavit of Captain Paul Washington, and the declaration of Richard A. Levy, dated September 29, 2010, which authenticates the supporting exhibits.

[1] In a separate motion, filed simultaneously herewith, Plaintiffs-Intervenors also seek appropriate compensatory damages based on the Court's finding of intentional discrimination.

ARGUMENT

POINT I
THE COURT HAS BROAD AUTHORITY TO ORDER THE PROPOSED INJUNCTIVE RELIEF

Where, as here, the Defendant has a longstanding pattern of intentional racial discrimination, the Court's equitable remedial powers are particularly broad. Section 706(g) of Title VII provides that when a defendant employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice," a federal court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . . *or any other equitable relief as the court deems appropriate*." 42 U.S.C. § 2000e-5(g)(1) (emphasis added). As the Second Circuit has said, "once a violation of Title VII is established, the district court possesses broad power as a court of equity to remedy the vestiges of past discriminatory practices." *Rios v. Enters. Ass'n Steamfitters Local 638*, 501 F.2d 622, 629 (2d Cir. 1974); *Ass'n Against Discrimination in Employment (ADE) v. City of Bridgeport*, 647 F.2d 256, 278 (2d Cir. 1981) (same). "The bounds of the court's discretion are set by the purposes of Title VII, which are to prevent discrimination and achieve equal employment opportunity in the future. . . and to make whole the victims of past discriminatory practices." *Berkman v. City of New York*, 705 F.2d 584, 594 (2d Cir. 1983) (citations omitted); *ADE v. City of Bridgeport*, 647 F.2d at 279 (same). Thus, when fashioning a remedy for racially discriminatory employment practices, a district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)(citation omitted); *see also Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 448 (1986) ("In order to foster equal employment

opportunities, Congress gave the lower courts broad power under § 706(g) to fashion the most *complete relief possible* to remedy past discrimination.") (emphasis added) (citations omitted).

A district court's remedial powers are especially broad where the discrimination is intentional and where "there has been a long-continued pattern of discrimination." *ADE v. City of Bridgeport*, 647 F.2d at 286; *Berkman*, 705 F.2d at 594 (court has "broad" discretion to fashion relief upon finding a violation of Title VII, the bounds of which are set by the goals of the statute, namely, "to prevent discrimination and achieve equal employment opportunity in the future … and to make whole the victims of past discriminatory practices." (citations omitted)). In such cases, the relief ordered by the court can and should go beyond mere compliance relief (*i.e.*, enjoining further use of the specific discriminatory employment practices challenged in the lawsuit) and compensatory relief (*i.e.*, make-whole relief for the actual victims of the challenged practices) to include affirmative injunctive relief (*i.e.*, relief designed to address effects of discrimination that cannot be remedied by compliance or compensatory relief). *See, e.g., Sheet Metal Workers*, 478 U.S. at 448 ("In some instances [], it may be necessary to require the employer or union to take affirmative steps to end discrimination effectively to enforce Title VII. Where an employer or union has engaged in particularly longstanding or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation."); *Berkman*, 705 F.2d at 596 (affirmative relief such as "a requirement that the defendant actively recruit or train members of the Title VII-protected group" "may be required where, for example, the defendant has intentionally or egregiously engaged in a practice of discrimination that is likely to have discouraged members of the protected group from becoming members of the applicant pool at any stage."), *affirmed in part and reversed in part by* 812 F.2d 52 (2d Cir. 1987); *Guardians*

Ass'n of the N.Y. City Police Dep't, Inc. v. Civil Serv. Comm'n, 630 F.2d 79, 108 (2d Cir. 1980) ("When it also appears the employer has discriminated prior to the use of the challenged selection procedure, then it may also be appropriate to fashion some form of affirmative relief on an interim and long-term basis, to remedy past violations."), *cert denied*, 452 U.S. 940 (1981). Such affirmative relief can, in certain circumstances, even be race-conscious. *See, e.g., Sheet Metal Workers*, 478 U.S. at 448-49, 476; *ADE v. City of Bridgeport*, 647 F.2d at 280.

The Court's authority to order the affirmative and monetary relief requested here also stems from its findings that the City violated the New York State and City Human Rights Laws. Courts have interpreted both statutes to afford greater protection than Title VII. *E.g., McGrath v. Toys "R" Us, Inc.*, 3 N.Y.3d 421 (2004) (stating that "the drafters of the Administrative Code of the City of New York explicitly stated that 'judges interpreting the City's Human Rights Law are not to be bound by restrictive state and federal rulings and are to take seriously the requirement that this law be liberally and independently construed.' (citing inter alia *Matter of Wittlinger v Wing*, 99 N.Y.2d 425, 786 N.E.2d 1270, 757 N.Y.S.2d 234 (2003)); *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 77 (1980) (noting that the State Human Rights law, "by its terms, should be 'construed liberally for the accomplishment of the purposes thereof'" (quoting N.Y. Exec. Law § 300)). The requirement that these laws be liberally construed and that they afford courts greater power than comparable federal provisions in attaining the goal of non-discrimination in hiring further supports the Court's power to order the relief requested herein.

The Court has found that the City has engaged in a decades-long pattern of intentional racial discrimination against black entry-level firefighter applicants, described as "34 years of intransigence and deliberate indifference, bookended by identical judicial declarations that the City's hiring practices are illegal." *See United States v. City of New York*, 2010 U.S. Dist. LEXIS

2506, at *92 (E.D.N.Y. Jan. 13, 2010). Such conduct on the part of the City "supports broader, rather than narrower, relief." *United States v. City of New York*, 2010 U.S. Dist. LEXIS 4509, at *68. Accordingly, as set forth below, each of the injunctive remedies proposed by Plaintiffs-Intervenors is well within the remedial powers conferred upon this Court by Title VII and the New York State and City Human Rights laws.

POINT II
THE COURT SHOULD APPOINT A SPECIAL MONITOR TO OVERSEE COMPLIANCE AND RESOLVE DISPUTES

Given the breadth of the injunctive relief that is appropriate here, and the possibility that disputes concerning compliance will arise among the Parties, Plaintiffs-Intervenors request that the Court appoint a Special Monitor to oversee compliance with the Court's Order (Order ¶¶ 1-2).[2] The Special Monitor should be given authority, in accordance with Fed. Rule of Civ. P. 53, to hear disputes concerning recruitment, candidate investigation, and workplace treatment of incumbent black firefighters; to take evidence from the parties; to impose additional reporting requirements if necessary; to attempt to resolve disputes where possible and to issue recommendations to the Court where no resolution can be reached.

District Courts have the authority to appoint a Special Master or Monitor when broad injunctive relief is ordered. *See, e.g., United States v. Yonkers Bd. of Educ.*, 29 F.3d 40, 44 (2d Cir. 1994) ("The power of the federal courts to appoint special masters to monitor compliance with their remedial orders is well established"), *citing New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 962 (2d Cir. N.Y. 1983), *cert. denied*, 464 U.S. 915 (1983), and *Stone v. City & County of San Francisco*, 968 F.2d 850, 859 n.18 (9th Cir. 1992) (collecting cases), *cert. denied*, 122 L. Ed. 2d 358, 113 S. Ct. 1050 (1993); *see also McClain v. Lufkin Indus.*

[2] The Court raised the subject of appointing a monitor to oversee implementation of a remedy in its January 21, 2010 Initial Remedial Order (Docket Entry 390 at 17 n. 11).

Inc., 2010 WL 455351, *4-5 (E.D. Tex, Jan. 15, 2010) (where the employer's promotion practices had a disparate impact on a class of black employees, the Court ordered injunctive relief and appointed "an outside Ombudsperson to monitor compliance with this Injunction and to hear complaints from class members regarding" any alleged "non-compliance with this injunction," as well as charges of discrimination or retaliation); *Powell v. Ward*, 487 F. Supp. 917, 935 (S.D.N.Y. 1980) (designating a special master to oversee compliance with prison reform injunction), *aff'd and modified on other grounds*, 643 F.2d 924 (2d Cir.) (per curiam), *cert. denied*, 454 U.S. 832 (1981).

In this case, a Special Monitor would be particularly useful to the Parties and the Court because he or she could help the Parties resolve disputes concerning the City's recruitment and publicity approach, the unwarranted disqualification of black and Hispanic candidates at any stage of candidate processing, or allegations of unfair treatment of black and Hispanic firefighters, including priority hires, subsequent to their appointment. The Parties will be more likely to resolve their differences, and avoid the need to involve the Court, if they have the assistance of a skilled and knowledgeable Monitor. Indeed, one would expect that the prospect of a rapid response to problems by an effective neutral would discourage unnecessary delay and dispute.

POINT III
THE PROPOSED INJUNCTIVE RELIEF IS WARRANTED HERE

A. FREQUENCY AND SCHEDULING OF FIREFIGHTER EXAM ADMINISTRATION

As mandated by the Court's Initial Relief Order (Docket Entry 390, at 54-55), the Parties' experts have begun designing a new open competitive exam to be used by the City for selecting entry-level firefighters. Plaintiffs-Intervenors ask that the Court order the City to administer the exam every two (2) years. Administering the exam only once every four (4) years, as the City

has done in the past, presents a barrier to black and Hispanic residents who are less likely than whites – whose family and friends are in the Department – to be aware of the opportunity for employment in the FDNY. They are therefore more likely to be unaware of the exam and miss an exam administration. Four (4) years later, they may be over the maximum age to apply. *See* Affidavit of Captain Paul Washington, dated September 29, 2010 (hereinafter "Washington Aff."), ¶4.[3]

The City should also be required to offer the exam on alternate dates, to accommodate potential applicants who cannot attend the regular exam day. In a survey of individuals who applied to take Exam 6019 but failed to appear for the test, the FDNY found that 31.1% of respondents had a work conflict that prevented them from appearing. *See* Declaration of Richard A. Levy, dated September 29, 2010 (hereinafter "Levy Decl."), Ex. G. This was the single most common reason stated for failing to take the exam. Id. The next most common explanations for not appearing were that the applicant did not receive the Admission Card necessary for entrance or was ill on the day of the exam. Id. Since the City already offers an alternate test date to applicants with religious observances or on military duty, it should be feasible to expand this option to other applicants who require an alternate test or whose absence of the scheduled date is excusable. This is a practical way of reducing barriers faced by some black and Hispanic applicants.

B. ENHANCED RECRUITMENT AND PUBLICITY

In the past, black firefighter applicants have been far fewer in number than would be expected. Although more than 26% of the City's 18- to 34-year-old population is black, blacks

[3] The Plaintiffs-Intervenors recognize that the test developers may devise an application process (e.g., continuous assessment centers) that would obviate the need for periodic exams. In the accompanying Proposed Order for Injunctive Relief and Service Awards to Class Representatives, we suggest that the issue of exam frequency be reconsidered based on the ultimate recommendation of the experts.

were only 10.2% of the test-takers for Exam 7029, were only 7.8% of the test-takers on Exam 2043, and were only 17.5% of the test-takers for Exam 6019. Washington Aff., ¶8; Levy Decl., Ex. A-C. Black and Hispanic applicants lack knowledge about the job and its benefits, do not believe that they can obtain the job, or are reasonably concerned about joining a virtually all-white organization. Washington Aff., ¶¶9, 18-19. Given the long history of exclusion, enhanced recruitment efforts are plainly needed.

Ultimately, the goal of the FDNY's Office of Recruitment & Diversity Initiatives (referred to here as the "Recruitment Unit") should be to ensure that blacks, Hispanics and whites are equally informed about employment opportunities in the firefighter title, with the expectation that this will result in a pool of applicants that is representative of the racial and ethnic makeup of the age-eligible residents of New York City. (Order, ¶ 6(a)).

The expansion or creation of targeted recruiting and advertising plans is well within this Court's broad remedial authority. In *Sheet Metal Workers*, after finding that the defendants had engaged in intentional discrimination in violation of Title VII, the district court appointed an administrator to oversee implementation of the remedies that it ordered. *EEOC v. Local 638 & Local 28 of the Sheet Metal Workers' Int'l Ass'n,* 401 F.Supp. 467, 479 (S.D.N.Y. 1975)(appointment of administrator affirmed sub nom by *Sheet Metal Workers*, 478 U.S. 421, 481-82 (1986). Among other things, the administrator proposed, and the district court ordered, a program to "conduct extensive recruitment and publicity campaigns aimed at minorities" because of the reputation that the defendants had created for intentionally discriminating against nonwhites. *Id.* at 432-33, & 433 n.8 (describing lower court's order). The Second Circuit affirmed this remedy on appeal. *EEOC v. Local 638 & Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 532 F.2d 821, 830-31 (2d Cir. 1976) (affirming recruitment remedy "as an appropriate

exercise of the district court's equitable discretion").[4] As the Supreme Court later explained, the purpose of the publicity and recruitment effort was to "dispel this reputation, and to encourage nonwhites to take advantage of opportunities" for employment with defendants. *Sheet Metal Workers*, 478 U.S. at 433 n.8.

The *Sheet Metal Workers* Court required defendants to "provide to plaintiffs and the Administrator a written plan for an effective general publicity and recruitment campaign to inform the non-white community in [defendant's] geographical jurisdiction of nondiscriminatory opportunities ... and to ensure an available pool of non-white applicants." Levy Decl., at Ex. I, "Affirmative Action Program & Order" at ¶46. The plaintiffs had an opportunity to comment on the proposed recruitment and publicity plan, and the administrator would resolve any disagreements. *Id.*

Other courts have ordered or approved similar recruitment relief, including provisions for involvement by the suing party in the creation and monitoring of such relief. *See United States v. Ironworkers Local 86*, 443 F.2d 544, 552-54 (9th Cir. 1971), *cert. denied* 404 U.S. 984 (1971) (affirming a remedial order requiring defendant construction unions to engage in recruiting and publicity efforts targeting black communities); *Carter v. Gallagher*, 452 F.2d 315, 319, 326, 329 (8th Cir. 1971) (affirming remedial order's requirement of outreach to minority community and targeted publicity campaign); *United States v. Local No. 86, Int. Ass'n of Bridge S., O. & R.*

[4] Although the initial recruitment and publicity order was not appealed to the Supreme Court, as it was superseded by a subsequent district court contempt order that expanded the remedy by creating a Fund for continued recruitment and publicity efforts, a majority of the Supreme Court approved this general category of relief in light of the intentional discrimination finding and the authority vested the district court. In particular, the majority noted with approval that lower courts had followed a "cautious approach" to the extent that, notwithstanding their clear authority to impose affirmative racial remedies in appropriate circumstances, they have "preferred to issue less harsh orders such as recruiting and posting of notices of vacancies." *Sheet Metal Workers*, 478 U.S. at 476 n.48 (quoting Blumrosen, *Affirmative Action in Employment After Weber*, 34 Rutgers L. Rev. 1, 41 (1981)).

Ironworkers et al., 315 F. Supp. 1202, 1238-39 (W.D. Wash. 1970) (requiring defendants to disseminate information about employment and apprenticeship opportunities to black communities to remedy Title VII violation).

More recently, in *NAACP v. Town of E. Haven*, 998 F. Supp. 176, 187-88 (D. Conn. 1998), *vacated and remanded on other grounds by* 259 F.3d 113 (2d Cir. 2001), the district court, after finding the defendant city to have engaged in discriminatory hiring practices, ordered it to establish an outreach program targeting black communities to "increase awareness of job opportunities through advertising directed to the black community and communications with black community organizations, [and] to implement a formal system for monitoring, enforcing, and keeping records of hiring and recruitment efforts." *NAACP*, 259 F.3d at 117. The recruitment relief was intended, in part, to "overcome the inhibitions which have discouraged qualified blacks from seeking Town employment in numbers representative of the makeup of the black community." *NAACP v. Town of E. Haven*, 998 F. Supp. 176, 187 (D. Conn. 1998). Notably, the district court found such a remedy appropriate even though plaintiffs had not alleged a discriminatory recruiting claim and the city had been found liable for disparate impact discrimination, not disparate treatment. The court found that recruitment relief was "in keeping with the prophylactic objective of Title VII, which is to 'achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees,' by fashioning the most complete relief to achieve that result." *Id.* at 187-88 (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 364 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

The Third Circuit has likewise acknowledged that since courts have broad equitable powers to fashion the most complete relief, they may order violators not only to cease

discriminatory practices, but also to take other affirmative measures that eliminate disparities caused by those practices. In *Newark Branch, NAACP v. Harrison*, 940 F.2d 792, 806-07 (3d Cir. 1991), the court affirmed an order requiring the defendant city to direct recruiting and publicity efforts at minority communities and rejected the city's contention that relief had to be narrowly tailored to the specific claims made in the complaint. The court held that "the district court's reliance on affirmative recruitment efforts was appropriate in order to 'dissipate the lingering effects of pervasive discrimination." *Id.* at 806-07.

Here, the City's liability for both disparate impact and intentional discrimination provides a strong legal and factual basis for the recruitment and publicity relief being sought. The City should be ordered to create, in consultation with the Vulcan Society, recruitment and publicity plans that include, at minimum:

1. Retaining a Professional Recruitment Expert (Order ¶ 6(b))

Effective recruitment in the months prior to the filing deadline is key in ensuring that minority communities learn about the upcoming exam administration. Historically, the FDNY's recruitment efforts have not been successful. Washington Aff., ¶8. The FDNY should take advantage of the recruitment expertise available in both the public and private sectors and retain a consultant who has demonstrated success in recruiting a diverse applicant pool, preferably in a uniformed title.

2. Employing Thirty (30) Full-Time, Full-Duty Recruiters Beginning at Least Eight (8) Months Prior to an Exam-Filing Period (Order ¶ 6(c) and (h))

The Columbia University research team that studied, at the FDNY's request, the recruitment campaign for Exam 2043 reported that the recruitment campaign "had an inadequate number of recruiters to carry out recruitment goals." Levy Decl., Ex. M, at 29. The Columbia group recommended a staff of thirty (30) recruiters, and noted that this is not a large number

compared to the size of the FDNY's uniformed force. Id. Plaintiffs-Intervenors agree with this recommendation and ask that the Court order the City to employ no fewer than thirty (30) full-time, full-duty recruiters during an open-filing period for a firefighter exam. (Order ¶ 6(c)). This number should be increased if, in the judgment of the recruitment expert, more staff are necessary to meet the FDNY's goal of a representative applicant pool.

By way of comparison, during the application period for Exam 6019, the FDNY's Office of Recruitment & Diversity Initiatives (the "Recruitment Unit") had only 8 full-duty firefighters and 60 light-duty firefighters who were temporarily assigned to recruiting. Washington Aff., ¶12. Light-duty firefighters need to focus on recovery from their injuries and spend significant time out of the office. Id. While the Recruitment Office also maintains a "Cadre List" of firefighters who are interested in doing recruitment work on overtime hours, these firefighters are not required to participate in recruitment work and do not have the depth of skill or experience that a professional recruiter would bring. A more permanent recruitment staff will be able to build relationships with potential applicants, which is necessary to bring results.

In addition, the FDNY should ensure that its recruitment staff is as diverse as the City it will be reaching out to. All black and Hispanic firefighters should be invited and encouraged to attend the recruitment training and join the recruitment campaign.

3. Providing the Recruitment Unit with an adequate budget and other material support (Order ¶ 6(d))

Effective recruiting requires adequate resources, ranging from printed materials to vehicles, as well as a sizable advertising budget. In 2008, the Vulcan Society used its own funds to place radio advertisements and to repair a vehicle to use for recruiting. (The FDNY's vehicles at that time were in serious disrepair, Washington Aff., ¶31; Levy Decl., Ex. O. The FDNY should be ordered to provide the Recruitment Unit with a budget that is adequate to meet the

goal of an applicant pool that reflects the young adult population of the City. This figure should be calculated with input from the recruitment expert and the Vulcan Society.

4. Targeting recruitment and advertising toward blacks and Hispanics (Order, ¶ 6(e)-(f))

As the Columbia University Study found, most firefighters apply to take the exam because they are recruited by family or friends. Levy Decl., Ex. OO at FDNY 026726. Blacks and Hispanics are less likely to be aware of the opportunity to serve as a firefighter. Moreover, according to the FDNY's Recruitment Director, many blacks are aware that minority incumbents believe that they are treated worse than their white co-workers. Washington Aff., ¶18; Levy Decl., Ex. J, Maglione Tr. at 163:16-166:21. Well-publicized instances of mistreatment only heighten the concern of potential black and Hispanic applicants. Washington Aff., ¶¶65-66.

This very litigation, in which the City refuses to accept an interim hiring procedure that might expand the number of black and Hispanic candidates for the job, sends a powerful negative message that can only further alienate black and Hispanic communities. The public comments of daily newspaper readers concerning this litigation are sure to discourage blacks and Hispanics who otherwise might be applicants. Washington Aff., ¶¶70-72.

Given the serious hurdles to recruiting black and Hispanic applicants into an atmosphere that may appear hostile, the FDNY must dispel that impression. It should target its effort toward encouraging blacks and Hispanics to apply and reassuring them that they are welcome and will be treated respectfully. Efforts should focus on New York City high schools, CUNY community colleges and 4-year colleges. The FDNY should direct advertising in print, television and radio outlets with large black and Hispanic audiences. All of these advertising materials must *prominently* state the Department's commitment to diversity and its interest in having a workforce that reflects the demographics of New York City. The City should also utilize the

Internet and social networking web sites in a manner designed by its recruitment expert, with input from the Vulcan Society, to reach out to black and Hispanic residents and portray the Department as a safe place for them to work.

5. Creating High-Quality Test-Preparation Courses that are Free and Accessible to Black and Hispanic Applicants (Order, ¶ (6)(g))

The FDNY should retain a professional consultant to design and implement test-preparation courses to prepare recruits for both the written and physical components of the firefighter exam. Although the FDNY conducted test-prep programs prior to Exam 6019, the materials were not related to the exam that was administered. Washington Aff., ¶24; Levy Decl., Ex. L. The Vulcan Society was compelled to use funds obtained from the City Council to hire its own test preparation consultant with experience in firefighter entrance exams. Washington Aff., ¶25. The consultant provided materials for each of the Vulcans' test-prep sessions; those courses, according to many applicants, were far more useful than the tutorials provided by the FDNY, which omitted the types of questions that were actually used on Exam 6019. Id.

6. Commencing Full-Scale Recruitment Efforts No Later than Eight (8) Months Prior to the Application Period for the Exam (Order, ¶ 6(h))

The FDNY's recruitment efforts for Exam 6019 began eight (8) months prior to the time that individuals were able to submit an application to take the exam. Washington Aff., ¶27. The application period then lasted for twelve (12) weeks. The next recruitment campaign should be of equal, if not greater, duration.

7. Partnership with the Vulcan Society and Reporting to Class Counsel (Order, ¶¶ 6-7)

The Vulcan Society has years of experience in recruitment of black firefighter applicants, and it should be consulted during each step of the FDNY's recruitment campaign. The City should also provide Class Counsel with quarterly reports detailing its recruitment activities, and

the amounts budgeted and spent on each activity. During the exam-filing period, the City should provide bi-weekly reports to the Vulcan Society with information about the number of blacks applying to take the exam, how they were recruited and what further efforts are planned.

C. REINSTATEMENT OF THE FIRE SAFETY CADET PROGRAM

From 1998 to 2002, the FDNY ran a Fire Safety Cadet Program that provided evening work opportunities for young adults who sought careers in the fire service. Washington Aff., ¶33. The Cadets took training courses in fire safety and prevention, physical fitness and emergency medical response, and they worked as interns in various divisions and offices of the FDNY. Id. at ¶34. After completing the program, Cadets were hired as Emergency Medical Technicians (EMTs) and were eligible to be promoted into the title of firefighter. Id. The Cadet Program was targeted toward CUNY students, a majority of whom are black and Hispanic, and it successfully increased diversity in the Department until it was discontinued in 2002. Id. at ¶35. The Cadet Program should be reinstated and expanded to include 400 age-eligible Cadets who are all students in the CUNY system. (Order, ¶10). Such relief is within the Court's remedial authority under Title VII, as it supports the remedial efforts that are required by the City's discrimination.[5]

D. CHANGES TO THE POST-EXAM CANDIDATE SCREENING PROCESS

Data from Exams 7029 and 6019 show that black firefighter candidates who passed the written test and whose eligibility list numbers were reached for consideration were nevertheless screened out during various stages of the FDNY's post-exam candidate screening process at

[5] It is also consistent with New York state law. *See, In re Gallagher*, 307 A.D.2d 76; 761 N.Y.S.2d 37 (N.Y. App. Div. 1st Dep't 2003) (finding that the City could, consistent with the "Merit and Fitness Clause" of the New York State Constitution (Art. V, § 6) promote EMTs into firefighter positions before applicants on an open-competitive list that was established using the same exam, and specifically rejecting the UFA's argument that this would lead to the appointment of less qualified candidates.)

much higher rates than white candidates. Washington Aff., ¶¶51-52; Levy Decl., Ex. T, CC, DD and ¶32. Many of these candidates never received communications from the FDNY about appearing for their initial post-exam screening intake interview, and others were improperly and unfairly disqualified based on arrests that did not result in convictions. In light of the apparent racial disparity in outcomes coupled with the history of intentional discrimination, it is imperative that the candidate screening process be more transparent and demonstrably fair.

The Columbia Study on diversity characterized the FDNY's "complex hiring process" as the "greatest challenge" to increasing diversity in the Department. Levy Decl., Ex. M at 12. In 2004, [redacted], an investigator in the FDNY's Candidate Investigation Division (CID), the unit within the FDNY that investigates candidates' educational, employment and criminal histories, driving records, City residency status, and other aspects of their background prior to appointment,, wrote a memo to FDNY Deputy Commissioner of Administration Douglas White with her suggestions for increasing diversity. She pointed out to Commissioner White that:

> Our "minority" candidates are not familiar with the investigation process and are easily intimidated. Other candidates receive guidance from family members or friends that work for the Department while the "minority" candidates very often do not know anyone that could provide guidance in this regard. "Minority" candidates have a greater likelihood of getting caught up in hurdles and giving up on the process.

Levy Decl., Ex. J.

This barrier to minority hiring and bias in decision making in screening process can be overcome.

1. Improved Notice to Candidates of Their Investigation Intake Interviews

An analysis by the City's expert Dr. Christopher Erath of the post-exam candidate screening data from the most recent firefighter exam, 6019, shows that 36.3% of all black candidates processed thus far by the FDNY have been disqualified for failing to report to their

initial candidate screening intake interview with CID, while only 26.6% of all white candidates have been disqualified for this reason. Levy Decl. Ex. U. According to CID director Dean Tow, once the CID mails a "candidate investigation packet" with an interview date, the CID does not follow-up to contact a candidate who does not appear, even in cases where the packet was returned as undeliverable. Levy Decl., Ex W, 10/24/07 Tow Tr. at 141-43. This practice disproportionately hurts black candidates because, as the Vulcans have learned over the past decade, a large number of black candidates change addresses during the several years that pass between the date of the firefighter exam and the date the candidate is processed. Washington Aff. ¶45. Black candidates are thus disqualified for failing to appear at interviews for which they received no notice. Id. at ¶46.

In 2004 the Vulcans located several of the black candidates on the Exam 2043 eligibility list who had been disqualified for failing to appear by simply calling them on the phone or, in some cases, visiting their homes in New York City. Washington Aff., ¶46. Because the FDNY has all candidates' social security numbers on file from their exam applications, they could be tracked through that means or on the Internet. The CID should be required in all future post-exam firefighter candidate screenings to employ these alternative methods for contacting candidates each time a notice to report for an intake interview is returned as undeliverable before disqualifying that candidate for failing to report. (Order, ¶14). The CID should also seek the assistance of the Vulcan Society and the Department of Justice in locating black and Hispanic candidates who did not appear for interviews. (Order, ¶¶12-13).

2. Changes to the Use of Records of Candidate Arrests that Did Not Result in Convictions

Under current FDNY policies and procedures, the CID will automatically refer to the FDNY's Personnel Review Board (PRB) any candidate who has a prior arrest history, even if

such arrest or arrests did not result in a conviction. Washington Aff., ¶53; Levy Decl., Ex. W, July 9, 2008 Tow Tr. at 87, 103-04. The PRB decides whether to grant or deny appointment based on such arrests. Washington Aff. ¶¶57-58; Levy Decl. Ex. X1-X5, Ex. Y. Those who are denied appointment by the PRB – either due to a criminal history or other "derogatory" information that surfaced in their background investigations – are coded as "considered not selected," or CNS. Washington Aff., ¶51; Levy Decl, Ex. EE.[6]

This manner of considering candidates' arrest records unfairly impacts black firefighter candidates. Arrest data from the New York Police Department (NYPD) shows that from 2005 to 2009, blacks represented 49% of all individuals arrested in New York City, despite comprising only about 26% of the City's population during that time. Levy Decl., ¶6, Ex. E, Ex. BB. Whites represented roughly 45% of the City's population but only 12% of those arrested during the same period were white.[7] Id. Blacks are thus more likely to be flagged by the CID, and then be denied appointment by the PRB, because of arrests alone. For Exam 7029, the pool of black and white candidates processed by the CID was 6.2% black, but 23.1% of those in the pool who were denied appointment by the PRB for purported "character and background" problems were black. Levy Decl., Ex. T at 35-36. This racial disparity corresponds to 6 units of standard deviation. Id. Likewise, for Exam 6019, blacks made up only 12.2% of all the candidates who

[6] Candidates with felony convictions are automatically disqualified from appointment.

[7] The arrest statistics are derived from New York Police Department's arrest data from the for the years 2005 through 2009, which have been produced to Plaintiffs-Intervenors' co-counsel, the Center for Constitutional Rights, in a separate litigation, *Floyd v. City of New York*, 08 Civ. 1034 (S.D.N.Y.) This data was produced under a stipulated protective order which prohibits disclosure of the raw arrest data itself to non-parties but does permit statistical summaries of the data, such as those cited above, to be disclosed to non-parties. *See* Charney Decl.¶ 3. The population statistics are taken from U.S. Census Bureau, *American Community Survey, 2005*, Tables B01001, B01001A, B01001B; *American Community Survey, 2006-2008 3-Year Estimates*, Tables B01001, B01001A, B01001B; *American Community Survey, 2009*, Tables B01001, B01001A, B1001B.

were processed as of August 2010, but they were 18.6% of the candidates who were denied appointment by the PRB. Levy Decl., ¶ 32.

As the Supreme Court noted in *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), "[a]rrest, by itself, is not considered competent evidence at either a criminal or civil trial to prove that a person did certain prohibited acts." *Id.* at 242 n.6. In *Schware*, the Court struck down a state's refusal to grant a law license to an individual based in part on his 20-year-old arrest history. The Court chided the state for failing to consider the age, disposition of the arrest, or the nature of the underlying offense. *Id.* at 242-43.

In *Dozier v. Chupka*, a federal district court concluded that the Columbus, Ohio Fire Department's arrest screen for selecting firefighters, under which fire department officials could factor a firefighter applicant's arrest *for any crime* into the hiring decision, even if such arrest did not result in a conviction, was not "related enough to job performance to overcome its discriminatory effect" on black firefighter applicants. 395 F.Supp. 836, 850 n.10 (S.D. Ohio 1975). Similarly, in *Gregory v. Litton Systems, Inc.*, the court held that a policy under which the defendant employer refused to hire anyone with multiple arrests for matters other than minor traffic offenses violated Title VII, because "information concerning a prospective employee's record of arrests without convictions, is irrelevant to his suitability or qualification for employment." 316 F. Supp. 401, 402-03 (C.D. Cal. 1970). The court found "no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees." *Id.* at 402.

The EEOC has also concluded that "[arrest] records alone cannot be used to routinely exclude persons from employment," and that "a blanket exclusion of people with arrest records

will almost never withstand scrutiny." United States Equal Employment Opportunity Commission, *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (1990), at §§ I, II.B.1, available at www.eeoc.gov/policy/docs/ arrest_records.html. Instead, under the EEOC's guidelines, an employer may use arrest records to deny a candidate a job *only if* the employer can show that the candidate actually engaged in the conduct alleged and that such conduct is related to the position sought. *Id.* at § I. To determine whether the charged conduct is related to the job, the employer should consider (1) the nature and gravity of the offense or offenses, (2) the time that has passed since the arrest, and (3) the nature of the job sought. *Id.* at § II.B.2. As for determining whether the candidate actually committed the alleged conduct, "the employer is required to allow the person a meaningful opportunity to explain the circumstances of the arrest(s) and to make a reasonable effort to determine whether the explanation is credible before eliminating him/her from employment opportunities." *Id.* at § II.B.3. The employer "may not perfunctorily allow the person an opportunity to explain and ignore the explanation where the person's claims could be easily verified by a phone call, i.e., to a previous employer or a police department." *Id.* (internal quotations omitted).

Here, the CID's practice of automatically referring to the PRB all firefighter candidates with even a single misdemeanor arrest, regardless of the seriousness and nature of the offense charged, the date of the arrest, or whether the candidate was ultimately convicted, resembles the kind of blanket arrest screens rejected by the EEOC and federal courts. Further, the CID does not require its investigators to investigate the veracity of candidates' explanations for their arrests by contacting the law enforcement agencies involved, *see* 7/9/08 Tow Tr. 43:19-44:22. Investigators make subjective and arbitrary credibility assessments on their own. For example,

during the Exam 7029 hiring cycle, CID director Tow concluded on his own, without any inquiries to the law enforcement agencies involved, that a Hispanic firefighter candidate's explanation for a 3-year-old domestic violence arrest that did not result in a conviction was not satisfactory while a white candidate's virtually identical explanation for a similar 1 ½ year-old domestic violence arrest to which he pled guilty was satisfactory. Levy Decl, Ex. W, 7/9/08 Tow Tr. at 163-73; Ex. X1 – X2 ([redacted] and [redacted] CID Files).

A review of sample candidate investigation files reveals that when making their appointment recommendations and decisions, CID and PRB often fail to consider the seriousness of the offenses for which candidates are arrested or how long ago the arrests occurred. For example, in 2001, both CID and PRB recommended the appointment of, and then-FDNY Commissioner Thomas Von Essen did appoint, Edward McMellon, a white former New York City police officer who was arrested on murder charges for the 1999 killing of Amadou Diallo. McMellon fired 16 of the 41 gunshots that struck Mr. Diallo on the night he was killed. Levy Decl., Ex. X4 ([redacted] CID File), Ex. Z1-Z2 (news articles on McMellon's appointment). During the same Exam 7029 hiring cycle, a black candidate was referred to CID and then denied appointment by the PRB based on a four- and a five-year-old arrest for drug possession (not sale), neither of which resulted in a conviction. Levy Decl, Ex. X5 ([redacted] CID File).

At a minimum, the FDNY must bring its use of candidate arrest records in line with EEOC Policy, both as a means of lessening the effects of the City's four decades of intentional discrimination and to ensure that the FDNY's candidate character and background evaluation process complies with Title VII. The CID must no longer automatically refer all candidates with prior arrests that did not result in convictions to the PRB, and neither the CID, PRB, or any other person or entity within the FDNY should deny a candidate appointment based on prior arrests

that did not result in convictions without first considering the nature, gravity, and date of the charged offenses and, perhaps more importantly, evaluating the credibility of the candidate's explanation of the circumstances surrounding the arrests. (Order, ¶¶15-17).

3. Record-Keeping and Monitoring of Candidate Character and Background Evaluations

The CID's and the PRB's decision-making also lacks objectivity. Both CID Director Tow and former Assistant Commissioner for Human Resources Sherry Kavaler have testified that there are no objective standards or criteria which guide CID and PRB determinations about whether the derogatory information about a candidate is serious enough to deny him or her appointment as a firefighter. Levy Decl, Ex. W, 7/9/08 Tow Tr. at 44:16-22, 113-14, 118-19, 143; Ex. FF, Kavaler Tr. at 178, 209-10. There are no minutes of the PRB's meetings or records of the reasons underlying its decisions. Id., Ex. W, 10/24/07 Tow Tr. at 53-54, Ex. FF, Kavaler Tr. at 179; Washington Aff. ¶ 52. Blatant favoritism profits candidates, most of whom are white, with friends and relatives in the Fire Department.

As former Assistant Commissioner Kavaler testified:

> People knew what was going on and who was going to the PRB.
>
> You would have lieutenants and captains, whatever, posting chief of department: This is the son of so and so. I lived next door to him for years, he's a good guy, he just had a fight in a disco, he got drunk, someone made a pass at his girlfriend, he socked him, he did community service.
>
> Something like that. Whatever it was. He beat his wife but his wife took him back so he shouldn't be considered a wife beater. He still could be a good firefighter.
>
> These types of things. That would be brought to the table. And people would say I know this guy, he's a good guy, his son has got to come on the job, I will vouch for him. I will bring him into my office tomorrow, I'll read him the riot act, say he's getting the chance of a lifetime and he better own up to it and make us proud and we would hire him. . .

> You're dealing with a lot of Irishmen who are drunks and they get into bar fights and they get arrested and they get arrested again. They fight, they sock their girlfriends, this is the things that cause their records to pop up to us because they get arrested because they fought with the police when they got arrested.
>
> This is—boys being boys. That type of thing.

Levy Decl., Ex FF, Kavaler Tr. at 369-70.

Not surprisingly then, the screening process has resulted in arbitrary denials of appointment to minority candidates with equal or lesser criminal histories than those of white candidates granted appointment, as well as a significant disparate impact on black candidates. Such "subjective and ad hoc employment practices. . . bolster [a Title VII] plaintiff['s] claim that defendants discriminated against class members." *Wright v. Stern*, 450 F.Supp.2d 335, 365-66 (S.D.N.Y. 2006); *United States v. City of New York*, 07 Civ. 2083, 2010 U.S. Dist. LEXIS 47267, * 38 (S.D.N.Y. May 13, 2010) (same) (quoting *Wright*); *see also Grant v. Bethelem Steel Corp.*, 635 F.2d 1007, 1015 (2d Cir. 1980) (observing that "subjective, word of mouth hiring methods" are suspect and used to mask ongoing bias). In *United States v. City of New York*, Judge Pauley found that the absence of any written standards or regulations guiding the New York City Department of Transportation's hiring process for provisional bridge painters, which resulted in no female applicants being hired, was powerful anecdotal evidence of a pattern and practice of gender discrimination on the part of the DOT. *See* 2010 U.S. Dist. LEXIS 47267 at *39-40.

The City's recent attempts to articulate objective standards to guide the CID and PRB's decision-making, Levy Decl. Ex EE, while a step in the right direction, are inadequate, leaving far too much discretion in the hands of individual CID investigators and PRB members. They do not provide protection against the kinds of arbitrary and unfair appointment decisions described above. Plaintiffs-Intervenors' propose that all PRB meeting minutes and appointment decisions

be in writing; all decisions denying appointment provide specific explanations as to why the PRB concluded that a candidate did not have "good character and satisfactory background"; that this written documentation be provided to candidates and Class Counsel; and that questionable denials of appointment to black and Hispanic candidates, or differential standards based on race, be reviewable by the Special Monitor and ultimately the Court. (Order, ¶¶23-29). The notice of denial given to black and Hispanic candidates should inform them that advice and assistance may be sought from Class Counsel.

E. MONITORING AND PREVENTING RETALIATION AND WORKPLACE DISCRIMINATION AGAINST BLACK FIREFIGHTERS

The feeling of being treated differently is an unfortunate fact of life for many black firefighters in New York City. A survey conducted by Columbia University researchers revealed that "[a]bout half of minority firefighters surveyed feel they have been treated differently because of their ethnicity and 61% believe officers tolerate inappropriate behavior." Levy Decl., Ex. OO at FDNY-026727. Being appointed as firefighters will not make whole the victims of Exams 7029 and 2043 if those appointees encounter discrimination and retaliation once they begin their new jobs.

Yet the risk of this mistreatment is very real, given the well-documented history of anti-black and anti-female incidents in the FDNY. The affidavit of Captain Washington describes some of these incidents, many of which have become public knowledge through the press. Washington Aff., ¶¶65-66. For example, at a Labor Day parade in Queens in 1998, two white firefighters wore black-face and parodied the brutal racist killing of James Byrd. Levy Decl., Ex. GG. In 2005, a noose was placed on a black firefighter's equipment in retaliation for his work with the Vulcan Society. Levy Decl., Ex. HH. And, in 2001, a flyer advertising a memorial service for black firefighters killed on 9/11 was defaced with racial slurs. Levy Decl., Ex. JJ.

Retired firefighter [redacted], who was a class plaintiff in *Berkman v. City of New York*, 536 F.Supp. 177 (S.D.N.Y. 1982), who saw several incidents of mistreatment of black and female firefighters, testified that "white firefighters didn't want them [black firefighters] around" Levy Decl., Ex. II, [redacted] Tr. 118:16-22.

Captain Washington has also received complaints from black probationary firefighters who were mistreated by instructors in the Training Academy and other black incumbents who have been hassled at work because of this lawsuit. Washington Aff. ¶¶67-68.

Data from the FDNY's own Office of Equal Employment Opportunity show that in fiscal years 2002 – 2007 there were 253 internal complaints of race or national origin discrimination, and that the EEO Office substantiated 26 of them. Levy Decl., ¶39, Ex. KK. There are questions about the effectiveness of that office, which is known for unreasonably long delays in addressing complaints due to understaffing.[8] Even when a complaint is substantiated, serious discipline is rare. Washington Aff., ¶80.

1. Complaints of Mistreatment Should Be Reviewed by a Court-Appointed Special Monitor

Close monitoring of the workplace treatment of black priority hires and interim hires furthers Title VII's "dual goals of providing make-whole relief for [the Class] and deterring future unlawful conduct." *Reiter v. MTA New York City Transit Auth.*, 457 F.3d 224, 230 (2d Cir. 2006). Monitoring relief is appropriate even where the underlying claims of the case concern discrimination in selection rather than on-the-job treatment. "The purpose of an

[8] The City's data shows that, as of the third quarter of FY2005 (Spring 2005), there were 118 complaint investigations which had been pending for more than one quarter, including 48 that had been pending for more than a year. Washington Aff., ¶78; Levy Decl., Ex. KK. This is a very large backlog, considering that there were only 174 internal EEO complaints filed in FY2004 and FY2005 combined. Id. By the Spring of 2007, the number of backlogged complaint investigations had increased to 186; worse, 121 of them were at least a year old. Washington Aff., ¶79; Levy Decl., Ex. KK.

injunction is to prevent future violations," and "of course, it can be utilized even without a showing of past wrongs" as long as "there exists some cognizable danger of recurrent violation, something more than a mere possibility." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *EEOC v. Everdry Mktg. and Mgmt., Inc.*, 556 F.Supp.2d 213, 225 (W.D.N.Y. 2008)(same). The likelihood of such future violations "should be evaluated upon the totality of the circumstances, including consideration of past illegal conduct." *Everdry Mktg*, 556 F.Supp.2d at 525; *see also W.T. Grant*, 345 U.S. at 633. As described above, there is much more than a "mere possibility" that future on-the job discrimination against the priority and interim hires will occur.

To ensure fair and equal treatment of black appointees, we ask that: (a) allegations by black appointees of discrimination or retaliation be referred to the Special Monitor (Order, ¶32), *see McClain v. Lufkin Industries*, 2010 WL 455351, *4-*5 (E.D. Tex. 2010) (appointing outside Ombudsperson to monitor compliance and to investigate and attempt to resolve discrimination and retaliation complaints from class members); (b) that black incumbents who face discipline or discharge be given the option of seeking assistance from Class Counsel (Order, ¶33); (c) all allegations substantiated by the Special Monitor and not appropriately remedied by the FDNY be referred to the Court (Order, ¶37); and (d) that the FDNY implement a zero-tolerance policy regarding workplace discrimination and retaliation and distribute a "Know Your Rights" guide that is designed in consultation with the Vulcan Society to inform all firefighters of their right to be free of any kind of job-related discrimination or retaliation and the avenues for seeking relief. (Order, ¶¶38-39).

2. The Court Should Enjoin Retaliation Against Black Hires

Where there is a long-standing pattern of intentional discrimination, as there is here, federal courts have provided injunctive relief designed to prevent future retaliation against

successful Title VII plaintiffs, even where the defendant employer was not sued for retaliation. *See, e.g., Cronin v. United Service Stations*, 809 F.Supp. 922, 933-34 (M.D. Ala. 1992) (injunction prohibiting retaliation where employer found liable only for sexual harassment and wrongful discharge); *Mohr v. Chicago School Reform Bd. of Trustees*, 155 F.Supp.2d 923, 931 (N.D. Ill. 2001)(injunction prohibiting retaliation where employer found liable for racially discriminatory termination of plaintiff); *EEOC v. Everdry Mktg.*, 556 F.Supp.2d at 225 (court willing to impose injunction against retaliation where plaintiffs sued only for sexual harassment but not retaliation); *United States v. City of New York*, 2010 U.S. LEXIS 472267, * 59-63 (S.D.N.Y. May 13, 2010) (adopting proposed relief order enjoining retaliation against plaintiff class members in lawsuit alleging only discriminatory hiring practices). Here, such an injunction against retaliation is warranted and necessary to prevent future mistreatment of members of the victim Class (Order, ¶ 30).

POINT IV
THE NAMED PLAINTIFFS-INTERVENORS ARE ENTITLED TO ADDITIONAL MONETARY RELIEF

A. INCENTIVE AWARDS FOR THE NAMED-PLAINTIFFS-INTERVENORS

The courts in this Circuit have "with some frequency" held that a named plaintiff in a successful employment discrimination class action "may, in addition to his or her allocable share of the ultimate recovery, apply for and, in the discretion of the Court, receive an additional award, termed an incentive award." *Roberts v. Texaco, Inc.*, 979 F.Supp. 185, 200 (S.D.N.Y. 1997)(listing cases); *see also Sheppard v. Consol. Edison Co. of N.Y., Inc.*, 2002 U.S. Dist. LEXIS 16314, *16 (E.D.N.Y. Aug. 1, 2002) (acknowledging "the appropriateness of incentive award payments to class representatives in employment discrimination cases"); *McClain*, 2010 WL 455351, at *24-*25 (awarding service awards and citing cases). In determining the amount of an incentive award to which a class representative is entitled, courts in this Circuit typically

consider "the existence of special circumstances including the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim, and, of course, the ultimate recovery." *Roberts*, *supra*; *Sheppard*, 2002 U.S. Dist. LEXIS 16314, at * 16-17 (same)(quoting *Roberts*).

In light of the aforementioned factors, the request for $15,000 for each of the individual named Plaintiffs-Intervenors, and $50,000 for the Vulcan Society as a whole, is entirely appropriate. To begin with, several members of the Vulcan Society, as well as one of the individual named Plaintiffs-Intervenors, Candido Nuñez, have been active New York City firefighters during most or all of this litigation, and have therefore risked retaliation by continuing to prosecute this case. As discussed above, the risk of such retaliation is very real.

The Vulcans and the individual named Plaintiffs-Intervenors have also contributed significant amounts of time and information which have been instrumental to the Government and Plaintiffs-Intervenors' victories during the liability phase of this case. It was the Vulcans and the three individual named Plaintiff-Intervenors who filed the two discrimination charges with the EEOC, in 2002 and 2005 respectively, which spawned the EEOC's and later the Department of Justice's investigation into the City's firefighter hiring practices and provided the factual basis for the Government's claims in this litigation. The Vulcans also provided important factual information about the history of the FDNY's discriminatory hiring practices which helped Plaintiffs-Intervenors to win summary judgment on their intentional discrimination claims. In addition, the Vulcans members and the three individual Plaintiffs-Intervenors, all of whom have worked full-time jobs throughout the course of this litigation, have spent countless

hours meeting with Plaintiffs-Intervenors' counsel, attending settlement conferences and other court proceedings, and assisting Plaintiffs-Intervenors' counsel in responding to the City's discovery requests and drafting submissions in support of class certification, compensatory damages and injunctive relief. The contributions of the named Plaintiffs-Intervenors are therefore virtually identical in kind and degree to that of the named plaintiff in *Roberts*, who received an $85,000 incentive award. 979 F.Supp. at 203-04 (named plaintiff's "active participation in the prosecution of the litigation ranged from regular conference calls with counsel and the other plaintiffs, to assisting counsel and participating in the discovery phase, to conferring with class members and witnesses, to maintaining an active role in the mediation process").

Finally, the incentive award amounts sought by the named Plaintiffs-Intervenors are entirely reasonable given the overall monetary relief which the Plaintiff-Intervenor class will receive in this case and the size of the incentive awards approved by the courts of this Circuit in other employment discrimination class actions. Here, Plaintiffs-Intervenors have sought a class back pay award of approximately $56.6 million, and a class compensatory damages award of approximately $14.5 million. The incentive awards sought for the named Plaintiffs-Intervenors are not disproportionate to the proposed total class recovery. *See Wright v. Stern*, 553 F.Supp.2d 337, 345 (S.D.N.Y. 2008) (approving incentive awards of $50,000 to each of the eleven named plaintiffs in a case where the total monetary relief, including attorneys' fees, was approximately $21 million). Moreover, the amounts of the proposed incentive awards fall within the range of awards approved in prior employment discrimination and other class actions in the Second Circuit. *See Roberts*, 979 F.Supp. at 201 (approving $85,000 incentive award for named plaintiff

and noting that incentive awards in other reported district court cases from the Second Circuit "generally range from $50,000 to $4,000")(citations omitted).

B. FUNDS FOR THE VULCAN SOCIETY'S WORK

The Vulcan Society should also be compensated for the extensive and critical work it will have to do to monitor and assist in securing the City's compliance with the many injunctive relief provisions of Plaintiffs-Intervenors' Proposed Order that will benefit and protect the rights of Plaintiff-Intervenors class members. They seek a fund of $75,000 as compensation for this additional work.

Under Plaintiffs-Intervenors' Proposed Order, the Vulcans will play an essential and appropriate role in ensuring that the injunctive remedies provided for in the Order are implemented. For example, the Vulcans will be responsible for consulting with the City and the recruitment expert on the goal of increasing the number of minority applicants and monitoring the staffing and effectiveness of the Recruitment program. It will advise on the retention of a test preparation expert to design its firefighter exam preparation materials and courses (Order, ¶¶6(c) and (g)). The Vulcans will monitor the outcomes of the Personnel Review Board proceedings to ensure that black firefighter candidates are no longer arbitrarily and unfairly denied appointment through the candidate character and background evaluation process (*id.* ¶¶ 16, 29) and will assist candidates in evaluating and appealing adverse decisions. They will monitor for retaliation against black priority hires or black firefighter candidates hired in the interim before a new selection devise is developed (*id.* ¶¶ 30, 33). Thus, the monitoring, advising and assisting work of the Vulcans will be "integral" to the enforcement of several important injunctive remedies contained in the Proposed Order. *See Burt v. Cty of Contra Costa*, 2001 U.S. Dist. LEXIS 25929, *56 (N.D.Cal. Aug. 20, 2001).

The Supreme Court has recognized that post-judgment monitoring to protect "the full scope of relief afforded by the [court's] decree was crucial to safeguard the interests asserted by [plaintiff]," *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 559 (1986) (awarding attorneys fees and costs for post-judgment monitoring before administrative agency as well as in court proceedings).

The 1991 amendments to Title VII provide for the recovery of expert fees incurred in post-judgment compliance monitoring. *See* 42 U.S.C. § 2000e-5(k); *Burt*, 2001 U.S. Dist. LEXIS 25929, at * 37. In *Burt*, plaintiffs were entitled to recover fees incurred by their EEO consulting firm hired to monitor the defendant employer's compliance with a consent decree. *Burt*, 2001 U.S. Dist. Lexis 25929, at *6, *11, *13-16, *73. In *Atlantic States Legal Foundation, Inc., v. Whiting Roll-Up Door Mfg. Corp.*, the district court awarded expert fees to the plaintiff itself for the work done by its president and senior scientist to monitor compliance with the consent decree entered in the case. *Atlantic States*, 1994 U.S. Dist. LEXIS 6071, * 9-10 (W.D.N.Y. Mar. 23, 1994). The court reasoned that the monitoring work done by this individual was provided in an "expert witness capacity" and not in his role as plaintiff. *Id.* at 10.

As set forth in the accompanying Affidavit of Captain Paul Washington, the Vulcans have done extensive work over the past several decades on (i) minority firefighter recruitment, (ii) test preparation, (iii) assisting minority firefighter candidates in navigating the post-exam screening process, and (iv) responding to workplace discrimination against black firefighters. They have a level of expertise and, in many respects, have achieved successes in each of these areas. *See* Washington Aff. ¶¶ 2, 5, 10, 15, 20, 24, 28-30, 44, 51, 57-58, 63, 66, 74-75, 77, 79-80. The experience, and expertise, of the Vulcans will be critical to the effective monitoring of the

injunctive relief provisions under Plaintiffs-Intervenors' Proposed Order. *See* Pl-Int Proposed Order ¶¶ 6(c) and (g), 29, 33.

Finally, from an equitable standpoint, the $75,000 figure requested by the Vulcans is entirely reasonable and appropriate. After all, if the Vulcans did not perform these vital compliance monitoring tasks themselves, the work would have to be done by Plaintiffs-Intervenors counsel or a retained outside expert, both of whom would undoubtedly incur fees far in excess of $75,000. *See Burt*, 2001 U.S. Dist. LEXIS 25929, at *45 (finding expert fees justified where compliance monitoring work would otherwise have to be performed by attorneys who would take longer to perform the work while charging higher hourly rates).

CONCLUSION

Plaintiffs-Intervenors respectfully request that the Court grant the proposed relief in the best interests of the victim Class, future firefighter applicants, and the goal of equal employment opportunity throughout New York City.

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