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 (RNx) CV 92-1898 MMM (RNx) FINAL ORDER RE PLAINTIFF LATIN AMERICAN LAW ENFORCEMENT ASSOCIATION'S MOTION FOR FURTHER EXTENSION OF THE 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 a consent decree agreement between defendant City of Los Angeles ("the City") and various plaintiffs, including the Latin American Law Enforcement Association ("LALEY"). On December 24, 2009, LALEY, the class representative for the Hispanic Plaintiff Class, filed an *ex parte* application requesting that the court extend those aspects of the consent decree with which

defendant City of Los Angeles had not complied and that it set a status conference and briefing schedule for a hearing on a further extension of the decree.[1] As a consequence of this application, on December 31, 2009, the City, LALEY, and the African American plaintiff class executed a stipulation to extend the terms of the consent decree until February 1, 2010 to allow the court to consider a motion by plaintiffs for a further extension.[2] On January 21, 2010, the City and LALEY executed a second stipulation to extend the terms of the consent decree until March 22, 2010.[3] On January 12, 2010, LALEY filed a motion to extend the consent decree as to the Hispanic plaintiff class.[4]

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

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[1]Plaintiff Latin American Law Enforcement Association's Request for Court to Set Status Conference and to Extend Consent Decree as to Hispanic Plaintiff Class ("Request"), Docket No. 255 (Dec. 24, 2009).

[2]Order Extending Termination Date for Consent to Decree as to Plaintiff Latin American Law Enforcement Association, Plaintiff African American Class and Defendant City of Los Angeles to February 1, 2010 ("12/31/09 Order"), Docket No. 266 (Dec. 31, 2009).

[3]Order Extending Termination Date for Consent to Decree as to Plaintiff Latin American Law Enforcement Association and Defendant City of Los Angeles to February 1, 2010 ("1/21/10 Order"), Docket No. 279 (Jan. 21, 2010). Counsel for the African American plaintiff class informed the City on January 5, 2010 that it would not seek a further extension of the consent decree and filed a notice of withdrawal of its joinder in the initial request to extend the consent decree filed December 29, 2009. (Notice of Withdrawal of Joinder, Docket No. 268 (Jan. 15, 2010).)

[4]Plaintiff Latin American Law Enforcement Association's Memorandum of Points and Authorities in Support of Motion and Petition to Extend Hunter-LALEY Consent Decree as to Hispanic Plaintiff Class ("Motion"), Docket No. 271 (Jan. 12, 2010). See also Declaration of Susan Silver in Support of Plaintiff Latin American Law Enforcement Association's Motion to Extend Consent Decree as to Hispanic Plaintiff Class ("Silver Decl."), Docket No. 272 (Jan. 12, 2010).

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. By its terms, the consent decree was to remain in effect for fifteen years, unless it was sooner terminated or extended. It provided that the court would retain jurisdiction "until such time as the City's final petition for relief has been granted."[5]

Paragraph 26 of the decree obligated the City to "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" set forth in the decree. It established, "[f]or each such 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."[6]

The decree also provided that "[t]he City [would] 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 intended 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

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[5]Silver Decl., Exh. A ("Consent Decree"), ¶ 38.

[6]*Id.*, ¶ 26.

selecting candidates from the next lower combined whole score bands."[7] 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 eligible for promotion all applicants certified by the City Personnel Department."[8]

The City also agreed to initiate various programs within the Police Department. Among these was a Supervisory Cross-Training Program "to enhance the promotability of Sergeants and Detectives." The goal of the program, which was to be open to persons in the Detective II, Detective III, and non-probationary Sergeant paygrades, was "to provide Sergeants the opportunity to work a Detective assignment, and Detectives the opportunity to work a field supervisory assignment." The City was to select applicants for the program with reference to their "future ability to promote, [considering] . . . past work performance, as well as the goals enumerated in [the consent decree]." Personnel loans were to last between six to twelve months; participants were to be allowed to return to their regular assignment before expiration of six months "if [they] so desire[d] and if the deployment needs of the Police Department so permit[ted]." The decree specified that the number of employees participating in the program could be limited in the City's discretion to an equal number of Sergeants and Detectives.[9]

The decree specified that the City would submit annual reports to plaintiffs on or about September 1 of each year the decree was in effect.[10] The status report was to include, *inter alia*, "an analysis, by race or ethnicity of the participant, of participation in the Supervisory Cross-Training Program established by Paragraph 39(f) of this Consent Decree and Agreement."[11]

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[7] *Id.*, ¶ 36.

[8] *Id.*

[9] *Id.*, ¶ 39(f).

[10] *Id.*, ¶ 42(b).

[11] *Id.*, ¶¶ 42(b)(viii), (b)(ix).

Paragraph 20 of the consent decree outlined the goals of the "affirmative action plan," which the consent decree embodied and which was "designed to address the underrepresentation of African American, Hispanic, and Asian American sworn officers in promotions to the civil service classifications of Detective, Sergeant, and Lieutenant, in paygrade advancements to the paygrades of Police Officer III, Detective II, Detective III, Sergeant II, and Lieutenant II, and in assignments to 'coveted positions,' as defined in Paragraph 25(c)."[12]

The consent decree explicitly prohibited the use of quotas,[13] and did not require the promotion of an unqualified candidate.[14] It set forth a complex set of "annual promotion goals" that are outlined in paragraph 26. For each ethnic group and classification enumerated, it states that the goal shall be "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."[15] For instance, the "feeder paygrades" for the position of Lieutenant are Sergeant I, Sergeant II, Detective II, and Detective III.[16] Consequently, if 40% of sworn officers holding positions in these four feeder paygrades and meeting minimum requirements for promotion are Hispanic, then the City's annual goal for promoting Hispanics to

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[12]Consent Decree, ¶ 20.

[13]*Id.*, ¶ 37 ("**Use of Quotas Prohibited.** Neither the above annual goals, interim goals, not goal attainment procedures shall be utilized as quotas. This Consent Decree and Agreement shall not be construed to require or to permit the use of quota relief").

[14]*Id.*, ¶ 22 ("**No Unqualified Candidate Need Be Selected.** . . . Nothing in this Consent Decree and Agreement shall be construed in any way to require the City to promote, advance, or to assign persons unqualified under then current selection standards, devices, practices, or procedures. All provisions in this Consent Decree and Agreement are subject to the availability of qualified African American, Hispanic, and Asian American candidates. However, the City shall in good faith conduct such programs as are necessary to satisfy the promotion, advancement, and assignment requirements of this Consent Decree and Agreement. Nothing in this Consent Decree and Agreement shall require the City to grant a preference to any particular individual who is African American, Hispanic, or Asian American").

[15]*Id.*, ¶ 26.

[16]*Id.*

Lieutenant was 32%. The feeder paygrades for the Detective and Sergeant classifications are Police Officer II, Police Officer III+1, and Police Officer III.[17] If, however, an enumerated ethnic group's percentage representation among sworn officers *actually* applying for promotion to a classification was higher than the group's representation within the relevant feeder paygrades, then the annual promotional goal was 80% of the percentage representation of actual applicants.

The consent decree also set forth annual paygrade advancement goals for advancement opportunities other than promotions. The "target paygrades" were Police Officer III, Detective II, Detective III, Sergeant II, and Lieutenant II. The feeder paygrade for Police Officer III is Police Officer II, the feeder paygrade for Detective II is Detective I, the feeder paygrade for Detective III is Detective II, and the feeder paygrade for Sergeant II is Sergeant I. The consent decree used the same 80% goal as for annual promotion goals, with the same exception where representation among sworn officers actually applying exceeded 80%.[18]

The consent decree expressly contemplated that certain goals would not be met, and identified "Goal Attainment Procedures" that the City was required to implement if targets were not met. Specifically, if a goal was not met, the City was required to perform five tasks to enhance its ability to meet the goal in the following year:

> "(a) Analyze its employment practices;
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> (b) Identify areas for improvement or practices for adjustment;
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> (c) Consider utilization of alternative devices to eliminate adverse impact, including, but not limited to, alternatives to written multiple-choice tests, use of 'pass-fail' written multiple-choice tests, reweighting of selection criteria, and use of bonus points;
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> (d) Make improvements or adjustments as required; and
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> (e) Meet periodically each year with representatives of the DFEH and plaintiffs'

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[17] *Id.* LALEY asserts that, while Police Officer I is the entry-level probationary classification, Police Office II is the first non-probationary level. (Motion at 6.)

[18] Consent Decree, ¶ 28.

counsel to accomplish these tasks."[19]

The consent decree referenced the court's role in two places. It addressed the court's authority to enforce the consent decree if it found that the City was not in compliance as follows:

> "Except for the requirements of this Consent Decree and Agreement, the City shall be entitled to utilize any selection standard, device, practice, or procedure whatsoever in Department promotion, paygrade advancement and assignment to 'covered positions,' provided that if the City is not in substantial compliance with the terms of this Consent Decree and Agreement, the Court may, in its discretion, issue such orders as it deems necessary to assure compliance with the terms of this Consent Decree and Agreement."[20]

The decree also referenced the court's role in terminating or extending the order:

> "The term of this Consent Decree and Agreement shall be fifteen (15) years after the date of entry thereof unless otherwise terminated or extended. The City may petition to be relieved of all or part of its obligations under the terms of this Consent Decree and Agreement at any time upon a showing of accomplishment of the objectives of the portion of the Consent Decree and Agreement from which the City seeks relief. The Court retains jurisdiction over this Consent Decree until such time as the City's final petition for relief has been granted. Plaintiffs may petition the court to extend the term of the Consent Decree and Agreement beyond its initial 15 year period upon a showing that the City has not substantially complied with its provisions. On such a petition or motion the burden of proof shall be on plaintiffs to prove lack of substantial compliance and the City shall be entitled to a rebuttable presumption of substantial compliance."[21]

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[19]Consent Decree, ¶ 34.

[20]Consent Decree, ¶ 21.

[21]*Id.*, ¶ 38.

B. Legal Standard Governing Extension of the Consent Decree

1. Extension Pursuant to the Terms of the Consent Decree

By its express terms, the decree and subsequent stipulated modifications provide that the decree will expire on December 31, 2009. "Because the decree contains an express expiration date . . . , any change to that date entails a modification of the decree." *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority*, 564 F.3d 1115, 1120 (9th Cir. 2009) (citing *Thompson v. U.S. Department Of Housing & Urban Development*, 404 F.3d 821, 824 (4th Cir. 2005) (holding that extension of a consent decree's termination date required modification of the decree)). The first issue, therefore, is whether, and under what conditions, a modification of the decree's expiration date is permitted.

"To answer this question, we turn first to the decree itself." *Labor/Community*, 564 F.3d at 1120. "[C]ourts treat consent decrees as contracts for enforcement purposes. A consent decree, like a contract, must be discerned within its four corners . . . ." *United States v. Asarco Inc.*, 430 F.3d 972, 980 (9th Cir. 2005). Consequently, the court must "appl[y] contract principles in accordance with Supreme Court precedent when interpreting consent decrees." *Id.* at 981. See also *Molski v. Gleich*, 318 F.3d 937, 956 (9th Cir. 2003) (Graber, J., specially concurring) ("In construing a consent decree, we apply the same principles used to interpret a contract," citing *Thompson v. Enomoto*, 915 F.2d 1383, 1388 (9th Cir. 1990)); *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) (noting that "[a] consent decree is . . . 'in some respects contractual in nature' " and consequently that "[c]ourts must find the meaning of a consent decree 'within its four corners[ ],'" citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992); *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); and *Enomoto*, 915 F.2d at 1388 (explaining that "[i]n construing consent decrees, courts use contract principles")). To determine whether it has authority to extend the consent decree's expiration date, therefore, the court must look to the four corners of the decree itself.

Paragraph 38 authorizes the court to extend the term of the decree if a plaintiff "petition[s] the court to extend the term of the Consent Decree and Agreement beyond its initial 15 year period upon a showing that the City has not substantially complied with its provisions. On such a petition

or motion the burden of proof shall be on plaintiffs to prove lack of substantial compliance and the City shall be entitled to a rebuttable presumption of substantial compliance."[22] Thus, plaintiff's requested modification of the decree's expiration date is warranted only if plaintiff can meet its burden of proving a lack of substantial compliance on the City's part. See *Labor/Community*, 564 F.3d at 1121 ("[The moving party] must demonstrate that [the non-moving party] failed to substantially comply with the decree in order to justify its extension"). In the absence of such proof, the court must presume that the City is in substantial compliance.

2. Extension by Modification Under Rule 60(b)(5)

In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the Supreme Court articulated a two-part test that must be satisfied in order to modify a consent decree under Rule 60(b)(5) of the Federal Rules of Civil Procedure. "The moving party must satisfy the initial burden of showing a significant change either in factual conditions or in the law warranting modification of the decree." *Asarco*, 430 F.3d at 979 (citing *Rufo*, 502 U.S. at 384). "The district court must then determine whether the proposed modification is suitably tailored to resolve the problems created by the changed factual or legal conditions." *Id.* (citing *Rufo*, 502 U.S. at 391). "In particular, '[i]f the movant cites significantly changed factual conditions, . . . it must additionally show that the changed conditions make compliance with the consent decree "more onerous," "unworkable," or "detrimental to the public interest."'" *Id.* (quoting *Small v. Hunt*, 98 F.3d 789, 795 (4th Cir. 1996), in turn quoting *Rufo*, 502 U.S. at 384)). Ordinarily, a court should not modify a decree "where a party relies upon events that actually were anticipated at the time it entered into a decree." *Rufo*, 502 U.S. at 385 (citation omitted).

Although *Rufo* and Rule 60(b)(5) address relief from final judgment – a standard that generally applies to a defendant seeking to vacate or limit a consent decree rather than to a plaintiff seeking to extend or enlarge a decree – the Ninth Circuit in *Labor/Community* applied the

[22]Consent Decree, ¶ 38.

Rufo test to a plaintiff's motion to extend the expiration date of a consent decree.[23] The *Labor/Community* court set forth four requirements that must be met by a party seeking to extend a consent decree under *Rufo*. "First, [the moving party] must establish that a 'significant change either in factual conditions or in the law' occurred after execution of the decree. . . . Second, it must demonstrate that the change was not 'anticipated at the time it entered into [the] decree.' . . . Third, it must show that the changed factual circumstance makes 'compliance with the consent decree more onerous, unworkable, or detrimental to the public interest.' . . . Finally, the proposed extension of the decree's termination date must be 'suitably tailored to resolve the problems created by the changed . . . conditions.'" *Labor/Community*, 564 F.3d at 1120 (quoting *Asarco*, 430 F.3d at 979).

"The failure of substantial compliance with the terms of a consent decree can qualify as a significant change in circumstances that would justify the decree's temporal extension." *Id.* at 1120-21. As is true of extension under the authority of paragraph 38 of the decree, however, a party claiming that a lack of substantial compliance constitutes a significant change justifying extension of a consent decree bears the burden of demonstrating that the City has not substantially complied.

The court notes, moreover, that *Labor/Community* held only that a lack of substantial compliance *could* qualify as a significant change warranting extension or modification of a decree. Whether or not it does turns on the second part of the *Labor/Community* test – on whether the "moving party anticipated a contested change in factual circumstances." *Asarco*, 430 F.3d at 981. The *Asarco* court drew this requirement from the Fourth Circuit's decision in *Thompson*, which it described as follows:

> "*Thompson* involved a group of African American public housing residents who entered into a consent decree with the United States Department of Housing and

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[23] *Labor/Community* so applied because the particular consent decree at issue in that case used the standard articulated in *Rufo* in its section governing modification of the decree. *Labor/Community*, 564 F.3d at 1120. Nonetheless, neither *Rufo* nor *Labor/Community* presents any limitation stating that a plaintiff may not seek relief of this sort under Rule 60(b)(5).

> Urban Development (HUD) requiring that new family housing financed with public funds be located in non-impacted areas (areas without high concentrations of minority residents or public housing). The decree purported to eliminate racial segregation and discrimination in Baltimore's public housing system. But instead of abiding by the decree, the local defendants decided that a more viable plan than the one agreed to would be to construct senior housing in impacted areas. The district court modified the consent decree to allow local defendants to seek federal funds for their new plans.
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> The Fourth Circuit reversed the district court on the ground that a particular section in the consent decree, into which the parties knowingly and voluntarily entered, 'provide[d] that, until the other obligations under the Decree ha[d] been satisfied, any new construction of public housing built with public housing funds must be located in a non-impacted area.' [*Thompson*, 220 F.3d] at 247. The plain terms of the decree, despite the viability of the senior housing plans, 'ma[d]e[ ] it clear that the parties contemplated that new construction would be required or desired during the life of the Consent Decree.' *Id*. Because the local defendants anticipated this change in factual circumstances, the Fourth Circuit found that modification of the decree was unwarranted." *Asarco*, 430 F.3d at 981.

Here, as in *Thompson*, the plain terms of the consent decree reveal that the parties anticipated the City might not be in substantial compliance with its terms at the end of 15 years. Consequently, they specified a procedure for addressing such a situation in paragraph 38. As a result, it is not possible to find that the City's alleged noncompliance satisfies the second part of the test for extension under Rule 60(b)(5).

Because the parties clearly contemplated in the consent decree that the City might not be in substantial noncompliance at the expiration of the 15-year term, the court need not consider the first, third, and fourth requirements. Plaintiff cannot succeed in demonstrating that extension is appropriate under the standard articulated in *Rufo* and its Ninth Circuit progeny for modification of a decree under Rule 60(b)(5). Consequently, the court will consider whether modification is

appropriate under the terms of the consent decree.[24]

C. Whether Laley's Motion to Extend the Consent Decree Should Be Granted Because the City Has Not Substantially Complied

1. Plaintiff's Motion

Plaintiff's motion, which focuses on the Sergeant I classification, asserts that the City has not met its annual goals in fourteen of the seventeen fiscal years since 1992-1993.[25] In nine of those years, the Sergeant I goals were missed by five or more persons, while in six of those years, the goals were missed by ten or more persons.[26] LALEY emphasizes the importance of the Sergeant I classification, both because the City has failed to meet its annual promotion goal for that classification, and because the Sergeant I position is a gateway to the Sergeant II classification, and affords those who attain the rank the supervisory experience necessary for promotion to the Lieutenant I and Lieutenant II classifications.[27] LALEY asserts that while the feeder paygrades for the Sergeant I position, Police Officer II, Police Officer III+1, and Police Officer III, have a Hispanic representation of 45%, the percentage of Sergeant I positions held by Hispanics is 32.2%.[28]

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[24]The court, however, will consider case law applying Rule 60(b)(5) by analogy in defining "substantial noncompliance" and applying that definition to the facts here.

[25]Motion at 5.

[26]*Id.*

[27]*Id.* at 7. The annual paygrade advancement goals have been met with respect to the Sergeant II classification in eleven of the last seventeen years, including three of the last five. (Silver Decl., Exh. B.) The annual promotion goals for Lieutenant I have been met in ten of the last seventeen years, including six of the last seven. (*Id.*) Finally, the annual paygrade advancement goals for Lieutenant II have been met in thirteen of the last seventeen years, including six of the last six. (*Id.*) Consequently, it appears that LALEY is not asserting that the failure to attain goals with respect to any of these classifications constitutes substantial noncompliance; rather, it appears it cites statistics regarding these classifications to show the harm caused by failure to attain substantial compliance as respects the Sergeant I classification.

[28]Motion at 6. Eighty percent of 45% is 36%. Although plaintiff focuses on the Sergeant I classification, it notes that overall percentage of Hispanic officers within the Department is

LALEY does not address whether the City undertook the remedial actions outlined in paragraph 34 of the decree in years when it missed promotional goals. It alleges only that "[t]he Hispanic plaintiff class would not have expected that if the City used vigorous good faith efforts to promote its members in compliance with the goals that such efforts would have resulted in 14 out of 17 years of missed annual goals at the Sergeant I level."[29]

Plaintiff alludes to the fact that "[f]or the 2008-2009 promotional process, the Department has instituted formal educational requirements for the classifications of Sergeant, Detective and Lieutenant. These requirements may be expected to shrink the feeder paygrades and applicant pools and . . . may well result in increased underrepresentation at the Sergeant I level."[30] Plaintiff

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41.8%. The percentage representation of Hispanics in each of the positions covered by the consent decree is as follows: Police Officer III – 40.4%; Detective I – 40.1%; Detective II – 36.6%; Detective III – 33.5%; Sergeant I – 32.2%; Sergeant II – 29.8%; Lieutenant I – 24.8%; and Lieutenant II – 24.7%. (*Id.* at 6 n. 4; Silver Decl. Exh. C.)

LALEY asserts that Hispanic representation in the Police Officer III classification is 7% below that of the feeder population. (Motion at 6.) Plaintiff's statistics confuse the issue. The question is not how the current population of a given position compares with the population of its feeder paygrade. The question is the extent to which the City has met the annual paygrade advancement goals for a given year. Based on its review of the evidence, the court concludes that the Police Officer III advancement goals have been met in eight of the last seventeen years, including three of the last five. (Silver Decl., Exh. B.) Plaintiff does not allege that this record constitutes substantial noncompliance, and notably does not object to the attainment of paygrade advancement goals for the Detective III paygrade, which have been met in seven of the last seventeen years, including two of the last five. (*Id.*) Indeed, in its opposition, the City notes that LALEY "briefly references" these statistics, but "doesn't seem to be making the claim that the City failed to meet its annual goals as to these positions." (Opp. at 4.)

Using the full seventeen period to assess compliance, as LALEY does, may produce misleading results. The consent decree was entered in 1992 to remedy a then-current problem with promotions in the department. The parties undoubtedly expected that the City's performance would improve over time. While the City has met promotional goals for the Sergeant I classification in only two of the last six years, it has met the goals for the Lieutenant I classification in five of the last six years, for the Detective I classification in four of the last six years (including in each of the last four years), and for the Lieutenant II classification in each of the last six years. (Silver Decl., Exh. B.)

[29]Motion at 5.

[30]Motion at 7.

adduces no evidence and provides no further detail regarding the new requirements. In any event, it is unclear that the consent decree gives the court authority to address the educational requirements. The consent decree defines the feeder population as those sworn police officers who are in the feeder paygrades and who meet "then-established minimum requirements for promotion."[31] The consent decree, therefore, appears to contemplate that minimum requirements for promotion will be set by the Department and that they may change. It does not contemplate that the court will have any role in overseeing the establishment of the requirements.

2. The City's Opposition

In response to LALEY's motion, the City proffers its own set of statistics. The City emphasizes two types of statistics to support its position that the consent decree should not be extended. First, the City highlights the overall demographics of the department to demonstrate that Hispanics now make up a substantial percentage of police officers. Sixty-two percent of officers are now persons of color; 42% are Hispanic while only 37% are Caucasian.[32] Since 2001, the department has been a "minority-majority department"; that year, 53.3% of sworn personnel were African American, Hispanic, and Asian American/Filipino officers.[33]

Second, the City emphasizes the increase in the representation of people of color at various ranks. The number of officers of color has increased for each rank except Chief and Assistant Chief; at the rank of Captain I, Sergeant I, Sergeant II, and each of the Detective and Police Officer ranks, officers of color now outnumber Caucasian officers.[34] In the Lieutenant II

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[31]Consent Decree, ¶ 20.

[32]Opp. at 5; Defendant City of Los Angeles' Notice of Lodging Exhibits in the City's Opposition to Plaintiff Latin American Law Enforcement Association's Motion to Extend the Consent Decree ("NOL"), Docket No. 281 (Feb. 8, 2010), Exh. 1; Declaration of Gerald Chaleff in Support of Defendant City of Los Angeles' Opposition to Plaintiff Latin American Law Enforcement Association's Motion to Extend the Consent Decree ("Chaleff Decl."), Docket No. 283 (Feb. 8, 2010), ¶¶ 3-4.

[33]Chaleff Decl., ¶ 4.

[34]NOL, Exh. 2.

classification, for fiscal year 1992/1993, the department selected 7 officers of color for advancement and 15 Caucasian officers. By 2008/2009, this statistic had reversed, and the department selected 23 officers of color as compared with 12 Caucasian officers.[35] In 1992/1993, in the Lieutenant I classification, the department selected 3 officers of color and 3 Caucasian officers for advancement. In 2008/2009, by contrast, the department selected 25 officers of color and 29 Caucasian officers.[36] In 1992/1993, the department selected 5 officers of color and 29 Caucasian officers for advancement to the Sergeant II classification. In 2008/2009, the department selected 60 officers of color and 43 Caucasian officers.[37]

In the Sergeant I classification, the department selected 13 officers of color and 25 Caucasian officers for advancement in 1992/1993. In 2008/2009, it selected 153 officers of color and 81 Caucasian officers in this classification.[38] In 1992/1993, the department selected 4 officers of color and 29 Caucasian officers for advancement in the Detective III classification. By contrast, in 2008/2009, it selected 41 officers of color and 17 Caucasian officers.[39] In 1992/1993 in the Detective II classification, the department selected 19 officers of color and 18 Caucasian officers for advancement. In 2008/2009, the department selected 64 officers of color and 124 Caucasian officers for promotion.[40] In the Detective I classification, the department selected 1 officer of color and 3 Caucasian officers for advancement in 1992/1993. In 2008/2009, it selected 122 officers of color and 77 Caucasian officers.[41] In 1992/1993, the department selected 60 officers of color and 44 Caucasian officers for advancement to Police Officer III. By 2008/2009,

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[35]NOL, Exh. 3.

[36]*Id.*, Exh. 4.

[37]*Id.*, Exh. 5.

[38]*Id.*, Exh. 6.

[39]*Id.*, Exh. 7.

[40]*Id.*, Exh. 8.

[41]*Id.*, Exh. 9.

the differential had grown, with the department selecting 257 officers of color and 90 Caucasian officers.[42] Finally, with respect to "coveted positions," in 1995/1996, the first fiscal year in which statistics for this category were tracked, the department selected 133 officers of color and 202 Caucasian officers for advancement. In 2008/2009, the department selected 181 officers of color and only 72 Caucasian officers.[43]

The City asserts that LALEY does not dispute its compliance with the following aspects of the consent decree: (1) utilization of standardized testing processes; (2) modification of the "Rule of Three Whole Scores"; (3) temporary establishment of a training fund; (4) temporary establishment of a scholarship, promotion incentive, and retirement benefits fund; (5) job counseling; (6) implementation of affirmative action training; (7) creation of a supervisory cross-training program; and (8) creation and dissemination of regular status reports regarding the City's accomplishments under the consent decree.[44]

The declaration of Gerald Chaleff, an administrator in the department, sheds some light on the new educational requirements LALEY mentions in its motion. In October 2002, then-Chief William Bratton raised the issue of educational requirements shortly after taking office, noting that the department was one of few major law enforcement organizations that did not include educational requirements in the promotion process. In 2004, the department began disseminating notice to all sworn personnel that educational requirements would become part of the eligibility standards for promotional exams in the department, including for the ranks of Sergeant I, Detective I, and Lieutenant I.[45] The department also worked with local colleges and universities to provide college credit for sworn personnel who attended job-related training and tuition

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[42] *Id.*, Exh. 10.

[43] *Id.*, Exh. 11.

[44] Opp. at 8-9; NOL, Exhs. 12-14.

[45] Chaleff Decl.,¶ 5.

reimbursement for advanced degree programs.[46]

3. Substantial Compliance

As noted, although the authority to extend the consent decree arises from the decree itself, the decree appears to borrow its "substantial noncompliance" language from Rule 60(b)(5); as a consequence, the court will analogize to case law arising under that rule. The court considers, in particular, the facts of *Labor/Community*.

In *Labor/Community*, community organizations and local residents brought a civil rights class action against the Los Angeles Metropolitan Transit Authority ("MTA"), charging that the MTA had discriminated against inner-city bus riders in allocating public transportation resources. In 1996, Judge Terry Hatter of this district approved a consent decree that committed the MTA to implement a detailed plan to improve bus service. *Labor/Community*, 564 F.3d at 1116. In 2006, the plaintiff class moved to extend the duration of the decree on the grounds that the MTA had failed to comply with the decree's bus overcrowding provisions. *Id.*[47] Judge Hatter concluded that "[d]espite an increasing ridership, increasing traffic congestion and fiscal constraints, MTA has substantially complied with the Consent Decree while maintaining fares at reasonable levels. The Consent Decree has served its purpose and will be not extended. . . . As a result of the Consent Decree and the efforts of all of the parties, the quality of life has improved for Los Angeles's public transit dependent poor population." *Id.* at 1121 (omission original).

Reviewing Judge Hatter's order declining to extend the decree, the Ninth Circuit noted that "[t]he court's finding that the decree 'had served its purpose' reflected a conclusion that it was no longer necessary to involve the federal courts in the day-to-day operation of the Los Angeles County bus system." *Id.* The court affirmed, and emphasized the distinction between substantial

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[46] *Id.*, ¶ 6.

[47] Unlike the consent decree in this case, the consent decree at issue in *Labor/Community* did not identify substantial noncompliance as the standard for extension; rather, it required a showing that (1) "a significant change in circumstances warrants revision" and (2) "the proposed revision or revisions are suitably tailored to the changed circumstances." *Labor/Community*, 564 F.3d at 1120. In addition, and importantly, the consent decree in *Labor/Community* did not direct that there be a rebuttable presumption of substantial compliance.

compliance and full compliance:

> "[T]he question is whether there was substantial compliance, a less precise standard [than full compliance] that cannot be satisfied by reference to one particular figure, while ignoring alternative information. Our analysis requires we do more than simply count the number of technical deviations from the decree. Instead, we must determine, using a holistic view of all the available information, whether [defendant's] compliance with the Decree overall was substantial, notwithstanding some minimal level of noncompliance." *Id.* at 1122.[48]

The Ninth Circuit noted the importance of adhering to "the principle that federal court intervention in state institutions is a temporary measure and may extend no longer than necessary to cure constitutional violations." *Id.* at 1123 (citing *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 248 (1991) ("Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that 'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination,'" in turn quoting *Spangler v. Pasadena City Board of Education*, 611 F.2d 1239, 1245 n. 5 (9th Cir. 1979) (Kennedy, J., concurring)). "Injunctions of this sort bind state and local officials to the policy preferences of their predecessors and may thereby 'improperly deprive future officials of their designated legislative and executive powers.'" *Horne v. Flores*, __ U.S. __, 129 S.Ct. 2579, 2594 (2009) (quoting *Frew v. Hawkins*, 540 U.S. 431, 441 (2004)).

As noted, the Ninth Circuit also emphasized whether the decree had "accomplished its essential purposes." *Labor/Community*, 564 F.3d at 1123. Here, the parties dispute the purpose

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[48]The Ninth Circuit noted that in cases in which courts concluded that extensions of the consent decree were warranted, courts had found "near total noncompliance." *Id.* at 1123 (citing *Thompson*, 404 F.3d at 834 (finding "near total failure" to comply with the terms of the consent decree); *David C. v. Leavitt*, 242 F.3d 1206, 1212 (10th Cir. 2001) (noting that defendant was "20 percent in compliance and 80 percent in noncompliance")).

the court should consider. LALEY would have the court consider the purpose of the consent decree as respects Hispanic officers only. The City counters that there is no precedent for severing a portion of the decree from the balance in this fashion. It contends that substantial noncompliance must be judged with respect to the consent decree as a whole. The decree states that it is designed "to provide equal employment opportunities for all City and Department employees" and "to address the underrepresentation of African American, Hispanic, and Asian American sworn officers in promotions" to certain positions "without affecting the legitimate rights of other Department employees."[49] Paragraph 38 emphasizes that the party seeking an extension of the decree must show that the City "has not substantially complied with its provisions" in general; it does not direct that a subclass by subclass analysis be undertaken.[50] The court is mindful of the Ninth Circuit's mandate that it "determine, using a holistic view of all the available information," *Labor/Community*, 564 F.3d at 1122, whether the City is in compliance.[51] For these reasons, the City's assertion that substantial compliance should be judged on the basis of the entire decree, rather than the decree as it applies to the Hispanic plaintiff class, is likely the better view.

The court need not, however, decide the issue. Whether judged against the consent decree as a whole or with respect to the Hispanic class only, LALEY has not met its burden of rebutting the presumption in favor of substantial compliance. LALEY has adduced minimal evidence of noncompliance, evidence that does not rise to the level of substantial noncompliance. The *Labor/Community* court cautioned that, in judging substantial compliance, a court must not "focus[ ] narrowly on [ ] one requirement." *Labor/Community*, 564 F.3d at 1122. LALEY's focus on the Sergeant I classification is akin to the focus on a single metric that the Ninth Circuit rejected as a standard for evaluating substantial compliance.

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[49]Consent Decree, ¶ 20.

[50]*Id.*, ¶ 38.

[51]This standard is, of course, modified in the present case because the court must begin with the presumption that the City is in substantial compliance (Consent Decree, ¶ 38.)

Were the court to find that failure to attain the numerical goals for the Sergeant I classification constituted substantial noncompliance, or even strict noncompliance, it would have transformed the goals into quotas. This would clearly vitiate the intent of the consent decree, which stated that the goals may not be utilized as quotas and that the decree "shall not be construed to require or to permit the use of quota relief."[52] Rather, as described *infra*, the consent decree sets goals, and establishes remedial procedures in the event the goals are not met. Consequently, even a finding of strict noncompliance would require evidence that, upon discovering that the promotional goals had not been met, the City failed to implement the goal attainment procedures outlined in paragraph 34. LALEY has not referenced that paragraph, much less alleged noncompliance.

As the City notes in its opposition, LALEY "provides no evidence to support its implicit accusation that the City has passed [ ] over . . . any Hispanic officers [for] a promotion to Sergeant I on the basis of their race/ethnicity or national origin."[53] In light of the consent decree's clear mandate that "nothing in [the consent decree] be construed in any way to require the City to promote, to advance, or to assign persons unqualified under then current selection standards, devices, practices or procedures,"[54] it was incumbent on LALEY, in order to demonstrate even strict noncompliance, to provide evidence that qualified Hispanic candidates were available for promotion. Given the presumption in favor of substantial compliance, the court is not in a position to presume that the City failed to promote qualified Hispanic officers.[55]

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[52]Consent Decree, ¶ 37.

[53]Opp. at 21.

[54]Consent Decree, ¶ 22.

[55]The court also notes a fundamental weakness in LALEY's evidence. LALEY has adduced no evidence regarding the extent to which the City has missed the promotion goals in any given year. The court knows, for instance, that the City has missed annual promotion goals for the Sergeant I classification in four of the last six years. The court does not know, however, whether the City missed the goal in any particular year by one officer, a dozen officers, or more. LALEY's evidence is binary – it states only that the City either did, or did not, meet the goal. LALEY's burden, however, is not to show strict noncompliance in a given year, but substantial

LALEY's reference to the absolute percentage of Hispanic officers occupying the various positions covered by the consent decree also misses the mark. The consent decree does not set goals for numbers of plaintiff class members holding various classifications and paygrades; it sets annual promotion goals.

Finally, the court finds that LALEY has not provided sufficient information regarding the new educational requirements to rely on them as a fact warranting extension of the consent decree due to substantial noncompliance. Neither party has described the nature of the requirements, and LALEY has failed to articulate any reason why they will have a disparate impact on Hispanic officers or other officers of color. Given that the new educational requirements were proposed in 2002, and the department gave formal notice of them in 2004, LALEY fails to explain why it waited until one week before the consent decree was to expire, over the holidays, to seek an extension. Indeed, having now had a full opportunity to brief its extension request, LALEY offers only vague references to the requirements.

For all of these reasons, the court concludes the LALEY has not rebutted the consent decree's presumption in favor of substantial compliance. As a consequence, extension of the decree is not appropriate under either the terms of the decree or Rule 60(b)(5).[56]

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noncompliance overall. Similarly, in years during which the City met the goals, the court does not know if it barely met the goals or vastly exceeded them. The court knows, for example, that the City met the promotion goals for the Lieutenant II classification in each of the last six years. It may be that the City barely met those goals or significantly exceeded them. Given this gap in the evidentiary record, the import of LALEY's evidence may be no more than the fact the City missed achieving the annual promotion goals for the Sergeant I classification by one officer in each year while substantially exceeding the goals in other categories. It would be anomalous to conclude that such a showing was adequate to overcome a presumption of substantial noncompliance.

[56]Also relevant in considering holistically whether the goals of the consent decree have been achieved is the fact that the African American and Asian American plaintiff classes have not joined LALEY's motion. This suggests implicitly that they do not feel that the City is in substantial noncompliance. So too, although they do not directly rebut plaintiff's evidence that the City has not met annual promotion goals with respect to Hispanics, the City's statistics regarding the overall representation of Hispanic officers in the department and the comparative promotion levels for officers of color versus Caucasian officers give rise to an inference that the goals of the decree

D. Whether the Court Can Extend the Consent Decree under its Inherent Authority

"It is well established that the district court has the inherent authority to enforce compliance with a consent decree that it has entered in an order, to hold parties in contempt for violating the terms therein, and to modify a decree." *Nehmer v. U.S. Department of Veterans Affairs*, 494 F.3d 846, 860 (9th Cir. 2007). See also *Holland v. New Jersey Department of Corrections*, 246 F.3d 267, 270 (3d Cir. 2001) ("[I]t is settled that a court does have inherent power to enforce a consent decree in response to a party's non-compliance, and to modify a decree in response to changed conditions").[57] See also *Spallone v. United States*, 493 U.S. 265, 276 (1990) (stating that courts have inherent power to enforce compliance with their consent decrees); *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968) (noting that courts have inherent power to modify a consent decree upon an appropriate showing). Indeed, "a court has broad equitable power to fashion a remedy in its exercise of its compliance enforcement and modification powers when a consent decree is aimed at remedying discrimination, as is the Consent Decree in the case at bar." *Holland*, 246 F.3d at 270. See also *Rufo*, 502 U.S. at 381 n. 6 (recognizing that a court's modification power "is long-established, broad, and flexible" (internal quotes and citation omitted)); *Spallone*, 493 U.S. at 276 (stating that a court can exercise "broad equitable powers" when enforcing compliance with a decree aimed at remedying past discrimination).

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have been met.

[57]Although the Ninth Circuit in *Nehmer* stated that courts have inherent authority to modify consent decrees, the court has, on other occasions, stated that Rule 60(b)(5) "'codifies the courts' traditional authority, inherent in the jurisdiction of the chancery, to modify or vacate the prospective effect of their decrees . . . .'" *Asarco*, 430 F.3d at 979 (quoting *Bellevue Manor Association v. United States*, 165 F.3d 1249, 1252 (9th Cir. 1999)). Consequently, it is not clear that the inherent authority discussed in this order, in the Third Circuit's decision in *Holland*, and in older Supreme Court decisions survives as a basis for modification separate and distinct from Rule 60(b)(5) and the standard set forth in *Rufo*. The Ninth Circuit has not addressed this precise question. Because plaintiff has not shown that the court should exercise its inherent authority to extend the consent decree under the standard set forth in decisions that recognize the existence of inherent authority to modify or extend a decree, the court assumes without deciding that it has inherent authority to extend a decree under appropriate circumstances.

"[T]his broad remedial power can be used to extend the effective time period of a consent decree." *Holland*, 246 F.3d at 270-71 (citing *Chrysler Corp. v. United States*, 316 U.S. 556 (1942) (consent decree extended via an exercise of the court's modification power), and *United States v. Local 359, United Seafood Workers*, 55 F.3d 64 (2d Cir. 1995) (extending parts of a consent decree through exercise of the court's compliance enforcement power)).

A court, however, "must make specific findings that support its use of these inherent powers." *Id.* (citing *Hughes v. United States*, 342 U.S. 353, 357-58 (1952) (hearing and findings of fact are required for exercise of the modification power), and *Harris v. City of Philadelphia*, 137 F.3d 209, 214 (3d Cir. 1998) (specific findings are needed if a court intends to exercise its compliance power)).

Although a court has "inherent power to enforce compliance with [its] lawful orders," moreover, this power is "not unlimited." *Spallone*, 493 U.S. at 276. Thus, "a court may use its compliance enforcement power to extend one or more provisions of a decree only if such compliance enforcement is essential to remedy the violation and thus provide the parties with the relief originally bargained for in the consent order." *Holland*, 246 F.3d at 283. Courts have also extended a consent decree when there have been "pervasive violations" of the decree by one party. *United States v. Local 359, United Seafood Workers*, 55 F.3d 64, 69 (2d Cir. 1995). Here, for the reasons stated in the court's analysis of substantial noncompliance, LALEY has not demonstrated that the City is presently violating the terms of the consent decree, much less pervasively. Nor has it shown that extension of the decree is essential to remedy the violation, or that an extension will provide the relief the class originally bargained for when it entered into the consent decree. To the contrary, plaintiff's implicit argument that the City is not in compliance with the decree because the promotional goals set forth in the decree have not been met frustrates the parties' clear agreement that the consent decree did not implement a quota system.

A consent decree can be modified only "upon an appropriate showing" of "the specific facts and circumstances" that justify a change in terms. *United Shoe*, 391 U.S. at 248-49. The court must make "a finding that conditions have changed so that the 'basic purpose of the original

consent decree' has been 'thwart[ed].'" *Holland*, 246 F.3d at 283 (quoting *Chrysler*, 316 U.S. at 562). This means that "time and experience have demonstrated" that "the decree has failed to accomplish th[e] result" it was "specifically designed to achieve." *United Shoe*, 391 U.S. at 249. See also *United States v. Motor Vehicle Manufacturers Association of the United States, Inc.*, 643 F.2d 644, 650 (9th Cir. 1981) ("In *Chrysler*, the test was announced to be whether the extension was necessary to effectuate the purpose of the decree"). Plaintiff has identified no specific facts or circumstances that would support a finding that the purposes or goals of the consent decree would be thwarted absent extension of its term. Plaintiff's reference to new educational requirements does not suffice to demonstrate changed conditions or show that the educational requirements will thwart the basic purpose of the consent decree. To the contrary, time and experience have demonstrated that the consent decree has largely accomplished the result intended. This is demonstrated circumstantially by the fact that only one of three plaintiff classes currently asserts noncompliance and directly by the statistics the City proffers, which show that the ethnic make–up of various ranks of the Los Angeles Police Department in 1992 bears little resemblance to the ethnic make–up of various ranks of the department in 2010. While not every goal of the consent decree has been met, there has been significant improvement in promoting members of each of the plaintiff classes to each job classification.

"Even if a court has the power to modify or enforce compliance with a consent decree, it must support its issuance of such an order with specific findings of fact." *Holland*, 246 F.3d at 284. See also *Hughes v. United States*, 342 U.S. 353, 357-58 (1952) (holding that an adequate hearing and findings of fact are required for exercise of the modification power). Because plaintiff has not demonstrated a violation of the consent decree by the City, the court cannot make the type of factual findings that are necessary to extend its term. Similarly, on the present record, the court cannot find that the decree has failed to accomplish its result.

Because plaintiff has failed to demonstrate that it would be an appropriate exercise of the

court's inherent authority to extend the life of the consent decree, the court declines to do so.[58]

III. CONCLUSION

For the foregoing reasons, LALEY's motion to extend the consent decree is denied. The terms of the consent decree will cease to be enforceable against the City after 11:59 p.m. on March 22, 2010. The court notes that paragraph 38 of the decree requires that the court retain jurisdiction over the consent decree until such time as the City files and the court grants a petition for relief. The court agrees with the City that because the decree will expire by its own terms, it is unclear what paragraph 38 means when it states that the court shall retain jurisdiction over the consent decree until the City's final petition for relief has been granted. Because, as amended by Judge Tashima, paragraph 38 has an uncertain meaning, and in order to avoid any appellate issues, the court directs the City to prepare and file such a final petition for relief from the consent decree no later than March 29, 2010. The petition shall be accompanied by a proposed order.

DATED: March 22, 2010

Margaret M. Morrow

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

[58]At oral argument, counsel for LALEY requested that the court refer the matter to a special master for factual development of its claim of substantial noncompliance. For the reasons stated, whether predicated on the consent decree itself, Rule 65, or the court's inherent supervisory power, a finding of a substantial noncompliance is a condition precedent to *any* extension of the consent decree, however short. Because it has determined that LALEY's showing with respect to substantial noncompliance by the City is inadequate to support extension of the consent decree, the court cannot extend the decree even were it inclined to entertain LALEY's request.

Counsel for LALEY also argued that the court should retain supervisory jurisdiction to continue to implement the purposes of the consent decree following its termination. Specifically, she asserted that the court should retain jurisdiction to oversee the City's transition from operating under the consent decree to operating independently in the area of affirmative action and non-discrimination. Counsel was unable to identify any basis for the exercise of such jurisdiction, however, and the court knows of none.