

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :
 :
 Plaintiff, :
 :

-and- :
 :

THE VULCAN SOCIETY, INC., *for itself and on* :
behalf of its members, JAMEL NICHOLSON, and :
RUSEBELL WILSON, *individually and on behalf of a* :
subclass of all other victims similarly situated seeking :
classwide injunctive relief, :
 :

07-cv-2067 (NGG) (RLM)

ROGER GREGG, MARCUS HAYWOOD, and :
KEVIN WALKER, *individually and on behalf of a* :
subclass of all other non-hire victims similarly :
situated; and :
 :

CANDIDO NUÑEZ and KEVIN SIMPKINS, :
individually and on behalf of a subclass of all other :
delayed-hire victims similarly situated, :
 :

Plaintiff-Intervenors, :
 :

-against- :
 :

THE CITY OF NEW YORK, :
 :
 Defendant. :
 :

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MONITOR'S TWENTY-FIRST PERIODIC REPORT TO THE COURT

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I. Executive Summary

This report summarizes activities relevant to compliance by the City of New York (the “City”) with the Modified Remedial Order during the 90 day period from June 21, 2017, when the Monitor’s Twentieth Periodic Report (Dkt. # 1784) was filed, to September 18, 2017. The report also summarizes the Monitor’s activities relating to the implementation of the Parties’ settlement of Plaintiffs-Intervenors’ disparate treatment claims (the “Disparate Treatment Settlement”), which the Parties agreed would fall within the Monitor’s purview. *See* Stipulation and Order dated June 5, 2015 (Dkt. # 1599); *see also* Memorandum & Order dated June 5, 2015 (Dkt. # 1598) at 10.

Over the past 90 days, the City and the FDNY have continued to work with the Monitor, the United States, and Plaintiffs-Intervenors and have made further progress in several areas covered by the Modified Remedial Order. In a number of those areas, substantial work remains to be done. For example, following the application period for the new open competitive firefighter examination, in which the FDNY succeeded in attracting a diverse group of applicants, the Department has engaged in a variety of activities to maintain contact with applicants and ensure that as many as possible become successful test-takers; but the extent to which the City will ultimately succeed in converting applicants from historically underrepresented groups into test-takers remains to be determined. Similarly, although the City has improved policies and record keeping and has taken steps toward other reforms in its EEO function, several planned initiatives in key areas, such as officer accountability and training, have not yet been fully implemented. Considerable work also remains to be done for the FDNY to demonstrate consistent effectiveness in its investigation and remediation of EEO complaints and its enforcement of anti-hazing and anti-retaliation policies. The City has advised FDNY

members of updates to equal employment and anti-hazing policies and has posted them in firehouses, but it has not developed any regular messaging to publicize the FDNY's commitment to diversity and inclusion, or its rejection of hazing.

In another key area, efforts to perform definitive disparate impact analyses of the components of the Medical Exam (the City's medical screening for entry-level firefighter candidates) have continued to be impeded by the lack of a workable database for Medical Exam information. Problems with the database have caused delays in the City's responses to data requests and inaccuracies in the data it provides.

Part II of this report provides an update on the City's recruitment campaign. The application period for the new open competitive examination closed on June 9, 2017, and the City began to administer the examination September 5. Testing will continue at locations throughout the City until October 14, with supplementary exam sessions at two designated test centers from October 16 through October 28 for applicants who do not appear for testing during the initial testing period. Since applications closed, the City has endeavored to maintain communications with applicants through frequent emails, text messages, and phone calls – sending reminders regarding test scheduling and encouraging applicants to take advantage of the FDNY's live tutorial sessions and online exam preparation resources. The City has advised that it intends to continue these efforts through the testing period.

The success of these efforts to limit attrition among key groups of applicants is vital to the ultimate success of the City's recruitment campaign. Just over 28% of the applications received by the City came from black applicants, and just over 27% came from Hispanic applicants. Accordingly, if the City can convert minority applicants into test-takers at a sufficiently high rate, a majority of the test-takers for the new open competitive exam will come

from historically underrepresented groups, and black representation among test-takers will meet the goal agreed upon by the Parties under the Disparate Treatment Settlement.¹ But it is by no means certain that the City will successfully convert enough black and Hispanic applicants into test-takers, and previous experience shows that it must devote significant effort to doing so: data provided by the City from Exam 2000 recruitment show that the attrition rates for black and Hispanic applicants between filing the application and taking the test were higher than the rate for whites.

The results of the City's attrition mitigation efforts thus far are inconclusive. Large numbers of applicants in all groups have responded to the FDNY's communications and signed up to attend tutorials, and the rates at which minority applicants have signed up for prep sessions are higher than the rates for white candidates. But many applicants in all groups have not responded to the FDNY's outreach, and their level of continuing interest and preparation is uncertain. At the Monitor's recommendation, the City has recently increased the recruitment staff devoted to phone calls to applicants in an intensified effort to reach applicants and maintain their interest during the key weeks of the examination period.

The City has begun to provide the other Parties and the Monitor with data from testing sessions – showing the numbers of applicants from each demographic group who have appeared for their scheduled testing dates, along with the numbers of applicants who have failed to appear without rescheduling. Based on these early numbers, thus far the rate of absences without rescheduling appears higher for black and Hispanic applicants than for white applicants. The

¹ As previous Periodic Reports described in detail, under the Disparate Treatment Settlement, the City agreed to use its "best efforts to recruit black test-takers in proportions closely approximating the representation of age eligible blacks in the New York City labor market, plus an additional 3%." The Parties agreed that the target figure for the City's "best efforts" in recruiting black test takers should be 28% of all test takers for the open competitive examination.

Monitor has requested additional information showing the rates at which applicants are rescheduling their exams for specific dates, expressing an intention to do so, or indicating affirmatively that they no longer plan to take the exam. The City has responded that some of the types of data requested by the Monitor are not retained, but it has agreed to provide additional data to the extent available.

The Monitor will continue to work with the City and the other Parties throughout the exam period to ensure that all appropriate steps are taken to maximize the rate at which applicants from historically underrepresented groups follow through and become test-takers for the ongoing examination. Once complete data from the open competitive examination becomes available, the City will also need to conduct a detailed analysis of all the components of its recruitment campaign, including its current attrition mitigation activities, to provide a basis for evidence-based decisions in future campaigns, and as part of an overall program of regular self-analysis regarding disparate impact going forward. The analysis should assess the effectiveness of the strategies and methods employed in the current campaign, provide an accounting of the resources devoted to the campaign, and determine whether and where different approaches or increased resources are needed for future campaigns.

Part III of this report discusses the status of three data management and analysis systems relevant to the Modified Remedial Order: a comprehensive, end-to-end database designed to manage data from all phases of the recruitment and hiring process; the Candidate Tracking Spreadsheet (“CTS”), which contains periodically updated data from the hiring process for

candidates who took Exam 2000 and Exam 2500², and which will be phased out now that the City has implemented the end-to-end database; and a recruitment database that the City has used to manage data from the ongoing campaign.

The City has reported that development of the comprehensive, end-to-end data management system is complete, that the system has received data from the December 2016 promotional exam, and that it is fully operational. The system will receive data on an ongoing basis in real or near real time, so that the City can perform immediate analysis of results and trends in recruitment and hiring. The City has agreed to demonstrate the operation of the database to the other Parties and the Monitor once candidates from the promotional list have begun to go through post-exam stages of the hiring process and have taken enough steps in the process to generate a representative set of data.

The City circulated the most recent and final updated version of the CTS on September 5, 2017. This most recent version, prepared after the last Academy class from the Exam 2000 and 2500 lists had been selected, contains final, complete, hiring process data for all the candidates on those lists. The Monitor and the Parties are currently reviewing and analyzing that data to determine the effect of various steps in the process on candidates in relevant demographic groups, both cumulatively and in different periods before and after changes in the process. The City has suggested that the Monitor and the Parties set a goal of identifying any remaining sources of disparate impact in the hiring process and implementing remedial reforms before the beginning of the post-examination phases of the hiring process for candidates taking the new open competitive examination – in June or July 2018. The Monitor is considering the City's

² Respectively, these are the open competitive examination and the promotional examination that produced lists of candidates from which Fire Academy classes were drawn from July 2013 through June 12, 2017, the start date of the most recent class.

proposal and has asked the other Parties to comment. The United States and Plaintiffs-Intervenors plan to provide their comments within the next several days.

The City's recruitment database has been operational since September 2016. The City has continued to employ the database in the current phase of the campaign – using it to manage and target its communications with applicants and to generate reports for the Monitor and the other Parties.

Part IV reports on the status of activities relating to the FDNY's EEO function. This remains one of the most active areas under the Monitorship, and one of the areas of greatest concern. The Monitor is concerned that there still appear to be workplaces within the Department that have not embraced a commitment to EEO compliance, and believes that the Department must increase its efforts to discourage violations of its EEO policies and to discipline perpetrators effectively when violations occur.

Over the past 90 days, the Monitor has intensified its focus on the FDNY's handling of EEO complaints and will continue to do so. Before the previous Periodic Report, the Monitor conducted a comprehensive multi-year retrospective review of the City's investigation of EEO-related complaints, and recommendations based on that review were communicated to the City on June 6, 2017. *See* Monitor's Twentieth Periodic Report at 30-31. At the Monitor's request, the City has continued to provide the Monitor with investigative materials from ongoing investigations; and the Monitor has provided comments and suggestions regarding the collection and analysis of evidence in those investigations. Although the City has agreed in principle with a number of the Monitor's recommendations for its investigative practices, the Monitor believes that the FDNY's investigative and evaluative practices continue to exhibit deficiencies.

The Monitor has also continued to work with the City on initiatives intended to enhance officer accountability for EEO matters. The City has continued with an expedited program of online EEO training for officers, which will enable it to implement a system of EEO performance review criteria for officers, beginning with Lieutenants in February 2018. It has also implemented a system of chain-of-command reporting in which officers have been ordered to confer with their superiors regularly (monthly at most levels of command) regarding a range of issues that affect workplace professionalism, including EEO issues. While the reporting requirement is a positive step, the Monitor has suggested modifications that it believes are essential to make the reports effective. The Monitor has recommended that the City require regular written reports, designed to ensure systematic adherence to EEO requirements, and that the City give officers more detailed instructions, including examples of conduct and conditions that may be symptomatic of or conducive to EEO and anti-hazing violations.

Based on advice from the Monitor's own experts, the Parties' suggestions, and the experience of other jurisdictions, the Monitor has long urged the City to employ climate surveys as a component of its efforts to identify EEO issues and gauge the effectiveness of remedial steps. Such surveys – typically administered anonymously, with severe penalties for attempting to influence them – are a classic, widely used method of eliciting employee feedback on EEO compliance and alerting senior management to problem behaviors that may require intervention. The City has now agreed to move forward with a climate survey, but initially only as a pilot project targeting a subset of recently hired firefighters. The City is considering administering a survey covering the entire Department, but has not yet committed to doing so. The Monitor believes strongly that a comprehensive survey of all FDNY personnel is important for the City to obtain a full picture of the EEO environment and related workplace issues in its firehouses, and it

has accordingly urged the City to move quickly to perform a comprehensive survey of all Department employees.

In the area of EEO messaging, the Monitor has urged the City to move forward expeditiously with its plans to develop new EEO and anti-hazing messaging linked to an overall campaign promoting the professional ethics of the Department – making it clear that diversity and inclusiveness are integral to the core mission of the FDNY. As previously reported, the City had engaged in discussions with representatives of the U.S. military to gather information on similar messaging developed by the army. But even though those discussions took place several months ago, at last report the FDNY’s efforts to develop its own messaging were still in their early stages. On a more immediate level, the Monitor also continues to urge the FDNY to deliver its existing EEO messaging more forcefully and consistently through all available channels.

As part of its work on EEO matters, on two occasions in the past 90 days the Monitor met with groups of firefighters, one assembled by the Vulcan Society and one by the City, to gather facts and hear comments regarding EEO issues -- including complaints regarding possible violations or assertedly deficient practices, as well as accounts of cases where management strategies fostered an atmosphere of inclusiveness. The Monitor has begun to incorporate the information gleaned from those meetings into further recommendations regarding the FDNY’s practices.

Part V reports on efforts to ensure that the various components of the Medical Exam do not have an unlawful disparate impact on black and Hispanic candidates.³

³ The Medical Exam is administered by the Bureau of Health Services (“BHS”).

For some time, the analysis of disparate impact has been impeded by the apparent inability of the City to produce reliable data showing candidates' results in the various components of the Medical Exam. In February, the City demonstrated a new Electronic Medical Record ("EMR") database, which was designed to fulfill requests for data both quickly and accurately. Unfortunately, the database has not been able to generate rapid responses to requests for medical data, and data recently derived from the EMR database continues to contain numerous inaccuracies and inconsistencies. In an effort to partially address the Monitor's data requests, the City recently circulated a "BHS Attrition Metrics Report," which it prepared using individual medical records to correct the BHS database information. Though the Monitor appreciates the City's efforts to create interim solutions pending completion of data management tools, the Monitor needs, and has repeatedly requested that the City provide, a reliable source of data so that the Monitor can receive information promptly and use the data to perform its own analyses. The Monitor has requested a further demonstration of the database as the next step in the process of identifying and remedying the continuing data issues and will press the City to devise and implement solutions expeditiously.

As previously reported, the City has engaged PSI Services LLC ("PSI"), which has assisted the City with validation of the written examination and the Functional Skills Test, to conduct a validation study of its current stairmill test. On August 3, 2017 the City provided the Monitor with PSI's updated validation proposal. The Monitor and its medical expert have evaluated this most recent proposal and will be discussing details with the City and PSI.

Part VI discusses recent developments relating to the FDNY's character review process, administered by the Candidate Investigation Division ("CID") and the Personnel Review Board ("PRB"). The Monitor and the Parties have continued to analyze and discuss the impact of the

character review phase of the hiring process on applicants from different racial and ethnic groups and are considering additional improvements. The Monitor has also continued its consultations with its expert, Alison Wilkey, examining further potential reforms in the character review process. On July 27, 2017, the Monitor and Ms. Wilkey met with the City to discuss a series of reforms proposed by the Monitor based on those consultations. The City took the proposals under consideration, and it has advised the Monitor that it plans to respond to them in writing by the end of this month.

The Monitor and the Parties have also continued to analyze data from the character review process in an effort to identify any disparate impact produced by the process as a whole or by its component steps.

The Monitor plans to continue to discuss further possible changes in the process that may eliminate unnecessary disadvantages for minority candidates – either those that result from non-job-related disqualification criteria or those that result from unnecessary complexity in procedures or from reliance on unreliable information.

Part VII discusses issues related to Exams 7501 (the promotional exam given in December 2016) and Exam 7001 (the open-competitive exam for which testing began on September 5, 2017 and will continue until the end of October).

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

II. Recruitment and Attrition Mitigation

A. Recruitment for the New Open Competitive Examination

1. Overview

On September 5, 2017, the City began administering the new open competitive firefighter examination at 7 locations throughout the City. The regular examination period will run through October 14, and supplementary exam sessions will take place at two test centers from October 16 through October 28 for applicants who miss dates in the regular testing period. As recounted in detail in the Monitor's Twentieth Periodic Report, during an application period that ran from April 5 to June 9, 2017, the FDNY collected 72,596 applications, of which 28.26% were from black applicants and 27.14% from Hispanic applicants. Since the application period closed, the FDNY has engaged in a variety of efforts to stay connected with applicants, maintain their interest, and encourage them to take advantage of live and online tutorials provided by the Department. The Monitor has continued to receive updates and provide input on the City's activities. The City has provided bi-weekly statistical reports showing its attempts to contact applicants, the rate of successful contacts, sign-ups for the FDNY's exam prep sessions, and attendance; and the Monitor and the Parties have discussed the FDNY's recruitment activities in frequent calls and meetings over the past 90 days, including a special purpose recruitment meeting July 13 and a September 7 conference call focusing on recruitment.

In the current, post-application phase of the recruitment process, the FDNY's goal is to maximize the number of applicants who go on to take the open competitive examination, and to

provide candidates with the resources and guidance they need to achieve exam scores high enough for them to be hired from the civil service list produced by the exam.⁴

The success or failure of Department's effort to minimize attrition and convert applicants into successful test-takers is likely to determine whether it achieves its the goal of attracting increased percentages of test-takers, and ultimately firefighters, from historically underrepresented groups. Under the Disparate Treatment Settlement, the City is required to "use its best efforts to recruit black test-takers for open-competitive firefighter entrance exams in proportions closely approximating the representation of age eligible blacks in the New York City labor market, plus an additional 3% to remedy a history of underrepresentation of blacks in the New York City firefighter ranks." Before the active phase of the current recruitment campaign began, the Parties agreed that the target figure for the City's "best efforts" in recruiting black test-takers should be 28% of all test-takers for the open competitive examination. As noted above, just over 28% of applications for the ongoing open competitive examination came from black applicants. Accordingly, for the City to meet its goal for black test-takers under the Disparate Treatment Settlement, it must ensure that the rate at which black applicants become test-takers is roughly the same as the rate for other demographic groups. Data from Exam 2000 indicate that the task is a challenging one: the rate of attrition between application and exam among black applicants for Exam 2000 was higher than for other groups.⁵

⁴ The lowest score for candidates appointed from the hiring list for Exam 2000 was 98 (including bonus points awarded for NYC residency and other reasons).

⁵ According to figures provided by the City, 36% of black applicants for Exam 2000 did not take the examination, compared to 26% of whites. Black applicants were 21.5% of total applicants for Exam 2000, but only 19.4% of test-takers. *See* Monitor's Twentieth Periodic Report at 12.

To date, it is not clear whether the City's efforts to maintain contact with applicants and convert them into successful test-takers have been sufficiently successful. Since the examination period began, the City has begun to provide the Monitor and the other Parties with data showing the numbers of applicants in each demographic group who have appeared for their scheduled testing dates, along with the numbers of applicants who have failed to appear without rescheduling. Based on these figures, as of September 14, 2017, the rate of absences without rescheduling appears higher for black and Hispanic candidates than for white candidates (53% for black applicants; 47% for Hispanics; and 39% for whites). If these percentages were to continue and ultimately reflect the overall attrition rates for the relevant groups, black test-takers would represent fewer than 28% of total test-takers (short of the goal for the City's best efforts under the Disparate Treatment Settlement). The City has advised the other Parties and the Monitor that it is focusing intensively on communications with applicants who miss their test dates, and it anticipates that those efforts will improve the rates at which minority applicants appear for exam dates later in the exam period. But it remains to be seen whether the City's efforts will have the desired effect.

The Monitor has requested additional data, including the rates at which applicants have rescheduled their exams for specific dates, expressed an intent to do so, or stated affirmatively that they no longer plan to take the exam. The City has advised the Monitor that some of the requested categories of data are not readily available. For example, although the City's systems show whether an applicant is scheduled for a future exam date, they do not show whether he or she was originally scheduled for a prior date and rescheduled. The City has agreed to provide the additional data to the extent it can.

The Monitor has emphasized the collection of data since the first Periodic Report and has urged the City to create systems to manage and analyze this type of information in real time (within a day or two at most). Going forward, the Monitor will continue to discuss with the City whether its data systems track the categories of data needed to inform its recruitment efforts and provide a basis for analyzing their impact and effectiveness.

2. Exam Preparation Resources and Communications with Applicants

As of September 15, 2017, the City reported that the FDNY had conducted 274 live exam preparation tutorials at locations throughout the City. It plans to conduct a total of 369 sessions before the end of the regular exam period October 14, with the last tutorial taking place the day before the last test date. Each class is run by a trained uniformed officer, accompanied by two firefighters. A total of 13,635 applicants had attended a prep session. The FDNY has also made printed versions of its exam preparation materials available to applicants at its tutorial sessions, at FDNY headquarters, and by mail in response to requests. In addition, complementing its live tutorials, the FDNY has provided online tutorial materials including sample questions and instruction on key skills. The City has also hosted a series of “Mobile Academy” events, which enable applicants to learn more about the written and physical testing process, and generally about the FDNY.

In addition to the FDNY’s exam preparation program, the Vulcan Society has also offered its own series of live tutorial sessions, which it has publicized via emails and phone calls to applicants. The Vulcan Society estimates that some 500 to 700 applicants have attended those sessions. The City and the Vulcan Society have sought to coordinate their efforts effectively, with the assistance of the Monitor. At the Vulcan Society’s request, the City has provided contact information for applicants, which the Vulcan Society has used to publicize its programs.

In addition, although the City declined to provide the Vulcan Society itself with a supply of printed copies of the FDNY tutorial materials, as already noted, it has made copies available to all applicants at its own tutorial locations, at FDNY headquarters, and by mail on request.

The FDNY has attempted to maintain contact with applicants through a variety of channels including emails, texts, and phone calls – tracking and managing its efforts with its ARCS recruitment database, which contains the contact information for all applicants for the exam. The FDNY’s communications have included invitations to prep sessions and reminders to applicants regarding test dates and locations. The City reports that as of September 9, 2017, among the 20,513 black applicants, 14,442 (70%) had either opened an email or picked up a phone call; 14,045 (68%) had responded by signing up for an exam prep session; and 4,292 (21%) had attended a session. Among the 19,700 Hispanic applicants, 15,164 (77%) had either opened an email or picked up a phone call; 12,244 (62%) had responded by signing up for an exam prep session; and 4,458 (23%) had attended a session. Among white candidates, 34% had signed up for a prep session and 14% had attended.

The rates at which black and Hispanic applicants have signed up for and/or attended prep sessions are higher than the rates for white candidates – potentially a favorable indication of continuing interest in target demographic groups. But given the rate at which candidates from all groups have failed to respond to the City’s communications, and the large numbers of candidates from all groups who have not taken advantage of live prep sessions, it is impossible to estimate with any confidence the rates at which applicants from the various groups will appear for the examination.

It is hoped that those applicants who are not attending live tutorials may be taking advantage of these online resources instead. As of September 7, the City reported that there had

been more than 5,191 “visits” to tutorial materials on the FDNY website and that the materials had been downloaded 5,849 times. These numbers may represent a substantial addition to the number of applicants who have shown a continuing commitment to take the exam. But the City does not have the ability to determine whether the visits and downloads are unique, to what extent the applicants accessing web based materials are the same applicants signing up for live tutorials, or how many applicants in particular ethnic groups have accessed or worked through the web based materials. For all these reasons it cannot be assumed that a substantial number of minority applicants who have not signed up for live exam prep are using the online resources instead.

The analysis is further complicated by the large number of applications that remain “pending” – especially among black applicants, for whom a higher percentage of total applications are pending than for other groups. Applications are considered pending where an application fee or fee waiver has not yet been processed; as of September 5, 2017, 4,202 applications from black applicants (20% of total black applicants) remain pending. As discussed in the Monitor’s previous Periodic Report, the City decided to permit pending applicants to finalize their applications after the application period has closed; and it will allow pending applicants to take the exam. But for an applicant to receive a score and to be included on the open competitive hiring list, his or her application must be completed. The FDNY has engaged in an intensive effort to follow up with pending applicants and urge them to complete their applications. The fact that so many have still failed to do so may indicate that a high percentage of pending applications will not mature into valid test-takers; and given the high percentage of black applicants with pending applications, it is a troubling indication concerning the likely rate of attrition among black applicants.

Taking all the available data into consideration, it is unclear whether the City will succeed in converting sufficient numbers of minority applicants into successful test-takers. The data provided by the City indicate that a substantial percentage of applicants in all groups have not taken advantage of preparatory instruction, or even confirmed that they remain committed to take the exam. In view of this uncertainty, on September 5, 2017 the Monitor requested that the City augment its staffing for a period of at least three weeks to increase the number of calls it can make to applicants. The Monitor recommended that the City add a minimum of five callers to target applicants who had not yet been reached or could be further encouraged to sit for the examination.⁶ The Monitor is continuing to follow the results of the City's efforts closely and will propose additional measures if they appear warranted.

3. Post-Campaign Analysis

As noted in the Monitor's previous Periodic Report, once the recruitment campaign for the upcoming open competitive examination is completed, the City will need to conduct a thorough analysis of the campaign to determine which components were effective and make data-driven decisions in designing future campaigns. The City's analysis should include the data gathered in the course of the campaign and after the final group of test-takers has been determined, along with data from surveys on test-taker characteristics that the City is administering to the new group of test-takers and to candidates called up for the hiring process from the Exam 2000 list. *See* Monitor's Twentieth Periodic Report at 46. The City's analysis should also include an assessment of the resources and budgeting for the current campaign, and

⁶ Since the application period ended, the City has operated a call center with 15 stations, with calls placed by an autodialer system. The added callers will not be linked to the autodialer, but rather will be provided with lists of applicants to call.

examine whether additional resources, or a different allocation of resources, will be needed for future campaigns.

B. Working Group

Over the past 90 days, in the area of recruitment, the Parties' efforts and the Monitor's have continued to focus on achieving diversity in the application pool for the new open competitive exam, and on the attrition mitigation efforts discussed in Part II.A. However, notwithstanding the Parties' continued focus on the open competitive examination, the Monitor has urged continued progress on initiatives undertaken by the Working Group Committee pursuant to the Disparate Treatment Settlement for the purpose of "creat[ing] educational and other opportunities that will enhance the ability of New York City students to pursue careers as New York City firefighters." Monitor's Twelfth Periodic Report (Dkt. # 1603) at 7-8 (citing Proposed Stipulation and Order (Dkt. # 1291-1) ¶ 1(e)). The Monitor has scheduled a Working Group conference call September 20, 2017 to discuss progress on the initiatives.

These initiatives include further development and implementation of the new Fire Cadet title, based on the program that was developed by the FDNY and the Working Group and approved by the New York State Civil Service Commission (the "CSC") at a public hearing held on June 16, 2016. *See* Monitor's Seventeenth Periodic Report (Dkt. # 1714) at 11-12. The City previously circulated a timeline for the implementation of the program in May of this year, reporting that a Uniformed Director had been appointed for the program, along with members of the Cadet Review Committee, and projecting that instruction would begin in September of 2018. *See* Monitor's Twentieth Periodic Report at 20. The City has now indicated that this start date is likely to change to align the Program's schedule to correspond with the next promotional exam.

The Monitor expects to receive updates on the timeline for the program and the City's progress on the September 20 conference call.

The Monitor continues to emphasize the importance of coordinating the scheduling of the Cadet Program with plans for the Department's promotional exams for the firefighter position. Cadets must remain in the Fire Cadet title to be eligible to take the promotional exam, and accordingly the Monitor plans to work with the Parties to ensure that the scheduling of the program and the examinations puts Fire Cadets in the best possible position to take the examination and become firefighters.

Initiatives undertaken by the Working Group also include a revived and expanded FDNY Explorers Program, a youth-focused initiative operated through posts located in high schools in diverse neighborhoods. The program provides training and mentoring to encourage participants to join the EMS and potentially obtain promotion from EMS into the firefighter service. *See* Monitor's Nineteenth Periodic Report (Dkt. # 1761) at 17-18. The FDNY has continued with efforts to further develop the program. Since the last Periodic Report, the City reports that an additional post has been chartered, with 5 post advisers and 11 Explorers, and the Department anticipates that an additional post will have 6 post advisers and submit its charter application by October. Once in EMS, Explorers will have the opportunity to become firefighters via the promotional exam. The FDNY has also continued to work on the rollout of the EMS Trainee title, which establishes an additional pathway into EMS for qualified candidates, including FDNY High School graduates and FDNY Explorers. *See id.* The City has reported that it anticipates an EMS Trainee class will be installed in June 2018, assuming the FDNY receives the Civil Service list in October 2017. Both of these initiatives have been spearheaded by the Department's Youth Workforce and Pipeline Programs Unit, whose mission includes introducing

a diverse array of young New York City residents to the prospect of careers in the FDNY and EMS.

On the scheduled September 20 conference call, the Monitor plans to work with the City and the other Parties to refine and finalize timelines for the remaining work on the Fire Cadet program, the Explorers Program, and the rollout of the EMS Trainee title.

III. Data Collection and Analysis

Over the past 90 days, in consultation with the other Parties and the Monitor, the City has continued to develop, implement, and/or work with several data systems created under the Monitorship. These include (1) a comprehensive recruitment database; (2) an end-to-end database that will track candidates through the recruitment and hiring processes; and (3) a Candidate Tracking Spreadsheet (“CTS”) containing available data from each step in the hiring process for candidates who took Exams 2000 and 2500. The status of those projects is discussed below.

A. Comprehensive Recruitment Database

As described in detail in previous Periodic Reports, the City’s comprehensive recruitment database, developed by its consultant Vanguard Communications, retains and manages a variety of data concerning potential candidates, including contact and demographic information and the history of the FDNY’s contacts with each recruit, from the first point of contact with the Department through the written examination. *See, e.g.*, Monitor’s Fifteenth Periodic Report (Dkt. # 1669) at 6-10. Before the application period, the FDNY used the system, known as “ARCS” to gather data and provide reports on the collection of expressions of interest (“EOI”) from potential candidates, and to manage communications with potential applicants via a variety of channels. *See* Monitor’s Twentieth Periodic Report at 20-21. Following the application

period, contact information and other data for all applicants (including those the FDNY had not contacted before they applied) was loaded into ARCS from DCAS systems, and ARCS has been used to manage communications with applicants to provide them with information about the exam, test prep sessions and online resources, and to encourage applicants to follow through and appear for the open competitive exam.⁷

The ARCS system will also provide data for future retrospective analyses of the FDNY's recruitment activities – allowing the City to evaluate the effectiveness of particular strategies with particular groups, and to develop more informed, data driven targeting for future campaigns.

B. End-to-End Hiring Database

The City has continued work on its end-to-end hiring database, called the Consolidated Candidate Tracking System, (“CCTS”), intended to track candidates' progress throughout the hiring process.

As described in detail in the Monitor's previous Periodic Reports, the end-to-end database is a central repository of high-level data from several different department-specific FDNY databases, and will also incorporate data from external sources, such as DCAS. *See* Monitor's Nineteenth Periodic Report at 21-24; *see also* Monitor's Sixteenth Periodic Report (Dkt. # 1694) at 11; Monitor's Twentieth Periodic Report at 23-24. Data from the internal department-level databases will automatically populate appropriate fields in the end-to-end

⁷ During the application period, applications were filed via the City's “OASys” system, maintained by DCAS; and reports on the collection of applications were drawn primarily from that system. But the City continued to generate reports comparing application data to EOI data from ARCS.

database. Data from DCAS, such as information regarding candidates' application status and examination results, will be imported into the CCTS at specified intervals.

Prior to the Monitor's last Periodic Report, the City stated that all essential functions of the system were in place and undergoing testing; and the database had already received data from the most recent administration of the promotional examination. The Monitor expects to view a demonstration of the database using the promotional data once promotional candidates have begun the hiring process and sufficient data regarding their progress has been generated for a demonstration to be meaningful.

C. Candidate Tracking Spreadsheet

As detailed in previous Periodic Reports, the CTS was developed to serve as a compilation of data for candidates on the hiring lists produced by Exams 2000 and 2500, as well as Priority Hire candidates. The CTS reflects each candidate's status, along with results from each step hiring process, from the written examination through intake and the additional required screening tests (*e.g.*, medical, character review). As previously recounted, early versions of the CTS contained gaps and anomalies that limited their usefulness. *See* Monitor's Twentieth Periodic Report at 24-25. But the three most recent versions, produced August 5, 2016, January 23, 2017, and September 5, 2017, remedied the most significant problems identified in previous iterations. The most recent version of the CTS was compiled following the conclusion of the hiring process for the last class to enter the Fire Academy from the Exam 2000 and 2500 lists. Accordingly, it includes complete and final hiring-process data for all candidates on those lists. The Parties and the Monitor plan to use this latest edition of the CTS to assess the impact of each phase of the process on relevant groups within the entire population of candidates on the Exam 2000 list.

In a September 1, 2017 email preceding the production of the final CTS, the City proposed that the Parties and the Monitor use the CTS data to identify any further areas in the hiring process in which remediation may be required, and that they formulate a plan to implement any remedial measures before the candidates from the next open competitive hiring list (generated by the ongoing exam) begin to enter the hiring process in June or July 2018. The Monitor is considering the City's proposal and has asked the other Parties to comment. It expects to receive comments from the United States and Plaintiffs-Intervenors within the next several days.

IV. EEO Compliance, FDNY Culture, and Retaliation Investigations

A. Overview

The Monitor has continued to work with its experts, the City, and the other Parties on all aspects of the FDNY's EEO function. In particular, following up on its comprehensive review of prior investigations, over the past 90 days the Monitor has continued to focus intensively on the FDNY's handling of pending EEO complaints. The Monitor has also continued to engage with the City on initiatives relating to training, accountability, messaging, and day-to-day EEO compliance – including the development of reporting mechanisms and EEO climate assessments. The Monitor has also convened fact-finding meetings with groups of firefighters and officers to identify problem areas and issues, along with steps that have been taken, or could be taken, to address them. In addition, the Monitor has encouraged the City to increase its efforts to deliver EEO messaging via a full range of channels and to expedite its work on new messaging incorporating EEO and diversity messages into the professional ethic of the FDNY.

Through its consultations with experts, its research on best practices, its review of EEO investigations, its meetings with FDNY leadership, and its fact-finding discussions with groups

of firefighters and officers, the Monitor has developed an increasingly detailed understanding of key attributes and practices associated with firehouses that appear to manage EEO issues most (and least) successfully. The overarching feature common to many successful firehouses appears to be active, engaged leadership by officers, including personal involvement by officers in the day to day work and life of the house. Effective management includes officer engagement in addressing potential EEO violations, consistent with mandatory reporting requirements; non-delegation of EEO responsibilities to senior firefighters; and clearly articulated expectations of acceptable conduct, backed up with the real possibility of formal and informal discipline for misconduct or rule-breaking. Information gathered by the Monitor also indicates that in many cases the EEO climate in a house benefits from frequent activity (either actual runs or drills) in which all members and officers join.

Many of the EEO initiatives already in progress, especially in the area of officer training and accountability, are intended to encourage, facilitate, and effectively require the type of active leadership that makes a firehouse less conducive to EEO violations. And going forward the Monitor intends to work with the City to develop additional mechanisms for encouraging the broader adoption of best practices associated with successful workplaces within the Department.

B. Investigations

As recounted in the Monitor's Twentieth Periodic Report, earlier this year the Monitor conducted a comprehensive review of the FDNY's investigations of EEO complaints over the past several years – including investigations conducted by the EEO Office and by the Bureau of Investigations and Trials ("BITS"); and on June 6, 2017 the Monitor sent the City a detailed set of recommendations for improved investigative practices based on its review. Issues emphasized in the Monitor's review and recommendations included the application of correct legal standards,

allocation of burdens of proof, frequency of communications with complainants, support for and fairness of credibility determinations, identifying and evaluating patterns among related instances of misconduct, thoroughness in gathering and analyzing evidence, and addressing failures to cooperate in investigations or efforts to withhold evidence. *See* Monitor's Twentieth Periodic Report at 30. On June 23, 2017, the Monitor met with key personnel from the City to discuss the recommendations. The City expressed agreement with many of the recommendations, although in some areas it disputed the Monitor's observations concerning deficiencies in its investigations, contending that its current practices already conformed to the recommended standards.

Following up on this retrospective review and recommendations, the Monitor has continued to receive regular updates and materials from current EEO investigations – including intake documents, investigative materials such as interview memos, and draft findings; and it has provided the FDNY with comments identifying areas where additional investigation may be warranted and/or where the analysis of evidence appears incomplete or inconsistent. As part of the continuing review, the Monitor has conducted regular weekly calls with the City, including the Assistant Commissioner for EEO, receiving updates on ongoing investigations. The review process serves at least two purposes – allowing the Monitor to provide advice and comments that may assist the FDNY in conducting full and fair investigations, and providing the Monitor with additional, current data with which to continue to evaluate the overall effectiveness of the FDNY's EEO function. Throughout the review process, the Monitor has focused on developing generally applicable recommendations for the investigative process, rather than on dictating outcomes.

Over the course of the Monitorship the FDNY has made progress addressing the profound structural deficiencies and shortage of resources that prevented it from conducting timely and effective EEO investigations. The EEO Office is fully staffed, the FDNY has issued an Investigation Manual and publicized its revised EEO Policy and a Statement of Principles regarding the treatment of complainants, and data management and communications with complainants have become somewhat more systematic and consistent. However, the Monitor has continued to observe some of the same deficiencies in the collection and analysis of evidence that it identified in its June 6, 2017 recommendations; and it is clear that substantial work remains to be done before the City can demonstrate a consistent ability to investigate complaints effectively. Further, although the FDNY has significantly increased its enforcement efforts with respect to failures to report EEO violations, it must also improve its processes for identifying wrongdoers and imposing discipline for the violations themselves. The Monitor plans to continue to review and comment on investigations on an approximately real-time basis going forward – both to assist the FDNY in improving its investigative practices and to evaluate its progress in implementing recommended reforms.

C. Training, Accountability, and Compliance

The Monitor has continued to work with the City on an array of initiatives relating to training, accountability, and EEO compliance. These include the City's ongoing EEO training for officers, plans for officers to report regularly up the chain of command on the professional climate in FDNY workplaces, and plans for anonymous climate surveys to assess the overall EEO environment within the Department.

On August 25, 2017, the City provided the Monitor with a copy of a new policy, dated July 12, 2017, requiring officers to confer regularly with their superiors (monthly for most ranks)

regarding factors relating to the maintenance of a “professional workplace” – including for example issues relating to “supportive leadership; professional ethic; anti-hazing/bullying; [and] previous, ongoing or potential inter-personal disputes.” Although the policy calls for reports on a range of issues not limited to EEO, and although it does not specifically require reports on EEO-related matters, they are implicitly within the scope of the enumerated topics.

While the policy represents a positive step, the Monitor believes it could be improved in some respects. In particular, the policy provides no detailed description or examples of the types of conduct or occurrences that should be reported; nor does it provide the type of detailed instructions that would ensure consistent reporting of key information. In addition, significantly, it requires only oral conferences, not written reports. Encouraging the City to remedy these deficiencies, on August 29, 2017 the Monitor transmitted a series of comments to the City regarding the new policy, recommending that reports be in writing and proposing that instructions for the reports include discussion of specific potential indications that interpersonal conflicts may be present, that hazing or bullying may be taking place, that firefighters may be experiencing adverse treatment on the basis of protected characteristics, and/or that the EEO climate in the firehouse may be conducive to violations.⁸ In the Monitor’s view, written reports are important if not essential to enable the FDNY to track histories and recognize patterns of conduct, to progressively train officers to handle issues as they arise, and to hold officers accountable for failing to identify and report conduct or events of which they were or should have been aware. The City has taken the Monitor’s comments under advisement.

⁸ The Monitor’s proposed list drew substantially from a list provided by Plaintiffs-Intervenors, in response to a request from the Monitor, identifying workplace situations and circumstances in which discriminatory harassment or hazing may be more likely to occur, and various types of conduct that have previously been associated with potential violations of EEO or anti-hazing policies.

Over the past 90 days, the City has also continued updated EEO training for its officers. The online version of the training is scheduled to be completed this month, and live EEO training sessions are scheduled to be completed in January 2018. Following the completion of online training, the FDNY plans to formally issue its new EEO performance metric for officers in October 2017,⁹ and to begin evaluating officers on their EEO performance along with operational criteria. The metric will be employed for the first time in Lieutenants' evaluations in February 2018.

Responding to longstanding requests from the Monitor, the City has also agreed to conduct an anonymous online survey to assess the EEO climate in its workplaces and employee perceptions of the Department's EEO function and its handling of EEO issues. The City has advised the Monitor that it intends to administer the survey in the first instance as a pilot project targeting a subset of recently hired firefighters, and it has shared a draft of the survey with the Monitor. The Monitor urges the City to proceed with the pilot project as soon as possible and to transition promptly to a full scale, Department-wide survey to effectively evaluate the status of the EEO climate in all its workplaces. The City should also ensure that the size and scope of the pilot project is sufficient to afford respondents a reasonable expectation of anonymity, and the Department should take all reasonable steps to ensure that the survey responses can be accessed only by authorized personnel. Climate surveys are a time-honored technique used by a wide

⁹ The specific criteria employed in the performance metric were discussed in the Monitor's Seventeenth Periodic Report at 23-24. The metric requires officers to "demonstrate adherence to FDNY EEO Policy" based on a number of factors including "ensur[ing] that members are treated consistently per the FDNY EEO Policy," consultation with the EEO Office and cooperation in EEO investigations, "[e]nforce[ment] of the prohibition of retaliation," and any history of substantiated complaints. Under the new metric, officers will also "be acknowledged for exceptional EEO-related performance, such as proactively exercising leadership in creating a climate that is inclusive and welcomes diversity; creating an atmosphere promoting EEO; and demonstrating a consistent history of responding sensibly and sensitively to EEO issues should they arise."

variety of employers – including the U.S. military, fire departments, and other para-military organizations – to understand the relationships within a diverse workforce and obtain feedback on the organization’s handling of EEO issues. The Monitor’s research and consultations with its experts confirm that climate surveys are a valuable tool in effective EEO management; and after many months of dialogue and deliberation, the City has not identified any reason not to proceed with a comprehensive survey for the FDNY.

In addition to working with the City and FDNY leadership on these initiatives, on two occasions in the past 90 days, the Monitor has met with groups of firefighters and FDNY officers – one group assembled by the Vulcan Society (July 20) and one by the City (September 6) – to gather information concerning the state of EEO within the Department, hear accounts of EEO issues, hear from FDNY personnel about practices that either improve or undermine relations between firefighters of diverse demographic groups, and explore ways to foster a workplace environment in which EEO violations are less likely to occur.

The Monitor’s meetings with FDNY personnel confirm the vital importance of fully engaged officers committed to running an inclusive workplace. The Monitor intends to continue to work intensively with its experts, the City, and the other Parties to continue to develop, implement and enforce practices that will enhance officer training and accountability, improve the flow of information on EEO issues, reduce the incidence of discrimination and harassment, and help the FDNY identify and address them when they occur.

D. Messaging

Over the past 90 days the Monitor has continued to urge the FDNY to expedite plans to update its EEO and anti-hazing messages and to communicate them more effectively. In particular, several months ago the City advised the Monitor that it planned to develop new

messaging integrating diversity and inclusion themes, along with anti-hazing messages, into a comprehensive campaign focusing on the value of professionalism within the Department. The campaign was to be developed in part based on consultations with the U.S. military, whose Center for Army Professionalism and Ethic (“CAPE”) developed messaging with analogous themes. As last reported at a general meeting on EEO issues on June 7, the development of that campaign was still in its nascent stages, and the Monitor has received no updates since that time. The FDNY should expedite the development of this integrated professionalism messaging campaign, as part of an overall effort to reinforce professional practices and values, including values of diversity and inclusion.

On a more immediate level, the FDNY must also ensure that its current EEO and anti-hazing messages are being delivered regularly and forcefully. Throughout the Monitorship, the Monitor has been informed that EEO messaging is most effective when it is delivered not only in posters and written materials but also vocally and repeatedly by officers. For the Department to communicate its messages of diversity and inclusion most effectively, it must direct officers to deliver them and hold them accountable for doing so.

V. Medical Exam-Related Issues

Pursuant to the Modified Remedial Order, the Monitor continues to address allegations by Plaintiffs-Intervenors and the United States that certain steps in the Medical Exam have a disparate impact on black and Hispanic candidates. *See, e.g.*, Monitor’s Nineteenth Periodic Report at 29-37; Monitor’s Fifteenth Periodic Report at 17-23; Monitor’s Thirteenth Periodic Report (Dkt. # 1636) at 11-17 (citing Modified Remedial Order ¶¶ 15, 19); *see generally* Monitor’s Eleventh Periodic Report (Dkt. # 1575) at 13-14.

A. EMR Database

As described in previous Periodic Reports, the City's prior record-keeping practices with respect to the Medical Exam have made it difficult for the Monitor and Parties to identify and analyze root causes of medical disqualification for black and Hispanic candidates compared to white candidates, and to analyze disparities in rates of disqualification among the groups. *See* Monitor's Nineteenth Periodic Report at 34-35; Monitor's Fifteenth Periodic Report at 23; Monitor's Thirteenth Periodic Report at 16-17; Monitor's Twelfth Periodic Report at 17-18.

Following sustained discussions with the Monitor about the need for improved data, the City agreed to create a database of relevant medical information for each candidate, including gender, age, and race/ethnicity; the date of any measurement, test, subtest, and retest; the result of each such measurement or test; follow-up appointments within BHS and with outside providers; and the results of such follow up appointments. The Monitor requested the database to facilitate systematic impact analyses of results produced by each component and sub-component of the Medical Exam. In February, the City gave the Monitor and other Parties a brief demonstration of its new EMR database, and the last Periodic Report stated that analyses of the EMR database, into which BHS has been entering information since approximately November 2015, would "show whether and to what extent no-cost testing, the new stairmill protocol, informational videos and documents, and other initiatives undertaken to reduce potential disparate impact have been successful and what other changes might be needed to

address any stages of the process that cause any unlawful disparate impact.” Twentieth Periodic Report at 36.¹⁰

Unfortunately, the Monitor and Parties have not been able to make use of the EMR database to undertake the planned analyses. On May 11, the Monitor asked the City to generate reports from the EMR database that would show: (1) the overall qualified/not qualified/reserved rates of open competitive candidates in the Medical Exam since the EMR database went live in November 2015, broken down by race/ethnicity, and (2) the qualified/not qualified/reserved rates of open competitive candidates on each separate component of the Medical Exam during the same period, also broken down by race/ethnicity. Based on the February demonstration, the Monitor anticipated that the City would run these reports using a few database queries and that the data would be transmitted within a few days. Nearly three months later, on August 2, the City produced – instead of the anticipated reports – a document entitled, “Fire Department of New York City Firefighter Candidate Bureau of Health Services Testing Attrition Metrics” (the “BHS Attrition Metrics Report”).

The BHS Attrition Metrics Report is an eighteen-page document that details the attrition rates for each “station” in the Medical Exam, for each race-ethnicity group. The report states that the data for the report was “extracted from the EMR database,” but explains that the City had to work with the data, adding or subtracting numbers in its calculations, to make the report accurately reflect attrition rates. For example, according to the City, for some candidates, data in the database indicates that they have tests that are “incomplete” or on which they were found “not qualified,” when in fact those candidates have passed the Medical Exam, and some of them

¹⁰ Beginning in early 2015, and as reported in every Periodic Report since that time, the City has made a series of adjustments to the Medical Exam process with the goal of reducing disparate impact wherever it might be occurring.

have been appointed to the Academy.¹¹ Although the City gives reasonable explanations for most of the database irregularities,¹² the fact remains that the database is not a reliable repository of information and cannot be used to generate accurate reports.

Similarly, a few days before the last Periodic Report, the City sent the Monitor and Parties a set of spreadsheets the City said reflected the then current contents of the EMR database. The Monitor, with the assistance of experts Manitou, Inc. and Dr. Denise Smith, examined the spreadsheets along with the CTS and individual medical files previously produced by the City, in an attempt to identify and assess trends in results of the Medical Exam since approximately 2012, as well as the effects of changes made to the process since that time. But the Monitor found that reliable analyses were not possible because of numerous limitations and inconsistencies in the data – some identified by the City and others not.

The Monitor was anticipating that the City would be able to produce reports run directly from the EMR database and that the Monitor and Parties would be able to perform analyses of the raw data rather than having to rely on the City's formulations. The Monitor has asked the City for a meeting at which the City can give the Monitor and the Monitor's experts a live demonstration of data entry and queries on the EMR database -- with the aim of finding ways to make the EMR database perform the functions for which the Monitor requested it. The Monitor expects the City to work to resolve the deficiencies in the EMR database as soon as possible, and in any event by the end of this year. Until those deficiencies are remedied, it may be impossible

¹¹ It is not clear why the City chose to make corrections to the data in the report, rather than correcting the data in the database.

¹² Issues encountered by the City include (a) the fact that, prior to November 2015, when BHS began using the EMR database, all medical records were kept in paper files, and candidates who had any form of medical testing prior to November 2015 have some of their results recorded in paper form rather than in the database, so that their database records are not complete; and (b) the data for the report was pulled while some candidates were still being processed for the final Academy class.

to perform a reliable and informative analysis of disparate impact for all the relevant components of the Medical Exam.

B. BHS Attrition Metrics Report

As described above, the BHS Attrition Metrics Report provides attrition rates for each station in the Medical Exam for each race-ethnicity group. Although the report warns that conclusions about disparate impact should not be drawn from the numbers in the attrition report because the City “has not conducted any analysis that asserts any statistical significance of these results,” the data in the document do show discrepancies between the results for different demographic groups in certain components of the Medical Exam. The City’s report asserts that, “[d]espite differences in attrition rates across race-ethnicities, the small sample size available here (which may exaggerate percentages that are based on small numerical differences), confounding factors and other statistical biases may influence the interpretation of the results. A further disparate impact analysis must be conducted to draw any conclusions from the results of the attrition calculations.” *Id.* at 6. Given the City’s caveats with respect to the BHS Attrition Metrics Report, the Monitor will continue to work with the City to refine the EMR database and its use so that reliable data about the Medical Exam can be made available for use in disparate impact and attrition analyses by all the Parties and the Monitor.

C. The Stairmill Test

Plaintiffs-Intervenors and the United States have expressed concern that the stairmill portion of the Medical Exam has a disparate impact on black and Hispanic candidates, and the Monitor’s preliminary analyses of the EMR spreadsheets, the BHS Attrition Metrics Report, and medical files produced by the City indicate that this concern is not unfounded. In part because of the way the City kept data about stairmill failures in the past, it is difficult to determine whether

the disparate impact should be attributed to candidates' underlying medical conditions or to non-medical factors, such as the way the stairmill test was administered by BHS. The City has implemented a number of measures to mitigate any adverse impact that may have resulted from a lack of information about the test or from the manner of its administration. *See* Monitor's Nineteenth Periodic Report at 30-32; Monitor's Eighteenth Periodic Report (Dkt. # 1734) at 32-33. The stairmill test will also be subject to a validation study to be undertaken by outside consultant, PSI.

1. Stairmill Validation

The City has considered a number of methods for validating the stairmill component of the Medical Exam. *See, e.g.,* Monitor's Thirteenth Periodic Report at 14; Monitor's Fifteenth Periodic Report at 19; Monitor's Twentieth Periodic Report at 34. On June 9, 2017, as reported in the last Periodic Report, the City sent the Monitor a stairmill validation study outline prepared by PSI. *See* Monitor's Twentieth Periodic Report at 34. On July 11, the City and the Monitor, along with PSI and the Monitor's expert, Dr. Smith, met to discuss the Monitor's observations and recommendations concerning PSI's June outline. On August 3, the City shared with the Monitor PSI's most-recently updated stairmill validation proposal, which incorporates much of what was discussed at the July meeting.

PSI's current proposal for demonstrating the job-relatedness of the stairmill test is to use a multi-step process to confirm that it predicts a level of aerobic capacity consistent with the aerobic demands of the work of an FDNY firefighter. The proposal calls for (1) measuring the level of aerobic activity (measured in METs) achieved by probationary firefighters at the Academy while taking the Functional Skills Test ("FST"), which combines a series of physical tasks required in firefighting; (2) using that data (possibly in conjunction with published research

data and national standards, such as NFPA 1582) to estimate the minimum METs level related to the job; and (3) examining the level of aerobic activity reached by the same Academy firefighters completing the stairmill test, in order to confirm that the stairmill test does not require a level of aerobic capacity exceeding the job-related level. Although a number of fundamental questions remain to be addressed, the Monitor believes that the City is making reasonable progress. The Monitor will urge the City to give full consideration to further questions and recommendations from Dr. Smith to ensure that, after the validation study is done, the City will be able to defend (a) the aerobic capacity/MET level it finds is required for the job, and (b) the ability of the stairmill test to predict that MET level accurately, using a scientifically-established cut-off value.

When PSI's validation outline is completed, the United States and Plaintiffs-Intervenors will have an opportunity to review and comment. The Monitor expects the City to begin the validation study as soon after these discussions as possible and for the study to be completed – including all analyses, reports, and conclusions – by the end of April 2018.¹³

VI. Character Screening by the CID and PRB

Since the last Periodic Report, the Parties and the Monitor, with the assistance of its expert consultants, Manitou, Inc., have continued to analyze the impact of the character review process on FDNY hiring, including the effect of reforms implemented earlier in the course of the Monitorship. The Monitor and the Parties have also continued to discuss additional potential reforms. With a complete, final set of data now available (in the CTS) for all the candidates who passed through the hiring process for Exams 2000 and 2500, the Parties and the Monitor are in a

¹³ As noted in earlier Periodic Reports, Plaintiffs-Intervenors and the United States have reserved their right to raise objections to the validation study. *See, e.g.*, Monitor's Twentieth Periodic Report at 33.

position to complete their analyses of the impact of previous reforms, and consider whether additional changes in the review process are called for.

A. Enhancements in the Character Review Process

As previously reported in detail, the City issued initial sets of interim guidelines for the CID and PRB in 2012, formulated in consultation with the Monitor and the other Parties; and subsequently (most recently in the summer of 2016) the Parties and the Monitor agreed on several modifications in standards governing the referral of candidates to the PRB, and in CID and PRB procedures. *See* Monitor's Sixteenth Periodic Report at 29-31; Monitor's Seventeenth Periodic Report at 29-30.¹⁴ The City also developed training materials corresponding to the revised guidelines, and the Parties and the Monitor continue to discuss possible refinements in the materials. *See* Monitor's Nineteenth Periodic Report at 38.

The Monitor and the Parties have continued to consider further potential changes in the character review process. On July 27, 2017, the Monitor and its expert Alison Wilkey¹⁵ met with the City to discuss several potential reforms recommended by the Monitor, developed in consultations with Ms. Wilkey – taking into consideration concerns and suggestions offered by the United States and Plaintiffs-Intervenors. *See* Monitor's Nineteenth Periodic Report at 38. The City has advised the Monitor that it will respond in detail to the recommendations later this month, basing its response in part on data in the final CTS, which the City produced to the Monitor and the other Parties on September 5, 2017.

¹⁴ As noted in prior Periodic Reports, the revisions were agreed upon by the Parties with the understanding that they may be subject to additional changes based on further analysis. *See* Monitor's Seventeenth Periodic Report at 30.

¹⁵ Ms. Wilkey's qualifications and expertise are summarized in the Monitor's Eighteenth Periodic Report at 39.

B. Analysis of Potential Disparate Impact

The Monitor and the Parties have continued to analyze data from the character review process – to assess whether the process as a whole or either of its component parts (referral to the PRB and PRB decision making) has a disparate impact on black or Hispanic candidates. As discussed in previous Periodic Reports, a preliminary analysis by the Monitor of data through the end of 2014 indicated that minority candidates were referred to the PRB at a higher rate than white candidates, and that among candidates referred to the PRB, a higher percentage of minority candidates than white candidates were disqualified by the PRB. *See, e.g.*, Monitor’s Thirteenth Periodic Report at 20-21. Since that analysis was performed, additional rounds of hiring have taken place for several subsequent Academy classes; the FDNY has implemented several reforms in the standards and procedures employed in the character review process (as discussed above); candidates disqualified under earlier standards and procedures have been reconsidered under the current, revised rules; and the City has produced additional compilations of data in a series of updated editions of the CTS. *See* Monitor’s Twentieth Periodic Report at 38-41. As discussed above in Part III.C, the most recent iteration of the CTS includes complete and final hiring-process data for all candidates on the Exam 2000 and 2500 lists, and reflects the outcome of reconsideration for those candidates disqualified under discontinued standards who were reconsidered using the current criteria and procedures.¹⁶

¹⁶ As discussed in detail in prior reports, some previous iterations of the CTS were marred by gaps, ambiguities, and inconsistencies that made them unreliable bases for analysis. *See* Monitor’s Twentieth Periodic Report at 24-25. But the three most recent iterations, including the final version, appear to have remedied the most significant problems identified in earlier iterations. It should also be noted that although the final CTS includes the outcome of reconsiderations, it does not provide a precise representation of the outcomes that would have occurred if the current standards had been used through the life of the list: in some cases candidates disqualified under earlier standards, who might have passed through the character review process under current standards, may not have been reconsidered – for example, because they declined the opportunity.

Using data from the most recent CTS, the Monitor and its consultants at Manitou have performed a series of analyses to assess the effect of the 2016 reforms in the character review process and determine whether it continued to produce higher rates of referral and disqualification for black and Hispanic candidates than for white candidates. In addition to analyzing rates of referral and disqualification, the Monitor is examining the effect that referral to the PRB has on the timing or terms of employment for candidates who are not disqualified. The Monitor plans to share the detailed results of its analyses with the Parties shortly.

Going forward, informed by the analyses, the Monitor plans to continue to discuss further potential reforms in the character review process with the City and the other Parties.

VII. Firefighter Exams

Pursuant to Paragraph 7 of the Modified Remedial Order, the Monitor is charged with overseeing the current computer-based test (“CBT”) for the position of entry-level firefighter. Consistent with the provisions of the Modified Remedial Order, the City and its testing consultant PSI have continued to work in coordination with the Monitor and the other Parties on the administration of the examination. The Monitor continues to be assisted by its testing expert, Dr. Shane Pittman of The Pittman McLenagan Group, L.C.

A. December 2016 Promotional Exam

The City’s recent promotional Exam 7501 was taken by 1,489 candidates, most of whom will be appointed to the next two classes to enter the Academy. The first of these classes is likely to begin in December 2017, and the second will begin in approximately June 2018. The last candidates on the promotional list will probably fill a portion of a third class.

Although oversight of the promotional exam is not within the scope of the Court’s Modified Remedial Order, the City agreed to provide demographic data from Exam 7501 to

facilitate analysis of any issues that may relate to the current open competitive exam. As reported in the last Periodic Report, PSI did not find statistically significant evidence of disparate impact on black or Hispanic candidates in the pass rate for the exam. *See* Monitor's Twentieth Periodic Report at 43-45.

B. Open Competitive Exam

Exam 7001 testing began on September 5 and is expected to continue until the end of October. The 72,582 applicants have been scheduled in four-hour test sessions in six test centers located within the five New York boroughs. These regular testing sessions will continue through October 14, 2017; and a supplementary series of testing sessions will be offered in two PSI test centers from October 16 through 28, 2017, with 5,400 seats available for applicants who miss the regular sessions.

On October 30, PSI will begin to create a database of the results of the CBT testing. PSI will analyze the results, and the Monitor and the United States' testing expert will review PSI's analyses in mid-December. (The Monitor and the United States will also review PSI's summary of the results from the optional candidate survey at that time.) PSI will then generate a preliminary candidate score roster and will send it to DCAS by mid-January 2018. PSI will conduct adverse impact analyses of the exam results, which the Monitor and the United States will review at the end of January 2018.

The City expects to appoint the first open-competitive candidates from the Exam 7001 list to the Academy in December 2018 or June 2019, depending on the number of promotional candidates who are appointed.

VIII. Additional Issues

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

- Discussions regarding individual candidates who are or claim to be entitled to relief under the Court's Orders, including their interactions with the FDNY, documents they have received, and their rights and remedies;
- Addressing questions and disagreements among the Parties regarding the status of specific Priority Hire candidates and other issues that are not addressed elsewhere in this report and that fall within the Modified Remedial Order or Disparate Treatment Settlement;
- Frequent calls, meetings, and correspondence with the Parties regarding the full range of issues related to implementation of and compliance with the Modified Remedial Order; and
- Performing the remaining duties of the Special Master appointed by the Court in its Order filed May 22, 2012 (Dkt. # 883). The Court assigned these duties to the Monitor in an order dated August 17, 2016.

Dated: September 19, 2017

New York, New York

/s/

Mark S. Cohen