

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 NINETEENTH 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 from December 12, 2016, when the Monitor’s Eighteenth Periodic Report (Dkt. # 1734) was filed, to March 12, 2017. This report also summarizes the Monitor’s activities relating to the implementation of the Parties’ settlement of Plaintiffs-Intervenors’ disparate treatment claims (the “Disparate Treatment Settlement”), which the Parties agreed would fall within the Monitor’s purview. *See* Stipulation and Order dated June 5, 2015 (Dkt. # 1599); *see also* Memorandum & Order dated June 5, 2015 (Dkt. # 1598) at 10.

Over the past 90 days, working with the Monitor, the United States, and Plaintiffs-Intervenors, the City and the FDNY have made further progress in a number of areas addressed in the Modified Remedial Order. However, in some of the areas where the Court called for reforms, serious problems persist and considerable work remains to be done. Specifically, in the area of EEO compliance and investigations, recent incidents of hazing and harassment show that the FDNY has not yet taken sufficient steps to eliminate abusive, discriminatory, and retaliatory conduct from its workplaces. The Department has recognized that it must do more to send the message that such conduct will not be tolerated, and to identify and discipline those who engage in it. It has committed to working with the Monitor to identify and implement reforms. In addition, in the area of recruitment, although the FDNY has increased its recruitment activities in the past 90 days, it is still uncertain that the campaign will achieve its goals. Accordingly, the FDNY must continue to identify and pursue additional recruitment activities – in-person events, advertising, and social media outreach – in order to maximize its chances of achieving its goals in recruiting a diverse pool of candidates.

Part II of this report provides a detailed update on the City's recruitment campaign, which is now in a critical phase, as the application period for the next open-competitive examination begins in April 2017. 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%"; and prior to the campaign, the Parties agreed to use certain benchmarks focused on "Expressions of Interest"¹ ("EOIs") to estimate the City's progress toward achieving the goal set by the Disparate Treatment Settlement. Throughout the campaign, the City has provided weekly and monthly reports showing the number of EOIs collected and comparing its performance to the agreed upon goals; and Part II of this report provides an update on the City's collection of EOIs to date.²

In part on its own initiative, and in part at the urging of the Monitor, the other Parties, and the Court, over the past 90 days the FDNY has increased its recruitment activities in several areas, and its collection of EOIs has accelerated. That said, if EOIs collected during the recruitment campaign for the previous examination (*i.e.* before January 2013) are excluded from the calculation, the FDNY is short of its target for the collection of EOIs from black prospective applicants by this point in the current campaign, and it is not clear that the City will reach the goal for black test-takers set forth in the Disparate Treatment Settlement. The City contends that

¹ "Expressions of interest" are forms (both paper and electronic) on which the FDNY collects information from potential candidates, both online and at in-person field recruiting events.

² Since the beginning of September, the City's reports have included EOIs collected during the previous recruitment campaign (*i.e.* before 2013) and carried over into the present campaign, along with all EOIs collected in the course of the current campaign – which nominally began January 1, 2013, but for which active recruitment began in March of this year. According to the City, inclusion of carried over EOIs is appropriate when comparing current results to those from the most recent campaign, because the past campaign figures also included EOIs that had been carried over.

pre-2013 EOIs should be counted in its total, and that with those included it is on pace to achieve its EOI goals. It also continues to express confidence that it will ultimately recruit enough black test-takers to achieve the agreed upon goal, in part because of its improved capacity to re-establish and maintain contact with potential candidates who have submitted EOIs. But initial results from efforts to reach out to potential candidates who have submitted EOIs – both the “legacy” EOIs from the previous campaign and EOIs collected since 2013 – are inconclusive, and the rate at which EOIs will ripen into test-takers is uncertain. Accordingly, over the past 90 days, the Monitor has continued to urge the City to take steps to increase its collection of EOIs during the remaining weeks of the campaign. In addition, following up on direction from the Court, the Monitor has asked the City to develop specific plans, including an appropriate supplementary budget, for a full range of recruitment activities (including in-person events, advertising, and social media outreach) to be implemented during an extended application period, assuming such an extended period is needed.

In addition to monitoring the City’s recruitment activities, the Monitor has also asked the City to track its overall budget and expenses for the campaign. The City has advised the Monitor that it is doing so, and it has recently provided the Monitor with budget figures for various components of the campaign.

Part III of this report describes the City’s continuing development and use of three data management and analysis systems relevant to the Modified Remedial Order: a comprehensive system incorporating data from all phases of the recruitment and hiring process; the interim Candidate Tracking Spreadsheet (“CTS”) compiling data from the hiring process for candidates on the current hiring lists; and a recruitment database used to manage data from the ongoing campaign.

The City continues to report that development of the comprehensive, end-to-end data management system is on schedule, and that the system will be fully operational in time to receive data from the December 2016 promotional exam as soon as the data is available – and ultimately to receive data from the next open-competitive exam.

The City has also continued to refine and update the CTS, which was created to report data from all stages of the hiring process for the current hiring lists. The City circulated the most recent updated version of the CTS on January 24, 2017, and during the past 90 days it has continued to consult with the Monitor and the other Parties to answer questions and clarify issues regarding the CTS data. Although some earlier versions of the CTS contained serious flaws, the City has remedied the most significant deficiencies, and the most recent version of the CTS appears to be sufficiently reliable to permit informative analysis in a number of areas. The Parties and the Monitor have also continued to discuss an attrition metrics analysis that the City circulated on October 5, 2016, based on the CTS data, and the Monitor, the United States, and Plaintiffs-Intervenors have also begun conducting their own analyses using data in the CTS.

The City's recruitment database – designed by its consultant, Vanguard Communications – has been operational since September 2016. And the FDNY is currently using it to track the effectiveness of specific recruitment events and activities, and to manage contacts with potential candidates as the recruitment campaign proceeds.

Part IV reports on the status of reforms and initiatives relating to the FDNY's EEO function. Despite some progress in the development of policies, structures, and procedures, continuing reports of discrimination, hazing, and harassment indicate that the FDNY has not yet succeeded in deterring, investigating, and effectively disciplining firefighters for unlawful

conduct in its firehouses. Accordingly, the Department must dramatically increase and re-tool its efforts in all aspects of EEO compliance.

Given the continuing deficiencies in the FDNY's EEO function, the Monitor plans to work closely with the Department over the next 90 days and beyond to develop and implement measures to enhance EEO compliance. On February 27, 2017, The Monitor met with senior uniformed leadership of the FDNY, along with the leadership of the EEO Office and the FDNY's Bureau of Investigations and Trials ("BITS"), to discuss the urgent need for additional reforms and aggressive action on EEO compliance. Going forward, the Monitor plans to meet regularly with key figures in the Department specifically on EEO issues and initiatives. Several months ago the Monitor also requested, and the City has recently produced, data and records from EEO-related investigations over the past three years; and the Monitor plans to review those materials to identify any patterns and develop recommendations for possible improvements in the Department's handling of such investigations. The Monitor also plans to work with the City on improved practices to ensure that complainants are not subject to retaliation.

The FDNY has recently announced plans for Commissioner Nigro to personally deliver a clear zero-tolerance message regarding hazing to FDNY officers, and it is preparing to issue a new anti-hazing policy. It has also committed to involving senior uniformed leadership in reforming anti-hazing and EEO practices. While these are positive developments, they are only the first steps in a long process in which the reformed policies of the FDNY must be translated into a cultural shift within the Department – eliminating discrimination and harassment.

Since the last Periodic Report, with the assistance of the Monitor, the Parties have agreed upon a statement of principles affirming the FDNY's support for EEO complainants, and a strict prohibition of retaliation. The statement was communicated to the Court in a letter from

Plaintiffs-Intervenors March 3, 2017, and the FDNY is currently finalizing plans for issuing and publicizing it.

The FDNY has also finalized two sets of training materials to be used in the next rounds of EEO training – one set for officers and one for firefighters. The FDNY has begun using the new materials in officer training, and it has committed to completing the new training for all officers by January of 2018. The Court has urged the City to accelerate this process and complete the training as soon as possible; and the City has begun to consider how it might be able to accelerate the training.

Part V reports on efforts to ensure that the various components of the City’s medical screening for entry-level candidates (the “Medical Exam”) do not have an unlawful disparate impact on black and Hispanic candidates.³

As previously reported, the City has made practical changes to its process for administering the stairmill portion of the Medical Exam so as to minimize the number of times a candidate may need to return to BHS. The changes are intended to address one possible cause of candidate attrition and potential disparate impact in this component of the Medical Exam. In addition to this effort to mitigate potential disparate impact, the City also plans to undertake a study to validate the stairmill as job related and consistent with business necessity. Although it has previously discussed with the Monitor and the other Parties a number of possible approaches to validation, the City has not actually conducted a validation study of the stairmill protocol since the Modified Remedial Order. But on February 13, 2017 the City advised the Monitor that the City has decided to engage PSI Services LLC (“PSI”), which has assisted the City with

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

validation of the written examination and the Functional Skills Test, to conduct a validation study of its current stairmill protocol.

Over the past 90 days the City has also provided the Monitor with additional materials to assist in analyzing disparate impact. These include medical files, produced pursuant to an ongoing request, and an updated spreadsheet that shows, among other things, the medical qualification status of candidates who have been through the Medical Exam process. The City has also rolled out a comprehensive new database that tracks the progress of candidates through the Medical Exam on a component-by-component basis, and which has been pilot tested since approximately November 2015. The new BHS database will permit disparate impact analyses of each component of the exam. Part V also reports on progress in the retesting of certain candidates who were previously disqualified.

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 the impact of this process on the hiring of specific demographic groups, and to develop additional improvements in policies and procedures. Before the last Periodic Report, the City had circulated draft training materials for members of the CID and PRB and had responded to follow up questions and requests from the Monitor and the other Parties, and the Monitor has since provided the City with comments on the materials.

Since the last Periodic Report, the Monitor has continued its consultations with its expert, Alison Wilkey, to explore further modifications of the character review process, taking into account input and suggestions from the United States and Plaintiffs-Intervenors. The Monitor

plans to offer additional recommendations to the City based on those consultations within the next several weeks.

The Monitor and the Parties have also continued with plans for candidates previously disqualified by the character review process to be reconsidered using recently revised standards and procedures.

Part VII discusses issues related to Exams 7501 (the promotional exam given in December 2016) and Exam 7001 (the next open competitive exam, to be given in September and October 2017).

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. Implementation and Ongoing Evaluation of Recruitment Plans

The FDNY's recruitment campaign for the next open-competitive entry-level firefighter examination is now at a critical juncture. The application period for the examination will begin in April 2017, and applicants will sit for the examination in September or October 2017.

Accordingly, results will soon demonstrate whether the FDNY's efforts over the past year to recruit a diverse population of applicants for the open-competitive examination have been successful, and whether its efforts to build candidate interest gradually over the life of the campaign have proven fruitful. Over the past 90 days, the Monitor has held meetings with the FDNY and the Parties (on January 17 and February 15, 2017) to monitor and evaluate the FDNY's recruitment campaign; and the FDNY has provided the Court with updates on its recruitment efforts at status conferences on February 16 and March 7, 2017. The FDNY has also continued to provide the Monitor and the Parties with data on a periodic basis showing the

progress of its campaign. While the FDNY has intensified its efforts in several areas and has accelerated its collection of EOIs in the past few weeks and months, the end of the recruitment campaign is rapidly approaching, and based on the numbers to date, the FDNY needs to sustain its recruitment efforts and look for opportunities to expand them further.

1. Progress toward Recruitment Goals

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.” As previously reported, before the current campaign, the Parties agreed upon a series of benchmarks to assess the City’s progress toward the goal set by the Disparate Treatment Settlement. Using labor market statistics and data from the previous recruitment campaign, the Parties estimated the number of EOIs that the City would need to collect to yield the percentage of black test-takers specified in the Disparate Treatment Settlement. *See* Monitor’s Seventeenth Periodic Report (Dkt. # 1714) at 5-6. That total EOI target was then divided into monthly and weekly targets to be used as benchmarks to assess the progress of the campaign toward its goal. *Id.* The initial target figure was subsequently adjusted downward, based on the City’s argument that the original target was based on data from the prior campaign that included some duplicate EOIs.

The Monitor remains concerned that the FDNY’s recruitment campaign may not achieve the Parties’ agreed upon EOI goals, and that it may not ultimately produce the target percentage of black test-takers set forth in the Disparate Treatment Settlement. Although the FDNY’s collection of EOIs from black prospective candidates has accelerated over the past 90 days, the

total of such EOIs collected in the course of the current campaign is approximately 73% of the benchmark that the Parties agreed upon for this point in the campaign, excluding EOIs collected in the prior campaign (*i.e.* before 2013) and carried over into this campaign.⁴ Moreover, that 73% includes a large number of EOIs collected years ago (as far back as 2013) well before the active phase of the current campaign began. During the past month, the FDNY has reported on efforts to re-establish or maintain contact with potential candidates – both “legacy” candidates who submitted EOIs in the previous campaign and those who submitted EOIs during the current campaign (*i.e.* since January 2013). These efforts to maintain contact with potential candidates and nurture their interest, which exceed any similar efforts in the past campaign, include emails encouraging the potential candidates to pursue applications. Thus far the results of these follow-up contacts, although encouraging in some respects, are inconclusive⁵; and it remains unclear what percentage of EOIs, especially older EOIs, will ripen into actual test-takers.

In addition, the extent to which the digital component of the campaign, run by the City’s consultant Hodes LLC, will contribute to EOI collection remains uncertain. As previously reported, the City has set a goal according to which EOIs collected by Hodes would account for approximately 50% of the total agreed upon EOI target.⁶ *See* Monitor’s Eighteenth Periodic Report at 14. But based on the City’s most recent reports to the Monitor and the other Parties, although several of Hodes’s initiatives have been productive, and although its rate of EOI

⁴ If these EOIs carried over from the current campaign are included in the total, as the City asserts they should be, *see* Monitor’s Seventeenth Periodic Report at 7, the FDNY is ahead of its periodic target.

⁵ For example, while some 30% of EOIs surveyed by the FDNY (all post-2012) have indicated that they were still interested in becoming firefighters, it remains to be seen how those survey responses will correlate to applications; in addition, the FDNY’s survey results circulated to the Monitor and the other Parties do not show the rate of favorable responses specific to particular demographic groups.

⁶ Hodes collects EOIs submitted by prospective candidates in online forms – commonly in response to digital, social media, or other advertising.

collection has grown over time, its EOI total is well below 50% of the EOIs collected thus far – and even farther below 50% of the agreed upon EOI benchmark for this point in the campaign. It is likely that Hodes’s efforts in advertising and outreach have contributed to EOI collections in other areas of the campaign (so that the full benefit of those efforts is not reflected solely in the EOIs Hodes collects directly); but whether that contribution will make up for the apparent shortfall to date in EOIs collected by Hodes directly remains to be seen.

In view of the uncertainties surrounding the FDNY’s ability to continue collecting EOIs at an accelerated pace, and the rate at which EOIs may ultimately mature into test-takers, the Monitor and the Court have urged the City to take steps to increase the rate of EOI collection. In particular, where specific components of the campaign appear to be effective, the Monitor has specifically advised the FDNY that it should devote additional resources to them. Conversely, the FDNY should not withdraw resources from any component of the campaign unless it has been shown to be impractical or unproductive. The City also should consider whether additional funds are needed to embark on additional efforts.

The Monitor has also asked the City to provide a detailed work plan for continued advertising and outreach that may be required if the application period is extended beyond the initial period in April. The City has assured the Monitor that the field campaign will continue events throughout any extended application period to collect applications. But in addition, there will be a need for the FDNY, through Hodes, to continue its advertising efforts during an extended application period. The Monitor expects the City to provide the other Parties and the Monitor with a plan for those activities before the next meeting on recruitment issues – scheduled for March 30, 2017.

Specific components of the campaign are discussed below.

2. Components of the Campaign

In-Person Recruitment. Over the past 90 days, the FDNY has continued to conduct in-person recruitment events, with numerous events staffed by FDNY recruiters at various venues. The City has also increased its use of “street teams” – mobile teams of recruiters who recruit throughout neighborhoods rather than remain at static locations. The street teams have proven to be very effective at collecting EOIs, and the Monitor previously recommended that the FDNY employ more street teams in its recruitment efforts. The FDNY has increased the number of such teams from its original level of one or two teams per day to its current level of eight to ten teams per day, beginning this month. The Monitor, Plaintiffs-Intervenors, and the Court (at the February 16 and March 7 status conferences) have encouraged the FDNY to continue to expand the street team program, as it remains one of the more effective, practical recruitment tactics employed by the FDNY to date. Specifically, both the Monitor and the Court have urged the City to make use of all available recruiters to staff street teams wherever teams may be effective, without regard to considerations of overtime or other limitations on resources. The City asserts that it will staff all the street teams it considers likely to be productive.

The FDNY advertised and held several “Mobile Academy Events” throughout New York City in February, providing potential candidates opportunities to participate in firefighting-themed activities and learn more about joining the FDNY. These in-person events foster direct, interpersonal interactions between potential firefighter candidates and the FDNY. They are also part of the FDNY’s ongoing efforts to maintain and “nurture” its connections with potential candidates who have already expressed interest in becoming firefighters – encouraging them to follow through on their interest and take the open-competitive exam. The FDNY should

continue to maintain data regarding such events in order to evaluate and maximize their effectiveness.

The in-person portion of the campaign also now includes the activities of a group of 55 civilian (non-FDNY) City employees who are canvassing for EOIs. As previously reported, the canvassers are City representatives who engage in outreach and provide information on a variety of City services in many of the same communities targeted by the recruitment campaign. *See* Monitor's Eighteenth Periodic Report at 9-10. Forty-four of these canvassers communicate FDNY recruitment messages as one of several topics they present when canvassing. Eleven of the 55 focus exclusively on FDNY recruitment messages. The City reports that these efforts have so far generated 312 EOIs, of which approximately 70% are from black and Hispanic prospective applicants.

Online Campaign. Most recently at the February 15, 2017 meeting, the FDNY and its consultant Hodes updated the Monitor and the Parties on the online component of the recruitment campaign – which includes digital advertising, social media advertising and outreach, and email communications directed to existing EOIs and contacts.⁷ Hodes reported that its efforts in both digital advertising and social media advertising have been successful in “reaching”⁸ a high percentage of individuals in target groups, and that its viewing penetration of the target audiences in digital advertising is close to the maximum achievable level and has little if any room to grow.

⁷ The City also provided a further update on some components of the digital campaign at the March 7, 2017 status conference.

⁸ A contact is “reached” if he or she views a digital advertisement, whether or not he or she acts on it.

Similarly, in social media, Hodes reported at the February 15 meeting that its advertising has been shown to some 91% of the black audience accessible through the principal social media platforms, along with 76% of the Hispanic audience. Following the January meeting with the Monitor and the other Parties, the FDNY had increased its efforts in social media advertising, and those efforts produced substantial increases over the numbers reported in January. Hodes has also explained that successful online campaigns require multiple touches and indicated that both additional outreach on social media and targeted digital advertising during the application period could be effective.

In addition to the online efforts undertaken by Hodes, the FDNY is also in the process of reaching out by email and telephone to individuals in target demographic groups who have previously provided the City with email contact information for other purposes. The FDNY was provided initially with a list of more than 600,000 names and phone numbers by the City. The City then took additional measures to analyze the initial list to confirm which contacts were in the target groups. It then provided that list to another vendor to add email addresses that had not been provided initially, and it has communicated with more than 50,000 such contacts.

Radio and Outdoor Advertising. The FDNY's recruitment campaign includes both radio advertisements and outdoor advertisements (including both subway station ads and other billboards) targeting key demographic groups. As discussed in previous reports, at the Monitor's request the FDNY moved up its schedule for starting its radio campaign, *see* Monitor's Eighteenth Periodic Report at 11-12, and it has recently expanded its presence on several radio stations. The FDNY made an initial purchase of time in December, and then resumed radio advertising at the end of January, running advertisements on four radio stations traditionally popular among key demographic groups. The FDNY has recently expanded the radio

advertisements on these stations to include the live reading of the advertisements on the air, as well as banner advertisements on the radio stations' websites, which may be viewed by potential candidates streaming the radio online.

Based upon the data presented by Hodes at the February 15 meeting, showing responses via a "text to join" number specific to the radio ads, the radio advertisement campaign appears to be particularly effective at generating interest among prospective candidates. The Monitor anticipates that the City will continue with its radio advertisement campaign through the end of the application period. And in view of the success of the radio campaign so far, the Monitor has encouraged the City to expand radio advertising as the application period approaches.

In the area of outdoor advertising, the FDNY has also rolled out 160 recruitment posters in 53 New York City subway stations – the maximum permitted by the MTA for advertising directed to a specific demographic group. The subway posters feature a diverse group of current FDNY firefighters and provide "text to join" contact information that potential candidates can use to reach out to the FDNY and receive more information about joining the Department. While the preliminary results provided by the City at the February 15 meeting suggest that relatively few EOIs have been received based upon the subway posters, the subway poster campaign is in its early stages, and more data is needed for an informative analysis. The Monitor anticipates that the City will continue to monitor the effectiveness of its subway poster campaign and adjust the campaign as necessary.

Although Hodes's efforts in these areas (both its online campaign and conventional advertising) have apparently been successful in communicating the FDNY's message to potential candidates in key demographic groups, and although Hodes's work is yielding highly useful information about the efficacy of particular media and messages, the number of EOIs collected

specifically through Hodes's channels (including responses to digital and social media advertising, and text responses to radio and outdoor advertising) remains comparatively small (approximately 4,200 EOIs from black prospective candidates, compared to a goal of more than 100,000 such EOIs for the whole campaign); and the rate at which Hodes's EOIs will produce test-takers is uncertain. For these reasons, it is essential that the City continue to employ every viable, potentially productive means of generating EOIs, while simultaneously turning its attention to converting EOIs into applications.

B. Working Group

In conjunction with their regularly-scheduled recruitment meetings, the Parties have continued to meet to discuss the implementation of initiatives developed by the Working Group Committee, which was established by 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)).

Over the past few months, the implementation of several of these initiatives has been spearheaded by the department's Youth Workforce and Pipeline Programs Unit (the “Youth Workforce Unit”). This unit – funded through the FDNY Foundation, the FDNY's official non-profit fundraising organization – leads a variety of programs including the FDNY High School, the FDNY's Explorer Program, and additional youth outreach efforts intended to introduce young people in New York City's diverse communities to careers as EMTs and firefighters. The senior staff of the Youth Workforce Unit has participated in recruitment meetings and updated the participants on the programs it operates, which are intended to provide educational opportunities for New York City students and potentially to increase the diversity of the

firefighter force. These include programs developed by the Working Group and programs initiated independently by the Youth Workforce Unit.

In the past 90 days, the FDNY, in coordination with DCAS, has developed and established the EMS Trainee title, a paid training position through which high school graduates, including graduates of the FDNY High School and alumni of the FDNY's Explorers Program in New York City high schools, may become certified EMTs.⁹ Trainees who successfully complete the initial three-month probationary training and certification period, and who pass the New York State Emergency Medical Technician certification examination, will automatically be promoted to the EMT title for a continued 12-month probationary period. This title creates an additional viable pathway for FDNY High School graduates and Explorers (along with other eligible candidates) to transition smoothly into EMS. In particular, students who take advantage of training in specialized skills provided by the Youth Workforce Unit may obtain certifications qualifying them for credits on the experience-based test used to select EMS Trainees. With continued mentorship and active alumni involvement, these students may ultimately be encouraged to pursue a promotion to the firefighter position through the promotional exam. As of February 28, 2017, 1,296 people have filed for the EMT Trainee title. Of those, over 34% have identified as Black or African-American, and 21% (across races) have identified as Hispanic/Latino.

Another initiative developed during Working Group Committee discussions has been an expansion of the Explorer Program. The Program provides enhanced training, mentoring and support for participants who wish to join the EMS and potentially promote from EMS into the

⁹ All high school graduates are eligible for the position, provided that they also have (1) at least six months of employment or (2) military service with an honorable discharge.

firefighter title. The program is operated through posts located in a number of high schools in diverse neighborhoods throughout the City. Over the past 90 days, the FDNY has continued the process of hiring additional mentors for the program in an effort to fully staff its eight existing posts, and ultimately to expand the program to two new posts. The City reports that six of eight posts are now fully “chartered” with a full complement of staff, and that the final two will be complete by the end of March 2017. Recruitment efforts for the program are proceeding, and open houses for the posts will be held within the next two weeks.

The Disparate Treatment Settlement specifically contemplated “the creation of a Fire Cadet title or special credit for completion of job-related fire science courses.” Monitor's Twelfth Periodic Report at 7-8 (citing Stipulation and Order ¶ 1(e)). As discussed in prior Periodic Reports, the City’s proposal for the Fire Cadet title, based on the program developed by the FDNY and the Working Group, was submitted to the New York State Civil Service Commission (the “CSC”) in September 2015 and approved by the CSC at a public hearing held on June 16, 2016. *See* Monitor’s Seventeenth Periodic Report at 11-12. The implementation of the Fire Cadet title has continued to be discussed as a component of the Parties’ general monthly recruitment meetings. Over the past 90 days, the FDNY has continued with the hiring process for key positions in the Cadet program including a Uniformed Academy Director, and it has engaged in drafting of selection criteria, a rating scale, and interview questions for the program. It is expected that these items will be finalized in April 2017.

The City has advised the Monitor that it plans to provide an updated timeline for the program at that time. But as of now, the City has not yet determined the start date for the initial class of the Fire Cadet program, the timing of required intermediate steps toward the rollout of the program, or the scheduling of the program in relation to the dates of promotional exams.

While the Monitor recognizes that the establishment of a new title can be complex, the effectiveness of the Fire Cadet title largely depends on its connection to the promotional exam for the firefighter position; consequently, time is increasingly of the essence if the program is to accomplish the goals set out in the Disparate Treatment Settlement. Accordingly, the Monitor urges the City to expedite its review and execution of a plan to implement the Fire Cadet title.

Finally, over the past 90 days, the Parties and the Monitor have finalized the Notice of Examination for the upcoming open-competitive examination – a notice which includes revisions suggested by the Working Group that make it easier for applicants with New York City high school diplomas (or an equivalent certification) to demonstrate eligibility for bonus points awarded for New York City residency.

III. Data Collection and Analysis

Data collection and analysis is crucial to the City's effective recruitment of a diverse group of firefighters and to its evaluation of the impact of the hiring process on minority candidates. The Monitor has accordingly emphasized the importance of comprehensive data collection and analysis throughout the Monitorship. *See, e.g.*, Monitor's Recruitment Report (Dkt. # 1464) at 40-48; Monitor's Thirteenth Periodic Report (Dkt. # 1636) at 7; Monitor's Sixteenth Periodic Report (Dkt. # 1694) at 10-16; Monitor's Seventeenth Periodic Report at 13-15; Monitor's Eighteenth Periodic Report at 19-23. To this end, the City has pursued three primary data projects: (1) the development of a comprehensive recruitment database; (2) the development of an end-to-end database that will track candidates on the next civil service lists from the first recruitment contact with the Fire Department throughout the hiring process; and (3) the creation and population of a Candidate Tracking Spreadsheet ("CTS") containing available data from each step in the hiring process for candidates, including Priority Hire candidates, who

took Exams 2000 and 2500.¹⁰ The end-to-end database remains in development, and the City has made significant progress on the database in the past 90 days, as detailed below. The recruitment database is operational and in use by recruitment staff, although some adjustments are ongoing. As requested by the Parties and the Monitor, the City provided an updated CTS in January of this year.

A. Comprehensive Recruitment Database

As described in previous Periodic Reports, the City hired Vanguard Communications to develop a comprehensive database that would track interested individuals, applicants and candidates throughout the current recruitment campaign. *See, e.g.*, Monitor's Fourteenth Periodic Report (Dkt. # 1651) at 6-11; Monitor's Fifteenth Periodic Report (Dkt. # 1669) at 7. The database is designed to capture information on prospective candidates, including demographic, geographic, and contact information, from the point of initial contact through the written examination. As such, it serves as a tool showing the effectiveness of the FDNY's recruitment efforts with key groups over time, enabling analysis in real time of the success of particular strategies, and aiding in the allocation of recruitment resources based on such analysis.

The City provides weekly and monthly reports to the Monitor and the Parties containing information generated from the recruitment database – showing the FDNY's progress in the collection of EOIs from specific demographic groups and in particular time frames. As described in the Monitor's Eighteenth Periodic Report, while some EOIs are collected electronically, for example through the digital campaign, many EOIs collected through the field

¹⁰ The CTS was created as an interim solution for the purposes of the Monitorship, as way for the City to collect data from the hiring process and provide it to the Monitor and the other Parties while the City worked to develop a permanent, comprehensive data management solution.

campaign continue to be collected on paper and then added to the database manually. *See* Monitor's Eighteenth Periodic Report at 20. After the City launched the new database in September of 2016, there was a substantial data entry lag, which impeded the FDNY's ability to analyze the effectiveness of its recruitment activities in real time. However, in November and December of 2016, the City employed additional staff to reduce the backlog, and it has since advised the Monitor and the other Parties that data entry is proceeding in a timely fashion.

The FDNY's use of its recruitment database will continue to be a focus of the Monitor over the next 90 days as the City, the Monitor, and the Parties continue to closely track the success of the recruitment campaign. As the Monitor continues to emphasize, it is crucial to have current and accurate data as a measure of the FDNY's progress in recruiting a diverse group of applicants, and as a basis for appropriate adjustments in the FDNY's recruitment strategies.

B. End-to-End Hiring Database

The City continues to build an end-to-end hiring database, called the Comprehensive Candidate Tracking System, ("CCTS"), to track candidates' progress throughout the hiring process, from initial recruitment contact to appointment. The City's data technology team provided an update to the Monitor and other Parties on February 22, 2017, and the City appears to have made significant progress in this area.

The end-to-end database will be a central point of access for data from several different sources including DCAS and FDNY department-level databases such as the recruitment database, the CID database, and the BHS database. The system has been designed so that data from internal FDNY databases will automatically populate in the end-to-end database. Data from DCAS, including information on candidates' application status and examination results, will need to be transferred and merged into the database at particular intervals, ideally daily. The

system also includes an interface that allows users to filter for various categories of data and run reports. The end-to-end database is intended to enable FDNY leadership to track candidates in near real-time and to assess how candidates are progressing through the recruitment and hiring processes.

In the past 90 days, the FDNY's technology team has continued to make progress both on improving department-level data systems and on automating the transfer of data from those databases to the CCTS, with a focus on the CID database. Previously, some of the information collected and maintained by CID was in hard copy form kept in physical files, and other information was maintained in a database that did not communicate with other FDNY data systems. The technology team has worked with CID leadership to digitize more data collection and processes, and to automate the transfer of certain key categories of information to the end-to-end database. For example, FDNY leadership or other authorized users will now be able to view a candidate's status throughout the application and character review process via the end-to-end database; and changes in status are time-stamped, allowing the user to review the history of a candidate's progress through the CID portion of the hiring process. The Parties and the Monitor continue to discuss what data should be included in the CID and other databases, and the Monitor will continue to track the progress of this project in the next 90 days. The Monitor and the Parties are scheduled to meet in late March, at which time the FDNY is to provide a comprehensive demonstration of the CID database and data system. Significant progress has also been made on the BHS database (discussed in more detail in Section V of this report), which manages data from the Medical Exam.

In addition to maintaining a large amount of data regarding candidates, the CCTS also has a filtering feature that allows users to search the database for specific categories of

information and to generate reports with that information. This feature allows users to search for the status history of one candidate in particular; to review the status of all candidates with respect to a specific component of the process; or to see how many candidates were disqualified by a specific step, divided by candidate type, race or gender. The search and reporting features are available through an interface called a dashboard, which can be customized for each department or user. Importantly, access to the CCTS will be limited to certain individuals in the FDNY, and some users will be authorized to view only certain categories of information within the system: each user will be able to access only the information in the end-to-end database that he or she is authorized to view. The types of reports that may be run are determined by the filters available on the dashboard, which can be customized for a particular user. The Monitor and the other Parties may request additional filters as analysis of the hiring process proceeds after the next set of examinations.

As previously described by the City, the end-to-end database would include data for candidates on the next civil service lists, while the CTS, discussed below, includes information for candidates who took Exams 2000 and 2500. However, the FDNY has recently advised that it was able to input into the CCTS a limited set of data for candidates from Exams 2000 and 2500. This step could improve the ability of the FDNY, the Monitor, and the Parties to track the progress of candidates still in processing for the next Academy class, to obtain timely reporting on the status of those candidates, and to analyze the hiring process for Exams 2000 and 2500. The City continues to work on the migration of this data to the end-to-end database, and hopes to generate its next data production to the Monitor and the other Parties, typically in the form of the candidate tracking spreadsheet, through the end-to-end database.

As of the February 22 meeting, some features of the end-to-end database remain to be implemented, such as the generation of notices and the full automation of data transfer from the Vanguard recruitment database to the end-to-end database. As stated above, the City has advised that all essential processes will be in place by the time candidate data from the next civil service lists becomes available for input. *See* Monitor's Sixteenth Periodic Report at 13. The Monitor expects to receive further detailed updates on the FDNY technology team's progress at subsequent meetings, and will continue to review the development of the end-to-end database.

C. Candidate Tracking Spreadsheet and Candidate Attrition Analysis

The CTS contains available data from each step of the hiring process for candidates who took Exams 2000 and 2500 and appear on the current civil service lists. As described in detail in prior Periodic Reports, the CTS previously took months to generate following the graduation of a Fire Academy class, and the data contained in those versions of the CTS was incomplete and unclear in several areas. The City has steadily made progress in generating the CTS in a more timely fashion and in improving the quality and internal consistency of the CTS data. Most recently, the City provided a new version of the CTS to the Monitor and other Parties on January 24, 2017, and it has explained or remedied much of the remaining data deficiencies, allowing meaningful data analysis to be performed for several areas of the hiring process.

In addition, in response to comments by the Monitor and other Parties, the City provided a revised analysis of certain attrition metrics that the City had developed internally for analysis of the hiring process. The Monitor and other Parties will continue to discuss the attrition analysis with the City and may suggest the City add certain areas of analysis going forward.

IV. EEO Compliance, FDNY Culture, and Retaliation Investigations

A. Overview

Over the past 90 days, the City has continued to work with the Monitor and the other Parties regarding key elements of the FDNY's EEO compliance obligations, including staffing the EEO office; publicizing the distribution of the revised EEO Policy and Investigation Manual; reviewing the FDNY's diversity and EEO training programs; evaluating and improving the FDNY's investigation of EEO complaints; and continuing discussions among the Parties regarding the EEO climate within the FDNY.

The FDNY has made significant advances in policies and staffing. However, as the Court noted in the status conference on February 16, 2017, reports of discrimination, retaliation, and threats of retaliation continue to surface. Also as the Court noted, until the FDNY demonstrates its ability to investigate these incidents, protect against retaliation, impose appropriate discipline, and deter violations, it will not be in full compliance with the Court's Order.

Without meaningful recourse for discrimination, retaliation, and harassment, firefighters will never feel fully reassured that the Department is willing to support them, and will not come forward with valid complaints. Even worse, potential violators may feel that there will be only modest repercussions, if any, for their actions. The FDNY has to restore its members' confidence in its ability to address complaints and protect complainants, or the progress the FDNY has made in establishing sound policies and structures will have no practical effect.

With that in mind, the FDNY must expedite officer training so that it may implement its new EEO performance metric for officers as soon as possible – along with implementing other systems and tactics that will ensure officer accountability for the treatment (and mistreatment) of

firefighters under their commands. The Monitor plans to work with the City to develop a firm timeline for officer training and evaluations. In addition, the FDNY must ensure that all complaints of discrimination, retaliation, hazing, and other forms of abuse are investigated thoroughly and competently, and that where violations are found, the perpetrators, and the officers who fail to supervise them or report potential misconduct, are disciplined appropriately.

B. EEO Statement of Principles

A new EEO Policy and a new EEO Investigations Manual were finalized and issued in November of last year. The Vulcan Society continued to have concerns, however, that the EEO Policy did not fully address the treatment of complainants who raise allegations of EEO misconduct. While not willing to amend the Policy, the City agreed to negotiate a statement of principles to address these concerns. Over the past 90 days the Parties and the Monitor negotiated and agreed on an EEO statement of principles, which restates and expands upon the FDNY's commitment to ensure that complainants are not subjected to retaliation, and that their terms and conditions of employment are not materially adversely affected because of their complaints. The full, final version of the statement was transmitted to the Court in a letter from Plaintiffs-Intervenors March 2, 2017. The City plans to resolve how the statement will be publicized within the Department over the next few weeks, with input from the other Parties and the Monitor.

C. Diversity and EEO Training

The Monitor, the United States, and Plaintiffs-Intervenors have agreed on the final form of two sets of EEO training materials (one for officers and one for firefighters), and the City has begun a new round of EEO training using the materials. (The training materials remain subject to further revision as feedback and additional comments are received from participants in these

training programs.) The City has also agreed, at the urging of the Monitor and the Court, to expedite the training process (particularly the officer training process) so that the training can begin to exert a positive influence on the EEO climate within the FDNY as soon as possible. In particular, it is essential that officers at all levels have the training, and understand their obligation, to identify, report, and work to remedy violations of EEO laws and policies.

D. Personnel and Staffing

The FDNY has acted effectively to remedy deficiencies in the number of personnel and in the resources devoted to EEO, which had previously been identified as significant obstacles to the effective performance of the EEO office. *See* Monitor's Fifteenth Periodic Report at 12-13. The EEO Office currently consists of seven attorneys including the Assistant Commissioner and Deputy Director. As of the previous Periodic Report, all but one of those positions had been filled, and in the intervening 90 days, the Department has nearly completed the hiring process for the remaining position. The office also has a number of staff personnel, and the City is posting open positions for additional roles to expand the operational capabilities and compliance activities of the EEO Office.

E. EEO Investigations and Discipline

As noted above, allegations of serious EEO violations and incidents of hazing in the FDNY continue to arise, and in at least one prominent case, the FDNY found such allegations credible and imposed discipline on firefighters directly involved in the misconduct. One of the most senior officers in the firehouse was also disciplined and reassigned. The Monitor is concerned that the cases that come to light may not be isolated incidents. In an effort to assess the scope of these problems, several months ago the Monitor asked the City to provide it with a comprehensive list of EEO, hazing, and retaliation complaints and investigations for the past

three years, including cases investigated by either BITS or the FDNY's EEO Office; investigative files for all such complaints; and an export of data from the Department's EEO database (which was set up under the Monitorship, and which is intended to track the Department's handling of all EEO complaints, whether addressed by the EEO Office or by BITS, *see* Monitor's Seventeenth Periodic Report at 21). At the status conference February 16, 2017, the Court directed the City to comply with the Monitor's requests as soon as possible, and the City completed a series of productions responsive to the Monitor's request on March 3. The Monitor is now in the process of reviewing and analyzing those materials.

Over the course of the Monitorship, the Monitor has also reviewed files from selected cases of alleged discrimination and retaliation, and has identified a number of potential improvements that it plans to recommend to the City. Those recommendations will be combined with additional recommendations that the Monitor expects will emerge from its analysis of the additional materials the City recently produced.

More broadly, going forward the Monitor plans to take a more active role in reviewing and monitoring investigations; and it plans to work closely with the FDNY to foster a diverse and inclusive culture that complies with the law. These plans have been discussed with the City and the leadership of the FDNY and are now under way. The FDNY has also begun its own aggressive initiative to communicate a robust anti-discrimination and anti-hazing message throughout its ranks, and to make it clear that officers will be held accountable for misconduct in their commands. The FDNY has announced plans for the Commissioner to meet with some 900 officers to drive home a zero-tolerance message regarding hazing, and it is preparing to issue a new anti-hazing policy. The FDNY and Monitor plan to communicate regularly regarding the FDNY's planned actions and further recommendations by the Monitor.

The Monitor is confident that the City and the FDNY leadership now grasp the magnitude, the importance, and the difficulty of the task confronting them. But it is clear that a great deal of work remains to be done to eradicate unacceptable behavior within the Department. The message must go out to all members of the FDNY that the Department is not a refuge for those who would engage in the type of abusive conduct that would result in termination in any other workplace.

V. Medical Exam-Related Issues

Pursuant to the Modified Remedial Order, the Monitor continues to address allegations that certain steps in the Medical Exam have a disparate impact on black and Hispanic candidates. *See, e.g.*, Monitor's Eighteenth Periodic Report at 30-34; Monitor's Fifteenth Periodic Report at 17-23; Monitor's Thirteenth Periodic Report at 11-17 (citing Modified Remedial Order ¶¶ 15, 19); *see generally* Monitor's Eleventh Periodic Report (Dkt. # 1575) at 13-14. These allegations appear to be borne out by the Monitor's own analyses. The Monitor continues to work with the City, the other Parties, the Monitor's expert Dr. Denise Smith, and the Monitor's expert consultants Manitou, Inc., to focus on possible causes of disparate impact and to implement a series of adjustments to the Medical Exam – with the goal of minimizing the potential for disparate impact while maintaining the FDNY's rigorous hiring standards. *See, e.g.*, Monitor's Fifteenth Periodic Report at 23. Many of the proposed initiatives and adjustments conceived by the Parties and the Monitor, and discussed in prior Periodic Reports, have now been implemented by the City. *See, e.g.*, Monitor's Fifteenth Periodic Report at 23; Monitor's Seventeenth Periodic Report at 27; Monitor's Eighteenth Periodic Report at 33-34. Initiatives that are still in process are discussed below.

A. 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. In part because of the way the City kept data in the past, it is difficult to identify whether the disparate impact relates to underlying medical conditions or to procedural and logistical aspects of the Medical Exam. As discussed in previous Periodic Reports and below, the City has implemented a number of measures to mitigate possible disparate impact produced by the stairmill test. *See* Monitor's Seventeenth Periodic Report at 25-27; Monitor's Eighteenth Periodic Report at 32-33. The City now plans to engage an outside consultant to conduct a validation study of the test.

1. Stairmill Test Protocol

During the latter portion of 2016, as previously reported, the City revised the way in which the stairmill portion of the Medical Exam is given in order to minimize the number of possible required visits to BHS and thereby attempt to address one possible cause of potential disparate impact in this portion of the Medical Exam. *See* Monitor's Eighteenth Periodic Report at 32-33. Under the protocol now in place, if a candidate's heart rate goes above the FDNY limit (90% of age-predicted maximum heart rate) during the 5:12 minute weighted vest phase of his or her first attempt at the stairmill, BHS will – at its discretion – permit the candidate to attempt an additional 2:48 minutes immediately, rather than requiring the candidate to come back to do so on a second occasion. *Id.* BHS believes this modification may obviate the need for a return visit for many candidates who otherwise would have to return to BHS on another date. Some applicants may not be able to take time off from an existing job or make childcare arrangements for multiple visits to BHS. It is hoped that giving candidates the chance to demonstrate their qualification without returning a second time will reduce voluntary attrition.

Other improvements to the stairmill test have included, as previously reported, random observation of stairmill testing by the Diversity Advocate; making a candidate's heart rate visible to the candidate during testing; and providing better guidance through written and video materials. *See* Monitor's Eighteenth Periodic Report at 33; Monitor's Seventeenth Periodic Report at 27; Monitor's Sixteenth Periodic Report at 23-26; Monitor's Fifteenth Periodic Report at 19-21.

2. Validation

Responding to concerns regarding potential disparate impact, the City has previously considered a number of methods to validate the stairmill component of the Medical Exam. *See, e.g.,* Monitor's Thirteenth Periodic Report at 14; Monitor's Fifteenth Periodic Report at 19. On February 13, 2017 the City advised the Monitor that it plans to engage PSI Services LLC ("PSI") to conduct a validation study showing that the BHS stairmill test accurately gauges a candidate's ability to achieve 12 METs. The City says PSI will rely on the IAFF's research and studies as support for the job-relatedness of that standard.¹¹ The United States and the Vulcan Society have previously expressed disagreement with use of the IAFF standard to supply the stairmill METs level, but have stated that they do not object to the City's taking steps to validate the stairmill notwithstanding their reservation of these disagreements. The City has also stated that, even if the validation study shows the BHS stairmill test requires more or less than an average of 12 METS, the City may still use the test to screen for illnesses that are incompatible with firefighting, though the City has not asserted that it would seek to use the stairmill test, by itself,

¹¹ The United States has indicated that it would not accept the 12 METS standard unless it is validated by a separate study showing its relevance to the work performed specifically by New York City firefighters.

as a “cut off” or disqualifier rather than as a screening mechanism to assess whether a need exists for additional testing.

B. Retesting Some Previously Disqualified Candidates

Over the past three months, the Parties and the Monitor continued to collaborate on identifying candidates eligible for retesting and notifying them of this opportunity. Candidates eligible for retesting who also require diagnostic testing are being offered the option to take advantage of the Medical Exam’s new no-cost diagnostic testing program. *See* Monitor’s Sixteenth Periodic Report at 26.

The City has advised the Monitor that all candidates eligible to retest have been invited to do so. According to the City, 184 candidates were invited to retest. Of these, roughly 32% were white, 35% were black, and 30% were Hispanic. Ninety-one candidates accepted the offer to retest. These 91 candidates consist of 26 Priority Hire candidates (18 black and 8 Hispanic); 18 promotional candidates (6 white, 6 black, and 6 Hispanic); and 47 open competitive candidates (13 white, 17 black, 15 Hispanic, and 2 Asian). Intake processing for medical retesting candidates began in June 2016. As of February 28, 2017, the status of these 91 candidates is as follows: 8 were appointed to the December 2016 class; 3 are currently qualified for all steps up to the run; 7 appeared for the exam but their results are still pending; 27 failed to report for their intake and/or the medical and/or psychological exam; 14 were promotional candidates whose processing ceased due to the expiration of the Civil Service list;¹² 9 have been medically disqualified; 5 exceeded the rescheduling limits; 2 passed the medical but were disqualified on the basis of character; 2 had claimed credits withdrawn; and 14 are in various stages of

¹² Of these 14 promotional candidates: 8 had already been found medically disqualified; 2 had failed to report; 1 exceeded the rescheduling limit; and 3 had been in various stages of processing when the list expired.

processing. Of the eight appointed to the December 2016 class, four are white, two are black, and two are Hispanic. The three candidates who have qualified for all steps but the run are on track to be appointed to the next class as long as their run is successful and CID does not receive any potentially negative information about them. The seven candidates who appeared for the medical exam but whose results are still pending and the fourteen who are in various stages of processing have a chance of being appointed to the next class if they get through all further processing successfully.

In November 2016, the City agreed to a new retesting category. Some candidates failed the Medical Exam and subsequently failed to appear for their scheduled Candidate Physical Ability Test (“CPAT”), potentially because they already knew they had failed the Medical Exam. The City offered a medical retest to these candidates, to be followed by a CPAT test. Notices for this new category of retesters were sent in December 2016 to the 29 candidates affected. The City has informed the Monitor that, of the 29 candidates invited to retest, approximately 18% were white, 41% were black, and 41% were Hispanic. Seven of these candidates accepted the offer to retest. These consisted of 6 Priority Hire candidates (3 black and 3 Hispanic) and 1 open competitive candidate (Hispanic). Of the seven: 3 failed to report for their intake and/or the medical and/or psychological exam; 2 appeared for the medical exam and their results are pending; 1 failed to cooperate with the background investigation; and 1 had claimed credits withdrawn. The candidates who accepted the offer received notices informing them that CPAT orientation sessions would be held on February 2 and 3; practice tests on April 4 and 5; and the final CPAT on April 6. Of the original 29 invited to retest, two candidates are still potentially eligible for hiring, and one of these attended a CPAT orientation session.

C. Tracking and Analyzing Data from the Medical Exam

As described in previous Periodic Reports, the City's prior record-keeping practices with respect to the Medical Exam, as well as inherent complexities in the processing of candidates through the Medical Exam process, made it difficult for the Monitor to identify and analyze root causes of medical disqualification for black and Hispanic candidates as compared to white candidates, as well as to analyze disparities in rates of disqualification among the groups. *See* Monitor's Fifteenth Periodic Report at 23; Monitor's Thirteenth Periodic Report at 16-17; Monitor's Twelfth Periodic Report at 17-18. These record-keeping practices and processing complexities include, but are not limited to, the following:

- the reasons given for medical disqualification were not always consistent (for example, BHS did not consistently distinguish between failure on the stairmill itself, failure to appear for a second or third stairmill attempt or an exercise stress test, and failure to submit results of outside testing required by a stairmill failure);
- many candidates who received a Notice of Final Disqualification ("NOFD") were later found to be qualified, as evidenced by their status on the Candidate Tracking Spreadsheet (sometimes this was the result of the City's consideration of test results submitted after the NOFD had been issued, sometimes the result of an appeal, and sometimes for reasons the Monitor could not determine from the documents produced by the City);
- many candidates received multiple NOFDs (some candidates received as many as three such "final" disqualification notices), the reasons for disqualification were not always the same, and, again, some of these candidates eventually were found qualified, and other were disqualified;

- some candidates who applied from more than one list (the Priority Hire list and/or the promotional list and/or the open competitive list) took the Medical Exam multiple times, sometimes with different results, but this could not always be determined from the City's files;
- sometimes a candidate's race or ethnicity was identified inconsistently in his or her medical file (this is likely due to the candidate's own change in self-identification, rather than an error on the part of BHS); and
- the City lost some NOFDs and full medical files in a fire, which made tracking the reasons for disqualification impossible for the candidates to whom those documents referred.

Over the past three months, however, the City has done a good deal of work to make more and clearer data available to the Monitor and the other Parties. First, the City completed production of a large set of files requested by the Monitor; and, while some details of these files may be confusing or incomplete with respect to individual candidates, as a whole they give the Monitor improved insight into how groups and subgroups of candidates performed on the various components of the Medical Exam. Second, as described above in Part III.C., the City's most recent CTS provides updated information about candidates' medical status. Although the CTS does not show, for candidates disqualified by the Medical Exam, which subpart of the exam each candidate failed, it does give a final answer with respect to some candidates who appear to have been disqualified, based on NOFDs, but who in fact have been appointed as firefighters. It also identifies candidates who failed the Medical Exam but for whom the City was unable to produce an NOFD. Third, the City has continued to provide data and explanations in connection with its Attrition Metrics study. Among other things, this document sheds further light on

disqualifications for candidates who failed, or failed to report for, the Medical Exam. The Monitor, with the assistance of experts led by Dr. Smith, is continuing to derive and analyze data from the various documents the City has produced. The Monitor's preliminary analyses are being refined as more data becomes available. The Monitor will continue to work with the City to track and analyze data and will use these analyses where appropriate to support the development of improvements wherever they are needed in the Medical Exam process.

Most recently, and perhaps most importantly, at a meeting on February 22, 2017, the City demonstrated its new BHS database to the Monitor and the other Parties. The City opted to create the database following sustained discussions with the Monitor about the need for improved data to enable systematic analysis of hiring procedures; and based on the February 22 demonstration, it seems likely to be an extremely useful tool for the City, the Monitor, and the other Parties. The BHS database is intended to collect a full range of data points related to the Medical Exam and to permit the tracking of relevant medical information about each candidate and his or her every interaction with BHS, including 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; the results of such follow up appointments; and all communications with the candidate, both during the exam at BHS and afterwards. The BHS database will equip the City with information needed to conduct a wide variety of important analyses, including disparate impact analyses of every component and sub-component of the Medical Exam.

The net result of the data collection efforts described above is that the Monitor and Parties can now begin to more meaningfully 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. Although the NOFDs, full medical files, and the CTS are all somewhat flawed and

incomplete, together they will allow the Monitor and the Parties to more precisely identify the sources of any potential disparate impact the Medical Exam had during the first three years or so of medical testing for candidates from Exams 2000 and 2500. Analyses of the BHS database, into which BHS has been entering information since approximately November 2015, will show whether no-cost testing, the new stairmill protocol, informational videos and documents, and other initiatives undertaken to reduce potential disparate impact have been successful and to what degree. The Monitor, the United States, and Plaintiffs-Intervenors have already submitted requests for data from the new database that will support these analyses.

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 explore, develop and implement modifications in the character review process, administered by the CID and PRB. The Parties and the Monitor have also continued to coordinate regarding the reconsideration of some previously disqualified candidates, and to analyze the effect of the character review process on FDNY hiring.

A. Enhancements in the Character Review Process

In the past 90 days, the Monitor and the Parties have continued to examine further potential reforms in the character review component of the firefighter hiring process. As previously reported in detail, over the course of the Monitorship the Parties and the Monitor have agreed on several rounds of changes in the criteria triggering referral of candidates to the PRB¹³

¹³ The revised Guidelines include changes in the gatekeeping criteria that determine whether candidates are referred by the CID to the PRB. For example, with respect to criminal history criteria, the revisions provide limited “look-back periods” for arrests that do not lead to convictions (which are not in themselves considered evidence of criminal conduct under EEOC guidelines) and call for referral for two or more misdemeanor arrests within the look-back period (rather than one). See Monitor’s Sixteenth Periodic Report at 29-30.

and in CID and PRB procedures. *See* Monitor's Sixteenth Periodic Report at 29-31; Monitor's Seventeenth Periodic Report at 29-30. The most recent revised criteria and instructions were approved by the Monitor in the summer of 2016 and employed in the processing of candidates for the class that entered the Fire Academy in December 2016.¹⁴ The City has also developed revised training materials for use in training FDNY staff (including CID staff and members of the PRB) on revised standards and procedures. The training materials were circulated to the other Parties and the Monitor on September 13, 2016. In response to a follow-up request from the Monitor, the City produced additional supporting materials on November 30, 2016. The other Parties and the Monitor have suggested additions and improvements to the City – most recently in a series of suggestions from the Monitor, communicated to the City on March 10, 2017.

Since the last Periodic Report, the Monitor has continued its consultations with its expert, Alison Wilkey, to explore further modifications of the character review process. (Ms. Wilkey's qualifications and expertise are summarized in the Monitor's Eighteenth Periodic Report at 39.) Ms. Wilkey's research, analysis, and examination of possible reforms has also taken into account proposals and lines of inquiry suggested by the United States and Plaintiffs-Intervenors – who have met with Ms. Wilkey and the Monitor on two occasions, most recently on February 28, 2017. The Monitor plans to meet with the City in March to discuss the results of Ms. Wilkey's analysis.

¹⁴ Also 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.

B. Reconsideration of Candidates

The Monitor and the Parties have also continued to carry out their previously agreed upon plan for candidates previously disqualified by the character review process to be reconsidered using recently revised standards and procedures. *See* Monitor's Seventeenth Periodic Report at 30-31. As recounted in the Monitor's previous Periodic Reports, 92 candidates were eligible for reconsideration, and 80 candidates accepted the invitation to be reconsidered. *See id.*; Monitor's Eighteenth Periodic Report at 40.

Based on figures provided by the City as of March 7, 2017, of the 80 candidates in processing for reconsideration thus far, four have been found not to be subject to PRB referral under the revised standards. Those candidates, accordingly, proceeded to the next stages of the hiring process without further character review. Of the remaining 76 candidates, 19 ceased processing for various reasons,¹⁵ nine continue to be reviewed for possible PRB referral, and 48 have been referred for reconsideration by the PRB. Within that group of 48, 18 were disqualified following reconsideration by PRB, and 30 have been approved for appointment (subject to successful completion of the other components of the hiring process). Of the 30 that have been approved for appointment (subject to the remainder of the hiring process), 11 were appointed to the December 2016 class.

C. Analysis of Potential Disparate Impact

The Monitor and the Parties have continued to analyze data generated by the character review process – examining whether the process as whole or either of its components (referral to the PRB or PRB decisions) has a disparate impact on black and Hispanic candidates. As

¹⁵ These reasons include failure to report for intake and/or the medical exam; exceeding the rescheduling limits; the expiration of the promotional Civil Service list; and the recalculation of list numbers upon the withdrawal of claimed credits.

recounted in detail 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. Following up on that assessment, the Monitor requested additional, updated data from the City that would support a detailed and updated analysis of PRB referrals and outcomes.¹⁶ *See* Monitor's Seventeenth Periodic Report at 31-32. The City has responded to the Monitor's request with a series of revised versions of the CTS, which incorporate data from the character review process. As previously reported, the first version of the CTS produced in response to the Monitor's request contained gaps, inconsistencies, and ambiguities that made it an unreliable basis for analysis; but in a revised version of the CTS (dated July 26 and produced August 4, 2016), many of those issues were resolved, *see* Monitor's Seventeenth Periodic Report at 31-32; and in follow up discussions, the City provided further clarifications; *see* Monitor's Eighteenth Periodic Report at 22-23. On January 23, 2017, the City produced a revised and updated version of the CTS, which included updated data for candidates processed for classes admitted to the Fire Academy through December 2016. The Monitor and the Parties plan to employ this updated data in disparate impact analyses that will assess the effect of the most recent round of revisions in character review criteria and procedures.

Before the City circulated the most recent edition of the CTS, the City and the United States had performed and circulated analyses of the character review process using data from the July version. On October 4, 2016, the City circulated to the Monitor and the other Parties its

¹⁶ The Monitor also performed its own detailed review of PRB files produced by the City, circulating a spreadsheet showing the results of that review to the Parties on March 24, 2016. *See* Monitor's Sixteenth Periodic Report at 31. The Monitor's spreadsheet included detailed categories for features of candidates histories – intended to permit analysis of associations between particular factors and PRB outcomes.

statistical analysis of the impact of various stages of the hiring process (including character review) on candidates from key demographic groups. The other Parties and the Monitor asked a number of questions about the methods employed in the City's analyses, including questions about the data and assumptions on which analyses of PRB referrals and outcomes were based, and the City responded in writing and on a conference call regarding data issues on February 9, 2017. The United States circulated an expert report on January 5, 2017, which offered opinions on whether the PRB process had a disparate impact on African Americans or Hispanics and the potential causes of any disparate impact. The other Parties and the Monitor plan to respond with questions about the methods employed by the United States' expert.

The Monitor has also performed its own analyses of PRB referrals and outcomes (using the July CTS data), with methods and assumptions that differ in some respects from those employed by the City and by the United States. The Monitor plans to continue with its own analyses using the fully updated CTS to examine the effect of the most recent reforms in the process. To the extent that elements of the analyses performed by the City and the United States appear useful and informative, the Monitor will incorporate them into its analysis.

VII. Next Firefighter Exam

Pursuant to Paragraph 7 of the Modified Remedial Order, the Monitor is charged with overseeing the next 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 development of the next 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

On December 12-14 of last year, 1501 applicants sat for Exam 7501, the promotional exam from which the City will choose its first candidates for the new FDNY civil service list. The City expects to appoint candidates from the resulting promotional list to the Academy class that will likely begin in either December 2017 or January 2018. Given the anticipated number of promotional candidates, many may also enter the following Academy class, anticipated to begin in approximately July 2018.

Although oversight of the promotional exam is not within the scope of the Court's Remedial Order, the City agreed to provide demographic data from Exam 7501 to facilitate analysis of any issues that may relate to the upcoming open competitive exam. According to the City, only 92 individuals (about 6%) of those who had applied failed to appear for Exam 7501. Of the 1501 test-takers, 627 were white, 232 were black, 350 were Hispanic, 78 were Asian, 7 were Native American, and 207 were reported as of "unknown" race/ethnicity.

After Exam 7501 was administered, PSI conducted item-level and exam-level analyses of the results and prepared a report summarizing the results, which was reviewed by the Monitor and the United States. The report, which compares the results of Exam 2500 and Exam 7501, shows that promotional candidates performed similarly across the two tests, which were highly correlated in terms of difficulty, means, and standard deviations. This correlation was expected, given that the CBT forms used for Exam 7501 were developed in 2012, using the same validated Form A from which the forms for exam 2500 were developed. The forms used for Exam 7501

were created but were not used widely during the 2012 exam cycle.¹⁷

Candidate Protest Review sessions for Exam 7501, during which candidates can challenge the answers to the exam, were held in mid-January and early February and produced approximately fifty protests. The Test Validation Board (“TVB”) – a panel composed of PSI’s John Weiner, the Monitor’s testing expert Dr. Pittman, and one representative from the Uniformed Firefighters Association – reviewed all the protests and did not change answers or scoring for any of them.¹⁸ While only a majority of the TVB panel is required to agree to the resolution of a protest, in all cases for both Exams 2500 and 7501, the panel was unanimous in its determinations. The TVB Report was sent to DCAS on March 8.

After the TVB confirmed that no scoring changes were required, PSI computed pass rates for Exam 7501, using the same scoring formulas and the cut score of 70 used for the validated Exam 2000. PSI prepared a report summarizing its findings, and the report was reviewed by the Monitor and the United States. PSI found no evidence of adverse impact in the pass rate; the pass rate difference was well below two standard deviations, and the AI ratio was near 1.0. Of the 1280 promotional candidates who took Exam 7501 and identified their race/ethnicity, only three failed, two of whom who were white and one of whom was black. Of the 1277 promotional applicants who passed, 620 were white, 227 were black, 346 were Hispanic, 77 were Asian, and 7 were Native American.

¹⁷ The new forms that have been developed by PSI over the past year are being kept in reserve and will be used for the upcoming open competitive exam. They, too, are based on Form A and are expected to yield a similarly high correlation with Exam 2000.

¹⁸ Questions that had been protested and had to be altered by the TVB in 2012 had already been dropped or corrected for Exam 7501. Many of the new protests were invalid because they failed either to identify which answer the protesting candidate gave or which answer the candidate believed was incorrect. Several of the protested cognitive items and all of the protested non-cognitive items had already been protested and denied in 2012.

The Monitor has asked PSI to analyze and report on whether there is adverse impact within different rank-ordered subgroups, and PSI has said it will do so after bonus points have been added to the passing scores.

B. Open Competitive Exam

As reported in the Monitor's Eighteenth Periodic Report, the application period for the next open-competitive CBT, Exam 7001, is scheduled to begin in early April 2017. *Id.* at 42. The exam is scheduled to take place in September and October 2017, and the City expects to appoint the first Academy class from that examination pool in December 2018 or June 2019, depending on the size of the promotional candidate pool. *Id.*

Open-competitive test-takers will be given new test forms developed from Form A by PSI, in consultation with the Monitor and with input from the United States. *See* Monitor's Eighteenth Periodic Report at 42-43; Monitor's Seventeenth Periodic Report at 33; Monitor's Sixteenth Periodic Report at 33-34. PSI has confirmed, and the United States agrees, that the new clones are "equivalent" to one another and to the previously validated Form A that CBT used for Exam 2000. *See* Monitor's Eighteenth Periodic Report at 43. Accordingly, Exam 7001 retains all the material attributes of the validated Exam 2000 and will be used in the next testing cycle.

C. Exam Survey

The City has proposed appending an optional survey to Exam No. 7001. The City says it will use the survey data to build statistical models to predict how individuals and groups progress through the hiring process – including the time it takes individuals to get through each milestone, from recruitment to appointment, and which individuals from which groups leave the process,

either by dropping out or because of disqualification. Specific plans for the survey are currently under discussion among the Monitor and the Parties.

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;
- The development of forms for various standard communications with candidates by the FDNY;
- 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: March 13, 2017

New York, New York

/s/

Mark S. Cohen