

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

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. :
 :

-----X

MONITOR’S EIGHTEENTH PERIODIC REPORT TO THE COURT

TABLE OF CONTENTS

I. Executive Summary 1

II. Recruitment and Attrition Mitigation 7

 A. Implementation and Ongoing Evaluation of Recruitment Plans 8

 B. Progress toward Recruitment Goals..... 12

 C. Working Group 16

III. Data Collection and Analysis..... 19

 A. Comprehensive Recruitment Database 19

 B. End-to-End Hiring Database..... 21

 C. Candidate Tracking Spreadsheet and Candidate Attrition Analysis..... 22

 D. Data Regarding Recent and Upcoming Hiring 23

IV. EEO Compliance and Retaliation Investigations..... 24

 A. Overview..... 24

 B. EEO Policy and Investigations Manual 25

 C. Diversity and EEO Training 26

 D. Personnel and Staffing 27

 E. EEO Data Collection and Analysis..... 28

 F. EEO Investigations and Discipline 28

 G. Officer Accountability 30

V. Medical Exam-Related Issues..... 31

 A. The Stairmill Test 32

 1. Stairmill Test Protocol 32

 2. Validation..... 33

 B. Information for Candidates..... 34

 C. Retesting Some Previously Disqualified Candidates..... 35

- D. Tracking and Analyzing Data from the Medical Exam 36
- VI. Character Screening by the CID and PRB 37
 - A. Enhancements in the Character Review Process 38
 - B. Analysis of Potential Disparate Impact..... 40
- VII. Next Firefighter Exam 42
 - A. December 2016 Promotional Exam 42
 - B. September/October 2017 Open-Competitive Exam 42
 - C. Next Steps 43
- VIII. Additional Issues..... 43

I. Executive Summary

This report summarizes activities relevant to compliance by the City of New York (the “City”) with the Modified Remedial Order from September 12, 2016, when the Monitor’s Seventeenth Periodic Report (Dkt. # 1714) was filed, to December 11, 2016. 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 continued to make progress reforming policies and improving practices in the key areas specified in the Modified Remedial Order. But in several of these areas – most notably EEO and the ongoing recruitment campaign – significant work remains to be done, and the FDNY must take additional steps to successfully translate reformed policies into real change in the culture and climate of the FDNY and to achieve the ultimate goal of recruiting a diverse workforce.

Part II of this report provides an update on the City’s recruitment campaign, which began in March of this year and will continue through the end of the application period for the next open-competitive examination in April 2017. As the Monitor’s Seventeenth Periodic Report 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.²

According to the City, when all EOIs collected to date are taken into account (including those collected in the previous campaign), it is on track to achieve the EOI targets agreed upon by the Parties, and thus is also on track to achieve the percentage goal for black test-takers established by the Disparate Treatment Settlement (assuming a conversion rate of EOIs to test-takers similar to the rate from the previous campaign). The City also hopes that improved data management and communication with potential candidates will allow it to convert EOIs to test-takers at a higher rate than it did in the previous campaign. However, because the City’s figures include many EOIs that are several years old and were collected before the start of current campaign efforts (and must therefore be assumed less likely to produce test-takers than newer EOIs), and because reliable data regarding time of collection are not available for many of the EOIs from the previous campaign, there is a very substantial risk that at the current rate of collection the campaign will fall short of its goals. Accordingly, over the past 90 days, the Monitor has urged the City to take additional steps to accelerate and intensify its efforts in all

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 The City’s most recent 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. At the request of the Monitor and the other Parties, the City has also recently provided year-of-collection data for the EOIs collected since January 1, 2013.

aspects of the campaign. The City has already implemented several of the Monitor's recommendations. But the Monitor believes the City must continue to increase its recruitment and marketing activities (*e.g.*, recruitment events, digital media, and conventional advertising) to ensure that it makes "best efforts" consistent with the terms of the Disparate Treatment Settlement.

In addition to monitoring the City's recruitment activities, the Monitor has also asked the City to track its budget and expenses for the campaign, and the City has advised the Monitor that it is doing so. The Monitor plans to follow up with the City to obtain interim figures.

Part III of this report describes the City's continuing work on three data management and analysis systems relevant to the Modified Remedial Order: a comprehensive system for data relating to all aspects of the recruitment and hiring process; the interim Candidate Tracking Spreadsheet ("CTS"); and a database for data gathered in the recruitment campaign.

The City continues to report that the comprehensive, end-to-end data management system for data from all phases of the recruitment and hiring process is on schedule to be operational in time to receive data from the next promotional examination (scheduled for December 2016) – and subsequently from the next open-competitive exam.

The City also has continued to consult with the Monitor and the other Parties regarding the CTS, which was devised to compile and permit the analysis of data from the hiring process for the current hiring lists. The City circulated the most recent iteration of the CTS on August 5, 2016, and during the past 90 days it has met and conferred with the Monitor and the other Parties to answer questions and clarify issues regarding the CTS data. As previously reported, earlier versions of the CTS contained gaps, inconsistencies, and ambiguities that made them less than reliable sources for analysis. While questions remain, the City has made progress in improving

the quality of the data and clarifying the categories of data presented in the CTS. On October 5, 2016, the City also circulated to the Monitor and the other Parties an analysis of attrition metrics that the City has developed to assess how candidates in diverse demographic groups are either disqualified by or do not continue with various phases of the hiring process; and the Monitor has followed up with questions for the City, which are currently pending. The Monitor is also conducting its own analyses based on data in the CTS.

The City's recruitment database went live in September. The database was designed by the City's consultant, Vanguard Communications, to assist the FDNY in maintaining and tracking contact with potential candidates throughout the ongoing campaign, as well as analyzing the FDNY workforce after the examination.

Part IV reports on the status of reforms and initiatives relating to the FDNY's EEO function. Since the last Periodic Report, the City has finalized a new EEO Policy and an EEO Investigations Manual, both issued in November, with the Policy including statements of support from the Mayor and the Commissioner. In conjunction with the EEO Policy, the FDNY has also agreed to issue a separate statement emphasizing and clarifying its support for employees who bring complaints to the EEO Office. However, the FDNY and Plaintiffs-Intervenors have so far been unable to agree on the language of the statement. The Monitor will continue to work with the City and the Parties to finalize the language and, if necessary, will ask the Court to resolve the matter. The FDNY has also continued to work with the Monitor and the other Parties to develop training that will complement the new EEO Policy and the new EEO performance metric for officers, and the Monitor expects that the updated training modules will be finalized within the next few weeks. The FDNY has advised the Monitor that preparations and scheduling for officer training are expected to take several months, and that the actual training will take

place over several further months. Given the critical importance of officer training to the FDNY's EEO reforms, the Monitor believes the FDNY should make every effort to accelerate that schedule.

With the new EEO Policy in place, it is critical for the FDNY to take all necessary steps to ensure that all members of the Department, especially its officers, comply with and cooperate in the enforcement of the Policy. The FDNY must encourage complainants with complaints of discrimination and/or retaliation to come forward, investigate potential violations vigorously, impose and publicize meaningful discipline where violations are found, and require all personnel to foster diversity and inclusiveness within its ranks. With these needs in mind, on September 21, 2016 the Monitor met with senior uniformed leadership of the FDNY and representatives from its investigative units to discuss steps (disciplinary and operational) that the FDNY has taken and can take to prevent and remedy incidents of discrimination and hazing that adversely affect the EEO climate within the FDNY and diminish the confidence of minority firefighters in the Department's EEO function. The Monitor has also requested and reviewed materials from recent investigations conducted by the FDNY's Bureau of Investigations and Trials ("BITS") and plans to transmit recommendations to the City to improve its investigative approach and techniques – consistent with the guidelines set forth in the new EEO Investigations Manual. Additional requests from the Monitor for a summary of recent investigations by the FDNY's investigative units and for materials from additional investigations are pending.

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 revised the way in which the stairmill portion of the Medical Examination is given in order to minimize the number of required visits to BHS and thereby attempt to address one possible cause of potential disparate impact resulting from this portion of the Medical Exam. Over the past 90 days the City has also continued to develop and roll out improved communications with candidates regarding the various components of the Medical 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. In the past 90 days, the City has begun using new provisional guidelines, along with revised forms and instructions, in the review of candidates by the FDNY's Candidate Investigation Division ("CID") and Personnel Review Board ("PRB"). As previously reported, the new guidelines and instructions were developed in consultation with the Monitor and the other Parties with the goal of reducing the risk of unnecessary disqualifications and thereby ensuring that no unlawful disparate impact is caused by the character review process. They include revised criteria governing referral to the PRB based on criminal history factors. The FDNY has also begun the process of reconsidering, under the new guidelines, candidates who were previously disqualified; and Part VI reports on the results to date of that reconsideration process.

Over the past 90 days the Monitor has also continued to explore additional potential reforms in the character review process. In particular, the Monitor has retained an expert to examine the use of criminal history and related data in character review. In an effort to address issues raised by Plaintiffs-Intervenors and the United States in this area, the Monitor has also

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

included them in consultations with its expert; and as a consequence Plaintiffs-Intervenors have tabled their request to retain an expert of their own on overlapping topics at the City's expense.

Part VII discusses issues related to the next computer-based exam for prospective firefighter candidates.

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

Over the past 90 days the FDNY has continued to carry out its recruitment campaign for the next open-competitive examination and to report to the Monitor and the other Parties on its activities and progress. Plaintiffs-Intervenors, the United States, and the Monitor, assisted by its expert Dr. Djuana Stoakley, have also continued to offer comments and suggestions on the FDNY's recruitment activities.

The campaign is now in a critical phase, with the April 2017 application period for the examination only four months away. (As currently scheduled, the application period runs from April 5, 2017 to April 25, 2017, with a potential extension through May 23, 2017.) The FDNY has continued to conduct in-person recruitment events throughout the City, complemented by its ongoing digital advertising and social media campaigns. At the Monitor's suggestion, the FDNY also recently embarked on the initial phase of its radio advertising campaign earlier than originally planned, with positive results. The FDNY also has stated that it plans to begin its outdoor advertising campaign in January. Given the number of EOIs collected to date, and the uncertainty surrounding the rate at which those EOIs will produce test-takers, it is imperative that the FDNY continue to expand and accelerate its recruitment activity in all phases of the campaign.

A. Implementation and Ongoing Evaluation of Recruitment Plans

The Monitor and the other Parties have received frequent updates on recruitment activities, and on the FDNY's progress toward its recruitment goals, including four in-person meetings devoted to recruitment on September 20, October 24, November 16, and December 8, 2016. At the meetings and in written weekly and monthly reports, the City has reported the number of EOIs collected from potential candidates. At each of the in-person meetings, the FDNY's recruitment staff and its consultant, Hodes LLC, have provided detailed updates on recruitment initiatives in key areas – discussed in detail below.

In-Person Recruitment Events. The FDNY has continued its in-person recruiting efforts with numerous events staffed by FDNY recruiters in a wide variety of venues. As part of those efforts, over the past 90 days the FDNY has endeavored to address suggestions by Plaintiffs-Intervenors and the Monitor to improve the effectiveness of recruiting teams and ensure adequate staffing of recruitment events. Specifically, acting on recommendations by the Monitor, the City has increased its use of “street teams” – mobile teams of recruiters who can canvass the neighborhood rather than remaining at a static location. In the course of the campaign, street teams have proven to be one of the more effective methods for collecting EOIs. At the December 8 meeting, the FDNY announced that it had begun deploying 15 street teams per week in targeted areas throughout the City – a three-fold increase over the weekly rate earlier in the campaign. The Department intends to continue to operate street teams at least at this rate as long as they continue to be effective. At the November 16 meeting, the FDNY also indicated that it could potentially relax a requirement that street teams be accompanied by officers – which has previously limited the number of street teams that could be deployed. (That said, the recent increase in street team activity has been accomplished entirely by using officer-supervised street teams. And the FDNY plans to continue to use officer-supervised teams going forward.) The

FDNY targets street team activity using demographic mapping and local knowledge of locations likely to generate contacts and interest from potential candidates. The Monitor will review the results of the increased street teams and discuss with the Parties whether further increases could be beneficial depending on results overall.

In addition, following discussions at the September 20, 2016 meeting, the FDNY took steps to ensure that policies permitting overtime for recruiters are effectively communicated, so that the most experienced and dedicated recruiters are permitted to maximize their work on the campaign. In response to queries and suggestions from Plaintiffs-Intervenors, the FDNY has also confirmed that its recruiting efforts include contacts with numerous New York City High Schools. Following up on discussions at the December 8 meeting, Plaintiffs-Intervenors plan to provide the FDNY with a list of high schools on which they believe the FDNY should focus its efforts.

In addition to these worthwhile efforts, the Monitor believes that FDNY must continue to expand the in-person phase of the campaign as much as possible. The recent increase in street team activity is encouraging. But given the amount of territory that street teams could potentially cover, it seems likely that the campaign would benefit from the addition of further teams; and the FDNY should endeavor to deploy as many teams as it believes could be effective. More generally, every possible effort must be made to maximize the number of productive recruiting events and ensure that they are fully staffed.

In a separate component of the in-person campaign, consistent with suggestions from the Monitor and the other Parties, the City is proceeding with plans to train and utilize, starting this month, a group of 50 civilian (non-FDNY) City employees to canvass for EOIs as part of the FDNY recruitment campaign. The canvassers are City representatives engaging in outreach and

providing information on a variety of City services in many of the same communities targeted by the recruitment campaign. Their activities include door-to-door canvassing and attendance at City sponsored events. Once trained, they will include FDNY recruitment messages in their activities where appropriate, and collect EOIs from prospective candidates. At the Monitor's request, the City advanced its timetable for training these City employee canvassers so that they can be deployed earlier than the City had planned. The Monitor will have further information relevant to this issue once the civilian canvassers have been deployed.

Plaintiffs-Intervenors have also suggested that paid canvassers could further augment the City's efforts and have requested that the City test this approach with a small pilot program. The City responded to the proposal by stating that it believes that civilian canvassers with ties to the City workforce are more likely to succeed in generating EOIs. Based on the results of the paid canvass, as well as the results of the campaign overall, the Monitor believes that it may be necessary to explore a variety of different approaches and will continue to review the possibilities further with the Parties as the campaign proceeds.

Online Campaign. At each of the recruitment meetings, Hodes has provided updates on the digital components of the FDNY's campaign, including the digital advertising and social media activities detailed in the Monitor's prior Periodic Reports. *See, e.g.*, Monitor's Seventeenth Periodic Report at 7-8. In consultation with the Monitor and the other Parties, FDNY and Hodes have continued to develop content for the digital campaign, and have taken steps to enlarge its capacity to gather and track contacts and EOIs from prospective candidates. The number of EOIs generated directly via the Hodes campaign is relatively low compared to live recruiting efforts, but both Hodes and the Monitor's expert advise that digital advertising is expected to also have cumulative effects that help to bolster other forms of advertising. Hodes

also is able to measure candidate response to various marketing messages that will be used later in the campaign. The Parties and the Monitor have also discussed adjustments that might be made in the allocation of resources within the digital campaign to ensure that sufficient digital advertising and outreach are directed to all key demographic groups despite the higher cost associated with ads effectively targeting some such groups. Given current results, the Monitor believes that the City may need to re-allocate or potentially increase funding to effectively reach some groups that advertisers charge more to reach online.

Hodes's work also includes follow-up with prospective candidates, and throughout the campaign Hodes has continued to reach out to contacts who have submitted EOIs – for example, emailing prospective applicants to provide information and maintain interest. These follow-up contacts have also included communications with potential candidates who submitted EOIs before the previous examination.

Radio and Outdoor Advertising. The FDNY's recruitment campaign includes radio advertising on stations selected to target key demographic groups, along with banners on firehouses and advertisements in selected subway stations and other public spaces. Addressing a recommendation from the Monitor, the FDNY began its radio campaign with an initial "buy" of advertising beginning November 30, 2016 – earlier than originally planned.⁴ The FDNY's original schedule called for radio advertising to be concentrated entirely in 2017 – in the weeks immediately preceding the deadline for applications. By starting its radio campaign earlier, the FDNY intends to generate increased interest in key groups and thereby enhance the rate of EOI collection in the in-person and online phases of the campaign. In addition, by measuring the effect of this early radio buy, the FDNY will be able to plan more effectively for later phases of

⁴ The advertising for this initial buy is spread over three weeks on one station and four weeks on another.

radio advertising in 2017 – refining targeting and/or increasing the volume of radio advertising (and potentially adjusting plans for other advertising) as warranted. (Data from the first week of the radio campaign – shared with the Monitor and the other Parties at the December 8 meeting – indicate that the radio advertising produced an increase in EOIs.) The FDNY plans to complete the current run of radio advertising in December, and then resume radio ads in March and April, immediately before and during the application period. The Monitor and its expert are reviewing this plan in the context of the City’s overall campaign initiatives and progress towards goals.

Following extensive consultations between the FDNY and Plaintiffs-Intervenors, firehouse banner ads have now been finalized and are ready to be displayed. The FDNY has also circulated versions of its subway posters, on which the Monitor and the other Parties have commented. It is expected that those advertisements will also be finalized shortly, and the FDNY intends to roll them out in January 2017 – earlier than originally planned.

B. 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.” More broadly, the Modified Remedial Order also required the City to identify best practices that should be employed to remedy deficiencies in its recruitment of black and Hispanic firefighter candidates. *See* Modified Remedial Order ¶¶ 25-30.

As previously reported, in advance of 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 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.*

Over the past 90 days, the FDNY has continued to provide the Monitor and the Parties with weekly and monthly statistics on its collection of EOIs from candidates in key demographic groups. On October 14, 2016, and on November 15, 2016, in response to requests from the Monitor and the other Parties, the City provided detailed breakdowns of EOIs by time of collection, and explanations of the calculations and assumptions reflected in its monthly and weekly statistics.

The reported statistics remain a source of concern, as EOIs collected since the end of the FDNY's previous campaign (especially those collected during the active phase of the current campaign, beginning in March of this year) continue to fall short of the periodic benchmarks established by the Parties. Responding to this concern, as discussed in the Monitor's prior Periodic Report, the City asserts that if all outstanding EOIs are counted (including those collected before the previous exam in 2012), its total of EOIs collected from prospective black candidates exceeds its target for EOI collection at this point in the campaign. *See* Monitor's Seventeenth Periodic Report at 8-9. The City also believes that its rate of EOI collection will improve immediately before and during the application period, and that the EOIs it has collected during the current campaign are more likely to lead to applications and test-takers than the EOIs collected in the previous campaign (on which the agreed upon projections were based). *See id.*

Notwithstanding these considerations, the Monitor remains concerned that the FDNY's collection of EOIs to date may not have put it in a favorable position to achieve its recruitment goals. Many of the EOIs counted in the City's reports were collected several years ago, and

therefore appear less likely to produce actual applicants and test-takers than the EOIs collected during the active phase of the current campaign. In addition, although the City's assumption that EOI collections will increase as the application period approaches may not be unreasonable, the assumption is also necessarily somewhat speculative; and the City has not yet provided a detailed projection of the expected increase (despite repeated requests from the Monitor and the other Parties). Similarly, the City's assumption that EOIs from the current campaign will produce test-takers at an improved rate (*i.e.*, that they will produce test-takers for the upcoming exam at a higher rate than EOIs from the last campaign produced test-takers for the last exam) is impossible to confirm or refute until after the campaign is concluded. As noted in the Monitor's prior Periodic Report, if that assumption proves to be incorrect over the course of the application period in April 2017, it will be too late for the City to take the necessary steps to generate more EOIs and applications from minority candidates. *See id.* at 10.

The extent to which the City's digital campaign will ultimately contribute test takers is also somewhat uncertain. Although the digital campaign operated by Hodes appears generally to be appropriately targeted, thus far the number of EOIs collected online is small compared to the contribution from the field campaign. The City has indicated that it expects Hodes to contribute approximately 50% of EOIs (and ultimately test-takers) to the eventual total. And at the December 8 meeting, Hodes provided some projections of EOI collection based on available data and on trends and assumptions concerning the growth rate of its EOI collection. Those projections showed Hodes approaching or achieving its goals by the end of the application period. But as Hodes candidly acknowledged, any such projections are necessarily somewhat uncertain, and the rate at which EOIs collected in the digital campaign will be converted to test takers is unknown. Given the low number of EOIs collected thus far and the uncertainty inherent

in any projection of EOIs or eventual test-takers, it cannot be assumed that Hodes's contribution to the City's recruitment effort will achieve its goals.

Given the uncertain prospects of the campaign and the City's obligation to use its "best efforts" to achieve the goals of the Disparate Treatment Settlement, as well as the broader mandates in the Modified Remedial Order, the Monitor continues to believe the City must take all steps reasonably calculated to maximize its collection of EOIs and the conversion of EOIs into applications and test-takers. The Monitor is encouraged that the FDNY began its radio ad campaign earlier than originally planned, has agreed to begin its outdoor ad campaigns sooner than originally planned, and has agreed to augment its recruitment efforts with non-FDNY personnel. The Department has also taken some important steps to expand its in-person recruitment activities and enhance their efficiency, and it has broadened the reach of its digital marketing campaign. That said, it is critical for the FDNY to continue to explore additional ways to increase its recruitment efforts, including (1) further augmenting the in-person campaign with a combination of additional street teams and additional recruiting events in the types of locations that have proven most productive; (2) closely tracking the effect of the early phases of radio and outdoor advertising to determine whether its plans for such advertising need to be accelerated or expanded; (3) considering whether additional resources should be devoted to social media and the other components of the digital campaign; and (4) determining whether those resources should be re-allocated to ensure that the campaign reaches all key demographic groups.

As the recruitment campaign moves forward, the Monitor and the Parties will continue to meet frequently to evaluate recruitment data, assess the FDNY's recruitment efforts, and explore possible enhancements in the campaign. The Monitor has also asked the City to track its budget

and expenditures for the current campaign, and the Monitor plans to follow up to obtain interim figures from the City.

C. Working Group

The Monitor has continued to facilitate meetings of the Working Group Committee, which was formed in accordance with the Disparate Treatment Settlement to develop initiatives “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 at 7-8 (citing Proposed Stipulation and Order (Dkt. # 1291-1) ¶ 1(e)).

One of the initiatives specifically described in the Disparate Treatment Settlement was “the creation of a Fire Cadet title or special credit for completion of job-related fire science courses.” *Id.* As discussed in the Monitor’s Seventeenth Periodic Report, the City’s proposal for the Fire Cadet title – which incorporated the program developed by the FDNY and the Working Group to recruit, select, and mentor a diverse cadre of cadets to progress to the firefighter position through the promotional examination process – 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 Working Group has since held meetings October 6 and November 16, 2016, at which it has continued discussion of the FDNY’s more detailed plans to implement the Fire Cadet program. Those discussions have addressed the selection process, job duties, and instructional curriculum for the Fire Cadet title, and the timeframe for completing milestones in the implementation of the program.

The Working Group also continues to develop additional initiatives to further the objectives of the Disparate Treatment Settlement. These include an expansion of the FDNY’s High School EMS Explorers program, which will provide instruction for obtaining EMT

certification, job placement services, extensive mentoring, and physical training to City high school students. The goal of the EMS Explorers Program is to provide enhanced information, mentoring and support for students who intend ultimately to pursue promotion from EMS into the firefighter title. The City previously described plans to begin hiring staff for this expanded program by the end of summer or early fall of 2016, with curriculum development and logistical implementation to continue over subsequent months. The original goal was to recruit and train a new class of EMS Explorers in the fall of 2016, with future classes to follow. The FDNY continues to move forward with its plans, although the schedule has been extended, and the exact timing and scale of the expansion of the program remain to be determined. As the City described in the November 16 meeting, the hiring process for a new group of “post advisors” is under way.⁵ However, because of current staff shortages, a number of the new advisors, once hired, will have to be assigned to fill positions at existing posts, and the number who will be available to staff new posts remains to be determined. This necessarily constrains the City’s ability to expand the EMS program immediately. The City intends to complete the hiring process and bring in a newly hired group of advisors by January 2017. Assuming enough suitable candidates can be identified, the City’s immediate goal is to fully staff its eight existing posts and potentially expand the EMS Explorer program into two additional posts at that time. The City also plans to conduct additional hiring for the program in the future, and the FDNY will detail a staff chief to the Explorers Program for a three-month period to evaluate and make recommendations for the program. These recommendations should allow the FDNY to accomplish its goals to expand the program in the spring of 2017.

⁵ The EMS Explorers program operates a series of “posts” that maintain relationships with City high schools.

At the most recent Working Group meeting November 16, the City also advised the Monitor and the other Parties that it plans to introduce an EMS trainee title. Trainees will receive paid work experience, training, and the opportunity to obtain state EMT certification – with the expectation that they will ultimately take the EMT civil service examination and become full-fledged EMTs within the FDNY. Among other things, the trainee title will provide an additional path into EMS – and potentially the firefighter title – for EMS explorers and graduates of the FDNY High School, who may receive training in specialized skills and obtain certifications qualifying them for credits on the EMT examination. It is hoped that the EMS trainee program, combined with expanded training opportunities, will establish a pathway into the FDNY for minority candidates who might be unable to obtain the training required to pass through the existing EMS hiring process.

The FDNY has also proposed the creation of a “FDNY Youth Alumni Association,” which would operate as a component of its FDNY Youth Workforce and Pipeline Programs. The alumni program would provide ongoing support to alumni of FDNY youth programs such as its EMS Explorers and graduates of the FDNY High School. This support would include civil service filing support for certified EMTs applying to entry-level positions in the EMS, Medic or Fire Cadet programs, and additional encouragement and support for those alumni interested in promoting to the firefighter position. The alumni program would also provide social, academic and physical fitness support through monthly meetings, training session, and tutorial programs and study sessions for civil service examinations.

As previously noted in the Monitor’s Seventeenth Periodic Report, the Working Group has also finalized suggested revisions to the open-competitive hiring process intended to 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. Although the Monitor and the Parties agreed on these changes several months ago, the City has not yet produced a revised Notice of Examination (“NOE”) reflecting them; however, the Monitor expects the revised NOE imminently.

III. Data Collection and Analysis

Throughout the Monitorship, the Monitor has emphasized the importance of effective data collection and analysis in the City’s efforts to recruit minority firefighters and in evaluating the impact of the hiring process on diverse demographic groups. *See, e.g.*, Monitor’s Recruitment Report (Dkt. # 1464) at 40-48; *id.* at 3-7; 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. Over the past 90 days, the City has continued to make progress on its three primary data projects: (1) the use of a comprehensive recruitment database for data from the ongoing campaign; (2) the development of an end-to-end database that will track candidates called up from the next civil service lists throughout the hiring process; and (3) maintaining a Candidate Tracking Spreadsheet (“CTS”) containing available data from each step in the hiring process for candidates who took Exams 2000 and 2500. Work remains to be done to complete each of these initiatives.

A. Comprehensive Recruitment Database

As described in detail in previous Periodic Reports, in preparation for the current recruitment campaign, the City engaged Vanguard Communications to build a recruitment database that would allow it to track prospective applicants and candidates through the entire recruitment process from the point of initial contact through the written examination. *See, e.g.*, Monitor’s Fifteenth Periodic Report (Dkt. # 1669) at 6-10. The database retains demographic,

geographic, and contact information on prospective applicants, and can be used as a tool to assess the progress of the recruitment campaign and to help the FDNY communicate frequently and effectively with potential candidates. *Id.* As such, the database is an important component of the FDNY's efforts to ensure that initial expressions of interest mature into applications and test-takers at the highest possible rate.

The launch of the comprehensive recruitment database, originally planned to coincide with the beginning of the campaign in spring 2016, was delayed by several months. *See* Monitor's Seventeenth Periodic Report to the Court at 13-14. However, in September the City reported that the database became fully operational, and the City has since continued to use it to store recruitment data and to track and manage recruitment activities. Many EOIs continue to be collected on paper rather than electronically, and therefore must be added to the database manually. As a result, the data in the system generally lags behind actual recruitment efforts to some extent. Shortly after the transition to the new system, the data entry lag was substantial, and posed a significant impediment to efforts to track and fine tune the FDNY's recruitment activities. However, in recent weeks the City has engaged additional staff to address the backlog and improve the timeliness of data entry, and the system now appears to be up to date within a week or so for the number of EOIs received by the FDNY. The City is able to tell how many EOIs in total have been received, as well as to track where the EOIs were collected and whether they were collected by the recruitment unit or via the City's online advertising efforts.

The City had indicated that it intended to measure the frequency of contacts with those who submitted EOIs and use it as a metric to assess the likelihood that a person who submits an EOI will proceed to take the exam. The Monitor has not been provided with results of such analysis at this time, but believes this would be highly relevant information.

The effective use of the comprehensive recruitment database will continue to be a focus of the Monitor over the next 90 days. With just a few months remaining, it is essential to have accurate real-time data to help measure progress and identify areas to which more resources may need to be devoted.

B. End-to-End Hiring Database

The City also continues to develop an end-to-end hiring database to track candidates' progress throughout the FDNY's selection process, from initial contact with prospective applicants through their candidacy and eventual appointment as entry-level firefighters. The end-to-end database will include important categories of data from several department-level databases, including the new recruitment database as well as the CID and BHS databases, along with information regarding candidates' applications and examination results from DCAS. *See, e.g.,* Monitor's Sixteenth Periodic Report at 11. To the extent possible, the data transfer from other systems and databases will be automated to allow the FDNY to review recruitment and candidate attrition data in real time and take appropriate corrective steps as needed. The end-to-end database will track candidates who take the next written examinations and appear on the next open-competitive and promotional civil service lists. The City has promised that the system will be fully operational by April 2017, when the promotional list will be established.

In the last 90 days, the FDNY's technology team has continued to make progress on systems for the transfer of data from the CID database to the end-to-end database. In addition, the technology team has worked on automating, to the extent possible, the collection of several categories of data in the CID database, as requested by the United States and Plaintiffs-Intervenors. The Parties and the Monitor continue to collaborate with the City to determine what data should be included in various databases.

Although progress has been made on the end-to-end system, several features remain to be implemented, such as the 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 a detailed update on the FDNY technology team's progress at a meeting on all data issues to be scheduled in January, and will continue to review the development of the end-to-end database.

C. Candidate Tracking Spreadsheet and Candidate Attrition Analysis

The City's CTS contains available data from each phase of the hiring process for candidates on the current hiring lists, who took Exams 2000 and 2500. As detailed in prior Periodic Reports, the CTS was constructed at the Monitor's request to allow the Monitor and the Parties to analyze recruitment and hiring data for these candidates, given that the City did not otherwise have a way to readily compile or assess such data. *See* Monitor's Sixteenth Periodic Report to the Court at 11, 14-15. The data in prior versions of the CTS (before the most recent update, dated July 26 and circulated August 5, 2016) was incomplete, internally inconsistent, or unclear in several areas. The most recent version remedied or minimized many of those deficiencies; and the Monitor and other Parties, most recently in a meeting on September 28, 2016, have asked the City explain or remedy the remaining data deficiencies to the extent possible, so that meaningful analysis may be performed. The City has taken steps to do so. It is hoped that these discussions will result in improvements to the next version of the CTS, to make it usable immediately upon receipt or very shortly thereafter.

Past iterations of the CTS took up to several months to prepare following the graduation of the class for which the CTS provided data. The City has committed to provide the Monitor

and the other Parties with the next iteration of the CTS much sooner, in January 2017, including data updated based on the completed hiring process for the class entering the Academy today.

In addition to answers and explanations regarding the CTS, the City provided to the Monitor and Parties, on October 5, 2016, its analysis of certain attrition metrics that the City developed internally for its own analysis of the firefighter hiring process. The City's analysis is intended to show the rates at which different demographic groups are either disqualified by or do not continue with selected phases of the hiring process. The Monitor reviewed the analysis and submitted follow-up questions to the City in early November regarding the assumption and calculation behind the analysis. The Monitor will continue to discuss the attrition analysis with the City, and may suggest additional areas of analysis the City may want to undertake.

D. Data Regarding Recent and Upcoming Hiring

The most recent Fire Academy class graduated and became probationary firefighters on November 2, 2016. According to data provided by the City, the class included a total of 295 candidates, of whom 46 are black, 66 are Hispanic, and one is a Priority Hire candidate. The table below shows the proportion of black and Hispanic Academy graduates as well as the number of Priority Hire candidates in each of the recent Academy classes. With the addition of these recent graduates, approximately 21% of FDNY firefighters are now black or Hispanic.

	Black		Hispanic		Priority Hire		Total Graduates
	#	%	#	%	#	%	#
July 2013	58	24.0%	87	36.0%	77	31.8%	242
Jan. 2014	48	16.8%	72	25.2%	31	10.8%	286
July 2014	41	14.6%	56	20.0%	7	2.5%	280
Dec. 2014	50	16.4%	70	23.0%	9	3.0%	305
June 2015	52	17.6%	58	19.7%	4	1.4%	295
Dec 2015	53	17.0%	62	20.0%	2	0.0%	310
June 2016	46	15.6%	66	22.4%	1	0.0%	295

The FDNY is currently processing candidates to develop the roster for the next class, which is scheduled to begin at the Fire Academy on December 12, 2016. The Monitor and the Parties are evaluating that process on an ongoing basis as part of the overall review of the hiring process as set forth in the Modified Remedial Order.

IV. EEO Compliance 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. As noted in the Monitor's previous Periodic Reports, these elements include staffing the EEO office; finalizing and distributing the FDNY's revised EEO Policy and Investigation Manual; evaluating and improving the FDNY's process for investigating EEO complaints; reviewing the implementation of a database created since the Monitorship to track investigations of possible EEO violations; reviewing the FDNY's diversity and EEO training programs; and continuing the FDNY's efforts to substantially improve the overall EEO climate within the FDNY.

In recent months the City has made progress in a number of these areas, most notably finalizing and rolling out the new EEO Policy. The City also has continued to train personnel during existing EEO training sessions, though it is working to refine those annual EEO training

modules. One persistent area of concern remains the Department's investigations of EEO complaints (and incidents of alleged hazing that raise EEO issues). These issues are discussed below.

B. EEO Policy and Investigations Manual

The FDNY's updated EEO Policy and Investigations Manual have been finalized and are now in effect. Announced in a Department Order dated November 17, 2016, the new EEO Policy includes statements of support from Mayor Bill de Blasio and FDNY Commissioner Daniel A. Nigro. Over the past 90 days, the Parties and the Monitor continued to exchange and discuss final comments on the EEO Policy and the Manual, and met in person on November 4, 2016 to discuss several outstanding issues. Most of these issues were resolved in subsequent discussions among the Parties before the November 17 announcement, and the Monitor and the Parties agreed to resolve a final issue (regarding measures to ensure that EEO complainants do not experience retaliation or materially adverse changes to terms and conditions of employment) separately from the Policy itself. The new documents clarify and improve upon a number of key EEO functions such as mandatory reporting obligations, communications with complainants, alternative dispute resolution, and command responsibility for EEO issues.

In conjunction with the issuance of the new EEO Policy, the FDNY also announced the establishment of an updated EEO counselor program to provide additional resources for personnel encountering EEO issues. The program is being re-launched with an initial staffing of 45 officers, firefighters, and EMTs who will be trained to counsel personnel and to provide assistance and guidance with the EEO process. The Monitor expects that the program could be an important and beneficial addition to the FDNY's EEO resources, and will continue to work with the FDNY regarding training and implementation of the counselor initiative.

In the Department Order announcing the rollout of the new EEO Policy, the FDNY re-introduced its EEO leadership, including Chief Diversity and Inclusion Officer Cecilia Loving, Assistant Commissioner Don Nguyen, and Diversity Advocate Lieutenant David Obiesie; and it emphasized a “renewed commitment to diversity, inclusion, and EEO” – expressing the hope that members of the FDNY will “work together to demonstrate that diversity and inclusion are paramount to the best ideas, innovation and growth for our future success.” The introduction of the revised EEO Policy was featured in employee bulletins and was complemented by a videotaped introductory statement from Commissioner Nigro, a statement of support from Mayor de Blasio, and links to the revised policy documents themselves. The EEO Policy changes also were the subject of a favorable press report in the *New York Daily News*. See <http://www.nydailynews.com/new-york/fdny-aims-douse-workplace-fights-new-policy-article-1.2881441>.

In conjunction with the EEO Policy, and in response to concerns expressed by Plaintiffs-Intervenors, the City agreed to issue a separate statement confirming and clarifying its commitment to support EEO complainants, and addressing specific issues relating to the protection of complainants who are detailed between firehouses following EEO complaints. However, despite extensive discussions (most recently on a December 7, 2016 conference call with the Monitor) the Parties have been unable to agree on the content of the statement, and may have to seek the assistance of the Monitor or the Court to finalize its terms.

C. Diversity and EEO Training

The Parties are also in the process of finalizing the FDNY’s revised and updated EEO training materials. The City circulated the most recent drafts of two EEO training modules (one for officers and one for regular EEO training) on October 24, 2016, in response to comments previously provided by the Monitor and the other Parties. The Monitor, the United States, and

Plaintiffs-Intervenors have offered further comments; and the Monitor expects that the next version of the revised drafts is likely to be approved by all Parties with minimal further revisions (if any). The training materials may undergo further changes as the Parties receive feedback and additional comments from participants in the training programs. The Monitor also expects the EEO Officer training to be one of several components in the overall effort to ensure that officers maintain an inclusive environment; insist upon adherence to the FDNY's policies and regulations; fulfill their obligations as mandatory reporters; and effectively address EEO issues in cooperation with the EEO Office. On the December 7, 2016 conference call, the City tentatively estimated that preparations for officer training, including training "facilitators" and scheduling training session, will take six to eight months and that officer training will take nine further months to complete. The City also indicated that EEO performance review criteria would be implemented only after all officers had been trained. In view of the critical role that officer training and accountability play in the implementation of the FDNY's EEO reforms, the Monitor is very concerned that this protracted timeline will prevent those reforms from taking full effect for more than a year. The City has agreed to review the timeline and use every possible measure to shorten it. The Monitor urges the City to do so, using all possible means to speed the training process – for example by scheduling and conducting training sessions for officers on a rolling basis as facilitators become available, and by implementing EEO performance review criteria for each officer as soon as his or her training is completed.

D. Personnel and Staffing

The FDNY has continued to hire new staff to bring the EEO Office up to full strength – remedying the lack of personnel and resources that the Court had identified as a significant impediment to the performance of the FDNY's EEO function. *See* Monitor's Fifteenth Periodic Report at 11-12. Including the Assistant Commissioner and Deputy Director, the EEO Office

consists of 7 attorneys plus staff. As of the date of this report, all the positions but one have been filled, and the Department is in the process of receiving and evaluating applications for its one remaining attorney investigator position. The City has also indicated that it plans to continue hiring for additional positions as it identifies further roles that would continue to improve the functioning of the EEO Office.

As previously reported, the FDNY has also appointed a new Diversity Advocate, Lieutenant David Obiesie. *See* Monitor's Seventeenth Periodic Report at 21. Lieutenant Obiesie had an initial meeting with the Monitor and the Parties October 6, 2016.

E. EEO Data Collection and Analysis

The City has previously confirmed the implementation and launch of an EEO Office database for tracking current complaints and investigations, including essential identifying data (*e.g.* Complainant, Respondent, nature of complaint, location) for investigations of EEO matters by other FDNY units, including BITS. The Monitor continues to seek a live demonstration of the database and requested an export or report of the EEO database system prior to the last Periodic Report. The Monitor also expects that the database will be used to identify and track patterns of complaints and inquiries, and that information from the database will be analyzed along with data from EEO climate surveys and other sources to evaluate the EEO climate within the FDNY and track compliance with reporting requirements.

F. EEO Investigations and Discipline

The Monitor has not seen as much progress concerning the conduct of EEO investigations as it has in other areas of EEO compliance. On one hand, the FDNY has imposed significant disciplinary measures in some cases to address EEO and related departmental violations. On the other hand, serious concerns persist regarding the time taken to complete investigations of EEO complaints and regarding the effectiveness of investigations. *See*

Monitor's Seventeenth Periodic Report at 21-23. The Monitor has reviewed investigative records for selected cases and has developed recommendations for improving the investigation process. In the near future, the Monitor will be meeting with the City to review those recommendations. The Monitor is concerned that the lack of adequate progress in this area undermines the progress made by the Parties in other areas of EEO compliance. The FDNY must establish an environment in which members with valid complaints of discrimination or retaliation are encouraged to come forward. But without meaningful recourse for EEO concerns and related workplace issues, the Department will be unable to instill confidence in minority firefighters that they have the full support of the Department. Likewise, potential violators may feel that there will only be modest repercussions, if any, for their actions. Accordingly, the Monitor hopes that the FDNY can make progress in this area that will complement, and give full effect to, its progress in other areas of EEO compliance.

Recent changes in procedure are now to begin being implemented with the November 2016 ratification of the revised EEO Policy and Investigations Manual. The final EEO Investigations Manual incorporates provisions requiring the EEO Office to conduct its own investigation in accordance with all the requirements applicable to EEO Office investigations and issue its own report regarding any colorable allegation of an EEO violation. These requirements will apply even where those allegations are also investigated by another FDNY bureau, which is significant because based on the Monitor's review EEO investigations are frequently handled in whole or in part by other bureaus. The Monitor expects this requirement will help to ensure that all EEO complaints are addressed in a consistent and timely fashion, by investigators appropriately attuned to EEO issues.

The Monitor and the Parties have also continued to discuss the need for measures to address incidents of hazing, harassment, or other conduct that may be detrimental to the FDNY's EEO climate even where that conduct may not result in a formal finding of an EEO violation by a specific individual. Some of these measures are addressed in the new EEO Policy, including increased guidance on workplace rules, the restatement of department regulations and restrictions, or disciplinary action against commanding officers. The Parties and the Monitor are continuing to discuss specific steps, within these general categories, that the FDNY may take in appropriate cases. The Monitor and other Parties understand the challenges identified by the City regarding certain specific measures proposed by the Monitor, but the Parties and Monitor have nonetheless agreed to work collaboratively to implement feasible measures that may improve EEO compliance.

G. Officer Accountability

The Monitor previously proposed a series of specific initiatives to emphasize the role of officers in ensuring EEO compliance, including (1) enhanced training for officers regarding EEO obligations and mandatory reporting; (2) reinforcing existing rules requiring commanders to investigate incidents, impose command discipline, and report violations such as gear tampering and hazing; (3) revising performance review criteria to include EEO metrics; and (4) considering EEO performance in promotions. Monitor's Fifteenth Periodic Report at 15-16.

Once finalized and implemented, the new officer training materials (*see supra* Section IV.C) will provide detailed guidance on officers' EEO responsibilities – including obligations to foster diversity and inclusiveness within their commands, to enforce compliance with the Department's EEO-related rules and regulations, and to work cooperatively with the EEO Office to address and resolve EEO issues and maintain a favorable EEO climate. In addition, as previously reported, the FDNY, working cooperatively with the Uniformed Fire Officers'

Association, has developed EEO performance review criteria for officers, which will be implemented in future performance reviews as soon as officers have undergone the revised training. *See* Monitor's Seventeenth Periodic Report at 23-24. Once the performance review criteria are fully implemented, following officer training, the Monitor will continue to work with the City to assess their effectiveness in enhancing compliance with the FDNY's EEO Policy.

On September 21, 2016, the Monitor met with members of the senior uniformed leadership of the FDNY to discuss initiatives relating to officer accountability and hear from the leadership regarding steps it has taken and can take at the operational level to ensure that officers join in efforts to maintain EEO compliance; to foster inclusiveness; and to address and prevent incidents of discrimination, retaliation, and hazing. The Monitor expressed appreciation for the interest and commitment expressed by senior leadership who attended the meeting. The Monitor plans to continue to work collaboratively with the FDNY, and in consultation with the other Parties, to encourage and facilitate compliance with the FDNY's EEO Policy throughout the Department's chain of command.

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 an unlawful disparate impact on black and Hispanic candidates. *See, e.g.*, 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. The Monitor continues to work with the City, the other Parties, and the Monitor's expert, Dr. Denise Smith, to analyze whether and where this disparate impact is occurring and to implement a series of adjustments to the Medical Exam

process intended to minimize the potential for disparate impact while maintaining the FDNY's rigorous hiring standards. *See, e.g.*, Monitor's Fifteenth Periodic Report at 23.

The current status of certain of these initiatives is 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. 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 and has advised that it is moving toward a validation of its stairmill test protocol.

1. Stairmill Test Protocol

As discussed in the Monitor's Seventeenth Periodic Report, the FDNY has revised its stairmill protocol to allow candidates a second chance to pass the stairmill during the first visit to BHS, rather than having to return for a second visit. *See id.* at 26. Previously, under the BHS stairmill protocol, a candidate failed but could return at a later date if his or her heart rate went above the FDNY limit (90% of age-predicted maximum heart rate) during either the unweighted or the weighted vest phase of the test. On the second attempt, if the candidate's heart rate exceeded the limit during the weighted phase of the test, he or she could opt to stay on the stairmill for an extra 2 minutes and 48 seconds and pass the test, provided only that the BHS physician monitoring did not observe signs of physical distress.

The City is now using a revised protocol. Currently, if a candidate's heart rate exceeds the limit during the weighted vest phase of his or her first attempt at the stairmill, BHS will – at its discretion, as outlined above – permit the candidate to attempt the additional 2:48 period immediately, rather than requiring the candidate to come back at a later date to do so during a second attempt. BHS believes this modification may obviate the need for a second attempt for

many candidates who otherwise would have to return to BHS on a separate occasion. 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 another chance to demonstrate their qualification without having to return a second time will reduce voluntary attrition caused by the need to revisit BHS.

Other improvements to the stairmill test include 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. These changes have already been implemented by the City. *See* 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

The City proposed certain methods in the past 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. The United States and Plaintiffs-Intervenors indicated disagreement with certain aspects of the City's initial proposed approach (the United States expressing the view that the proposed approach would not establish the validity of the stairmill test). But they stated that they did not object to the City's proceeding with these proposed validation studies. The City is currently evaluating data that it considers relevant to the stairmill and is exploring other validation methods in addition to those previously proposed. As reported in the Monitor's Seventeenth Periodic Report, in mid-August the City advised the Monitor that it expected to have an update on these efforts in October. *Id.* at 27. The City reported in mid-October, however, that its collection of data was delayed, and that it could not yet provide a description of its validation protocol. To date the Monitor and the other Parties have not received either a description of the protocol or any reports from the study. The City has advised the Monitor that

it will provide an update this week, but it is not clear whether the update will include the protocol or data from the study.

B. Information for Candidates

As discussed in previous Periodic Reports, the Monitor and the Parties have worked cooperatively to develop a number of ways to provide candidates with more information about preparing for the Medical Exam. *See, e.g.*, Monitor's Seventeenth Periodic Report at 27; Monitor's Sixteenth Periodic Report at 25-26; Monitor's Fifteenth Periodic Report at 19-21. These include two documents and three videos that are now accessible on the FDNY website. To make sure that candidates, including those retesting, are made aware of these new documents and videos, the City has sent emails and will include alerts in mailings sent to candidates.

The BHS Guidance for Firefighting Candidates Concerning Medical Assessment ("BHS Guidance"), completed at the end of June of this year, includes descriptions of the forms and various tests involved in the City's medical assessment process; how best to prepare for the tests; and post-exam follow-up steps. The City also finalized a set of frequently asked questions ("FAQs") that provide, in question and answer format, information similar to that contained in the BHS Guidance. Alerts about these documents began to be sent out in August, and the letter to candidates notifying them of their intake appointment with CID includes links to the Candidate Resources page where the BHS Guidance and FAQs are posted.

The City has also completed three informational videos about the Medical Exam process, all now posted on the FDNY's youtube channel, which can be accessed through the FDNY website. The first video provides an overview of the Medical Exam and how best to prepare for it. This overview video was made available during the period covered by the Monitor's Seventeenth Periodic Report. *See id.* at 27. The second video is an in-depth description and demonstration of the Pulmonary Function Test ("PFT"). The PFT video was made available to

candidates in September of this year. The third video provides a demonstration of proper stairmill technique and describes in detail the full stairmill protocol, including how the test is administered, the various chances to retake the test, and options to provide the results of other tests that demonstrate cardiovascular fitness. The stairmill video was finalized and posted in November. Candidates are advised of the videos in the letter notifying them of their initial intake appointment, and again when the FDNY contacts them to schedule the Medical Exam. Plaintiffs-Intervenors and the United States suggested that the City might also wish to post the videos on social media, but the City has opted to use only the notifications described above at the present time, stating that the letters to candidates taking the tests are an effective way of publicizing the videos.

C. Retesting Some Previously Disqualified Candidates

The Parties and the Monitor continue 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.

According to the City, as of December 8, 2016, 184 candidates have been invited to retest. Of these, roughly 32% are white, 35% are black, and 30% are Hispanic. Intake processing for retesting candidates began in mid-September. As of December 8, ninety-one candidates had accepted the offer for retesting and were in various stages of processing. 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). Of these same 91, 15 have passed the medical; 5 have been medically disqualified; 18 appeared for the exam but their results are still pending; 11 failed to report for either their CID intake appointments or their scheduled medical tests; 2 exceeded their

rescheduling limits; and the rest (45) are in various stages of processing. Of the fifteen candidates who have passed the medical retest so far, eight have been appointed to the December 2016 class; four of these are white, two are black, and two are Hispanic.

In November, the City agreed to a new retesting category. Some candidates failed the medical and subsequently failed to appear for their scheduled Candidate Physical Ability Test (“CPAT”), potentially because they already knew they had failed the medical. For those in this group who would have been eligible for retesting had they not failed the CPAT by virtue of their failure to appear for it, the City is now offering a medical retest, which will be followed by a CPAT test. Notices for this new category of retesters have just been sent to the 29 candidates in question.

D. Tracking and Analyzing Data from the Medical Exam

As described in previous Periodic Reports, limitations in the FDNY’s prior record-keeping practices with respect to disqualified candidates – including BHS’s failure to consistently and clearly track reasons for disqualification – have 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. Accordingly, the Monitor has requested, and the City has continued to provide, the medical files of candidates who were disqualified by the Medical Exam.

The Monitor, with the assistance of experts led by Dr. Smith, is continuing to derive and analyze data from these documents. The City’s most recently circulated CTS contains more – and apparently more accurate – information than previous versions, which will help with these efforts. The Monitor and Parties can begin to develop at least an approximate understanding of

the percentages of white, black, and Hispanic candidates who were disqualified at the Medical Exam, and to identify particular points of failure on sub-tests within the Medical Exam.

The City has also provided the Monitor and the other Parties with a set of attrition metrics that shed further light on disqualifications based on failure of, or failure to report for, the Medical Exam. Analysis, however, is complicated by the fact that the CTS and the attrition metrics produced by the City include data for many more candidates than those included in the City's production of medical files. This discrepancy flows from the fact that the CTS tracks the medical qualification status of all candidates, and the documents produced relate only to a set of medical disqualification notices issued by BHS between February 2013 and November 2015. Although the data sets do not map directly onto one another, the City has now produced enough files to permit the Monitor to do preliminary analyses, which can be 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 make improvements wherever they are needed in the Medical Exam process.

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 goal is to ensure that the character review process fulfills its purpose of screening prospective firefighters accurately and fairly – excluding unfit candidates on the basis of job-related criteria while avoiding unjustifiable disparate impact and minimizing the risk of rejection or attrition for qualified candidates on the basis of factors that are irrelevant to their fitness for appointment as firefighters. 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 work relating to the analysis and implementation of new standards and procedures for the character review process. As recounted in detail in earlier Periodic Reports, the Parties and Monitor previously agreed on several rounds of changes in the standards governing the referral of candidates to the PRB,⁶ in the procedures governing both CID investigation and PRB review, and in related forms and instructions. *See* Monitor's Sixteenth Periodic Report at 29-31; Monitor's Seventeenth Periodic Report at 29-30. The Monitor approved the most recent substantive changes in PRB and CID Guidelines before the last Periodic Report, and those changes have since been put into effect in the processing of candidates for the upcoming academy class, which will start in December 2016.⁷ On September 13, 2016, the City circulated revised training materials for use in training FDNY staff (including CID staff and the members of the PRB) on revised standards and procedures. The Monitor and the Parties reviewed the materials and transmitted follow up questions to the City asking for additional details of the training. The City responded November 30, and the Monitor and the other Parties are in the process of reviewing the more detailed descriptions of the training that the City provided.

⁶ 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 revised referral criteria 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.

⁷ 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.

Since the last Periodic Report, the Monitor has also engaged an expert, Alison Wilkey, to assist in the evaluation and modification of the character review process. Ms. Wilkey is currently Policy Director of the Prisoner Reentry Institute at John Jay College. Her expertise includes the effects of criminal history and other factors on job-seekers, rates of recidivism or (conversely) “desistance” associated with different criminal offenses, and hiring-process best practices for eliciting and analyzing candidate histories.

Ms. Wilkey has begun to help the Monitor assess the character review process and to identify and evaluate additional potential reforms. These may include further changes in referral and disqualification criteria, revised procedures to make the character review process more efficient and accurate, and enhanced instructions and communications with candidates.

As discussed in the Monitor’s Seventeenth Periodic Report, Plaintiffs-Intervenors had requested that they be permitted to engage their own expert on these issues at the City’s expense. The City opposed the request. To address each side’s concerns, the Monitor has included Plaintiffs-Intervenors (along with the United States) in consultations with Ms. Wilkey, and will consider incorporating issues they raise in her work plan. The consultations with Plaintiffs-Intervenors and the United States so far have included meetings on October 11, 2016 and November 22, 2016.

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. *See* Monitor’s Seventeenth Periodic Report at 30-31. As recounted in the Monitor’s previous Periodic Report, 92 candidates were eligible for reconsideration, and 80 candidates accepted the invitation to be reconsidered. *See id.* Based on figures provided by the City to date, of candidates processes for reconsideration thus far, three have been found not to be

subject to PRB referral under the revised standards. Those candidates have accordingly passed the character review component of the hiring process without further review. A further 40 candidates have been referred for reconsideration by the PRB; 14 of those 40 have been disqualified following reconsideration by PRB, and 26 have been approved for appointment (subject to successful completion of the other components of the hiring process).

B. Analysis of Potential Disparate Impact

As recounted in detail in previous Periodic Reports, the Monitor's analysis 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. *See* Monitor's Seventeenth Periodic Report at 31-32. 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 data set initially provided by the City in response to the Monitor's request (in the form of the CTS) 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. In discussions and correspondence since the last Periodic Report, including a meeting dedicated to data issues on September 28, 2016, the City has provided further

clarifications.⁸ Although not without flaws, the revised data in the most recent CTS appears sufficiently reliable and comprehensive to support at least a high-level analysis of PRB referrals and outcomes by demographic group.

On October 4, 2016, the City circulated to the Monitor and the other Parties its statistical analysis of the impact of various stages of the hiring process (including character review) on candidates from key demographic groups. The Monitor responded with a series of questions about the City's analyses, including questions about the data and assumptions on which the City's analyses of PRB referrals and outcomes were based. The Monitor is conducting its own updated analysis of the impact of the character review process, and the approach employed by the City appears to differ from methods used by the Monitor in assessing the impact of character review.

As soon as the City responds with a full explanation of the assumptions, criteria, and calculations it employed, the Monitor plans to continue with its own analysis to determine whether the character review process, or either component of it, has a disparate impact on minority candidates. The Monitor's analysis will also incorporate elements of the City's approach to the extent warranted. In addition, the City has represented that it plans to produce an updated CTS in January 2017, incorporating data showing outcomes of the hiring process for the academy class that commenced today. This data will reflect PRB referrals and outcomes under the revised guidelines implemented after May 2016, and will permit at least a preliminary assessment of the effect of the most recent changes in the substantive and procedural rules governing the character review process.

⁸ At the September 28 meeting, the City also demonstrated the functions of its "CIDApp" database, which the FDNY uses to manage data from numerous stages of the hiring process.

VII. Next Firefighter Exam

Pursuant to Paragraph 7 of the Modified Remedial Order, the Monitor is responsible for oversight of 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 Services LLC (“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

The upcoming promotional exam, Exam 7501, will be administered from December 12 to December 14, 2016. The exam will consist of versions of the examination form that was created, validated, and used for Exam 2000, known as “Form A” but were not used during the 2012 exam cycle. Candidates from the resulting promotional list will begin to be appointed to Academy classes in December 2017 or January 2018.

B. September/October 2017 Open-Competitive Exam

The application period for the next open-competitive exam is scheduled to begin in early April 2017. 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 applicant candidate pool.

Open-competitive test-takers will be given new test forms developed from Form A, which are currently being developed by PSI. *See* Monitor’s Seventeenth Periodic Report at 33; Monitor’s Sixteenth Periodic Report at 33-34. With input from Dr. Pittman and the United States’ testing expert, Dr. David Jones, PSI completed the equivalency study phase of the test development process in November. PSI has confirmed, and the United States has agreed, that the new clones are “equivalent” to one another and to the previously-validated Form A used for

Exam 2000. Accordingly, the new forms of the test retain all the material attributes of the validated Exam 2000 and can be used in the next testing cycle.

C. Next Steps

After Exam 7501 has been administered, PSI will do item-level and exam-level analyses of the results. These will be reviewed by the City and the Monitor. Next, PSI will conduct adverse impact analyses, which will also be reviewed by the City and the Monitor. These analyses and their review should be completed by mid-March 2017.

VIII. Additional Issues

On an ongoing basis, the Parties and the Monitor consider a range of issues relating to enforcement of the Modified Remedial Order. During the period covered by this report, these issues 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: December 12, 2016

New York, New York

/s/

Mark S. Cohen