

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 FIFTEENTH 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 16, 2015, when the Monitor’s Fourteenth Periodic Report (Dkt. # 1651) was filed, to March 14, 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.

Many of the activities summarized in this report were also discussed at the February 29, 2016 status conference, at which the Parties and the Monitor updated the Court on the status of their efforts to develop and implement reforms in several areas covered by the Modified Remedial Order. Specific updates provided at the conference are recounted below in relevant sections of the report addressing specific areas of activity. On March 11, 2016, the Court issued an Order setting the next status conference for June 20, 2016 and ordering the City to continue to work with the Monitor and the Parties in the intervening period, as directed by the Monitor and in accordance with schedules set by the Monitor. The Order requires the City to report to the Monitor on or before March 31, 2016 regarding the hiring of a Chief Diversity and Inclusion Officer (“CDIO”) for the FDNY and to report to the Court on or before April 29, 2016 regarding its progress in implementing agreed-upon changes to the Medical Exam, and regarding other specified issues and tasks related to the Medical Exam.

Over the past 90 days, the Parties and the Monitor have continued to work cooperatively on a broad range of initiatives and policy reforms intended to bring the City into compliance with

the Modified Remedial Order and implement the Disparate Treatment Settlement. In several of the problem areas identified in the Modified Remedial Order, the City has made substantial progress in the past 90 days. New leadership has begun to drive essential reforms in key FDNY functions including EEO, data management, and recruiting. Comprehensive, achievable goals have been developed in several areas; and some new policies have been drafted. But given the large scale of the remaining tasks and the broad scope of the required reforms, much remains to be done – especially because in some of the most critical areas the City has only recently installed effective leadership, articulated solid plans, and allocated the required resources. For example, although the City has assigned a large and qualified team the task of creating an “end-to-end” database to track candidates through the entire hiring process, and although the team has made strides in gathering data and making the data available for analysis, the end-to-end database is not scheduled to be operational for a number of months, and the reliability of data in several key categories remains to be confirmed. It is essential that the development and deployment of the end-to-end database, and other critical tasks, be accelerated.

Another essential step that the City has not yet taken is the hiring of a new CDIO for the FDNY – a position that the City was required to create under the terms of the Disparate Treatment Settlement. There has been no CDIO for several months. At the February 29, 2016 status conference, the City represented to the Court that the hiring process for the new CDIO is in its final stages. It is important for that process to be completed as soon as possible.

As the Monitor has noted in previous reports, several of the reforms and initiatives now in progress are time sensitive. Notably, with the recruitment campaign for the next open competitive exam underway, it is essential that the City develop messaging and techniques that will attract a diverse pool of candidates, track the success of its recruiting efforts, and be ready to

adapt recruiting methods based on the results it achieves as the campaign proceeds. In addition, because candidates from the current civil service hiring list are continuing to go through the various stages of the FDNY's hiring process, delays in implementing reforms necessarily diminish the number of candidates to whom reformed hiring criteria and procedures are applied – and increase the number of candidates who may require re-testing or re-review. Because so much remains to be accomplished, and because the benefit of essential initiatives and policy changes may be diminished if they are delayed, it is important for the City and all concerned to continue to devise, agree upon, and implement reforms as expeditiously as possible.

Part II of this report discusses the status of the FDNY's effort to recruit black and Hispanic applicants as entry-level firefighters pursuant to the Modified Remedial Order – including plans described by the City at a recent comprehensive meeting on recruitment, in subsequent communications with the Monitor and the other Parties, and at the February 29, 2016 status conference before the Court. It also discusses the steps taken by the City to establish data systems that will measure the success of FDNY recruiting activities. In addition to plans for the upcoming campaign, the initiatives in this area also include the efforts of a Working Group established pursuant to the Disparate Treatment Settlement (including its proposal for a Fire Cadet Program, which continues to be under review by the New York State Civil Service Commission).

Part III reports on the FDNY's EEO function. This section reports on the City's progress in drafting a revised EEO Policy and a new Investigations Manual, with comments and input from the Monitor and the other Parties. It also recounts the City's development of an EEO database, which is now operational, for tracking EEO complaints and investigations. And it describes additional initiatives and programs under consideration by the City, including

initiatives intended to ensure officer involvement in and accountability for EEO issues within their commands. This section also provides an update on the process for hiring a new CDIO.

Part IV provides an update on the steps being taken to ensure that the Medical Exam does not have an unlawful disparate impact on black and Hispanic candidates. Those steps include efforts to change the way in which some medical tests are administered, along with improved guidance and support for candidates undergoing testing, and continuing efforts to gather data showing any impact of the testing on hiring. In the past 90 days, the Parties have substantially resolved nearly all their remaining disagreements on reforms that should be implemented in the Medical Exam, including improvements in testing procedures and in communications with candidates; and the reforms should now be implemented as soon as possible. Part IV also reports on discussions among the Parties regarding plans for re-testing of certain candidates previously disqualified.

Part V discusses recent developments relating to the FDNY's character review process, including continuing efforts to identify and eliminate any unlawful disparate impact. The Parties and the Monitor have worked together on changes in the substantive guidelines governing the process. And they have also collaborated on improved versions of the instructions and communications provided to candidates when they begin the character review process and if they are referred to the PRB.

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

Part VII 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. Creating and Implementing Recruitment Plans**

The FDNY's recruitment campaign for the next open-competitive entry-level firefighter examination began on March 1, 2016. In preparation for the campaign, the FDNY and its Office of Recruitment and Diversity ("ORD"), the Parties and the Monitor (with the assistance of its expert consultants, Manitou, Inc.) have discussed and refined the messaging and methods to be employed by the FDNY in recruiting a diverse workforce.

On January 20, 2016, the Monitor convened a meeting with the Parties at which representatives of the FDNY described its recruiting plans. The Monitor had previously expressed concerns that the FDNY's efforts to recruit a diverse group of applicants lacked a sound foundation in data from past campaigns, and that the FDNY lacked the ability to adjust its strategies in the middle of a recruiting campaign based on data gathered in the course of that campaign. *See, e.g.*, Monitor's Recruitment Report to the Court (Dkt. # 1464) at 49 ("Monitor's Recruitment Report"); Monitor's Fifth Periodic Report (Dkt. # 1198) at 16-19; Monitor's Sixth Periodic Report (Dkt. # 1249) at 32-45; Monitor's Fourteenth Periodic Report at 6-8. Addressing these concerns, the FDNY's presentation at the January 20 meeting emphasized data tracking and analysis, which will enable the FDNY to assess results from specific recruiting activities and events and to adjust its methods as the campaign proceeds.

The FDNY also presented a general overview of its plans for recruiting activities at the January 20 meeting; and on March 2, the City sent the Monitor a list of more than 200 recruiting events that the FDNY plans to conduct in March 2016. In subsequent discussions with the Monitor, the City has provided additional details of its recruiting plans. The Monitor is working with the City to develop a comprehensive detailed project plan, with milestones and deadlines,

which will enable the Monitor and the Parties to conduct an informed assessment of the City's strategies and evaluate their success as the campaign proceeds. The Monitor expects that the project plan will be finalized no later than the end of March and shared with the other Parties.

In early February 2016, the FDNY and its recruitment consultants, Hodes LLC and Horowitz Research, conducted focus groups of current and non-firefighters drawn from a variety of backgrounds and demographics. The Monitor attended several of the focus group sessions and reviewed the focus group questions in advance. The City has also provided the Monitor with analyses of target audiences and key messages developed with its consultants. The City advises that Hodes LLC will be presenting messaging and branding proposals within the next few weeks.

As the Parties discussed at the February 29, 2016 status conference, under the terms of the Disparate Treatment Settlement, the City has set ambitious goals for recruiting test-takers for the upcoming exam, and to meet those goals, or even approach them, it needs to maximize the efficiency of its recruiting initiatives. The City has obtained approval for recently hired and probationary firefighters to participate in recruitment (subject to any overtime limitations that may apply to more junior firefighters).

#### **B. Data Collection and Analysis**

As discussed in detail in the Monitor's Fourteenth Periodic Report, it is essential for the FDNY to develop and utilize comprehensive, systematic tools for collecting and analyzing data generated by its recruitment activities and by the hiring process for entry-level firefighters. The need for such data capabilities has been a longstanding and consistent theme in the litigation and throughout the Monitorship. *See, e.g.*, Monitor's Recruitment Report at 40; *id.* at 3-7 (summarizing the Court's findings of fact regarding recruitment and the Modified Remedial Order); Monitor's Thirteenth Periodic Report (Dkt. # 1636) at 7.



Although the FDNY still has not fully developed the tools it needs to gather and analyze data regarding the recruitment and hiring processes, the City has made meaningful progress toward its goals over the past 90 days. As discussed in the Monitor’s Fourteenth Periodic Report, the Parties and the Monitor have continued to work on two primary data projects related to the entry-level firefighter selection process: (1) the FDNY’s comprehensive recruitment database and (2) an end-to-end hiring database.

1. Comprehensive Recruitment Database

The City has continued to work over the past 90 days with its consultant Vanguard Communications to develop a new recruitment data system, which will be capable of compiling and analyzing data on prospective applicants and candidates for the position of entry-level firefighter from the point of first contact through the written examination. The system will automatically capture relevant data at various points throughout the recruiting process – such as when a prospective candidate fills out an Expression of Interest form (“EOI”) on an electronic tablet with a recruiter, or when contact is made with the candidate through a phone bank call. In addition, data that is not automatically captured can be entered into the system by recruitment personnel. The system will also capture demographic data, along with information indicating (for example) how prospective applicants became interested in the entry-level firefighter position, whether ORD has followed up through any number of outreach efforts, whether the prospective applicants have filed applications to take the exam, and whether a prospective candidate has registered for or attended exam tutoring sessions. The system will allow ORD and FDNY leadership to identify in real time the methods that have been most successful in attracting and retaining minority candidates so that resources can be allocated strategically over the course of the recruitment campaign.

The City has provided regular updates on the development of the Vanguard system in the last 90 days. The City has also provided the Monitor with the system project plan, and the Monitor is satisfied that adequate progress is being made. It is important for the City to continue to make progress in accordance with the project plan. The FDNY is already using the first portion of the system at recruiting events in the month of March; and, based on the Parties' and the Monitor's analysis of the system's functionality during this month, the FDNY may make adjustments going forward, while completion remains ongoing. The Monitor and the Parties will discuss this subject further on March 21, 2016, at a scheduled meeting devoted to recruitment and data.

## 2. End-to-End Hiring Database

Throughout the Monitorship, the Monitor has emphasized the need for the FDNY to develop an end-to-end database that will allow careful analysis of each stage of the recruitment and selection process. *See, e.g.*, Monitor's First Periodic Report (Dkt. # 823) at 20; Monitor's Ninth Periodic Report (Dkt. # 1462) at 13; Monitor's Twelfth Periodic Report (Dkt. # 1603) at 4, 6-7; Monitor's Fourteenth Periodic Report at 11-13. Such an end-to-end database is an essential tool for tracking and analyzing attrition at various stages of the hiring process – and for the Parties' efforts to mitigate the attrition rate for minority candidates. Although past discussions did not result in significant progress in this area, the City now appears to have allocated the resources needed to develop this essential tool. At a February 4, 2016 meeting on data issues, the City updated the Monitor and the other Parties on its progress and plans for the database. The City has advised the Monitor that the end-to-end database system will be ready for data input from the promotional exam in April 2017. The results for that exam are scheduled to be released on May 3, 2017. As discussed at the February 29, 2016 status conference, all possible

efforts should be made to move up the date for completion of the database. The Monitor will also encourage the City, to the extent possible, to roll out the end-to-end database in phases as it is developed.

Until the end-to-end database is operational, the City is planning to rely heavily on the Candidate Tracking Spreadsheet (“CTS”) (described in detail in the Monitor’s Fourteenth Periodic Report) for data tracking and analysis. *See* Monitor’s Fourteenth Periodic Report at 11-13. The City circulated an updated and expanded version of the CTS on January 15, 2016, and has provided the other Parties and the Monitor with a “Data Dictionary” that defines the numerous data fields in the spreadsheet and identifies fields where the meaning or reliability of data has not been confirmed. The Monitor and the other Parties have sent the City a number of questions and proposed changes, and have identified a number of apparent data inconsistencies in the CTS. At the February 4, 2016 meeting on data issues, the City advised the Monitor and the other Parties that it planned to develop, adapt, and expand the CTS in parallel with development of the end-to-end database, and to use the CTS to generate analyses of recruiting and hiring data in a user-friendly “dashboard” format that will display patterns in the data according to demographic groups and other criteria. The FDNY reported that it expects to use this dashboard function to help guide its recruiting efforts. The CTS is also expected to be the source of data for disparate impact and other analyses that the City, the Monitor, and the other Parties need to conduct to track the success of the reforms that have been or are about to be implemented, and to evaluate the need for additional changes. For the CTS to serve this purpose, the data inconsistencies identified by the Monitor and the Parties must be resolved.

The Monitor remains concerned about the pace at which the City completes projects and resolves issues relating to data, and about uncertainties that continue to exist with regard to data

contained in the CTS. The City has itself identified a number of areas in which the significance of particular data entries is not clear, or where data may not have been collected and entered consistently or reliably. The Monitor and the Parties have also identified a number of apparent anomalies in the CTS data. The City has stated that it intends to address these issues, and assured the Court at the recent status conference that its data tools would be capable of producing reliable analyses by the end of June 2016. Until the outstanding issues are cleared up, the Parties still lack any electronic access to the information needed to determine whether and where disparate impact continues to occur in the City's hiring process for entry level firefighters.

### **C. Working Group**

The City and the Parties have formed a Working Group with representatives from the City's Law, Education and Citywide Administrative Services Departments, along with representatives from the FDNY, the Vulcan Society, the United States and the City University of New York ("CUNY"), 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 at 7-8 citing Proposed Stipulation and Order (Dkt. # 1291-1) ¶ 1(e). As discussed in the Monitor's previous periodic reports, the Working Group was formed pursuant to the Disparate Treatment Settlement. *See, e.g.*, Monitor's Fourteenth Periodic Report at 13-15.

As previously reported, in September 2015 the City submitted a proposal to the New York State Civil Service Commission for "the creation of a Fire Cadet title," as described in the Disparate Treatment Settlement. *Id.* *See* Monitor's Fourteenth Periodic Report at 13-14. The proposal before the Commission described the selection process, job duties, and instructional curriculum for the Fire Cadet title, each of which is designed to attract, select, mentor and retain

a diverse cadre of cadets, who will progress to the firefighter position through the promotional examination process and subsequent completion of the firefighter training process. Since the proposal was submitted, the Working Group (through the City) has responded to the Commission's requests for additional information regarding the purpose and scope of the Fire Cadet Program.

The Working Group is also seeking to develop additional initiatives to offset the advantages that the Court found benefit many white candidates during the lengthy application and screening process – including the “friends and family” networks largely unavailable to minority candidates. *See, e.g.*, Findings of Fact (Dkt. # 741) at 13-15. In October 2015, the Vulcan Society proposed exploration of increased outreach to high school students to encourage them to pursue EMT career opportunities with promotional routes to a career in the fire service, including, where eligible, in time for the next promotional exam. In February 2016, the City objected to the proposal and stated its view that the proposal fell outside the scope of the Working Group. The Monitor's expectation is that by the date of the next Periodic Report, the Parties will reach consensus on whether the Vulcan Society's proposal is workable and that the Working Group will be in a position to report progress toward identifying and implementing one or more new initiatives, in addition to the Fire Cadet Program, to “create educational and other opportunities that will enhance the ability of New York City students to pursue careers as New York City firefighters,” as set forth in the Parties' settlement agreement.

### **III. EEO Compliance and Retaliation Investigations**

Over the past 90 days, the City has worked with the Monitor and the other Parties (and with the Monitor's expert consultant, Gary Richardson) to make progress on several key initiatives to fulfill the FDNY's EEO compliance obligations, including hiring senior EEO staff;

drafting, revising and updating the FDNY's EEO policies and investigation procedures; devising and implementing measures to improve accountability at the command level; developing and implementing a database to track EEO complaints and monitor internal investigations; implementing additional diversity and EEO training programs; and discussing additional initiatives to address ongoing issues affecting the EEO climate within the FDNY. Substantial progress has been made in addressing several of the most persistent issues that have concerned the Monitor throughout the Monitorship. The Monitor and the Parties held a special-purpose meeting on January 21, 2015 (the "EEO Meeting") to discuss these initiatives in greater detail, at which the City reported on progress in several key areas. The Monitor anticipates that the City will continue to make progress in these areas.

**A. Personnel and Staffing**

The FDNY's EEO compliance activities are currently being overseen by Don Nguyen, who has been appointed as Assistant Commissioner for EEO. Over the past few months – first as Deputy Director of EEO, then as Acting Assistant Commissioner, and finally in his current permanent position as Assistant Commissioner – Assistant Commissioner Nguyen has been working with the Monitor and the Parties to develop and implement a new set of EEO policies and procedures that will address many of the longstanding concerns raised in the past by the Court, the Parties and the Monitor with respect to the FDNY's EEO function. These policies and procedures are discussed in greater detail below.

The FDNY is also actively seeking to hire a new Deputy Director of EEO to fill the position vacated by Nguyen's appointment as Assistant Commissioner, and it is continuing to hire additional EEO staff. These efforts to hire additional personnel, which follow up on the City's allocation of temporary staff from other departments within the FDNY to support EEO,

represent continued progress in addressing the critical outstanding need for adequate staffing of the EEO Office – a pre-requisite for lasting and meaningful improvement of the FDNY’s EEO compliance activities. The Monitor is hopeful that the City will continue to make progress in these staffing efforts as part of an overall commitment to developing sufficient resources within the EEO Office.

The City has also moved forward with the hiring process for the position of CDIO, established as part of the Disparate Treatment Settlement. The position has been vacant since the previous CDIO was reassigned several months ago. At the February 29, 2016 status conference, the City advised the Court that it had interviewed seven candidates for the CDIO position, and that the Commissioner would soon select one of those candidates to be submitted for approval to the Mayor’s office. The Court instructed the City to report further on the hiring process by March 31, 2016, and the Monitor urges the City to finish the selection process by that date.

**B. EEO Policy**

The Monitor has continued to work with the City, and in particular with Assistant Commissioner Nguyen, to finalize a new EEO Policy for the FDNY. The new Policy includes provisions to clarify the roles of firefighters and officers in ensuring that firefighters and officers are aware of, and comply with, applicable EEO laws and regulations. The Monitor has particularly emphasized that the EEO responsibilities of supervisors must be clearly stated, and that supervisors must be accountable for their performance on EEO issues. Following comments by the Monitor on the City’s initial draft of the new EEO Policy, the Parties and the Monitor discussed the draft at the EEO Meeting, along with additional proposals and plans for the EEO office; and they have continued to discuss proposals in regularly scheduled discussions. The City plans to circulate a revised draft of the Policy at the end of March, addressing comments

from the Monitor and the other Parties. The Monitor hopes and expects that the Policy will be finalized by June 2016. The Parties have also been reviewing ways to make EEO resources more easily available to FDNY personnel. These include more visible signage at firehouses and the FDNY's plan for a team of "EEO Counselors" (a revived version of the position of "EEO Liaison"). As described by the City in its draft EEO Policy, the Counselors (both civilian and non-civilian, and from various ranks) will serve as liaisons between the uniformed fire force and the EEO Office – providing information and guidance in response to inquiries on EEO issues; and their roles may also include assisting commanders with climate surveys and assessment, assisting with EEO training, and working with the EEO Office on other initiatives to enhance diversity and inclusion.

### **C. Complaint Intake and Investigation Processes**

Concurrently with their work on the revised EEO Policy, the Monitor and the Parties have also continued to develop a new EEO Investigations Manual and to discuss issues related to the City's handling of EEO complaints. As with the revised EEO Policy, the City produced an initial draft of the new Manual (*see* Monitor's Fourteenth Periodic Report at 15); the Monitor and the other Parties offered comments; and all concerned discussed issues relating to the Manual and investigative procedures generally at the EEO Meeting. The policies and procedures under discussion include (1) the intake process for EEO complaints; (2) potential means of facilitating discussions among complainants and commanding officers; (3) options for alternative dispute resolution; (4) investigative practices; (5) analysis of evidence and investigative findings; and (6) communications with complainants. The City is currently revising the Investigations Manual in response to comments from the Monitor and the other Parties, and is scheduled to



circulate a revised draft by the end of March. The Monitor anticipates that the new Manual will be finalized by June of this year.

**D. Diversity and EEO Training**

As discussed in the Monitor's Fourteenth Periodic report, the FDNY engaged the Kaleidoscope Group, a diversity consulting company, to train the FDNY firefighter force on diversity and inclusion issues. Over the past 90 days, the Parties have continued to discuss additional EEO and diversity training programs, both for the uniformed fire force and for personnel within the EEO office. This supplemental training includes training for officers in their EEO responsibilities toward firefighters under their command – for which the FDNY has committed to develop a new training module. It also includes additional investigative, administrative and dispute resolution training for the FDNY's EEO staff.

**E. Officer Accountability**

Throughout discussions with the City on EEO issues, the Monitor and the Parties have emphasized the need to reinforce the role of commanders in ensuring compliance with EEO Policy, addressing EEO issues, and maintaining a favorable EEO climate within their commands. In particular, the Monitor has recommended that the City (1) develop and deliver enhanced training for officers regarding EEO obligations and mandatory reporting; (2) reinforce existing rules requiring commanders to investigate incidents, impose command discipline, and report violations such as gear tampering and hazing; (3) revise performance review criteria to include EEO metrics; and (4) consider EEO performance in promotions. As noted above, the City has committed to develop a new training module for officers consistent with the Monitor's recommendations. It has also undertaken to devise and implement revised criteria for

performance reviews and promotions, which the Monitor expects to be in place within the near term.

**F. EEO Data Collection and Analysis**

During the January 21 EEO Meeting, the City provided the Monitor and the other Parties with an update on its progress in developing and implementing a database to track EEO complaints and other EEO-related personnel data. This update included a presentation of certain preliminary data fields and other functionalities of the database. The database includes all of the data fields the Monitor had identified for tracking, as well as additional information. The information tracked includes demographic data, categories of discrimination alleged, and data showing the length of investigations and specific steps taken. The database includes the capability to identify recurring accusers and accused, as well as geographic locations with problems. The City has confirmed that the system is now operational for tracking current complaints and investigations conducted by the EEO Office. The City is considering how and to what extent it can enable the database to track investigations of EEO matters by the FDNY's Bureau of Investigations and Trials ("BITS") or other City agencies, and has communicated its agreement to the premise that EEO investigations handled in part or whole by BITS should be tracked generally along the same lines as other EEO matters. The EEO Office intends to make further modifications to the database as it gains experience using the system and identifies potential improvements.

**G. EEO Retaliation Investigations and Discipline**

Over the past 90 days, the City has continued to inform the Monitor and the other Parties of the status of ongoing EEO retaliation investigations being conducted by the EEO Office, including those being conducted by BITS. The Monitor continues to emphasize the need for

effective and timely EEO investigations, as well as the need to impose appropriate discipline where violations of law or policy are found. The Monitor has also emphasized the need for the City and the other Parties to explore remedial action where a complaint or other EEO violation may not be the work of a discrete wrongdoer, but rather the result of a retaliatory climate within a firehouse or other command division. Possible remedies include additional EEO training and messaging to emphasize existing FDNY policies against hazing and retaliation, along with EEO policies – and enforcement of existing operational mandates concerning gear, assignments, and the like. The City has stated that it takes the need to address retaliation seriously, as well as the need to protect complainants, and that it recognizes that in some instances intervention in the form of training or counseling may be necessary and appropriate even if a single wrongdoer is not identified.

#### **IV. Medical Exam Related Issues**

Pursuant to applicable provisions of the Modified Remedial Order, the Monitor has continued to address allegations that certain steps in the City's Medical Exam have a disparate impact on black and/or Hispanic candidates. *See, e.g.*, Monitor's Fourteenth Periodic Report at 19-25; Monitor's Thirteenth Periodic Report at 11-17 (citing Modified Remedial Order ¶¶ 15, 19). As previously reported, Plaintiffs-Intervenors have expressed concerns that the Medical Exam has an unfavorable disparate impact on black candidates, and the United States has raised the same concerns with respect to both black and Hispanic candidates. *See, e.g.*, Monitor's Eleventh Periodic Report (Dkt. # 1575) at 13-14. The Monitor is engaged in a comprehensive analysis of these issues, and has requested relevant data from the City. *See, e.g.*, Monitor's Fourteenth Periodic Report at 20.

In part because of limitations in the City's record-keeping practices for prior medical examinations and delays in obtaining certain information, it has been difficult to determine which factors have contributed to racial imbalances in exam results. *See id.* Nevertheless, the City has recently produced to the Monitor further documents and data; and, based on this and previously-available information, the Monitor and the Parties are continuing to pursue initiatives intended to address likely contributing factors to the racial imbalance in the Medical Exam results. The status of the implementation of each of those initiatives is discussed below in Subsection A.

The Monitor's in-depth analysis of the Medical Exam is ongoing; these efforts are described in Subsection B.

**A. Implementation of Agreed Initiatives Regarding the Medical Exam**

The Monitor has worked with the Parties to develop, agree upon, and begin to implement measures to mitigate possible causes of disparate impact. Previously, the Monitor and the Parties agreed in principle that the City would:

- Conduct a validation study of the stairmill portion of the Medical Exam;
- Provide candidates with more information about the Medical Exam;
- Pay for additional testing that may be necessary following a candidate's second failure on the stairmill test;
- Fund other diagnostic testing;
- Allow the Diversity Advocate to observe the stairmill exam;
- Track and record specific data regarding the Medical Exam; and
- Retest some candidates, in appropriate circumstances.

Monitor's Fourteenth Periodic Report at 20-21; Monitor's Thirteenth Periodic Report at 13; Monitor's Twelfth Periodic Report at 13-15; Monitor's Eleventh Periodic Report at 15.

Over the past 90 days, the Monitor and the Parties have worked to further the FDNY's implementation of these initiatives. With the exception of the stairmill validation, which has been deferred as described below, these initiatives have either been completed or are well underway. The following table summarizes the current status of each initiative.

### Status of Medical Exam Initiatives

Initiative	Status
Conduct a validation study of the stairmill test	The City has recently proposed that instead of validating the stairmill test currently used by the Bureau of Health Services ("BHS"), BHS will re-administer the stairmill test that is already a component of the Candidate Physical Ability Test ("CPAT") <sup>1</sup> – employing the re-administration of the CPAT stairmill test as a component of the Medical Exam. This proposal is predicated on the understanding that candidates will have to take and pass the CPAT before proceeding to the Medical Exam. The City's rationale for re-administering the test is to ensure that candidates are still physically fit at the time of the medical exam. Though the Plaintiffs and Plaintiffs-Intervenors continue to reserve certain arguments with respect to the City's proposal, there is no current objection to adoption of the City's proposal at this time, and the City intends to proceed. Plaintiffs-Intervenors have taken the position that the City's approach will require additional data tracking within the BHS database.
Provide candidates with more information	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. These include the following: <ol style="list-style-type: none"> <li>1. The "BHS Guidance for Firefighting Candidates Concerning Medical</li> </ol>

<sup>1</sup> The CPAT is a standardized physical abilities test developed through a joint initiative of the International Association of Fire Fighters and the International Association of Fire Chiefs in conjunction with a consortium of ten municipal fire departments, including the FDNY.

Initiative	Status
	<p>Assessment,” a document prepared pursuant to the Disparate Treatment Settlement, which includes a description of (1) the forms and the various tests involved, (2) how best to prepare for them, and (3) post-exam follow-up steps. The City has posted this guidance document with Fire Academy materials on the FDNY website, and it will also be included in the FDNY hiring process introductory materials.</p> <p>2. A set of frequently asked questions (“FAQs”) that provides similar information to that contained in the guidance document, presented in question and answer format. This document has also been posted on the FDNY website and will also be included in FDNY hiring materials.</p> <p>3. Three informational videos: one providing an overview of preparation for the Medical Exam and the various steps it includes, and two additional videos for specific components of the Medical Exam – one for the stairmill test and one for the pulmonary function test (“PFT”) – providing more detailed instructions and demonstrations for those two steps. The script for the overview video has been agreed to by the Parties and the Monitor and will proceed to production. The City has indicated that it believes it can use a pre-existing video as a model to generate a script for the CPAT stairmill video. The Parties are continuing discussions on a draft video script for the PFT. The City anticipates that production of the videos will take approximately eight weeks after the scripts are finalized.</p> <p>The City has confirmed that it will take 6-8 weeks to produce the overview and PFT videos after the scripts are finalized. The videos will</p>

Initiative	Status
	<p>then be made available for viewing on the FDNY website.<sup>2</sup></p> <p>The Monitor and Parties continue to discuss the most effective ways to transmit these various informational items to the largest possible number of candidates. The City has reported that it plans to overhaul its website (in part to make it more user friendly for mobile applications likely to be used by younger applicants) and that the informational documents and videos will be part of the new website.</p>
Pay for follow-up diagnostic testing	<p>For various reasons – including cost – some candidates may have been deterred from complying with BHS requests for follow-up testing. To address these issues, the FDNY has undertaken two parallel initiatives. The FDNY has begun providing certain required follow-up blood tests to candidates free of charge at BHS. The FDNY has also obtained funding to subsidize other kinds of follow-up diagnostic testing that must be conducted by outside providers. The FDNY has identified providers for this outside testing; and it has been discussing with the Monitor and the other Parties its plan for scheduling appointments with outside providers, making payments to them, and tracking results from the tests they perform.</p>
Allow certain FDNY personnel to observe the stairmill exam	<p>With the agreement of all Parties, the Diversity Advocate was designated to observe the administration of the stairmill portion of the Medical Exam periodically, on a random basis. This initiative is underway.</p>
Track and record specific data regarding the Medical Exam	<p>The City has been developing a new database to track Medical Exam information for candidates on the current civil service list, and for candidates from future lists. The database is to be used for disparate impact analysis of</p>

<sup>2</sup> The Monitor expects the FAQs and the videos to work in tandem with the BHS guidance document to provide enhanced information about the Medical Exam to all candidates.

Initiative	Status
	<p>the various components of the Medical Exam. Last year, the City told the Monitor that the database would be up and running by September 30, 2015. According to the City, the database for capturing the medical evaluation data was operational by October 2015, although refinement and troubleshooting continues. The City has provided the Monitor and the other Parties with some further information about the design and content of the database, including specific categories of data that will be collected; the Monitor and the other Parties have provided feedback to the City and clarified certain aspects of the database's expected functioning; and the Monitor may have further input on the information to be captured.</p>
<p>Retest some candidates</p>	<p>The Parties have continued detailed discussions about criteria to determine which previously-disqualified candidates are eligible for medical retesting. Although the Parties have not yet arrived at a complete agreement on all these criteria, they have made progress. In the last Periodic Report, the Monitor reported that it would probably need to submit a Recommendation to the Court on this issue. The Parties' recent progress toward an agreement has made it less likely that such a recommendation will be necessary. The Monitor is hopeful that the retesting issues can be resolved without the need to raise them with the Court.</p> <p>Candidates eligible for retesting will be offered the option to take advantage of the no-cost diagnostic testing program being offered to new candidates, as described above.</p> <p>The drafting of a notice to be sent to candidates, informing them of their eligibility to be retested, is nearly complete. Because time is of the essence, the Parties have agreed that those candidates whom all Parties agree are eligible for retesting will be notified about</p>



Initiative	Status
	their retest dates as soon as possible.

The Monitor continues to work with the Parties toward full implementation of these initiatives.

**B. Continuing Analysis**

The Monitor has continued to compile and evaluate data relevant to possible disparate impact produced by the Medical Exam, including data from the files of candidates who were disqualified because they failed the Medical Exam. *See* Monitor’s Thirteenth Periodic Report at 16-17; Monitor’s Twelfth Periodic Report at 17-18; Monitor’s Eleventh Periodic Report at 14; Monitor’s Tenth Periodic Report at 13-14. As described in previous Periodic Reports, limitations in the City’s prior record-keeping practices with respect to these disqualified candidates – including the fact that reasons for disqualification have not always been clearly tracked – have made it difficult for the Monitor to analyze the root causes of apparent disparate rates of medical disqualification for black and Hispanic candidates as compared to white candidates. *See* 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 provided on a rolling basis, prior Notices of Final Medical Disqualification (“NOFD”) and the full medical files of candidates disqualified by the Medical Exam. The Monitor, with the assistance of experts led by Dr. Denise Smith, is continuing to derive and analyze data from these documents. The City assures the Monitor that it has now completed its production of NOFDs and will provide the full medical files by March 28, 2016.

**V. 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 develop new standards, procedures, and materials for the character review process administered by the FDNY Candidate Investigation Division (“CID”) and its Personnel Review Board (“PRB”).

**A. Analysis of Potential Disparate Impact**

As previously reported, the Monitor’s analysis of data through the end of 2014 for referrals to the PRB and PRB outcomes 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. Shortly before the last Periodic Report in December, the City provided the Monitor with additional data showing the status and results of PRB reviews for candidates referred to the PRB through June of 2015 – including data for candidates referred to the PRB since the implementation of the most recent revised set of the PRB Guidelines in November 2014. In addition, as reported in Part II.B above, on January 15, 2016, the City provided the Monitor and the other Parties with an updated Candidate Tracking Spreadsheet (“CTS”), which includes data showing (1) whether candidates have been considered by CID and (2) for each such candidate, whether he or she was referred to PRB. The Monitor plans to perform an analysis combining the PRB outcomes data with the referral data from the CTS, in order to determine whether and to what extent the two phases of the character review process, separately and in combination, have continued to produce the type of disproportionate outcomes seen in the Monitor’s original analysis. However, in developing the latest version of the CTS, the City identified issues in some of the component data fields that must be resolved before the Monitor can proceed with the

analysis. At the February 29, 2016 status conference, the City represented that the remaining issues with the CTS would be resolved sufficiently to enable the Parties and the Monitor to perform reliable disparate impact analyses within the first half of this year. The Monitor will go forward with its analysis of PRB data as soon as the City has produced reliable data (or confirmed that the existing data is accurate), and will report to the Court on the results of its analysis.

**B. Potential Enhancements in the Character Review Process**

The Parties and the Monitor have continued to formulate, and the City has begun to implement, further changes in PRB standards and procedures that might help minimize any disparate impact on black and Hispanic candidates. The Monitor and the Parties met January 6, 2016 to discuss the character review process and potential reforms. The topics included (1) proposals developed by the Monitor (to which the City had provided its initial responses) addressing a number of key areas including criteria for referral to the PRB; (2) information and instructions provided to candidates; (3) training for PRB members; (4) procedures and criteria for PRB determinations; and (5) appeals. The participants also discussed proposals circulated by Plaintiffs-Intervenors and the United States in the weeks leading up to the meeting. *See* Monitor's Fourteenth Periodic Report at 26-27.

In the days following the meeting, the Monitor, Plaintiffs-Intervenors, and the United States provided additional comments and input to the City regarding the forms and instructions used to provide candidates the opportunity to explain events in their histories that require referral to the PRB. On January 29, 2016, the City circulated a revised "Appendix M" or "Explanation of Background Information Form" ("Explanation Form") and accompanying instructions. Following additional comments from the other Parties and the Monitor, on February 22 the City

circulated (1) a further revised Explanation Form and instructions and (2) a revised Candidate Intake letter that describes the CID/PRB process. In addition, on February 12, 2016 the City circulated revised sections of relevant PRB and CID Guidelines – reflecting changes in referral criteria and clarifications of CID and PRB procedures.

The Parties have engaged in further discussions regarding the Explanation Form and Instructions, and the Monitor expects that the City will produce a final revised version of the Form within a short time.

The Parties and the Monitor have also continued to work together to produce a set of revised PRB and CID guidelines for use in the next round of CID referrals and PRB reviews. Discussions have focused both on the standards employed by the PRB and on the gatekeeping criteria that govern referrals to the PRB by the CID – either of which may produce an unfavorable impact on minority candidates in the character review process. The Monitor, Plaintiffs-Intervenors, and the United States provided comments on the City's draft guidelines. The City plans to circulate new guidelines within the next few weeks, adopting all the recommendations to which it is prepared to agree, and, once approved, to use the new policies in referring and reviewing candidates going forward. The Parties have advised the Monitor that they have agreed to reserve certain further disputes regarding the Guidelines for continued discussion.

At the February 29, 2016 status conference, the Court stated that any remaining disputes between the Parties regarding the character review process could be addressed at the next status conference, which will take place on June 20, 2016. The Monitor will set a briefing schedule and provide recommendations to the Court regarding any such disputes in advance of the June 20, 2016 conference.

## **VI. Next Examination**

As discussed in prior reports, the next open competitive examination for entry-level firefighters is scheduled to begin in September 2017, with an application period opening in April 2017. *See* Monitor's Fourteenth Periodic Report at 28-29. The City plans to appoint the first Academy class from the next open competitive list in December 2018. *Id.* at 29. The City has also advised the Monitor that it plans to appoint probationary firefighters from the next promotional hire list to an Academy class in December 2017 or January 2018. *Id.*

The Monitor is responsible for oversight of the next examination pursuant to Paragraph 7 of the Modified Remedial Order. The City and its testing consultant, PSI Services LLC ("PSI"), have been working in coordination with the Monitor and the other Parties on the development of the next examination. *See, e.g.,* Monitor's Fourteenth Periodic Report at 28; Monitor's Thirteenth Periodic Report at 25; Monitor's Twelfth Periodic Report at 10. The Monitor continues to be assisted by the Monitor's testing expert, Dr. Shane Pittman.

Over the past 90 days, the Monitor has continued to consult with Dr. Pittman regarding the development of the next examination. Specifically, the Monitor and Dr. Pittman have focused on the pilot testing of the next computer-based examination, in which participants were selected to complete a pilot test of the next examination. In late December 2015, Dr. Pittman oversaw the pilot testing sessions conducted by PSI, and both the Monitor and Dr. Pittman subsequently reviewed the data results from the pilot testing and provided feedback to PSI. Dr. Pittman has provided the Monitor's comments to the City, PSI, and the other Parties.

In February 2016, PSI began conducting an equivalency study for the computer-based examination. The purpose of this equivalency study is to develop different forms for the computer-based examination that, based on data analysis, are "equivalent" to one another and to

the previously validated test form used in connection with Exam 2000. This equivalency between forms of the computer-based examination is intended to create a “level playing field” for all firefighter candidates, even though different candidates will take different forms of the examination. PSI is currently recruiting participants and scheduling sessions for the equivalency study, and the Monitor and Dr. Pittman will continue to provide oversight in this process – including, among other things, reviewing the demographic mix for the participants in the equivalency study to ensure that the study uses a diverse pool of participants.

Based on the project plan created by the City and PSI (with input from the Monitor and the other Parties), the City and PSI intend to conduct the equivalency study over the next several months, with analysis of the results to occur in June 2016. The equivalency study will be reviewed by the Monitor, and the Monitor and Dr. Pittman will continue to be consulted as the City and PSI make progress in these efforts.

Additionally, consistent with the Monitor’s prior practice of oversight of the examination process, the Monitor will continue to communicate with a sub-group composed of counsel and experts for each of the Parties as the equivalency study and further development of the next examination moves forward.

## **VII. 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:

- Record-keeping and communications with Priority Hire candidates regarding retroactive seniority benefits, their status as probationary firefighters, and other issues, including firefighters’ access to seniority information;

- Issues arising from investigations of specific alleged EEO violations, including alleged instances of retaliation as defined in Paragraph 17 of the Modified Remedial Order;
- Terminations and resignations of Priority Hire entry-level firefighters at the Fire Academy, including the reasons for such terminations and the status of affected candidates at the time of termination;
- Other discussions regarding individual candidates who are 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 new forms for Notices of Disqualification and related communications from the FDNY;
- The assignment of firehouses for probationary firefighters including Priority Hire candidates, and the criteria for such assignments;
- The FDNY policy for "recycling" (i.e. the opportunity for candidates to be re-admitted to the Fire Academy after resignation) and the information provided to candidates regarding that policy.

Dated: March 15, 2016  
New York, New York

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/s/

Mark S. Cohen