

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL BRIONEZ, et al.,

No. C 01-3969 CW

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE, et al.,

Defendants.

ORDER DENYING
DEFENDANTS'
MOTION FOR ENTRY
OF ORDER THAT
DEFENDANTS HAVE
DISCHARGED THEIR
OBLIGATIONS UNDER
THE SETTLEMENT
AGREEMENT, AND
GRANTING IN PART
AND DENYING IN
PART PLAINTIFFS'
MOTION FOR
CONTEMPT AND FOR
ENFORCEMENT OF
COURT-APPROVED
SETTLEMENT
AGREEMENT

Defendants move for entry of an order finding that they have discharged their obligations under the Hispanic Settlement Agreement (HSA or Agreement). Plaintiffs oppose that motion, and have filed their own motion for contempt and enforcement of the Agreement. Defendants oppose Plaintiffs' motion.

1 The matters were heard on February 10, 2006. Having
2 considered all of the papers filed by the parties and oral argument
3 on the motions, the Court denies Defendants' motion and grants
4 Plaintiffs' motion in part and denies it in part.

5 BACKGROUND

6 Plaintiffs filed this action in October, 2001, alleging that
7 Hispanics were under-represented in the workforce of the Pacific
8 Southwest Region of the Forest Service of the United States
9 Department of Agriculture (Region 5), as compared to applicable
10 Civilian Labor Force (CLF) statistics. According to Plaintiffs,
11 this under-representation was based on Region 5's process for
12 hiring and promotion, which unlawfully discriminated against
13 Plaintiffs and other class members in violation of Title VII.

14 Less than a year later, in June, 2002, the parties entered
15 into the Agreement. In October, 2002, the Court, following notice
16 and fairness proceedings, approved the Agreement. The effective
17 date of the Agreement was December 22, 2002.

18 The Agreement required a Monitor, and, pursuant to the
19 Agreement, the parties selected Marcie Seville as the Monitor. The
20 Agreement provided that the parties had to attempt to resolve with
21 the Monitor disagreements regarding compliance, before seeking
22 relief from this Court.

23 In May, 2005, Plaintiffs filed with the Monitor their Request
24 for Findings and Enforcement Recommendations. Defendants submitted
25 an opposition and Plaintiffs then submitted a reply. The Monitor
26 issued her Tentative Report in August, 2005.

27 On October 29, 2005, after Defendants lodged their objections
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1 to the tentative report, the Monitor issued her Report and
2 Recommendations of Court-Appointed Monitor. The Monitor's Report
3 stated that:

4 Defendants have not substantially complied with all
5 provisions of HSA § IV.B-G., and § V, or with
6 alternative methods of implementation agreed upon by the
7 Parties. Defendants' efforts at HSA implementation have
8 been seriously hampered by continuing changes in key
9 personnel and proposals for implementation followed by
10 mid-stream changes in plans and strategies. There have
11 been ongoing delays in implementation -- or complete
12 abandonment -- of the very measures that Defendants
13 themselves have proposed to carry out their HSA
14 obligations. Defendants have not realized the stated
15 intent of the HSA -- to eliminate barriers to hiring,
16 promotion, and retention, and . . . they have not
17 substantially complied with their obligations under the
18 following HSA provisions:

12 § IV.C (maintaining a full-time Region Recruitment
13 Coordinator ("RRC") position, with the primary
14 purpose of implementing the Recruitment Program,
15 funded at a level enabling the RRC to accomplish the
16 objectives of the HSA)

15 § IV.D (making a good faith effort to maintain and
16 fill the Civil Rights ("CR") Director during the HSA
17 Term)

17 § V.A.1(1)&(2) (having a Regional Recruitment Program
18 designed to disseminate effective information
19 relating to employment opportunities and to increase
20 diversity of applicants by engaging in recruitment
21 activities consistent with § IV obligations)

20 § V.A.2 (monitoring all recruitment and promotion
21 actions of Forest Supervisors and Regional Office
22 Directors and all recruitment and promotion actions
23 taken under their supervision)

23 § V.A.3 (Employing alternatives agreed upon by the
24 parties in any action to fill a competitive vacancy)

24 § V.B.1(a) (Having the RRC responsible for
25 coordinating outreach and recruitment)

25 § V.B.2 (Giving the RRC access to specified data,
26 including RNO information)

27 The Monitor finds that Defendants are in substantial
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1 compliance with: § IV.B (issuance of policy
2 statement), § IV.E (Advertisement of Region 5
3 positions), § IV.F (retaining Monitor), § V.A.4 (as
to recruitment from the Student Career Employment
Program), and § V.C (Training).

4 As to § IV.G, which requires the Defendants to make a
5 good faith effort to provide sufficient resources to
6 meet the obligations under the HSA, the Monitor finds
7 that substantial resources have been directed toward
HSA efforts, but in some situations, the use of those
resources has been misguided and has not furthered
the Region's efforts to meet its HSA obligations.

8 The Monitor further finds that, in the more than two and
9 one-half years since the effective date of the HSA,
Defendants have failed to make substantial progress
10 toward the § IV workforce parity goal. Although Region
5 is at or above parity in several professional series
and program managers (GS 340), those series comprise a
11 relatively small percentage of the permanent workforce.
Most of the Region's progress is in the hiring of
12 student trainees in firefighter apprenticeship
positions, under the SCEP or Student Career Experience
13 Program hiring authority. While successful in
recruiting and selecting Hispanic applicants for that
14 program, the Region has failed to take steps to address
retention of those new hires and there has been
15 significant attrition. Without consideration of the
SCEP hires, the Region has made almost no progress in
16 increasing Hispanic representation during the HSA term,
and the Monitor concludes that the SCEP employees are
17 not properly included in the permanent workforce. Based
upon existing shortfalls of permanent Hispanic
18 employees, and workforce projections, the Monitor finds
that there is little or no likelihood that Defendants
19 will achieve the HSA goal near the February 2006 HSA
expiration date, or within any reasonable time period
20 after expiration.

21 Monitor's Report, 17-19 (Summary of the Monitor's Findings).

22 The Report concluded by urging the parties to resolve the non-
23 compliance issues. But the parties could not. According to
24 Defendants, they presented a written offer to Plaintiffs indicating
25 that they were willing to accept, in whole or in part, eleven out
26 of the fourteen recommendations made by the Monitor. On
27 December 5, 2005, Plaintiffs responded that they could not accept

1 Defendants' proposed terms and notified Defendants of their intent
2 "to pursue enforcement remedies in federal court."

3 In response, Defendants filed their motion for entry of an
4 order that they have discharged their obligations under the
5 Agreement. Two weeks later, Plaintiffs filed their motion for
6 contempt and enforcement of the Agreement. In their motion,
7 Plaintiffs seek remedial enforcement measures, including a three-
8 year extension of the term of the Agreement, and declaratory relief
9 holding that voluntary race-conscious affirmative action is
10 warranted and legally justified.

11 The Agreement was set to expire on February 14, 2006. On
12 February 10, 2006, after the hearing, the Court issued an order
13 extending the Agreement for one year.

14 LEGAL STANDARD

15 This Court has the inherent power summarily to enforce a
16 settlement agreement involving an action pending before it. In re
17 Suchy, 786 F.2d 900, 902-03 (9th Cir. 1985). The interpretation
18 and enforcement of a settlement agreement is governed by the legal
19 principles applicable to contracts. United Commercial Ins. Serv.,
20 Inc. v. Paymaster Corp., 962 F.2d 853, 856 (9th Cir. 1992).

21 DISCUSSION

22 I. Monitor's Report

23 Defendants argue that the Monitor's Report is not properly
24 before the Court; they contend that Plaintiffs treat the Monitor's
25 Report as if it were an initial ruling that is appealed to this
26 Court. It is not.

27 Plaintiffs cite Federal Rule of Civil Procedure 53, noting
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1 that it requires the Court to decide de novo all objections to the
2 Monitor's findings of fact and conclusions of law. Rule 53
3 provides that, unless a statute provides otherwise, a court may
4 appoint a master only to "perform duties consented to by the
5 parties." Fed. R. Civ. P. 53(a)(1)(A). The Agreement does not
6 provide that a Monitor's Report will be presented to the Court.
7 Defendants contend that they did not agree that the Monitor would
8 present a Report and recommendation to the Court. Plaintiffs
9 respond that the Monitor's Statement of Work, prepared by the
10 parties, provides, "The Monitor may meet with and report to the
11 Court if directed by the Court."

12 Although the Court did not "direct" the Monitor to report to
13 the Court, the Court finds her report useful and wishes to consider
14 it. Defendants have had the opportunity to counter her factual
15 statements and respond to her legal conclusions. The Court has
16 considered Defendants' positions, as well as the Monitor's Report,
17 and reached its own findings and conclusions.

18 II. Agreement

19 The Agreement provides that any motion before this Court for
20 enforcement shall be limited to enforcement of the provisions
21 contained in Sections IV and VIII. The Agreement further states
22 that in a Court proceeding to enforce compliance with Section IV,
23 Defendants shall not be found in breach of the Agreement, and the
24 Court shall not order further relief, if the Court finds that
25 Defendants have substantially complied with Section IV.B through G
26 and Section V, or any alternative methods of implementation agreed
27 upon by the parties, and have nonetheless been unable to reach the
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1 goals of Section IV.A. If the Court finds that Defendants are in
2 breach, however, the Agreement provides that the Court may order
3 specific enforcement of the provisions contained in Section IV.B.
4 through IV.G., additional remedial measures to increase Hispanic
5 representation subject to the availability of Region 5 positions,
6 any alternative provisions agreed upon by the parties, and/or a
7 one-time, one-year extension of the Term of the Agreement.

8 A. Contempt/Breach of Agreement

9 Plaintiffs contend that Defendants have breached the Agreement
10 and thus are in civil contempt. For this Court to find contempt,
11 Plaintiffs must show by clear and convincing evidence that
12 Defendants violated a specific and definite order of the Court.
13 Stone v. City and County of San Francisco, 968 F.2d 850, 856 n.9
14 (9th Cir. 1992). The burden then shifts to Defendants to
15 demonstrate why they were unable to comply, and to show they took
16 every reasonable step to comply. Id. While "there is no good
17 faith exception to the requirement of obedience to a court order,"
18 a party should not be held in contempt if its actions appear to be
19 based on a good faith and reasonable interpretation of the court's
20 order; substantial compliance with the court order is a defense to
21 civil contempt. In re Dual-Deck Video Cassette Recorder Antitrust
22 Litig., 10 F.3d 693, 695 (9th Cir. 1993).

23 Defendants argue that, not only are they not in contempt, the
24 Agreement does not allow Plaintiffs to move for contempt. They
25 note that the word "contempt" does not appear in the Agreement.
26 Defendants point to language in the Agreement to argue that the
27 parties agreed to limit the Court's retained jurisdiction solely to
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1 enforcing compliance of two sections: "The District Court will
2 retain jurisdiction during the term of this Agreement for the
3 purpose of enforcing compliance with Sections IV and VIII." HSA,
4 § VII.A. Plaintiffs do not address this argument in their reply.
5 But, as they note in their moving papers, the Final Judgment
6 Approving the Settlement Agreement is enforceable by this Court
7 both as a judicial decree and as a voluntary agreement between the
8 parties.¹ And "courts have inherent power to enforce compliance
9 with their lawful orders through civil contempt." Spallone v.
10 United States, 493 U.S. 265, 276 (1990) (quoting Shillitani v.
11 United States, 384 U.S. 364, 370 (1966)).

12 1. Section IV

13 As noted above, Section IV of the Agreement, entitled Duties
14 and Obligations, is enforceable. Plaintiffs contend that
15 Defendants are in violation of Sections IV.A.1, IV.C, IV.D and
16 IV.G.

17 a. Section IV.A

18 According to this section, "It is the intention of Defendants
19 to undertake and continue specific measures designed to eliminate
20 barriers to hiring, promotion, and retention of Hispanics in the
21 Region 5 workforce." Subsection One states Defendants' goal: to
22 increase Hispanic representation in the Region 5 workforce to a
23 percentage equivalent to the percentage of Hispanics in the
24 Applicable Labor Pool in the Relevant Geographic Area. Subsection

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26 ¹Defendants' argument that Plaintiffs cannot move for contempt
27 is based solely on the language in the Agreement. They do not
28 argue that Plaintiffs cannot move for contempt because the
Agreement is not a consent order.

1 Two provides: "Nothing in this Agreement will obligate Region 5 to
2 create new positions, to fill any particular position, or to
3 promote, select, or assign any particular person to any particular
4 position. No provision of this Agreement is intended as, or may be
5 construed as imposing, a quota."

6 Defendants contend that this section contains merely
7 aspirational goals and thus it cannot be enforceable; they note
8 that, unlike other sections in Section IV, this section does not
9 contain the words "shall" or "will." This is incorrect. As
10 Plaintiffs note, the Agreement itself, in the section on
11 enforcement, expressly provides that the Court will be measuring
12 breach by whether Defendants have been "unable to reach the goals
13 of Section IV.A." The Agreement also expressly provides that
14 Section IV is enforceable; it does not divide Section IV into
15 subsections that are enforceable and subsections that are not.
16 Furthermore, the goal falls within the Duties and Obligations
17 provision of the Agreement. And it is not an impermissible quota;
18 as the Supreme Court explained,

19 Properly understood, a quota is a program in which a
20 certain fixed number or proportion of opportunities are
21 reserved exclusively for certain minority groups. Quotas
22 impose a fixed number or percentage which must be
23 attained, or which cannot be exceeded, and insulate the
individual from comparison with all other candidates for
the available seats. In contrast, a permissible
goal . . . require[s] only a good-faith effort . . . to
come within a range demarcated by the goal itself.

24 Grutter v. Bollinger, 539 U.S. 306, 335 (2003) (inner citations and
25 quotations removed; alternations in original).

26 Not only is this section enforceable, it provides the
27 benchmarks that Defendants claim are lacking in the Agreement,

1 making this case distinguishable from Donnelly v. Secretary of U.S.
2 Department of Agriculture, 95-C-4389-DLJ (N.D. Cal. Nov. 22, 2005),
3 which involved the Women's Settlement Agreement.² The parties and
4 their experts dispute what these benchmarks currently are and what
5 information should be compared to the benchmarks. Defendants
6 contend that, based on statistics provided by their experts, all
7 benchmark goals have been surpassed, and that there is now a
8 surplus of Hispanic representation in the overall Region 5
9 workforce. But Plaintiffs claim, based on their experts' studies,
10 that Hispanics continue to be under-represented; they note that
11 there are only ten more Hispanic permanent employees in Region 5
12 than there were at the beginning of the Agreement. Two issues are
13 predominantly responsible for the parties' diverging views:
14 (1) whether to include Student Career Employment Program positions
15 in the GS-462 Forestry Technicians job series and (2) how to
16 determine the Recruitment CLF Data based on the 2000 Census.

17 i. Inclusion of Student Career Employment
18 Program positions

19 According to Defendants, the Hispanic representation in the
20 Region 5 workforce from October 1, 2002 (a few weeks before the
21 Court approved the Agreement) to December 3, 2005, increased from
22 8.9 percent to 12.5 percent. Plaintiffs contend this increase is
23 based on the inclusion of Student Career Employment Program
24 positions within the permanent workforce; not including those

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26 ²Plaintiffs further note that Donnelly was a settlement of
27 hostile environment/sexual harassment litigation, and did not
28 involve hiring or increasing women's representation in the
workforce.

1 positions, the Hispanic workforce in Region 5 has remained
2 approximately nine percent throughout the three-year settlement
3 period.

4 The Student Career Employment Program provides a system
5 whereby students can train to become career Forest Service
6 Employees. These apprentices, or SCEPs, have the potential to
7 become permanent employees upon graduation, if SCEP requirements
8 are met and appropriate positions are available. Unlike permanent
9 employees, however, SCEPs generally have no procedural or appeal
10 rights. In May, 2004, Defendants hired 245 Hispanic SCEPs; by
11 October, 2005, only 143 remained.

12 Defendants do not dispute that the inclusion of SCEPs
13 substantially increases the percentage of Hispanic representation
14 in the Region 5 workforce overall and the GS-462 Forest Technician
15 job series specifically; nor do Defendants deny the SCEPs' high
16 attrition rate. Nonetheless, Defendants argue that SCEPs are
17 properly included in the data to analyze Hispanic representation
18 and to determine if their goals have been met. Defendants note
19 that they have always included SCEPs in their data, and that SCEPs
20 were included in their baseline data when the parties negotiated
21 the HSA, a fact Plaintiffs do not dispute. Defendants' expert
22 states that temporary or trainee employees, like SCEPs, are not
23 excluded from the CLF data, discussed below, which is based on all
24 types of employees, including those in jobs that will not lead to a
25 long-term career. Defendants further point to the language in the
26 Agreement that requires them to keep track of the number and
27 percentage of Hispanics admitted into the Region 5 SCEP and to
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1 recruit from that program.

2 The Monitor, however, rejected Defendants' reasons for
3 including SCEPs in the permanent workforce statistics and did not
4 include SCEPs in determining the representation of Hispanics in
5 permanent jobs. Plaintiffs urge this Court to do the same.

6 It is true that, as noted above, SCEPs were included as
7 permanent employees in the baseline percentages of the Agreement
8 and in the early monitoring reports. But, as the Monitor noted,
9 the data shows that the difference between the percentages of
10 Hispanic employees with and without SCEPs in the early monitoring
11 reports is de minimis. Furthermore, the Agreement makes clear that
12 permanent employees and SCEPs are not treated the same; they are
13 included in separate categories. The language in the Agreement
14 regarding what information needs to be in the monitoring report
15 demonstrates this: Defendants are required to collect information
16 regarding permanent employees, information regarding positions,
17 information regarding promotions, information regarding the average
18 grade of employees, and information regarding SCEPs.

19 Although the Agreement makes clear that SCEPs are not
20 permanent employees, the goal in Section IV.A.1 is "to increase
21 Hispanic representation in the Region 5 workforce"; it does not
22 specify whether this goal applies only to permanent employees.
23 Nonetheless, based on the language of the Agreement and the
24 dwindling numbers of SCEPs, the Court will not include the SCEPs in
25 the permanent workforce statistics. And Defendants' argument, that
26 even excluding the SCEPs there was a substantial increase in
27 Hispanic representation, is not persuasive: using Defendants'

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1 numbers, on December 22, 2002, the Hispanic representation was 8.9
2 percent (466/5,252) and on December 31, 2005 it increased to 9.9
3 percent (476/4829). As Plaintiffs and the Monitor note, without
4 including the SCEPs, there has been little, if any, progress toward
5 the goal of Section IV.A.1 of the Agreement.

6 ii. 2000 CLF Data

7 In Exhibit B to the Agreement, the parties agreed on the
8 percentages for each Civilian Labor Force job based on the 1990
9 Census; these percentages establish the series-specific CLF
10 workforce parity goals. The Agreement states that "Defendants
11 shall provide this information using the 1990 EEOC Civilian Labor
12 Force Data until the 2000 EEOC Civilian Labor Force Data is
13 available." HSA, § II.A.1(c). Now that the 2000 EEOC Civilian
14 Labor Force Data is available, the parties disagree over the
15 correct percentages based on the new information. As Plaintiffs
16 note, this disagreement arises because the Census Bureau made
17 numerous changes in the code numbers, labels and detailed contents
18 of its occupational categories in the 2000 Census. Although the
19 parties disagree as to how the 1990 percentages should be updated,
20 the parties agree that the GS-462 Forestry Technician job series is
21 the most important to analyze because employees in that series
22 account for approximately half of Region 5's workforce.³ The
23 agreed-upon CLF percentage for this job series based on the 1990
24 Census was 21.3 percent. Plaintiffs contend that the updated CLF

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26 ³The Monitor noted that the parties agree on the 2000 CLF
27 percentages in almost half of the thirty series listed and differed
28 by one percent or less in several others.

1 percentage is 33.8 percent; the Monitor agreed. Defendants,
2 however, contend that 15.1 percent is the correct updated
3 percentage.

4 Before addressing how the parties arrived at their differing
5 percentages, Defendants argue that the Agreement provides that
6 Defendants, not Plaintiffs, are to provide the relevant EEOC-CLF
7 data. The Agreement does state the "Defendants shall provide"
8 EEOC-CLF data. But nowhere does the Agreement provide, or even
9 suggest, that Defendants alone shall determine the appropriate 2000
10 Census revisions to Exhibit B. Although Plaintiffs do not address
11 this argument, the Monitor rejected it. The Court also rejects
12 Defendants' argument that they alone can provide the updated
13 percentages.

14 Plaintiffs hired an expert, Dr. Marc Bendick, to determine the
15 updated percentages based on the 2000 Census. To determine the
16 correct percentage for the Forestry Technician occupation group,
17 which was no longer used in the 2000 Census, Dr. Bendick used a
18 weighted average of the Hispanic representation in three occupation
19 codes: 196, Miscellaneous Life, Physical, and Social Science
20 Technicians; 612, Forest and Conversation Workers; and 21, Farmers
21 and Ranchers.

22 Defendants, however, assert that the appropriate comparison,
23 or crosswalk, as the parties call it, for the missing Forestry
24 Technician occupation group is occupation code 196, and that the
25 updated percentage should be based on that code alone. Defendants
26 contend that the EEOC affirmed their analysis; though, as the
27 Monitor noted, the EEOC provided only "general guidance" that

1 agreed with Defendants' results. After the Monitor issued her
2 report, Defendants hired an expert, Dr. Claudia A. González
3 Martínez, who agreed with Defendants that occupation code 196
4 provides the correct updated percentage. Dr. González then
5 adjusted occupation code 196 to account for citizenship and English
6 proficiency -- qualifications Defendants state are necessary to
7 work for Region 5 -- to reach Defendants' updated CLF percentage of
8 15.1 percent.

9 But, as Plaintiffs and their experts note, there are problems
10 with using only code 196. For example, Dr. Bendick asserts that
11 code 196 corresponds to only twenty-seven percent of the 1990
12 Forestry Technician occupation. Dr. Bendick notes that, given the
13 increase in the Hispanic population in Region 5, it is highly
14 improbable that the CLF workforce parity goal for the Forestry
15 Technician job series would decrease over the decade; under
16 Defendants' calculations, however, the goal drops from 21.3 percent
17 to 15.1 percent. Furthermore, there is a wide range of positions
18 in the GS-462 job series, from "paper and pencil" jobs, requiring
19 supervisory skills and possibly a college degree, to "pick and
20 shovel" jobs, requiring a high school degree and the ability to
21 move dirt, suppress fires, chop brush and maintain hiking trails.
22 Using only code 196 would ignore the diversity of GS-462 positions
23 and the fact that many position descriptions do not require
24 performing data analysis and report-writing.

25 Plaintiffs also contend that there are problems with
26 Defendants' use of English proficiency and U.S. citizenship.
27 Plaintiffs note that the parties did not agree to adjust the data
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1 to account for those two factors and that it is not clear whether
2 adjustment for language ability is appropriate in all job series.
3 They further note that SCEPs need only be lawfully admitted to the
4 United States; SCEPs need not be citizens before they convert to
5 permanent positions. Because the Court is not including SCEPs in
6 the permanent workforce statistics, however, citizenship
7 requirements for SCEPs are irrelevant; Plaintiffs point to no other
8 GS-462 position that does not require U.S. citizenship.

9 The Court finds that Plaintiffs' updated percentage is
10 preferable to Defendants'. But the Court agrees with Defendants
11 that the applicable labor pool means those individuals representing
12 the relevant civilian labor force who possess the qualifications
13 corresponding to Region 5 job series and categories. Thus, these
14 percentages must take into account citizenship and language
15 ability. Plaintiffs state that the adjustments for language
16 ability and citizenship result in inconsequential differences for
17 the central issue of the level of under-representation of
18 Hispanics. For the updated percentage for GS-462, the Court will
19 use Plaintiffs' calculation that adopt Defendants' language ability
20 and citizenship adjustments: 31.5 percent.

21 iii. Under-representation in the Region 5
22 Workforce

23 The Court finds that Hispanics continue to be under-
24 represented in the Region 5 workforce. As noted by Plaintiffs'
25 expert, Dr. Louis R. Lanier, with or without SCEPs, with or without
26 the citizenship and language ability adjustments, and using
27 Defendants' most up-to-date workforce numbers, there remains a
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1 statistically significant difference between Defendants' Hispanic
2 workforce and the Hispanic workforce as a whole.

3 b. Section IV.C

4 This section requires that "Defendants will maintain a full-
5 time Regional Recruitment Coordinator position, with the primary
6 purpose of implementing the Recruitment Program set forth in
7 Section V" and that the position will be funded at a level enabling
8 the Coordinator to accomplish the objectives of this Agreement. In
9 their motion, Defendants state that the position of the Coordinator
10 has been filled, or the duties performed, since shortly after the
11 Monitor was hired. Defendants list the five individuals who have
12 filled the position, temporarily filled the position, performed the
13 position's duties or assisted in performing the position's duties.

14 The Monitor, however, found that Defendants did not maintain a
15 full-time Coordinator, as required by the Agreement. The Monitor
16 described the multiple times she raised this issue with Defendants.
17 The Monitor also noted that she had warned Defendants that, one and
18 a half years into the Agreement, there was not a clear plan for
19 what the full-time Coordinator would be doing. While others may
20 have been performing the Coordinator's duties in the absence of a
21 full-time Coordinator, those duties were not being performed on a
22 full-time basis.

23 Defendants never state that they have had a full-time
24 Coordinator, who implemented the Recruitment Program, as required
25 by the Agreement. Instead, Defendants merely state, "There is no
26 dispute that Defendants have maintained the Regional Recruitment
27 Coordinator (RCC) Position." The Agreement, however, requires

1 more, and the Court finds that Defendants are not in substantial
2 compliance with this section.

3 c. Section IV.D

4 This section requires that Defendants make a good faith effort
5 to maintain and fill the position of Region 5 Civil Rights
6 Director, during the term of the Agreement. To show their
7 compliance, Defendants list five individuals who have held that
8 position, one of whom was the Acting Director for less than two
9 months. Defendants contend that filling a position with acting
10 directors, while a permanent director is sought, is good faith
11 compliance. Plaintiffs disagree, as did the Monitor.

12 The Monitor noted that for eleven months in 2003 and 2004
13 there were either short-term detailers or an acting director in the
14 Civil Rights Director position. The Monitor acknowledged that
15 there may be situations when a Director's duties are effectively
16 performed by various acting or detailed personnel, but found that
17 was not the case in this situation. When the first Director
18 retired, she was replaced by an Acting Director, who was unfamiliar
19 with issues involving the Agreement and retired after few months.
20 The next Acting Director left after two months. The position was
21 not filled with a permanent director until almost a year after the
22 first director retired, despite the urgent need, and repeated
23 requests by the Monitor, to fill the permanent position.

24 Good faith requires more than merely filling the position with
25 several individuals serving as Acting Civil Rights Director. The
26 Court finds that Defendants did not exercise the requisite good
27 faith and thus are not in substantial compliance with this section.

1 d. Section IV.G

2 This section requires that Defendants make a good faith effort
3 to provide sufficient resources to meet their obligations under the
4 Agreement. Defendants state that they have spent a substantial
5 amount of money implementing the Agreement. Plaintiffs do not
6 dispute that Defendants have provided sufficient resources; but
7 they argue that a good faith effort includes an obligation to
8 allocate the funding in a manner designed to meet the Agreement's
9 goals. Plaintiffs complain about the consulting firms that
10 Defendants hired to publish narrative reports not required by the
11 data-production requirements of the Agreement. But, as Defendants
12 note, the Agreement does not require Defendants to allocate
13 resources as prescribed by Plaintiffs. The Court finds that
14 Defendants are in substantial compliance with this section.

15 2. Section V

16 Although the Court determines that Defendants have not met
17 their stated goal in Section IV.A.1, the Court, as noted above,
18 cannot find Defendants in breach if they substantially complied
19 with the rest of Section IV and Section V.

20 As determined above, Defendants are not in substantial
21 compliance with Sections IV.C and IV.D; but they are in substantial
22 compliance with Sections IV.B, IV.E, IV.F and IV. G. The Court
23 will now examine whether Defendants are in substantial compliance
24 with Section V, entitled Methods of Implementation. Plaintiffs
25 contend that Defendants are not in substantial compliance with
26 Sections V.A and V.B. Plaintiffs do not dispute Defendants'
27 compliance with Section V.C.

1 a. Section V.A.

2 Plaintiffs argue that Defendants are not in substantial
3 compliance with subsections 1, 2 and 3; they do not dispute
4 Defendants' compliance with subsections 4 and 5.

5 i. Section V.A.1

6 This subsection provides, "The Regional Program includes
7 components that are designed (1) to disseminate effectively
8 information related to employment opportunities and (2) to increase
9 the diversity of the applicant pool by engaging in recruitment
10 activities, both government-wide and externally." Defendants
11 contend that they are in substantial compliance with this provision
12 because they have developed and implemented a Regional Recruitment
13 Program, which includes an Outreach and Recruitment Strategy with
14 the goal of attracting, hiring and retaining "talented employees in
15 order to sustain a skilled and diverse Regional workforce."
16 Defendants point to activities they have funded, such as hiring an
17 outside contractor to recruit for Region 5 positions and funding a
18 full-time Student Career Employment Program coordinator.

19 Plaintiffs, however, note that Section V.A.1 required
20 Defendants promptly to implement a recruitment and outreach program
21 and to ensure it is effective, but that, as the Monitor stated,
22 "That has not occurred." Monitor's Report, 37. The Outreach and
23 Recruitment Strategy was not effectively disseminated until early
24 2005. The Monitor acknowledged that Defendants were successful in
25 recruiting a diverse applicant pool for the fire apprentice hiring,
26 but found that "it was a one-time event -- not an effective
27 Regional Recruitment Program -- and it involved only entry level

1 student trainee positions." Monitor's Report, 49. Except for
2 student apprentice hiring, Defendants' data does not show that
3 Region 5 is having any success in getting a more diverse applicant
4 pool.

5 Nor do Defendants assert that their applicant pool has become
6 more diverse. Defendants again cite Donnelly, but, as noted above,
7 this case is distinguishable from Donnelly. Here, the Agreement,
8 specifically Exhibit B, provides measures to evaluate
9 effectiveness. Defendants accuse Plaintiffs of presenting no
10 evidence that information about employment opportunities is not
11 being effectively disseminated; yet, Defendants provide no evidence
12 that any of its programs are designed to, or have, increased the
13 diversity of the applicant pool.

14 Furthermore, late compliance is not substantial compliance.
15 While the Agreement did not provide a specific time table for
16 completion of tasks, Defendants cannot expect to be found in
17 substantial compliance when they have implemented measures only
18 recently and thus have been unable to determine the effectiveness
19 of these measures. Even in Donnelly, which Defendants urge this
20 Court to follow, the court extended the term of the settlement
21 agreement for an extra year due to "start-up delays." The Court
22 finds that Defendants are not in substantial compliance with this
23 provision.

24 ii. Section V.A.2

25 This subsection provides, "Region 5 will monitor all
26 recruitment and promotion actions of Forest Supervisors and
27 Regional Office Directors and all recruitment and promotion actions
28

1 taken under their supervision." Defendants state that they are
2 monitoring all the recruitment and promotion actions as required by
3 this provision. But Plaintiffs note that the form used by
4 Defendants was not even disseminated to the field until
5 February, 2005. Plaintiffs also note the Monitor's finding that
6 Defendants' belated monitoring procedures do not constitute
7 substantial compliance with this section.

8 As the Monitor found,

9 having recently implemented a policy does not address the
10 fact that, for several years, Region 5 filled positions
11 without the required monitoring of recruitment and
12 promotions. While the RRC has reviewed a small number of
13 positions under the new oversight policy, according to
14 the HSA reports, Region 5 has filled more than 4,000
positions from October, 2002, to October, 2004, all of
which were filled well before the oversight policy was
put in place. Moreover, simply having a policy in place
does not mean that the oversight is occurring or is being
done effectively.

15 Monitor's Report, 35 (inner citation omitted). The Monitor further
16 found that, while Defendants made a commitment to do monthly
17 reviews and reports, they have been unable to carry that out.

18 The Court finds that Defendants are not in substantial
19 compliance with this section.

20 iii. Section V.A.3

21 This section provides, "Defendants shall employ the Outreach
22 and Recruitment Procedures using the Employment Outreach and
23 Recruitment Documentation, attached as Exhibit C . . . in any
24 action to fill a vacancy through competitive processes for a Region
25 5 Position. Prior to the final selection for a Region 5 Position,
26 the selection certificate and supporting paperwork will be reviewed
27 by the unit Human Resource Officer." Defendants state that the

1 parties, with input from the Monitor, designed a new, more
2 effective Exhibit C. According to Defendants, they first used the
3 old Exhibit C and then used the new Exhibit C.

4 Plaintiffs do not dispute Defendants' use of Exhibit C, either
5 in its old or new form. Instead, they note that the new form
6 contains "checkpoints," or specific times during the hiring process
7 when procedures must be reviewed to determine, for example, whether
8 the applicant pool is sufficiently diverse. The checkpoints
9 require access to race and national origin data. But, as the
10 Monitor noted, until late September, 2005, the only point at which
11 Defendants had access to that data was six days prior to the
12 closing of the vacancy announcement; data on applicants who applied
13 in the last six days of the opening was not available. Because
14 Defendants could not fully evaluate the checkpoint system or the
15 revised form due to the unavailability of data, the Monitor
16 determined that Defendants were not in substantial compliance with
17 Section V.A.2. The Court agrees; as noted above, last-minute
18 compliance is not substantial compliance. The Court finds that
19 Defendants are not in substantial compliance with this section.

20 b. Section V.B

21 This section describes the duties of the Regional Recruitment
22 Coordinator: (1) coordinating outreach and recruitment; (2) being
23 knowledgeable in Region 5's hiring practices; and (3) making
24 regular presentations. The section further describes the
25 information that the Coordinator needs to be able to access.
26 Defendants state that the Coordinator is responsible for monitoring
27 Region 5's outreach and recruitment strategies and action plans and
28

1 makes presentations at Regional Leadership Team meetings, which are
2 held at least three times a year. In addition, Defendants contend
3 that the Coordinator has access to all the data listed in this
4 section.

5 Plaintiffs disagree that the Coordinator has undertaken the
6 duties described in this section or has access to the required
7 information. They quote from the Monitor's Report that, after
8 concluding that Defendants were not in substantial compliance with
9 V.B.1, stated:

10 The RRC position has not been filled on a full time
11 basis throughout the HSA and has not been funded at a
12 level enabling the incumbent to accomplish the
13 objectives of the HSA. The various individuals in the
14 RRC position have not effectively been in the role of
15 coordinating the Region's outreach and recruitment or
16 otherwise in charge of the Regional Recruitment Program.

17 Monitor's Report, 31 (emphasis in original). Plaintiffs further
18 note that some of the information required to be available to the
19 Coordinator was not accessible.

20 In response, Defendants contend that Plaintiffs failed to
21 counter their evidence that the Coordinator has carried out the
22 responsibilities outlined in this section. But Defendants did not
23 provide evidence that the Coordinator organized and oversaw
24 outreach or recruitment; nor did Defendants provide evidence that
25 the Coordinator was knowledgeable about hiring practices. Vicki
26 Johnson's declaration states, in a conclusory fashion, that the
27 Coordinator has carried out the responsibilities outlined in this
28 section, but the declaration does not specify anything that the
Coordinator organized, oversaw or coordinated. Instead, the
declaration states that the Coordinator monitored and performed a

1 full range of internal and external recruitment and placement
2 duties. In addition, the declaration is silent as to the
3 Coordinator's knowledge of hiring practices. Defendants also
4 respond that the data issues now have been resolved, so that the
5 Coordinator has access to all the required information. This is
6 not sufficient to show that Defendants are in substantial
7 compliance with this section; the Court finds that they are not.

8 B. Enforcement

9 Although Plaintiffs show that Defendants are not in
10 substantial compliance with various provisions of the Agreement,
11 Plaintiffs have not proven contempt by clear and convincing
12 evidence. The Court does not find that Defendants are in contempt,
13 but it does find that Defendants are not in substantial compliance
14 with Sections IV.B through IV.G and Section V as a whole and
15 specifically that Defendants are in breach of Sections IV.A, IV.C.
16 and IV.D. Accordingly, the Court will order further relief. As
17 noted above, the Agreement provides that if the Court finds that
18 Defendants are in breach, "the Court may order specific enforcement
19 of the provisions contained in Section IV.B. through G., additional
20 remedial measures to increase Hispanic representation subject to
21 the availability of Region 5 Positions, any alternative provision
22 agreed upon by the parties, and/or a one-time, one-year extension
23 of the Term of the Agreement." Even without this language, the
24 Court has the inherent power to enforce this Agreement. TNT
25 Marketing, Inc. v. Agresti, 796 F.2d 276, 278 (9th Cir. 1986)
26 ("district court had inherent power to enforce the agreement in
27 settlement of litigation before it").

1 The Court will enforce this Agreement; however, it will not
2 modify the Agreement. Plaintiffs argue that the Court can order
3 the relief sought through either enforcement or modification. But,
4 as both parties note, for the Court to modify this Agreement,
5 Plaintiffs must first establish a significant change, in either
6 factual conditions or in the law, requiring modification; then the
7 Court must determine whether the requested modification is
8 "suitably tailored" to resolve the issues created by the changed
9 circumstances. See Keith v. Volpe, 784 F.2d 1457, 1460 (9th Cir.
10 1986). Plaintiffs contend that the scope of Defendants' failure to
11 comply with the Agreement alone provides grounds for modification
12 as a changed circumstance. The two out-of-circuit cases they cite,
13 however, do not support that argument. As Defendants note, those
14 cases present egregious circumstances not present here. For
15 example, in Thompson v. U.S. Department Of Housing & Urban
16 Development, 404 F.3d 821, 828 (4th Cir. 2005), the court found
17 that the defendants had "done almost nothing that they were
18 required to do." (Emphasis in original.) Here, Plaintiffs do not
19 dispute that Defendants have complied with several provisions, such
20 as those dealing with training and retaining the Monitor.

21 The only changed circumstance that Plaintiffs point to is the
22 National Forest Service's consolidation of all human resources
23 personnel in Albuquerque, New Mexico. While this could classify as
24 a significant changed circumstance, the Court, as discussed below,
25 without modifying the Agreement, can order that Defendants ensure
26 that there will be sufficient human resources personnel in Region 5
27 to implement the Agreement effectively. Thus, the Court finds that
28

1 modification of the Agreement is inappropriate.

2 C. Relief

3 Pointing to the language in the Agreement that allows the
4 Court to order "additional remedial measures to increase Hispanic
5 representation," Plaintiffs request that Defendant be required to
6 implement the following measures recommended by the Monitor:

7 (1) extending the Agreement for three years; (2) contracting with
8 an effective outside recruiter; (3) establishing a fire apprentice
9 mentoring program; (4) advertising all positions as inter-
10 disciplinary and multi-grade; (5) expanding the Central California
11 Consortium; (6) creating a Selection Review position;
12 (7) establishing short-term benchmarks; (8) tracking previously
13 qualified Hispanic applicants for recruitment and outreach
14 purposes; (9) providing identifying race and national origin
15 information to hiring officials for voluntary use as a selection-
16 plus factor in job series where Hispanics are under-represented;
17 (10) retaining and providing data on the race and national origin
18 of applicants for temporary fire-related positions; and
19 (11) notwithstanding the upcoming move of Human Resource staff to
20 Albuquerque, New Mexico, retaining local human resources personnel
21 sufficient to carry out all recruitment activities related to
22 effective implementation of the Agreement. Defendants argue that
23 Plaintiffs take the "additional remedial measures" language out of
24 context and that Plaintiffs ask this Court to put into place a new
25 settlement agreement, one not bargained for by the parties.

26 1. Three-year extension of the Agreement

27 As noted above, the Agreement provides for a one-time, one-
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1 year extension to the term of the Agreement. The Monitor
2 recommended that Defendants voluntarily agree to add another two
3 years to this provision, making a three-year extension to the
4 Agreement. Defendants contend that this relief contravenes the
5 agreed upon one-year extension in the Agreement. Plaintiffs
6 contend that a two-year extension is a permissible "additional
7 remedial measure" to increase Hispanic representation. Plaintiffs
8 also argue that the Court has the power to modify the Agreement.
9 However, as noted above, the Court will not do.

10 As the Ninth Circuit has instructed, "'[T]he scope of a
11 consent decree must be discerned within its four corners, and not
12 by reference to what might satisfy the purpose of one of the
13 parties' or by what 'might have been written had the plaintiff
14 established his factual claims and legal theories in litigation.'" San Francisco NAACP v. San Francisco Unified Sch. Dist., 896 F.2d
15 412, 413 (9th Cir. 1990) (alteration in original) (quoting United
16 States v. Armour & Co., 402 U.S. 673, 682 (1971)). The parties
17 agreed to limit the extension of the Agreement to one year. Thus,
18 without modifying the Agreement, the Court can only order a one-
19 year extension of the term of the Agreement.
20

21 2. Contracting with an effective outside recruiter

22 Defendants argue that this request, which requires Defendants
23 to evaluate the effectiveness of their outside recruiter and allows
24 the Monitor to determine whether the recruitment services are
25 sufficient, contravenes the Agreement, which gives Region 5 control
26 over its Recruiting Program. But that control is found in Section
27 V.A, a section with which Defendants did not substantially comply.
28

1 The Court finds that granting this request is an appropriate
2 additional remedial measure to increase Hispanic representation.

3 3. Fire apprentice mentoring program

4 The Monitor notes that Defendants stated that they accepted
5 the Monitor's recommendation to implement an effective mentoring
6 program. Defendants have done so, revising their existing formal
7 Mentoring Program to add a component for new employees with less
8 than one year of service. Plaintiffs do not dispute that a
9 mentoring program for fire apprentices is currently in place. The
10 Court orders Defendants to continue this program.

11 4. Advertising of all positions as inter-disciplinary
12 and multi-grade

13 Plaintiffs request that Defendants be ordered to advertise all
14 positions as multi-grade, and to issue inter-disciplinary
15 announcements, in order to attract a broad applicant pool which
16 will effectuate the purposes of the Agreement. Defendants contend
17 that to do so would violate a United States Forest Service policy
18 (issued November 30, 2005), which provides that a single position
19 description can no longer be classified or advertised in broad
20 inter-disciplinary series, except in limited circumstances. Under
21 the policy, Defendants may classify and advertise a position in two
22 series if there is a logical pairing of series that directly
23 correlate to the work performed. Plaintiffs do not address this
24 policy change. The Court will not order Defendants to violate a
25 Forest Service policy: Defendants are ordered to advertise all
26 positions as multi-grade and to issue inter-disciplinary
27 announcements whenever consistent with this policy, i.e., if there
28

1 is a logical pairing of series that directly correlate to the work
2 performed.

3 5. Expanding the Central California Consortium

4 The Central California Consortium is an environmental
5 education, outreach and recruitment program for students that is
6 sponsored by the Forest Service and Region 5. Based on the success
7 of this program, the Monitor recommended that Defendants expand the
8 activities of the Central California Consortium to at least two
9 additional locations. Defendants complain that this relief
10 contravenes their control over their own recruiting program and
11 that seeking this relief contradicts Plaintiffs' exclusion of SCEP
12 positions from their analysis of Hispanic representation in the
13 workforce; the CCC only recruits SCEPs and temporary student
14 employees. Given the success of this program, the Court grants
15 this request.

16 6. Creating a selection review position

17 Plaintiffs ask the Court to order Defendants to create and
18 fund an independent selection review position to be filled by a
19 person selected by and supervised directly by the Monitor.
20 Defendants argue that this request contravenes the Agreement, which
21 provides that "Region 5 will monitor all recruitment and promotion
22 activities." HSA, § V.A.2. Region 5 may do so; this is not
23 inconsistent with additional monitoring. As the Monitor noted,
24 Defendants were backlogged on selection reviews and have determined
25 that the Coordinator does not have time to do the reviews. The
26 Monitor found that an individual responsible for independent
27 selection review will not result in Defendants ceding their hiring
28

1 authority to someone outside the department, but it will ensure
2 that there is a consistent and timely review of Defendants'
3 established procedures so barriers to increased Hispanic
4 representation can be identified and addressed. The Court grants
5 this relief.

6 7. Establishing short-term benchmarks

7 Plaintiffs request that the Court order the parties to meet
8 with the Monitor within thirty days of this order to establish
9 short-term benchmarks for progress toward the HSA goal of
10 increasing Hispanic representation in the Region 5 workforce.
11 These benchmarks would chart the employment levels of Hispanic
12 employees. Defendants claim that this relief is unconstitutional
13 because it creates a race-based classification that does not pass
14 strict scrutiny. The Court denies this request.

15 8. Tracking of previously qualified Hispanic
16 applicants for recruitment and outreach purposes

17 Plaintiffs request that the Court order Defendants to create,
18 within thirty days from this order, a database that can identify
19 previously qualified Hispanic applicants for employment in Region 5
20 who were not selected for positions, for the purpose of outreach
21 and recruitment for future available positions. The Court denies
22 this request.

23 9. Providing identifying race and national origin
24 information to hiring officials for voluntary use as
25 a selection-plus factor in job series where
26 Hispanics are under-represented

27 Plaintiffs state in their reply that they are not asking the
28 Court to order Defendants to provide identifying race and national
origin information to hiring officials or to instruct their hiring

1 officials that they may consider race and national information as a
2 "plus factor" in filling positions where Hispanics are under-
3 represented. Rather, Plaintiffs seek a determination from this
4 Court that the voluntarily use of race and national origin as a
5 "plus factor" to select among qualified applicants in under-
6 represented jobs series is constitutional. The Court will discuss
7 this below.

8 10. Retaining and providing data on the race and
9 national origin of applicants for temporary fire-
 related positions

10 Plaintiffs ask the Court to order Defendants to provide the
11 Monitor with data on the race and national origin of applicants for
12 temporary fire-related job positions. Defendants note that this
13 was not on the list of data which the Agreement required that
14 Region 5 provide; nor is a temporary fire-related position a
15 "Region 5 position," as that term is defined in the Agreement.
16 Furthermore, Defendants again contend that this request is
17 inconsistent with Plaintiffs' exclusion of SCEPs from their
18 analysis of Region 5's progress on increasing Hispanic
19 representation in the permanent workforce. But, as the Monitor
20 noted, permanent entry-level fire-related positions have
21 traditionally been filled by employees with past experience as
22 temporary employees. Thus, the Court finds that this is also an
23 appropriate remedial measure and grants this request.

24 11. Retaining human resources personnel sufficient to
25 carry out all recruitment activities related to
 effective implementation of the Agreement

26 In response to the Forest Service's consolidation of all human
27 resource positions in Albuquerque, New Mexico, as discussed above,
28

1 Plaintiffs request that the Court order that Defendants are to
2 ensure that Region 5 retains on each forest and in the Regional
3 Office of Region 5, human resources personnel sufficient to carry
4 out all recruitment activities related to the effective
5 implementation of the Agreement. Defendants contend that this
6 request is too broad; nonetheless, they note that Region 5 received
7 a waiver from the Forest Service and that the human resources
8 staffing and recruitment functions of Region 5 will only be moved
9 to Albuquerque when the Agreement ends or when the Human Resources
10 staff has demonstrated the capacity successfully to perform the
11 work required in meeting the duties and obligations of the
12 Agreement. The Court finds that Plaintiffs' request is an
13 appropriate remedial measure and that, because of the waiver,
14 Defendants will not be in violation of Forest Service directives
15 and policy on workforce planning if this request is granted.
16 Therefore, the Court grants this request and orders that, until the
17 Agreement ends, Defendants are to retain, on each forest and in the
18 Regional Office of Region 5, human resources personnel sufficient
19 to carry out all recruitment activities related to implementing the
20 Agreement and this order.

21 III. Race as a Plus Factor

22 As noted above, Plaintiffs request that the Court declare that
23 the voluntary use of race and national origin as an optional plus
24 factor, to select among qualified applicants in job series in which
25 Hispanics are under-represented, is constitutionally permissible.
26 Plaintiffs emphasize that Defendants' workforce has been
27 persistently imbalanced for over a decade; this is the second
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1 settlement agreement that has tried and failed to address the low
2 representation of Hispanics in Defendants' workforce. Plaintiffs
3 contend that, armed with such a determination from this Court,
4 Defendants could engage in voluntary, lawful and effective efforts
5 to remedy past discrimination which has resulted in long-standing
6 workforce disparities. But, Defendants have made clear that, even
7 if the Court were to make such a determination, they do not wish to
8 use race and national origin as a plus factor, and they do not
9 believe that there has been past discrimination.

10 All racial classifications imposed by the government must be
11 analyzed by a reviewing court under strict scrutiny. Grutter, 539
12 U.S. at 326. Under the strict scrutiny standard, a race-based
13 classification is permissible only if it serves a compelling
14 government interest and is narrowly tailored to meet that interest.
15 See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235
16 (1995). The Supreme Court recently instructed, "Not every decision
17 influenced by race is equally objectionable and strict scrutiny is
18 designed to provide a framework for carefully examining the
19 importance and sincerity of the reasons advanced by the
20 governmental decision maker for the use of race in the particular
21 context." Grutter, 539 U.S. at 327.

22 A. Compelling government interest

23 Both parties agree that a gross statistical disparity can
24 satisfy a prima facie standard for discrimination and form the
25 strong basis in evidence warranting affirmative action. See, e.g.,
26 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989).
27 Plaintiffs' statistics show a gross disparity in some of the job
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1 series and could justify Defendants finding that there was past
2 discrimination by the government. Cases involving affirmative
3 action contemplate a voluntary finding of past discrimination. See
4 Johnson v. Transportation Agency, 480 U.S. 616, 620 (1987)
5 (voluntary assumption by the State agency that an affirmative plan
6 was justified to "remedy the effects of past practices"). Thus, a
7 court finding of discrimination by the government is not required
8 to justify voluntary affirmative action; voluntary findings of past
9 discrimination by a government agency suffice. See id; Ho v. San
10 Francisco Unified Sch. Dist., 965 F. Supp. 1316, 1324 (N.D. Cal.
11 1997) (citing Wygant v. Jackson Board of Educ., 476 U.S. 267, 289
12 (1986) (O'Connor, J., concurring in part) ("a contemporaneous or
13 antecedent finding of past discrimination by a court or other
14 competent body is not a constitutional prerequisite to a public
15 employer's voluntary agreement to an affirmative action plan,"
16 because a constitutional violation "does not arise with the making
17 of a finding; it arises when the wrong is committed"). Even though
18 there is sufficient evidence to justify Defendants voluntarily
19 finding past discrimination in their former hiring practice,
20 Defendants, at the hearing and in their papers, deny any past
21 discriminatory practices. To support a compelling government
22 interest, there must be prior discrimination by the government;
23 findings of societal discrimination are not adequate. Id. at 490-
24 91. Plaintiffs have not attempted to prove past discrimination.
25 Because Defendants have made clear that they do not, and will not,
26 admit to past discrimination, it does not appear that the
27 government has a compelling interest in remedying it with
28

1 affirmative action.

2 B. Narrowly tailored

3 Defendants note the Supreme Court's instruction that, because
4 racial classifications "are simply too pernicious to permit any but
5 the most exact connection between justification and
6 classification," the Court must conduct "a most searching
7 examination." Gratz v. Bollinger, 539 U.S. 244, 270 (2003). The
8 Monitor conducted such an examination and concluded that the
9 optional plus factor recommendation was narrowly tailored. In
10 reaching her conclusion, she examined the necessity for relief and
11 the efficacy of alternative methods, the flexibility and duration
12 of the relief, the relationship of the numerical goals to the
13 relevant labor market and the impact of the relief on the rights of
14 third parties. She noted that Defendants had tried race-neutral
15 measures for years, with only limited success: data from the Forest
16 Service shows that Region 5 has increased its Hispanic permanent
17 employee representation by less than three percent in the past
18 fifteen years. Furthermore, the proposed affirmative action
19 measure is flexible, of limited duration and takes into account the
20 impact on others.

21 Defendants argue that the use of race as a plus factor is a
22 quota and thus impermissible. They attempt to distinguish this
23 case from Grutter by arguing that the use of race and national
24 origin as a plus factor here would result in a workforce with a
25 defined racial make-up. This argument fails. In Grutter, the
26 Supreme Court found that race was a legitimate plus factor because
27 it was used as one factor among many that the law school admissions
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1 officers took into account; it was a factor that was not the
2 "defining feature" of any particular application and its use did
3 not guarantee a student body that bore a statistical relationship
4 to the make-up of the applicant pool.

5 The proposed affirmative action here is like that allowed in
6 Grutter: it would allow race and national origin to be considered
7 "flexibly as a 'plus' factor in the context of individualized
8 consideration of each and every candidate." 539 U.S. at 335. All
9 qualified candidates would compete with other qualified candidates.
10 There would be no Hispanic quota; Plaintiffs' envisioned
11 affirmative action provides only the option of considering race and
12 national origin as a plus factor, not the obligation. The Court
13 finds that the voluntary use of race and national origin as an
14 optional plus factor to select among qualified applicants in job
15 series where Hispanics are under-represented, for the limited time
16 that the Agreement remains in effect, like the use of race as a
17 plus factor in Grutter, would be narrowly tailored.

18 C. Strict scrutiny

19 Because it appears that there is not a compelling government
20 interest, the Court denies Plaintiffs' request that it declare
21 that, in this situation, the voluntary use of race and national
22 origin as an optional plus factor, to select among qualified
23 applicants in job series in which Hispanics are under-represented,
24 is constitutionally permissible.

25 CONCLUSION

26 For the foregoing reasons, the Court DENIES Defendants' Motion
27 For Entry of Order That Defendants Have Discharged Their

Obligations Under the Settlement Agreement (Docket No. 94). The Court GRANTS IN PART Plaintiffs' Motion For Contempt and Enforcement of Court-Approved Settlement Agreement (Docket No. 107) and DENIES it IN PART. Specifically, the Court finds that, while Defendants are not in contempt, they are in breach of Sections IV.A.1, IV.C and IV.D of the Agreement. The Court will enforce the Agreement. The Court extends the term of the Agreement by one year. The Court further orders, as remedial measures to increase the representation of Hispanics, that:

Defendants contract with an effective outside recruiter; in order to do this, Defendants and the Monitor shall evaluate the effectiveness of Defendants' recently hired outside recruiter, Baitz.com;

Defendants continue their fire apprentice mentoring program;

Defendants advertise all positions as multi-grade and issue inter-disciplinary announcements whenever possible, i.e., if there is a logical pairing of series that directly correlate to the work performed;

Defendants expand the activities of the Central California Consortium to at least two additional locations;

Defendants create and fund an independent selection review position; the individual who fills that position will be selected by and supervised directly by the Monitor;

Defendants retain and provide data on the race and national origin of applicants for temporary fire-related positions; and

Defendants retain, until the Agreement ends, human resources personnel, sufficient to carry out all recruitment activities

1 related to implementing the Agreement and this order, on each
2 forest and in the Regional Office of Region 5.

3 In addition, because the parties were unable to agree on a
4 reporting and enforcement procedure for the remainder of the
5 Agreement period, the Court directs the Monitor to propose a
6 reporting and enforcement procedure and submit it to the Court,
7 within twenty-one days from this order, for consideration.

8 IT IS SO ORDERED.

9
10 Dated: 3/30/06



CLAUDIA WILKEN
United States District Judge