

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-and-

MEMORANDUM & ORDER

07-CV-2067 (NGG) (RLM)

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*,

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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NICHOLAS G. GARAUFIS, United States District Judge.

This Memorandum and Order explains the court's intention to impose the Draft Remedial Order, Permanent Injunction and Order Appointing Court Monitor attached as an Exhibit ("Draft Remedial Order"), notifies the parties of the provisions of the Draft Remedial Order relating to the appointment of a Court Monitor and offers them the opportunity to comment pursuant to Federal Rule of Civil Procedure 53(b)(1), and directs the parties to appear for a conference to

schedule a Fairness Hearing at which the court will consider the objections to the Draft Remedial Order presented by interested non-parties pursuant to 42 U.S.C. § 2000e-2(n)(1).

I. BACKGROUND

The United States Department of Justice began this litigation on May 21, 2007, when it filed a complaint alleging that the City of New York's pass/fail and rank-order uses of written examinations 7029 and 2043 to hire entry-level firefighters had an unlawful disparate impact on black and Hispanic applicants. (USA Compl. (Docket Entry # 1).) But this lawsuit is only the most recent effort in what amounts to a nearly forty-year struggle to integrate the Fire Department of the City of New York ("FDNY"). While the City's other uniformed services and fire departments across the country have changed to reflect the communities they serve,¹ employment as a New York City firefighter—arguably "the best job in the world"²—has remained a stubborn bastion of white male privilege.

The evidence in this case has established that the FDNY has not remained segregated-in-fact for over forty years by accident. In its opinions and findings of fact in this case, the court has extensively detailed how policies, procedures, and practices adopted by the City of New York are responsible for systematically excluding black and Hispanic firefighter candidates from the ranks of the FDNY. The result of these actions—deliberately undertaken by the City of New York despite its officials' knowledge of their discriminatory effects—has been exactly the kind of systematic employment discrimination Congress intended to eradicate and prevent when it passed Title VII of the Civil Rights Act of 1964. That this discrimination has been allowed to persist in New York City for so long is a shameful blight on the records of the six mayors of this

¹ See Disparate Impact Op. (Docket Entry # 294) at 2 n.5.

² See FDNY, Current Opportunities, http://www.nyc.gov/html/fdny/html/community/employment_index.shtml (last visited Sept. 28, 2011).

City who failed to take responsibility for doing what was necessary to end it. (See Disparate Treatment Op. (Docket Entry # 385) at 51.)

In the court's Disparate Impact Opinion, the court found that the City of New York's pass/fail and rank-order uses of Exam 7029 and Exam 2043 to hire entry-level firefighters had a disparate impact on black and Hispanic firefighter candidates. (Disparate Impact Op. (Docket Entry # 294) at 16-23, 91-92.) Describing the process the City used to create the tests, the court found that the City was unable to establish that the gross disparities created by the City's uses of these two examinations were justified by business necessity. (*Id.* at 35-37, 92.)

In the court's subsequent Disparate Treatment Opinion the court found that Plaintiff-Intervenors had established that the City of New York's repeated and knowing use of discriminatory testing procedures constituted a pattern and practice of intentional discrimination against black firefighter candidates. (Disparate Treatment Op. at 28-33.) In that Opinion the court noted the undisputed statistical evidence of adverse impact on black firefighter candidates who took Exams 7029 and 2043, and recounted the numerous times the City has been sued for the same basic failure to design and administer civil service examinations that are job-related and do not have a disparate impact upon minority groups.

In its Disparate Treatment Opinion, the court concluded that the City's pattern and practice of discrimination against black firefighter applicants caused the disproportionate underrepresentation of blacks in the FDNY, and that the underrepresentation of blacks in the FDNY is a vestige of that discrimination:

Together, [*Vulcan Soc'y of New York City Fire Dep't, Inc. v. Civil Serv. Comm'n*, 360 F. Supp. 1265 (S.D.N.Y. 1973) *aff'd* in relevant part by 490 F.2d 387 (2d Cir. 1973)], [*Guardians Ass'n of the New York City Police Dep't, Inc. v. Civil Serv. Comm'n*, 630 F.2d 79 (2d Cir. 1980)], and this court's Disparate Impact Opinion demonstrate that the City's use of discriminatory testing procedures to select uniformed service-members is a decades-old problem. The

historical data amassed by the Intervenor shows that blacks have been consistently and drastically underrepresented in the FDNY relative to their representation in the City population; that blacks have been underrepresented in the FDNY relative to their representation in the fire departments of other large cities; and that blacks have been underrepresented in the FDNY relative to their representation in New York's other uniformed-services agencies."

(Id. at 31.) The court further explained:

The disparate impact of the City's hiring policies is reflected in the FDNY's racial composition. When this litigation commenced in 2007, blacks constituted 3.4% of the firefighter force. During the period 2006-2008, blacks constituted 25.1% of the City population. As stated above, this disparity is highly probative of discrimination because, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." Teamsters [v. United States], 431 U.S. [324,] 340 n.20 [(1977)].

(Id. at 49.)

Following the court's Disparate Impact and Disparate Treatment Opinions, the court held a hearing to inquire into the validity of the City's most recent examination for entry-level firefighters, Exam 6019, which had been administered in January 2007, not long before this litigation began. In the court's Exam 6019 Validity Opinion, the court concluded that Exam 6019 suffered from the same flaws that crippled Exams 7029 and 2043, even though Exam 6019 had been developed *after* the U.S. EEOC found reasonable cause to believe that the City's uses of Exams 7029 and 2043 violated Title VII. (Exam 6019 Validity Op. (Docket Entry # 505) at 1-5, 37.) In the court's Exam 6019 Validity Opinion the court found, as it had in its Disparate Impact Opinion, and as Judge Weinfeld found before that in his 1973 opinion in Vulcan Soc'y of New York City Fire Dep't, Inc. v. Civil Serv. Comm'n of the City of New York, 360 F. Supp. 1265, 1269 (S.D.N.Y. 1973), that the City's uses of a civil service test to hire entry-level firefighters had a disparate impact on black and Hispanic test takers, and that the City's uses of the test were not justified by business necessity.

The court's Disparate Impact Opinion and Exam 6019 Validity Opinion established that the City's last three firefighter examinations had an un-justifiable disparate impact on black and Hispanic firefighter candidates. The court's Disparate Treatment Opinion established that the underrepresentation of blacks in the ranks of New York City firefighters is a vestige of the City's discrimination against black firefighter candidates. But the scope and nature of the court's prospective remedy for these violations remained in dispute. In August 2011 the court conducted a remedial-phase bench trial seeking answers to two basic questions regarding prospective injunctive relief:

- (1) What relief is necessary to ensure that the City will not—yet again—violate the requirements of Title VII of the Civil Rights Act of 1964 and other applicable equal employment opportunity laws?
- (2) What relief is necessary to eliminate the primary vestige of the City's intentional discrimination against black firefighter candidates—the underrepresentation of blacks in the ranks of the City's firefighters?

Drawing on the factual record created through four years of litigation, and supplemented by the court's Findings of Fact from the August 2011 bench trial (Findings of Fact as to Injunctive Relief (Docket Entry # 741) ("Findings of Fact")), this Memorandum and Order explains the scope and nature of the prospective relief the court currently intends to impose on the City of New York through the Draft Remedial Order attached as Exhibit A. Furthermore, the court offers the parties the opportunity to be heard regarding the court's intent to appoint a Court Monitor to oversee the City's compliance with its orders, and orders the parties to attend a status conference to plan a Fairness Hearing to allow non-parties to the litigation to object to the Draft Remedial Order.

II. LEGAL STANDARD

Congress enacted Title VII of the Civil Rights Act of 1964 "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which

have fostered racially stratified job environments to the disadvantage of minority citizens.”

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). In order to meet this sweeping mandate, “Congress deliberately gave the district courts broad authority under Title VII to fashion the most complete relief possible.” Local 28 of Sheet Metal Workers’ Int’l Ass’n v. EEOC, 478 U.S. 421, 465 (1986); see also Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (Once a district court has found a violation of federal law, the scope of its “equitable power to remedy past wrongs is broad”).

Once liability for racial discrimination has been established, a district court “has not merely the power but the duty” to “bar like discrimination in the future.” Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)). “Compliance relief is designed to erase the discriminatory effect of the challenged practice and to assure compliance with Title VII in the future.” Berkman v. City of New York, 705 F.2d 584, 595-96 (2d Cir. 1983). In the context of discriminatory testing regimes, such relief involves “restricting the use of an invalid exam, specifying procedures and standards for a new valid selection procedure, and authorizing interim hiring that does not have a disparate racial impact.” Guardians Ass’n of New York City Police Dep’t, Inc. v. Civil Service Comm’n, 630 F.2d 79, 108 (2d Cir. 1980). According to the Second Circuit, where a court determines that the use of a written examination violates Title VII, it is “obviously appropriate to bar its continued use, except on an interim basis with adjustments that eliminate its disparate racial impact and thereby avoid its unlawful effect.” Id. at 91.

But the court’s remedial powers are not limited to simply enjoining an employer from using discriminatory tests in making hiring decisions. “In some instances [], it may be necessary to require the employer or union to take affirmative steps to end discrimination effectively to

enforce Title VII. Where an employer or union has engaged in particularly longstanding or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation.” Local 28 of Sheet Metal Workers Int’l Ass’n, 478 U.S. 421, 448 (1986). “Further, even where the employer or union formally ceases to engage in discrimination, informal mechanisms may obstruct equal employment opportunities.” Id. at 449. “Affirmative relief is that designed principally to remedy the effects of discrimination that may not be cured by the granting of compliance or compensatory relief. . . . Such relief may be required where, for example, the defendant has intentionally or egregiously engaged in a practice of discrimination that is likely to have discouraged members of the protected group from becoming members of the applicant pool at any stage.” Berkman, 705 F.2d at 596. “Affirmative relief is normally justified only if the defendant's discrimination has been intentional, or there has been a long-continued pattern of egregious discrimination.” Id. (internal citation omitted).

At the same time, principles of federalism compel a “proper respect for the integrity and function of local government institutions” in imposing a remedy—“local authorities have the ‘primary responsibility for elucidating, assessing and solving’ the problems of desegregation.” Missouri v. Jenkins, 495 U.S. 33, 51 (1990) (quoting Brown v. Bd. of Educ., 349 U.S. 294, 299 (1955)). Such respect does not, however, “require a court to adopt wholesale the local government’s choice of remedies.” United States v. Yonkers Bd. of Educ., 29 F.3d 40, 43 (1994) (“Yonkers”). “A district court that finds that a local government entity that has committed a violation of the Constitution must provide the local government a reasonable opportunity to remedy a constitutional deficiency, imposing upon it a court-devised solution only if the state plan proves to be unfeasible or inadequate for the purpose.” Schwartz v. Dolan, 86

F.3d 315, 319 (2d Cir. 1996) (quotation omitted). “The district court has not only the power but the duty to ensure that the defendant's proposal represents the most effective means of achieving desegregation.” Yonkers, 29 F.3d at 43.

III. DISCUSSION

A. The Probability of the City’s Prospective Compliance

The court does not approach its task of fashioning a remedy in this case blind to the fact that it is not the first court to attempt to integrate the FDNY by judicial decree. In the Disparate Treatment Opinion, the court noted Judge Weinfeld’s 1973 ruling provided the context for this case:

The history of the City’s efforts to remedy its discriminatory firefighter hiring policies can be summarized as follows: 34 years of intransigence and deliberate indifference, bookended by identical judicial declarations that the City’s hiring policies are illegal. . . . In the interim, the City cycled through six mayoral administrations and ten fire commissioners. The percentage of black firefighters in the FDNY, meanwhile, held steady at around 3%. In 2001, the FDNY had almost half as many black firefighters as it did in 1965, one year after the passage of Title VII.

(Disparate Treatment Op. at 51.)

Though the City’s use of discriminatory hiring practices has persisted through numerous changes in City leadership, the evidence adduced in this case gives the court little hope that Mayor Michael R. Bloomberg or any of his senior leadership has any intention of stepping up to the task of ending discrimination at the FDNY. The Disparate Treatment Opinion details how the City’s current leaders have consistently failed to take responsibility for ensuring that the City’s firefighter hiring practices comply with federal, state, and City equal employment opportunity laws and policies. (Disparate Treatment Op. at 32, 54-61.) Despite the efforts of members of the Vulcan Society, politicians at all levels of government, the U.S. EEOC, and some City officials and agencies to constructively discuss clear evidence that the City’s hiring

practices were discriminatory with Mayor Bloomberg and the City's last two fire commissioners, the City did nothing. (*Id.*) Indeed, for only the second time in the City's history, when the City's independent Equal Employment Practices Commission ("EEPC") advised Mayor Bloomberg that the FDNY had failed to comply with its obligation under the Mayor's own Citywide EEO Policy to *study* the FDNY's hiring practices for the possibility of adverse impact, Mayor Bloomberg rejected the EEPC's recommendation, tersely stating that he was satisfied with the FDNY's compliance efforts. (*Id.* at 56.)

The following summary highlights the repeated attempts of numerous City officials and institutions to persuade Mayor Bloomberg and his Administration to take action on the City's use of discriminatory hiring procedures to hire entry-level firefighters:

- Equal Employment Practices Commission

The Equal Employment Practices Commission ("EEPC") is an independent, non-mayoral entity charged with monitoring the compliance of City agencies with the City's EEO policies. (Pl.-Int. Rule 56.1 Statement (Docket Entry # 344) ¶ 64-65.) Beginning in 1999,³ the EEPC conducted an audit of Firefighter Exam 7029, the preliminary results of the which "showed that the pass rate of whites was 91.6%, while the pass rate of blacks was only 61%." (*Id.* ¶ 75.) In May 2000, the EEPC notified the FDNY of this issue (*id.*), but despite the EEPC's efforts over multiple years, neither the FDNY nor the Mayor took action to so much as *investigate* the potential disparate impact of the exam. As the court discussed in Disparate Treatment Opinion:

Over the next two years, the EEPC continually asked the FDNY to conduct a study on the adverse impact of the written examination, and reminded the Commissioner that he had a legal duty under the City's Equal Employment Opportunity Policy ("EEO Policy") to examine the FDNY's hiring practices for possible discriminatory impacts. Each time, the

³ Although the court discusses the City's response to the 1999-2000 audit conducted by the EEPC here, the record in this case contains evidence of additional EEPC efforts to collect information about the FDNY's non-compliance with EEO policy and make recommendations to remedy this failure that date back to at least 1994. (See Pl.-Int. Rule 56.1 Statement ¶¶ 69-96.)

FDNY . . . either refused to conduct the study outright or claimed that it was taking the EEPD's suggestion under consideration. In the spring of 2003, the EEPD finally issued a report concerning the FDNY's failures directly to Mayor Bloomberg, a measure it had only had to resort to twice before over the course of approximately 200 agency audits. This report recounted the history of the EEPD's audit, including its statistical findings of disparate pass rates between white and black candidates, and documented the FDNY's failure and refusal to implement various corrective measures aimed at bringing it into compliance with the City's EEO policy. In October 2003, Mayor Bloomberg responded in a two-paragraph letter that he was satisfied with the FDNY's compliance efforts.

(Disparate Treatment Op. at 55-56; see also Bloomberg Letter (Ex. Z to Decl. of Richard Levy (Docket Entry # 345).) Ignoring the FDNY's utter failure to comply with EEO policy and implement necessary changes, Mayor Bloomberg simply stated, "I am satisfied that the Fire Department has adequately addressed the points raised in the EEPD's report." (Bloomberg Letter at 1.)

- Public Advocate

On May 3, 2001, then-New York City Public Advocate Mark Green sent a letter to the Deputy Mayor and the Fire Commissioner, urging them to address the "long and unacceptable history of de facto and formal segregation of one of the City's largest and most vital uniformed services." (Green Letter (Ex. B to Decl. of Richard Levy); see also Pl.-Int. Rule 56.1 Statement ¶ 20.) This letter compared the representation of blacks and Hispanics in the Fire Department to the representation of blacks and Hispanics in the New York City Police Department, the Sanitation Department, and the Correction Department.⁴ The Public Advocate noted that "the

⁴ The Public Advocate's letter included the following table:

Department	Blacks (%)	Latinos (%)
Fire Department	3.8	3.2
Police Department	16.6	18.0
Sanitation Department	24.3	14.6
Correction Department	61.4	18.0

(Green Letter at 1; see also Pl.-Int. Rule 56.1 Statement ¶ 20.) As the court noted in its Disparate Treatment Opinion, this table reveals a stark contrast in the representation of minorities in the Fire Department versus other uniformed services, and that relative to the FDNY "the proportional representation of blacks was over four times greater in the New York City Police Department ("NYPD"), over six times greater in the Sanitation Department, and over 16 times greater in the Correction Department. (Disparate Treatment Op. at 18 n.12.)

firefighter force is the least diverse ethnically [and] racially . . . of all the uniformed services in the City.” (Green Letter at 1.) Furthermore, the Public Advocate compared the FDNY to fire departments in other major cities, whose efforts have resulted in significantly more diversity in their ranks, and urged the City to take proactive steps toward reform.⁵ (*Id.* at 1-4 (“New York City must do a better job recruiting and hiring African Americans, Latinos, and women as firefighters.”).)

- City Council Members and Other Officials and Concerned Citizens

Additionally, multiple high-ranking government officials have written to Mayor Bloomberg expressing their concerns about the lack of racial minorities in the FDNY and the potentially discriminatory nature of the firefighter testing and hiring procedures. (*See* Affidavit of Paul Washington (“Washington Aff.”) (Docket Entry # 125) Exs. 18, 20, 21, 22; *see also* Disparate Treatment Op. at 56 n.30.) On February 24, 2005, then-City Council Member Yvette D. Clarke⁶ wrote a six-page letter to Mayor Bloomberg in her capacity as the Chair of the Committee on Fire & Criminal Justice Services.⁷ (Clarke Letter (Ex. 18 to Washington Aff.).) This letter, written after two years of attempting to “engage the FDNY in a dialogue on

⁵ The letter included the following table, comparing the percentage of blacks and Hispanics in the FDNY with the percentages in fire departments in other cities with populations of over one million:

City	Black Population (% of total population)	Black Firefighters (% of force)	Ratio of Black Representation in Municipal Fire Department to Black Representation in Municipal Population
Los Angeles	11.2	14.0	1.25
San Antonio	6.8	7.0	1.01
San Diego	7.9	7.7	0.97
Dallas	25.9	18.1	0.70
Houston	25.3	17.1	0.68
Philadelphia	43.2	26.3	0.61
Chicago	36.8	20.4	0.55
New York	26.6	2.9	0.11

(Green Letter at 2.)

⁶ Clarke is now a United States Congressional Representative.

⁷ On the same day, then-Council Member Clarke also wrote a letter to then-Fire Commissioner Scoppetta expressing her dissatisfaction with the Fire Department’s lack of progress with regard to firefighter diversity. (Ex. 19 to Washington Aff.)

diversity,” detailed the Committee’s concern with the underrepresentation of minorities and women in the Fire Department’s ranks and the “level of effort made” to remedy the situation. (*Id.* at 1-2 (“After two years of discussing this issue. . . I am frustrated by the lack of sincere, demonstrative and proactive effort by the FDNY.”).) The Committee’s letter also made recommendations designed to help remedy this problem, including restoring the Fire Cadet Program, properly funding the Department’s diversity initiatives, and reforming several aspects of the testing and selection process. (*Id.* at 2-4.) Nonetheless, in the absence of court supervision, Mayor Bloomberg failed to direct the Fire Department to implement any of these recommendations or take any other responsive action.

Mayor Bloomberg received similar letters from multiple other officials and community leaders, including United States Congressional Representatives Charles B. Rangel (Ex. 22 to Washington Aff.) and Gregory W. Meeks (Exs. 20, 21 to Washington Aff.), as well as City Council Members Charles Barron and Miguel Martinez, the Reverend Al Sharpton, and then-State Senator David Patterson (Ex. 20 to Washington Aff.). Additionally, members of the Vulcan Society met with the Mayor in 2002 and 2006, further alerting him to the discriminatory effects of the Fire Department’s hiring policies. (Disparate Treatment Op. at 56 n.30 (citing Washington Aff. ¶¶ 19, 27-28).)

The clear evidence of disparate impact that Mayor Bloomberg and his senior leadership chose to ignore was obvious to anyone else who looked. Instead of facing hard facts and asking hard questions about the City’s abysmal track record of hiring black and Hispanic firefighters, the Bloomberg Administration dug in and fought back. The only reason that the court today considers how to end the City’s discriminatory hiring practices and eliminate their lasting effects is that a coalition of black New York City firefighters and President George W. Bush’s attorney

general, Alberto Gonzalez, decided their only recourse was to sue the City of New York to make it stop.

Today—four years of litigation and two adverse liability rulings later—the City still doesn’t get it. In testimony and depositions in this case, the City’s senior leaders have routinely denied that they are responsible for doing anything to remedy nearly forty years of discrimination. Throughout this litigation City officials have routinely disclaimed accountability for the City’s failures, shifting blame to offices, bureaus, divisions, and departments that lie outside the scope of their narrow parochial concerns. Examples of the City’s culture of bureaucratic blame-shifting in this case are legion. They include former Fire Commissioner Von Essen’s assertion to the City’s EEPc in September 2000 that the EEPc’s recommendation that the FDNY conduct a disparate impact study of its written examination was “Not Applicable” to the FDNY, because it was the Department of Citywide Administrative Services’ (“DCAS”) responsibility to perform an exam validation study. (See Fraenkel Decl. (Docket Entry # 321) Ex. 3 (“EEPC Audit Report”) at EEPc 0388.) The EEPc’s response to Commissioner Von Essen noted that the FDNY’s response was contradicted by the City’s own EEO Policy. (EEPC Audit Report at EEPc 0393.)

Examples also appear in the City’s litigation conduct. In one particularly revealing example, the City’s Office of Corporation Counsel responded to Magistrate Judge Mann’s order to show cause (see Docket Entry ## 132, 137) why sanctions should not be imposed for what the court would later call the City’s “chronic—now bordering on recalcitrant” discovery violations (see First Special Master Appointment Order (Docket Entry # 441) at 2). In its letter explaining the Office of Corporation Counsel’s efforts to obtain responsive documents from document

custodians in DCAS, Corporation Counsel included the text of two emails sent by DCAS's

Deputy General Counsel to DCAS employees:

Tom and Matt, you are going to be deposed next week. If, during those depositions, DOJ learns that there are more documents which were not supplied, the consequences could be serious, such as motions for contempt of court.

I'm not sure of how many other ways to say this: DOJ and Federal Court are not the Civil Service Commission, or the City Council, or even State court. They are mean SOB's.

(NYC Response to OSC (Docket Entry # 139) at 2-3.) An earlier email conveyed the same point:

We are not dealing here with a schlock law firm in State court. This is DOJ and Federal Court. There are very, very serious consequences for not turning over documents which are responsive and, I believe (but I will check), there are serious consequences even if the failure to supply a document was purely unintentional.

(Id. at 3-4.) Putting to one side the implication that DCAS employees are less careful in meeting their discovery obligations in connection with state court proceedings than those in federal court, the fact that the City's own in-house counsel cannot secure the City's compliance with its legal obligations without threats of federal court enforcement speaks volumes about the magnitude of the task the court faces in securing the City's compliance with the equal employment opportunity laws and the court's remedial orders. Unfortunately, even threats were not enough. *Two years later* the City's lawyers were still "discovering" thousands of documents it had been obligated to produce under the very discovery orders at issue in the City's response to Judge Mann's April 29, 2008 Order to Show Cause. (See April 29, 2010, Order to Show Cause for Discovery Sanctions (Docket Entry # 426) at 2-3; First Special Master Appointment Order at 5-7.)

The blame-shifting and accountability-avoidance that goes on at the highest levels of the City's leadership was on full display at the remedial-phase bench trial. Commissioner Cassano was asked whether he thought that the fact blacks *still* only represent 3% of firefighters was a

problem, especially because blacks had comprised just 3% of firefighters for nine years since the EEOC charges of discrimination that culminated in this lawsuit, and nearly forty years since Judge Weinfeld's ruling. (Injunctive Relief Bench Trial Tr. at 873:13- 874:8.) Cassano replied "[w]ell, all we can do as a department is recruit as many minority candidates as we can. . . . That's the Fire Department's involvement in the process." (*Id.*) Commissioner Cassano's testimony also showed that the City's bureaucratic boundaries, while open for inter-departmental finger-pointing, block positive reforms. When asked whether he was aware of the fact that over 50% of the NYPD's police officers are black or Hispanic, in contrast with the FDNY's firefighters, Cassano replied: "I'm not aware of it, but I don't see what the difference is. I run the Fire Department, not the Police Department." (Injunctive Relief Bench Trial Tr. at 876:9-877:3.)

Even if the court were to take seriously the proposition that the internal division of responsibilities between the City's bureaucratic fiefdoms shields senior City officials from any accountability for the City's duty to comply with the law, a reasonable person might expect to find a high-ranking official atop the City's hierarchy who bears ultimate responsibility for the actions of the subordinates he employs to carry out his orders. Indeed, both the current and most recent City EEO Policies do exactly that. The City EEO Policy issued by Mayor Bloomberg in 2005 provided that: "Each agency head will ensure that his or her agency does not discriminate against employees or applicants for employment as prohibited by federal, state and local laws. Agency heads are accountable to their respective Deputy Mayors⁸ for their agencies' EEO practices." (Injunctive Relief Bench Trial Tr. at 776:23-777:18, Def. Ex. 19 ("2005 NYC EEO

⁸ According to the New York City Charter, the City's Deputy Mayors serve at the pleasure of the Mayor: "The mayor shall appoint one or more deputy mayors with such duties and responsibilities as the mayor determines." N.Y.C. Charter § 7.

Policy”) at 17.) The City EEO Policy in effect from 1996 to 2005⁹ included similar language, but also explicitly provided that: “The Mayor of the City of New York has ultimate responsibility for ensuring that the EEO laws are being adhered to and that the appropriate EEO policies are developed and enforced.” (See Fraenkel Decl. (Docket Entry ## 321, 322), Ex. 5 (“Bloomberg Dep.”) at 56:5-24; Levy Decl. (Docket Entry # 345) Ex. F (“1996 NYC EEO Policy”) at 17.)

Nonetheless, if this litigation has proven anything, it is that it is folly to expect any official of the City of New York to accept accountability for seeing that the equal employment opportunity laws are followed. In deposition testimony, Mayor Bloomberg denied even knowing what it means to be “responsible”:

LEVY: Do you consider yourself responsible for seeing that EEO laws and policies are followed?

BLOOMBERG: You just asked that question. I don’t know what the word “responsibility” is and I can’t answer your question.

LEVY: Well do you consider yourself responsible in any sense?

BLOOMBERG: I don’t know what the word “responsible” is, counsel.

LEVY: Did you ever hear the phrase “The buck stops with me,” or “The buck stops with him”?

BLOOMBERG: I have heard that.

LEVY: Does that refer to you?

BLOOMBERG: I have heard that.

⁹ The City EEO Policy issued by Mayor Giuliani in 1996 (see Levy Decl. (Docket Entry # 345) Ex. F (“1996 NYC EEO Policy”) at 17), remained in effect until 2005 when Mayor Bloomberg replaced it with a new policy (see 2005 NYC EEO Policy at 1 (“This Policy and the EEO Policy Handbook replace the previous Equal Employment Opportunity Policy of the City of New York (1996).”).

(Bloomberg Dep. at 59:2-18.) In his deposition testimony Mayor Bloomberg claimed to be unable to recall the City's EEO Policies—including the one he issued. (Bloomberg Dep. at 50:2-56:4.)

Commissioner Cassano's statement that "all we can do as a department is recruit as many minority candidates as we can" reveals a deeper truth about the City's response to this litigation. Though the evidence in this case has established that the City's discrimination against black firefighter candidates is historic, in both duration and magnitude, the City is determined to change as little as possible. In the face of dramatic disparities in the FDNY, Commissioner Cassano's testimony remained self-congratulatory: He testified that he saw no need for injunctive relief—and even more remarkably no need for any improvements at all—in connection with the Department's recruitment efforts (Injunctive Relief Bench Trial Tr. at 852:6, 857:20 ("I think we are doing a very good job"), 858:13-14); the PRB review process (*id.* at 860:3-10 ("It's an extremely fair process, non-discriminatory"), 863:20-21); the Department's record-keeping and transparency (*id.* at 862:15-21, 864:3-7); the EEO office (*id.* at 865:3-11 (stating that he is "actively involved in [the work of the EEO office], and I'm certainly doing a good job")); or the Department's diversity initiatives overall (*id.* at 876:16-21 (stating that he is "extremely satisfied"))).

The one area in which the City has been willing to admit any fault is its failure to adequately recruit black and Hispanic firefighter candidates. With respect to recruiting at least, the City has made significant improvements. But if left to its own devices, the court has no doubt that the City's solution to the underrepresentation of black and Hispanic firefighters caused by the City's use of discriminatory testing procedures would be to recruit as many black and Hispanic firefighter candidates as possible and subject them to a hiring process that has been

proven to systematically—and illegally—exclude blacks and Hispanics at rates much higher than whites. Enhanced recruitment will simply not adequately address the deficiencies the court has found in the City’s hiring process. See Yonkers, 29 F.3d at 43 (“The district court has not only the power but the duty to ensure that the defendant’s proposal represents the most effective means of achieving desegregation.”).

This litigation could have turned out much differently. Had the City’s leadership shown the least bit of concern for the effect of the court’s liability rulings, had the City demonstrated by word and deed an intention to use this litigation as an opportunity to reconsider and reevaluate hiring practices and procedures that have illegally excluded black and Hispanic firefighter candidates for nearly forty years, this would be a much different order. Instead, the court’s assessment of the evidence, including the testimony of senior City officials, reveals a pervasive disregard—an absolute rejection—of the court’s conclusions. Lacking from the City’s response to this litigation is an attitude of voluntary compliance and any indication that its leaders have the will to carry out a program of reform to prevent future violations of the equal employment opportunity laws at the New York City Fire Department.

At trial, the City argued that court intervention is unnecessary because the City has policies, procedures, and institutions erected independent of this litigation to prevent this discrimination from recurring. The City is correct—on paper the City has an exceptional commitment to equal employment opportunity. But as detailed in the court’s Findings of Fact, in practice the City’s institutions lack the capacity to ensure the City’s compliance with applicable equal employment opportunity laws. The court’s Disparate Treatment Opinion describes how Mayor Bloomberg and his Fire Commissioners ignored warnings from the City’s own institutions like the Office of the Public Advocate and the EEPD, from the Mayor’s own officials

in DCAS, and ignored the mandates of the City's EEO Policy in refusing to act on clear evidence that the City's written firefighter examinations disproportionately disadvantaged black and Hispanic firefighters. Time after time, City officials denied accountability and blamed someone else. Time after time, institutions created to prevent lawsuits just like this one were ignored and their effectiveness compromised by the City's leaders.

Not even the threat of court action has been enough to cause the City to reevaluate how it fulfills the mandates of the equal employment opportunity laws. In the court's Findings of Fact the court examined the FDNY's EEO Office—the office responsible under the City's own EEO Policy for ensuring the FDNY's compliance with applicable equal employment opportunity laws. The court found that even after the court's finding of disparate impact and disparate treatment discrimination, the City allowed a hiring freeze to hollow out the FDNY's EEO Office, depriving it of the resources to conduct all but the most perfunctory of investigations and limiting its role to little more than customer service for dissatisfied employees. Today the FDNY's EEO Office stands as little more than a bureaucratic Potemkin village, pointed out to casual observers as evidence of the City's commitment to comply with the equal employment opportunity laws. But behind the name and its prominent position on the FDNY's Organizational Chart, it is an office hobbled by a chronic lack of resources and policies and practices that prevent it from effectively carrying out its assigned role.

The record developed in this case, viewed against the backdrop of a nearly identical liability ruling almost forty years ago and the failed remedial order that followed it, makes abundantly clear that the City will not comply with its obligations under the applicable equal employment opportunity laws and this court's orders without close and continuing court supervision. The court notes that this conclusion is as applicable to the remedy for the City's

violation of the disparate impact provisions of Title VII as it is to the remedy for the City's intentional discrimination against black firefighter candidates. Regrettably, Counsel for the United States declined to actively participate in the remedial-phase bench trial because the United States did not believe the evidence presented in that proceeding to be relevant to the injunctive relief the court would impose for the City's violations of Title VII's disparate impact provisions. On the contrary, much of the evidence presented in that proceeding demonstrated that the City is incapable of assuring the court that it will henceforth comply with applicable equal employment opportunity law, much less the court's orders. The court's findings as to the need for injunctive and monitoring relief to prevent the City from committing further violations of the equal employment opportunity laws are as applicable to the City's violations of the disparate impact provisions of Title VII as they are to the need to prevent further acts of intentional discrimination by the City.

B. The Relief Required

1. General Purpose of the Draft Remedial Order

The court's Draft Remedial Order does not impose hiring quotas in any shape or form on the City of New York. Despite the City's misleading and inflammatory statements to the contrary,¹⁰ this court has never endorsed hiring quotas in this litigation, and has repeatedly stated that it does not believe quotas would be an effective to remedy the City's discrimination. (See, e.g., Order on Interim Hiring (Docket Entry # 527) at 25.) Indeed, Judge Weinfeld imposed hiring quotas on the City to remedy the same discrimination in 1973, yet here we are again, nearly forty years later. (See Disparate Treatment Op. at 15 (citing Vulcan Soc'y of New York

¹⁰ See Exam 6019 Injunction Op. (Docket Entry # 569) at 8, 12 (observing that the City cited absolutely no legal authority or reasoning for its claim that the approved Exam 6019 Hiring Options were "hiring quotas," and pointing out that one of the hiring options the City called a quota was actually suggested to the court by the City itself).

City Fire Dep't. Inc. v. Civil Serv. Comm'n, 490 F.2d 387, 391, 398-99 (2d Cir. 1973) (affirming Judge Weinfeld's order that the City hire one minority applicant for every three non-minority applicants hired).)

Instead, the court's Draft Remedial Order would compel the City to undertake a program of court-guided institutional reform to make its equal employment opportunity compliance activities effective, to eliminate the barriers its hiring policies and practices have erected or maintained that serve to perpetuate the underrepresentation of blacks and Hispanics as firefighters in the FDNY. The Draft Remedial Order attempts to strike a balance between the need for close supervision of the City's compliance with applicable equal employment opportunity laws and the court's orders, and the court's preference for leaving the City in charge of the day-to-day minutiae of administering the FDNY's firefighter hiring process and EEO compliance activities.

Plaintiff-Intervenors have asked the court to order the City to take highly-specific steps to remedy the City's discrimination and eliminate the vestiges of its discrimination against black firefighter candidates. For example, Plaintiff-Intervenors have requested that the court require the FDNY to advertise on specific radio stations during its recruitment campaigns, and to reinstate a program called the Fire Cadet Program that successfully mentored and encouraged black and Hispanic youth to join the FDNY. (See Pl.-Int. Pretrial Br. (Docket Entry # 658) at 37-39.) Without doubt, many of Plaintiff-Intervenors' specific suggestions, including the Fire Cadet Program, show promise in increasing the representation of blacks and Hispanics in the FDNY.

But the specific relief requested by Plaintiff-Intervenors is simply a means to an end—the end of the City's discrimination and the end to the City's policies and practices that perpetuate

the effects of the City's discrimination against black firefighter candidates. The evidence at trial did not establish that Plaintiff-Intervenors' proposed specific remedial measures were the only ones capable of ending the City's discrimination or even that they are, all things considered, preferable to other means of doing so. Accordingly, with a few minor exceptions¹¹ the court's Draft Remedial Order does not require the City to adopt specific policy changes or specific hiring or recruitment policies or practices. It is the court's view that nearly forty years of discrimination will not be cured by a few simple tweaks to the City's policies and practices. What is needed is for the City to comprehensively re-assess its policies and practices, to analyze the evidence showing the effect of those policies and practices, and to rationally consider how they can be changed to achieve a firefighter hiring process that is—in actual practice and effect—fair and open to all. Thus, the Draft Remedial Order simply compels the City to take a hard look at its policies and practices, consider the evidence, and decide what actions should be taken. The court believes that the process set out in the Draft Remedial Order preserves the City's "primary responsibility" for desegregating the FDNY. See Missouri v. Jenkins, 495 U.S. at 51.

To be sure, the court will not brook any defiance from the City in undertaking necessary remedial action. Where the evidence shows that the City's policies and practices perpetuate the effects of the City's discrimination against black and Hispanic firefighter candidates—like those addressed in the court's Findings of Fact—the City must take remedial action. But where the evidence shows that there is more than one acceptable reform available to give effect to the remedial purposes of the Draft Remedial Order, it is the court's view that the City should be the

¹¹ In the Draft Remedial Order the court requires the City to adopt a few specific remedial policies and practices that are intended to protect black and Hispanic firefighter candidates who will be processed for hiring off of the civil service hiring list created using the results of Exam 2000, to be administered in January 2012. Because the court does not anticipate that the process of studying and reforming the City's policies and practices will have been completed by the time the City begins to process firefighter candidates who will take Exam 2000, these remedial measures are necessary to ensure minimum protections for these firefighter candidates in the interim.

party to choose among them. See Schwartz v. Dolan, 86 F.3d 315, 319 (2d Cir. 1996) (holding that where “there were different possible ways to remedy the violation” local government entity should have been allowed to choose among them). In the end, the court will hold the City accountable for its results, not its means.

Below the court briefly summarizes the aims of the Draft Remedial Order.

2. General Terms of the Permanent Injunction

The Draft Remedial Order enjoins the City from continuing to use the hiring practices found unlawful by the court in its Disparate Impact Opinion, Disparate Treatment Opinion, and Exam 6019 Validity Opinion. Furthermore, the Draft Remedial Order directs the City to take steps to end those hiring policies and practices that operate to perpetuate the effects of the City’s pattern and practice of discrimination against black firefighter candidates.

3. Firefighter Test Development and Administration

The Draft Remedial Order continues the court’s supervision over the City’s development and administration of the examinations used by the City to screen and select entry-level firefighters. The Parties and court-appointed Special Master Mary Jo White have worked together for over a year to develop a firefighter examination that—unlike its recent firefighter examinations—actually identifies the candidates most qualified to be hired for the position of entry-level firefighter. While the process of developing that new test, Exam 2000, is not yet complete, the Parties and the Special Master have worked well together. The court credits the Parties, including the City of New York, and non-parties, including the Uniformed Firefighters Association and the Uniformed Fire Officers Association, for cooperating to develop a test that selects the best candidates to be appointed entry-level firefighters and does so in a manner that treats all candidates fairly. The court is especially grateful for the assistance of Special Master

White and the attorneys at her law firm, Debevoise & Plimpton LLP. The working relationship that Special Master White has fostered among the Parties in this contentious litigation has been instrumental in moving this difficult process forward.

The Draft Remedial Order does not necessarily require the Court Monitor and the Parties to engage in the same level of consultation and supervision that has marked the Special Master's management of the test development process for Exam 2000. The court is hopeful that the City will be able to use its experience in designing Exam 2000 to design the next firefighter examination in a more self-directed manner. Thus, the Draft Remedial Order leaves the management and supervision of the process for the development of the next firefighter examination to the discretion of the Court Monitor.

4. Firefighter Candidate Recruitment

As the court detailed in its Findings of Fact, the City's firefighter candidate recruitment efforts for Exam 2000 were a improvement over its past efforts. The court credits the City for making the significant financial investments that made that effort a success and Assistant Commissioner for Recruitment and Diversity Michele Maglione for using those resources to great effect. Nevertheless, in its Findings of Fact the court found that a formal remedial recruitment program is absolutely essential to ending the underrepresentation of blacks and Hispanics in the ranks of the City's firefighters, and found several facts that suggest the City may retreat from its commitment to invest significant resources in a formal recruitment program for Exam 2000 may not be sustainable going forward.

The Draft Remedial Order seeks to build on the City's success recruiting for Exam 2000 by creating a process that will result in an independent review of the City's firefighter recruitment efforts and will require the City to set measureable goals against which its

recruitment efforts can be judged. The independent review will result in a determination of the level of resources that are required to effectively implement an effective firefighter candidate recruitment program, will offer an evidence-based critique of the City's recruitment efforts and recommend useful changes in strategy and tactics based on empirical evidence.

5. Post-Examination Firefighter Candidate Screening

As detailed in its Findings of Fact, the court has found significant deficiencies in the City's post-examination firefighter candidate screening process. In the Findings of Fact, the court found that friends and family members of firefighter candidates seek to insert themselves in the firefighter candidate screening process in ways that may disproportionately favor white candidates over black firefighter candidates. Thus, the Draft Remedial Order imposes a duty on all those involved in firefighter candidate screening to create records of communications relating to specific firefighter candidates in order to document this practice and prevent its potentially harmful effects. Furthermore, the Draft Remedial Order requires the FDNY's Personnel Review Board ("PRB") to adopt policies and procedures regarding the participation of PRB members who have a potential conflict of interest with respect to any candidate under review by the PRB, or have information about a candidate obtained outside the Candidate Investigation Division ("CID")'s formal investigative process.

The court's Findings of Fact noted that CID and PRB operate without written policies and guidelines for the investigation, referral, and consideration of a firefighter candidate's character and fitness to be a firefighter. More specifically, the court found that the City's policies and practices significantly increased the probability that the City would misuse arrest information in making decisions regarding a candidate's character and fitness to be a firefighter, and that the misuse of arrest information would disproportionately disadvantage black firefighter

candidates. Consequently, the Draft Remedial Order requires CID and PRB to adopt policies and procedures for the investigation, referral, and consideration of a firefighter candidate's character and fitness to be a firefighter and specifically the investigation and use of arrest information in making those decisions. The Draft Remedial Order also requires members of CID and PRB to be trained to follow and apply the EEO laws and policies in the performance of their respective responsibilities. Finally, the Draft Remedial Order requires the Court Monitor to observe all PRB meetings held in connection with PRB's consideration of any candidate who took Exam 2000 and to issue a report recommending changes in PRB's policies and practices based on these observations.

6. EEO Compliance Reform

In its Findings of Fact the court found that the FDNY's EEO Office is woefully underfunded and fails to effectively carry out its responsibilities to ensure the FDNY's compliance with the EEO laws. The Draft Remedial Order requires an independent top-to-bottom reassessment of the City's EEO compliance policies and practices with respect to the FDNY as the first step to reforming the City's EEO compliance program in the FDNY. A further purpose of the Draft Remedial Order is to require the City to develop and implement a plan to prevent and deter acts of retaliation and discrimination against current, former, and future City employees who participated in this litigation in any way.

7. Attrition Mitigation Plan and Reassessment of Entry-Level Firefighter Selection

The court has found that the City's hiring policies and practices promote high rates of voluntary candidate attrition during the post-examination firefighter candidate screening process. The court concluded that the number of candidates disqualified for dropping out of the post-

examination firefighter candidate screening process makes voluntary candidate attrition one of the City's most pervasive firefighter candidate selection devices. Moreover, the court found that black firefighter candidates are significantly more likely than white firefighter candidates to be disqualified for dropping out of the post-examination screening process.

In its Findings of Fact the court noted some of the efforts being made by Assistant Commissioner Maglione to decrease the high rate of voluntary candidate attrition between the firefighter hiring process's numerous steps. Building on those efforts, the Draft Remedial Order requires the City to draft and implement a written plan to mitigate and diminish high rates of voluntary candidate attrition over the short-term, and to consult with the Parties and the Court Monitor in doing so. The Draft Remedial Order also requires the City to perform a long-term top-to-bottom reassessment of the firefighter hiring process, and to develop a range of alternative firefighter hiring processes in consultation with the Parties and the Court Monitor. The purpose of the long-term reassessment is to determine whether other firefighter hiring policies and practices are available that would fairly select qualified firefighter candidates while preventing the harms caused by the defects in the City's current firefighter hiring process.

8. Retention of Jurisdiction

The Draft Remedial Order contemplates that the court will retain jurisdiction over the remedial phase of this litigation for at least ten years after the court issues its Final Remedial Order or through the City's implementation of the next two entry-level firefighter hiring processes. The court must retain jurisdiction for a period of time long enough to ensure that the City takes lasting steps to guarantee its compliance with the mandates of applicable equal employment opportunity laws and policies. The Draft Remedial Order contemplates that upon the occurrence of the later of ten years after the issuance of the Final Remedial Order or after the

City has completed two full processes for the selection of entry-level firefighters the court will hold a bench trial to re-evaluate the City's compliance with applicable equal employment opportunity laws. If after the bench trial the court concludes that the City has shown that, among other things, it has ended its discriminatory hiring practices and taken sufficient affirmative measures to end the policies and practices that have perpetuated the harmful effects of those discriminatory hiring practices and procedures, the court will relinquish jurisdiction. On the other hand, if the City fails to demonstrate that it has effectively remedied its non-compliance with the mandates of applicable equal employment opportunity laws, the court will order such other further relief as it finds is warranted under the circumstances.

C. Need for a Court Monitor

The Draft Remedial Order contemplates that a court-appointed monitor will play an important role in ensuring the City's compliance with the requirements of the Draft Remedial Order. The Draft Remedial Order contemplates that the Court Monitor will take primary responsibility for leading the parties through the specific remedial steps the court requires the parties to complete. Moreover, the Court Monitor will have the duty and the authority to proactively audit and investigate the City's compliance with the terms of the Draft Remedial Order. For example, the Court Monitor will have the authority to perform independent investigations of the FDNY's EEO compliance program and the post-examination screening phase of the City's process for selecting entry-level firefighters.

A court monitor is necessary because the court lacks the time and resources to perform the supervisory tasks necessary to ensure that the City carries out its obligations under the Draft Remedial Order in good faith and with reasonable diligence. District courts have frequently made use of court-appointed monitors and other masters in similarly large and complex civil

rights litigations where ensuring a large organization's or municipality's compliance with the court's orders would be too time-consuming or difficult for the court to undertake without assistance.

Under Federal Rule of Civil Procedure 53(b)(1) the court directs the parties to submit any comments on the terms of the court's intended appointment of a court monitor. The court also directs the parties to submit names, biographies, and resumes of individuals the parties believe would suitably carry out the responsibilities of the Court Monitor as specified in the Draft Remedial Order. The parties should endeavor to present a joint list of candidates, but in the event that the parties cannot agree to one list, the parties may submit separate lists.

D. Fairness Hearing

Pursuant to 42 U.S.C. § 2000e-2(n)(1) the court will hold a Fairness Hearing to permit non-parties to this litigation to voice objections to the court's Draft Remedial Order before the court issues a Final Remedial Order. Prior to scheduling that Fairness Hearing the court requires briefing from the parties on the scheduling and administration of the Fairness Hearing, including the form and medium of the notice the court should provide to non-parties and the length of time non-parties should be given to object to the court's Draft Remedial Order. The court encourages the parties to attempt to resolve as many of these questions as possible prior to submitting briefing to the court.

IV. CONCLUSION

Pursuant to Federal Rule of Civil Procedure 53(b)(1), the parties shall submit briefing on the scope and terms of the court's intended appointment of a Court Monitor, and on the logistics of a Fairness Hearing by Monday, October 17, 2011. By Wednesday, October 19, 2011, the parties shall jointly or separately suggest three or more names of individuals who they believe

would suitable in carrying out the role of Court Monitor, and submit those individuals' resumes and short biographies to the court. The parties shall appear for a status conference to discuss these matters on Thursday, October 20, 2011 at 2:30 p.m. in Courtroom 4D South.

SO ORDERED.

Dated: Brooklyn, New York
October 5, 2011

s/Nicholas G. Garaufis

NICHOLAS G. GARAUFIS
United States District Judge

**Exhibit: Draft Remedial Order,
Permanent Injunction, and
Order Appointing Court
Monitor**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

Plaintiff,

-and-

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

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

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

Plaintiff-Intervenors,

-against-

THE CITY OF NEW YORK,

Defendant.

-----X
NICHOLAS G. GARAUFIS, United States District Judge.

**DRAFT REMEDIAL ORDER,
PERMANENT INJUNCTION,
AND
ORDER APPOINTING
COURT MONITOR**

07-CV-2067 (NGG) (RLM)

This Draft Remedial Order, Permanent Injunction, and Order Appointing Court Monitor ("Draft Remedial Order") includes, in sum and substance, the terms of the injunction the court currently intends to impose on the City of New York in this action, and the intended terms of the Court Monitor's appointment. The accompanying Memorandum and Order provides the parties with the opportunity to be heard regarding the terms of the court's intended order appointing a court monitor under Federal Rule of Civil Procedure 53(b)(1). The accompanying Memorandum

and Order further directs the parties to submit briefing regarding a Fairness Hearing for interested non-parties. The court will entertain objections to the Draft Remedial Order from interested non-parties at a Fairness Hearing, and after considering the objections, will issue a Final Remedial Order.

IT IS HEREBY ORDERED THAT:

I. DEFINITIONS

1. The following definitions apply to this Order.
2. “This Order” refers to these Definitions (Part I), all terms of the Permanent Injunction the court imposes on the City of New York (Part II), all terms of the Order Appointing Court Monitor (Part III), the terms of the court’s Retention of Jurisdiction (Part IV), and all terms of the assessment of Costs and Fees (Part V).
3. “The Parties” are: the United States of America, by its counsel the United States Department of Justice; The Vulcan Society, Inc. and the Injunctive Relief Subclass (through its appointed individual representatives Jamel Nicholson, and Rusebell Wilson), by their counsel Levy Ratner, P.C., Scott + Scott LLP, and the Center for Constitutional Rights; and the City of New York, by its counsel the Corporation Counsel of the City of New York.
4. “City of New York” and “the City” refer to all commissions, agencies, offices, bureaus, departments, divisions, elected and appointed officials, managers, employees, volunteers, paid and unpaid interns, independent contractors, and other agents of the City of New York, any person or entity over which any of the foregoing exercise direct or indirect control because of their affiliation with the City of New York, and any person or entity acting in concert or participation with any of the foregoing, and includes, without limitation, the following agencies of the City of New York:

- (a) "FDNY" refers to the Fire Department of the City of New York;
 - (b) "ORD" refers to the Office of Recruitment and Diversity of the FDNY;
 - (c) "EEO Office" refers to the Equal Employment Opportunity Office of the FDNY;
 - (d) "BITS" refers to the Bureau of Investigations and Trials of the FDNY;
 - (e) "CID" refers to the Candidate Investigation Division of the FDNY;
 - (f) "PRB" refers to the Personnel Review Board of the FDNY;
 - (g) "DCAS" refers to the Department of Citywide Administrative Services of the City of New York;
 - (h) "EEPC" refers to the Equal Employment Practices Commission of the City of New York; and
 - (i) "Executive Office of the Mayor" refers to the Mayor of the City of New York, his deputy mayors, senior advisors, and the employees and agents of the City of New York employed or retained by the City of New York to assist the foregoing in the performance of their duties.
5. "Document" refers broadly to the full range of materials and information specified in Federal Rule of Civil Procedure 34 without regard to the medium in which it is kept or stored.
6. "Court Monitor" and "Monitor" refer to the person appointed by the Court in Part III of this Order to oversee the City's compliance with the terms of this Order, and any persons retained or employed by the Monitor to carry out the Monitor's assigned duties.
7. "Days" refers to calendar days unless otherwise specified clearly in the context of a particular provision of this Order. If any deadline referenced in this Order should fall on a Saturday, Sunday, or legal holiday, the deadline shall be moved to the next day that is not a Saturday, Sunday, or legal holiday.

8. “Entry-level firefighter” refers to a person in the entry-level uniformed position in the FDNY regardless of whether the person may be called a “recruit,” “trainee,” “probie” or other title until the individual has completed academy training and/or a probationary period. It does not refer to a person selected for promotion to the position of Firefighter from the position of Emergency Medical Technician or Paramedic through the City of New York’s open-competitive promotional examination.

9. “Firefighter candidate” refers to any person who applies to participate in any step of the process for the selection of entry-level firefighters administered by the City of New York to hire entry-level firefighters, until that person is formally appointed an entry-level firefighter.

10. “Process for the selection of entry-level firefighters,” “entry-level firefighter selection process,” “entry-level firefighter hiring process,” and similar terms, refer to any and all steps taken by the City of New York to hire entry-level firefighters including, without limitation: developing or validating a written or computer based-examination to screen firefighter candidates; recruiting people to be firefighter candidates; issuing a Notice of Examination to open an application period for any person to apply to take any examination to be hired by the City of New York as an entry-level firefighter; administering a written or computer-based examination to firefighter candidates; assessing a firefighter candidate’s physical fitness or ability; determining that a firefighter candidate has passed or failed any examination or assessment at any stage of his or her candidacy; determining to award or not award any credits (e.g., New York City residency credit) to a firefighter candidate; ranking or not ranking a firefighter candidate on any civil service hiring list; certifying a civil service list of firefighter candidates for hiring; determining to begin investigating any firefighter candidate’s background or eligibility to be hired as an entry-level firefighter; the process of investigating a firefighter

candidate's background and eligibility to be hired as an entry-level firefighter; determining to refer a candidate to any person or body for additional consideration of his or her character or fitness to be a firefighter, and making any recommendations concerning the outcome of that consideration; determining that a firefighter candidate possesses or does not possess the character or fitness to be a firefighter; administering a medical and/or psychological examination to a firefighter candidate; determining to make an offer to hire a firefighter candidate to the position of entry-level firefighter; determining not to hire a firefighter candidate for any reason, including that the firefighter candidate is ineligible for hiring, failed to report to or cooperate with any step in the entry-level firefighter selection process, does not possess the character or fitness necessary to be a firefighter, is medically or psychologically unfit to be hired, or for any other reason.

11. "EEO" refers to "equal employment opportunity," i.e., the opportunity to obtain employment without discrimination because of because of race, color, religion, sex, national origin, age, or disability.

12. "EEO Laws" refers to laws which protect an employee's or employment candidate's rights to equal employment opportunities, including, without limitation, and as interpreted by federal and state courts: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq.; New York State Human Rights Law, New York Executive Law §§ 290 et seq.; and New York City Human Rights Law, Administrative Code §§ 8-101 et seq.

II. PERMANENT INJUNCTION

A. GENERAL TERMS

13. The City of New York shall not use, in any way, Firefighter Exam 7029, Firefighter Exam 2043, or Firefighter Exam 6019 as part of any process for the selection of entry-level firefighters.¹

14. The City of New York shall not use as part of any entry-level firefighter selection process, any examination that in any way results in a disparate impact upon black or Hispanic applicants and is not job related for the position of entry-level firefighter and consistent with business necessity, or does not otherwise meet the requirements of federal, state, and City EEO laws.

15. The City of New York shall not take any step in any process for the selection of entry-level firefighters, or use any examination as part of such process, without first obtaining the approval of the Court Monitor (the "Monitor") through the processes specified by the Monitor.

16. The City of New York shall not retaliate against or in any way adversely affect the terms or conditions of employment of any person because he or she has complained of discrimination against blacks or Hispanics on the basis of their race or national origin in the selection and hiring of entry-level firefighters, or has participated in the investigation or litigation of any claim or allegation of such discrimination, or has sought or obtained relief from the court in this case.

¹ Paragraph 13 of this Order supersedes and replaces the court's order enjoining the City of New York from hiring firefighters using Exam 6019 except in compliance with the authorized hiring options identified by the court in its Exam 6019 Hiring Options Order of September 13, 2010. (See Exam 6019 Hiring Options Order (Docket Entry # 526); Exam 6019 Injunction (Docket Entry # 569) at 19-20.) As provided in Paragraph 13, this Order revokes the City of New York's permission to use Exam 6019 to hire entry-level firefighters using one of the five options specified in the court's earlier orders.

17. The City of New York shall not discriminate on the basis of race against black or Hispanic firefighter candidates in the development or implementation of any process for the selection of entry-level firefighters.

18. The City of New York shall, with reasonable diligence, take all steps necessary to eliminate the vestiges of its pattern and practice of discrimination against black firefighter candidates, to remove all barriers to the elimination of these vestiges of discrimination, and to end all policies and practices that have the effect of perpetuating the effects of the City's discrimination against black firefighter candidates.

19. The Parties shall timely comply with the orders of the Court Monitor as provided in this Order.

20. All submissions that this injunction requires the City to file with the court shall be signed by the Mayor of the City of New York and witnessed by the Corporation Counsel.

B. SPECIFIC REMEDIAL MEASURES

Firefighter Test Development and Administration

21. The Court Monitor shall adopt a schedule which requires the City of New York to notify the Monitor and the Parties before commencing any step in a process for the selection of entry-level firefighters.

22. The Court Monitor may require the City to disclose any information relating to any step in any process for the selection of entry-level firefighters before allowing the City to proceed to any step in the process. The Court Monitor may require the City to establish that it has satisfied conditions specified by the Monitor, or to obtain the Monitor's explicit approval before commencing any step in the process for the selection of entry-level firefighters.

23. At least 90 days prior to the establishment of any new eligible civil service list for the entry-level firefighter position, the City shall notify the Court Monitor, the United States, and the Injunctive Relief Subclass in writing that it intends to establish a new eligible list and shall provide to the Monitor, the United States, and the Injunctive Relief Subclass a detailed description of each step in the selection process from which the list was developed and of the manner in which the City intends to use the eligible list to make appointments. In addition, the City shall state in writing, separately by race and national origin, the number of applicants who were eligible to proceed to each step in the process leading up to the establishment of the eligible list, the number of applicants to whom each step was administered, and the number of applicants who passed the step or were eligible to continue in the selection process.

Firefighter Candidate Recruitment

24. The City of New York, specifically ORD and DCAS, shall, in consultation with the Court Monitor, or the Special Master if a Court Monitor has not yet been appointed, the United States, and the Injunctive Relief Subclass, design an optional survey which the City of New York shall administer to all individuals who take Exam 2000 at the time they take Exam 2000. The purposes of the survey shall be to determine the effectiveness of ORD's various recruitment activities and strategies, to determine the reasons why firefighter candidates chose to apply to become entry-level firefighters, to determine how many firefighter candidates have friends or family members in the FDNY, and to obtain any other useful information. Each survey form provided to the firefighter candidates shall be pre-marked with the firefighter candidate's unique applicant identification number. The survey forms shall prominently state that survey responses shall not be used in any way by the City of New York to make hiring decisions.

25. The City of New York shall retain an independent recruitment consultant, whose selection shall be subject to the approval of the Court Monitor, and who shall submit a final report that:

(a) identifies and evaluates the effectiveness of ORD's various recruitment activities at recruiting black and Hispanic firefighter candidates against the costs of those activities;

(b) identifies best practices for the recruitment of black and Hispanic employees generally and firefighter candidates in particular, both nationally and in New York City in particular;

(c) recommends tactics ORD can use to improve the effectiveness and efficiency with which it recruits black and Hispanic firefighter candidates;

(d) recommends changes to ORD's long-term black and Hispanic firefighter candidate recruitment strategy and intensive pre-exam recruitment strategy;

(e) recommends measureable short-term and long-term goals for the recruitment of black and Hispanic entry-level firefighter candidates; and

(f) in light of these findings and recommendations, identifies the resources needed by ORD to meet its goals, and recommends minimum and ideal budgets for ORD for those fiscal years in which no firefighter examination will be administered and separate minimum and ideal budgets for ORD for fiscal years in which the City of New York will administer a firefighter examination.

26. The independent recruitment consultant, the City of New York, and the Court Monitor shall cooperatively develop a plan for the consultant's research subject to the approval of the Court Monitor. At the discretion of the Court Monitor, the United States and the Injunctive Relief Subclass may meet with the Court Monitor, the City of New York, and the consultant to

recommend areas of inquiry for the consultant's research. The City shall fully cooperate with the consultant's research. The consultant shall regularly update the City and the Court Monitor on the scope and progress of the consultant's research and shall inform the Court Monitor if the consultant has any difficulties acquiring information needed to complete the consultant's assigned tasks. The Court Monitor may, in the Monitor's discretion, use the Monitor's authority to obtain access to individuals, documents, places, or things to provide information to the consultant.

27. The independent recruitment consultant's final report shall be filed with the court and submitted to the Parties and Court Monitor no later than March 31, 2013.

28. The City of New York shall consider the recommendations in the independent recruitment consultant's final report and file a response with the court 90 days after the consultant's final report is filed with the court. In its response the City shall specifically indicate which of the recommendations it will carry out and how it plans to do so, providing a specific timetable for those recommendations that cannot be carried out immediately. For those recommendations the City declines to carry out, the City shall explain why it declines to carry them out, and shall identify any alternative steps it intends to take to achieve the purposes of the recommendations.

29. The Court Monitor shall file a reply with the court 30 days after the City of New York files its response. The Monitor's reply shall explain whether the Monitor believes the City's response to the consultant's final report is sufficient, and shall recommend to the court any additional action the Monitor believes is necessary to accomplish the remedial purposes of this Order. The United States and the Injunctive Relief Subclass may also file replies with the court no later than 30 days after the City files its response.

Attrition Mitigation Plan and Reassessment of Entry-Level Firefighter Selection

30. The City, in consultation with the Court Monitor and the Parties, shall draft and implement a written plan to mitigate and diminish rates of voluntary candidate attrition between different steps of the City's process for the selection of entry-level firefighters. The written attrition mitigation plan shall focus particularly on the steps needed to prevent "voluntary" (as that term is used currently by the FDNY) candidate attrition from disproportionately affecting the retention rates for black and Hispanic firefighter candidates during the firefighter hiring process for Exam 2000. The City shall submit its first draft written attrition mitigation plan to the Parties by December 2, 2011. The Parties and the Court Monitor shall subsequently discuss revisions to and implementation of the attrition mitigation plan as directed by the Court Monitor. The Court Monitor shall make a recommendation to the court as to whether the attrition mitigation plan, either as drafted by the City or including amendments the Court Monitor may propose, should be adopted by the City in the Exam 2000 firefighter selection process.

31. The City of New York, in consultation with the Parties and the Court Monitor, shall conduct a comprehensive top-to-bottom assessment of all steps in its process for the selection of entry-level firefighters that evaluates the strengths and weaknesses of the City's current selection process as a whole and of individual steps in that process. As part of its review, the City shall also research and develop at least three alternative selection processes that solve the problems the City identifies in its current selection process. The City shall evaluate the strengths and weaknesses of the alternative selection processes and identify barriers to their implementation, including the need for legislative, administrative, or other governmental action.

32. The scope of the City's review of its current entry-level firefighter selection process, and its plan to research alternative selection processes shall be subject to the approval of the Court

Monitor. The City shall keep the Court Monitor and the Parties informed as to the progress of its research in regular meetings and, if the Court Monitor deems it necessary, provide written reports to the Parties and the Court Monitor.

33. The final report shall recommend that the Mayor of the City of New York take specific actions on the adoption of alternative selection processes or the modification of the City's current selection process. By December 2, 2012, the Mayor of the City of New York shall file with the court the City's final report. The Mayor shall specifically indicate which of the recommendations he or she will carry out immediately, provide a specific timetable for those recommendations that cannot be carried out immediately, and explain the steps for required in implementing each recommendation. Before the Mayor may file the City's final report, the Court Monitor must certify that the City carried out its assessment of its current entry-level firefighter selection process and researched and evaluated alternative selection processes in good faith and with reasonable diligence.

34. The Court Monitor or any Party may file a reply to the Mayor's response with the court 30 days after the Mayor files his or her response. Any reply filed with the court shall explain whether the Monitor or Party believes the Mayor's response to the final report is sufficient, and shall recommend to the court any additional action the Monitor or Party believes is necessary to accomplish the remedial purposes of this Order.

Post-Examination Firefighter Candidate Screening

35. Any elected or appointed official, manager, employee, volunteer, paid or unpaid intern, independent contractor, or other agent of the City of New York who is involved or becomes involved, formally or informally, in any of the following specific steps of the process for hiring entry-level firefighters shall immediately create a written record of all oral communications in

which they are involved, directly or through an intermediary, that concern any person who is a candidate to be hired by the City of New York as an entry-level firefighter. The duty created by this Paragraph applies to the foregoing persons who are involved in the following steps of the process for hiring entry-level firefighters, including entry-level firefighter candidates under consideration after taking Exam 2000:

- (a) background investigation of firefighter candidates;
- (b) determination to create, and preparation of a consideration report to send to the PRB;
- (c) recommendations to the PRB;
- (d) PRB consideration, discussion, or review of firefighter candidates; and
- (e) any review by the Fire Commissioner or other senior FDNY official of PRB decisions or CID's background investigation.

36. The written record required by Paragraph 35 shall:

- (a) state the date and time the written record was created, and the name and title of the person who created it;
- (b) include the date and time of the communication and any relevant information concerning the medium of the communication (e.g., in-person, telephone call, message left with assistant, etc.);
- (c) identify the firefighter candidate(s) who is/are the subject of the communication;
- (d) identify the participants to the communication, including the nature of each participant's relationship or source of knowledge about the firefighter candidate who is the subject of the communication and whether each participant is an elected or appointed official, manager, employee, volunteer, paid or unpaid intern,

independent contractor, or other agent of the City of New York, and if so, their affiliation with the City of New York; and

- (e) a brief description of the substance and purpose of the communication, and a summary information provided by each participant concerning the firefighter candidate who is the subject of the communication.

37. The City of New York shall designate a senior official, manager, or employee of the FDNY who is employed as an attorney, to be responsible for collecting, reviewing, and retaining the written records created pursuant to the duty created in Paragraphs 35 and 36. The designated senior official shall be responsible for creating and enforcing policies and procedures necessary to implement the duty to create these written records, subject to the approval of the Court Monitor.

38. Before CID begins the process of investigating the background of any firefighter candidate, including any firefighter candidate under consideration after taking Exam 2000, the FDNY shall create and adopt written policies and procedures for CID's operations, subject to the approval of the Court Monitor. At a minimum, those policies and procedures shall:

- (a) Specify the circumstances under which CID will prepare a consideration report to the PRB and when CID will send that report to the PRB;
- (b) Specify the circumstances under which CID will conduct a deeper investigation of a firefighter candidate's background, including for example, circumstances in which a candidate has been arrested for a crime but not subsequently convicted;
- (c) Specify additional investigative steps CID investigators must take when deeper investigation of a firefighter candidate's background is determined to be warranted.

39. Before the PRB meets to discuss, consider, or review any firefighter candidate, including any firefighter candidate under consideration after taking Exam 2000, the FDNY shall create and adopt written policies and procedures for the operation of the PRB, subject to the approval of the Court Monitor. At a minimum, those policies and procedures shall:

- (a) Require PRB members who may have a conflict of interest as to any particular firefighter candidate under review by the PRB to disclose to all members of the PRB the nature of their potentially-conflicting interest;
- (b) Regulate the participation on the PRB of members who may have a conflict of interest regarding a firefighter candidate under review, including defining which conflicts of interest require a PRB member to recuse him- or herself from the PRB's consideration of that firefighter candidate;
- (c) Require PRB members to disclose in writing whether they received any ex parte communications or have any personal knowledge concerning a firefighter candidate under review by the PRB;
- (d) Regulate the participation on the PRB of members who received any ex parte communications or have any personal knowledge concerning a firefighter candidate under review by the PRB;
- (e) Require the PRB to adopt an individualized and fact-specific statement of reasons for any adverse decision the PRB makes as to any firefighter candidate it reviews.

40. Before CID begins the process of investigating any firefighter candidate's background, including any firefighter candidate who has taken Exam 2000, and before the PRB meets to discuss, consider, or review any firefighter candidate, including any firefighter candidate who has taken Exam 2000, each investigator and manager in CID, and each member of the PRB shall

receive interactive training tailored to educate the recipients how to practically apply applicable equal employment opportunity laws and policies in the performance of their responsibilities in CID or on the PRB, respectively. The trainings shall be provided by an independent third-party provider approved by the Court Monitor. The curriculum for each of the training sessions shall be subject to approval by the Court Monitor. The Court Monitor and senior managers of the FDNY EEO Office shall attend both the CID training and the PRB training. No investigator or manager in CID may participate in investigating a firefighter candidate's background, and no PRB member may participate in a PRB meeting regarding a firefighter candidate until the Court Monitor certifies to the court that they have satisfactorily completed this training requirement.

41. The Court Monitor shall attend all meetings of the PRB—in person, as a non-participating observer—that are held to consider any person who is a candidate to be hired as an entry-level firefighter off the eligible civil service list certified using the results of Exam 2000. No member of the PRB shall communicate orally or in writing with any other member of the PRB, either directly or through an intermediary, about any person who is a candidate to be hired as an entry-level firefighter off the list certified using the results of Exam 2000 outside the physical presence of the Court Monitor. The FDNY shall provide the Court Monitor with copies of all materials submitted for consideration of the PRB no fewer than 14 days before any meeting of the PRB.

42. Based on the Court Monitor's observations of PRB meetings, the Monitor shall file a report critiquing the performance of the PRB and the information provided to it by CID, and recommending the adoption of any policies, practices, or procedures the Monitor believes are necessary to ensure that the CID adequately informs the PRB of necessary information, and that the PRB fairly considers all firefighter candidates consistent with the requirements of all

applicable equal employment opportunity laws and policies. The Monitor's report shall preserve the anonymity of particular candidates reviewed by the PRB and, to the extent possible, preserve the confidentiality of PRB discussions by not disclosing the identities of particular speakers during PRB meetings.

43. The City of New York shall consider the recommendations in the Court Monitor's report on the PRB and CID, and shall file a response with the court 90 days after the Monitor's report is filed with the court. In its response, the City shall specifically indicate which of the recommendations it will carry out and how it plans to do so, providing a specific timetable for those recommendations that cannot be carried out immediately. For those recommendations the City declines to carry out, the City shall explain why it declines to carry them out, and shall identify any alternative steps it intends to take to achieve the purposes of the recommendations.

44. The Court Monitor shall file a reply with the court 30 days after the City of New York files its response. The Monitor's reply shall explain whether the Monitor believes the City's response to the Monitor's report is sufficient, and shall recommend to the court any additional action the Monitor believes is necessary to accomplish the remedial purposes of this Order. The United States and the Injunctive Relief Subclass may also file replies with the court no later than 30 days after the City files its response.

EEO Compliance Reform

45. The City of New York shall retain an independent EEO consultant, whose selection shall be subject to the approval of the Court Monitor, and who shall submit a final report that:

(a) identifies all equal employment opportunity law compliance activities currently performed by all FDNY offices, bureaus, divisions, boards, or other subdivisions, including without limitation the EEO Office, ORD, BITS, CID, and the PRB;

(b) evaluates the effectiveness of the equal employment opportunity law compliance activities currently performed by each FDNY office, bureau, division, or other subdivisions;

(c) identifies all tasks the FDNY's EEO Office ought to be performing under the City's EEO Policy;

(d) identifies all tasks the EEO Office should be performing to ensure the FDNY's compliance with applicable equal employment opportunity laws and policies in light of the violations of the equal employment opportunity laws identified by the court in its Disparate Impact Opinion (Docket Entry # 294), Disparate Treatment Opinion (Docket Entry # 385), and Exam 6019 Validity Opinion (Docket Entry # 505), and in light of the deficiencies in the FDNY's EEO compliance program identified in the court's Findings of Fact as to the Need for and Scope of Injunctive Relief (Docket Entry # 740);

(e) identifies best practices used by other offices responsible for ensuring a comparable municipal department's compliance with applicable equal employment opportunity laws and policies, and particularly, best practices used by EEO offices in other fire departments nationally;

(f) recommends a detailed compliance program to be carried out by the EEO Office including specific compliance activities, and which references specific metrics and goals to be used to evaluate the EEO Office's performance in carrying out each activity;

(g) identifies methods of detecting, deterring, and preventing acts of retaliation and discrimination against current and future City of New York employees involved with this litigation in any way² because of their involvement with this litigation;

(h) recommends specific actions for the EEO Office, and any other relevant agency of the City of New York, to take to deter and prevent acts of retaliation or discrimination against any current and future City of New York employees because of their involvement with this litigation;

(i) in light of these findings and recommendations, identifies the staff and other resources needed by the EEO Office to carry out the compliance program and retaliation deterrence program recommended by the consultant, and recommends a minimum and an ideal budget for the EEO Office to successfully meet expectations under the recommended compliance program and retaliation deterrence program;

(j) evaluates the FDNY's policies, procedures, and actual practices for disciplining employees found to be responsible for substantiated equal employment opportunity law and policy violations;

(k) identifies procedural, organizational, cultural, logistical, resource, policy, political and other barriers to the EEO Office's ability to ensure the FDNY's compliance with applicable federal, state, and City equal employment opportunity laws and policies;

² As that term is used in Paragraph 45(g) and (h) "involvement with this litigation" includes, without limitation, witnesses, declarants, and affiants who have offered oral or written testimony to the court in connection with the litigation of this case; past, present, and future members of the Vulcan Society, Inc.; individual subclass representatives; any person who may assert a claim that he or she was a victim of the City's discrimination identified in the court's Disparate Impact Opinion (Docket Entry # 294) or Disparate Treatment Opinion (Docket Entry # 385); and any person who claims to benefit from any order issued by the court in this litigation.

(l) recommends process, organizational, and policy changes within the EEO Office to eliminate barriers to the EEO Office's ability to ensure the FDNY's compliance with applicable federal, state, and City equal employment opportunity laws and policies;

(m) recommends process, organizational, and policy changes within the FDNY as a whole to eliminate barriers to the EEO Office's ability to ensure the FDNY's compliance with applicable federal, state, and City equal employment opportunity laws and policies; and

(n) recommends process, organizational, and policy changes within the City of New York as a whole, including DCAS and any other relevant agency, to eliminate barriers to the EEO Office's ability to ensure the FDNY's compliance with applicable federal, state, and City equal employment opportunity laws and policies.

46. The independent EEO consultant, the City of New York, and the Court Monitor shall cooperatively develop a plan for the consultant's research subject to the approval of the Court Monitor. At the discretion of the Court Monitor, the United States and the Injunctive Relief Subclass may meet with the Court Monitor, the City of New York, and the consultant to recommend areas of inquiry for the consultant's research. The City shall fully cooperate with the consultant's research. The consultant shall regularly update the City and the Court Monitor on the scope and progress of the consultant's research and shall inform the Court Monitor if the consultant has any difficulties acquiring information needed to complete the consultant's assigned tasks. The Court Monitor may, in the Monitor's discretion, use the Monitor's authority to obtain access to individuals, documents, places, or things to provide information to the consultant.

47. The independent EEO consultant's final report shall be filed with the court and submitted to the Parties and Court Monitor no later than March 31, 2013.

48. The City of New York shall consider the recommendations in the independent EEO consultant's final report and file a response with the court 90 days after the consultant's final report is filed with the court. In its response the City shall specifically indicate which of the recommendations it will carry out and how it plans to do so, providing a specific timetable for those recommendations that cannot be carried out immediately. For those recommendations the City declines to carry out, the City shall explain why it declines to carry them out, and shall identify any alternative steps it intends to take to achieve the purposes of the recommendations.

49. The Court Monitor shall file a reply with the court 30 days after the City of New York files its response. The Monitor's reply shall explain whether the Monitor believes the City's response to the consultant's final report is sufficient, and shall recommend to the court any additional action the Monitor believes is necessary to accomplish the remedial purposes of this Order. The United States and the Injunctive Relief Subclass may also file replies with the court no later than 30 days after the City files its response.

C. DOCUMENT RETENTION AND PRESERVATION

50. The Court Monitor, in consultation with the Parties, shall prepare and file a Document Retention and Preservation Order directing the City of New York to retain, preserve, and maintain specified broad categories of documents that are relevant to evaluating the City's compliance with this Order, including documents currently in existence and any documents which will be created in the future. The Court Monitor may amend or supplement the Document Retention and Preservation Order at any time.

51. Following the Court Monitor's issuance of the Document Retention and Preservation Order, counsel for the City of New York shall immediately issue a Document Retention and Preservation Notice advising all individuals currently subject to the Document Retention and

Preservation Order of their continuing obligations under the order, and shall promptly issue a Document Retention and Preservation Notice to any individual who may subsequently become subject to the duties and obligations created by the order. At least every 6 months, counsel for the City of New York shall remind individuals subject to the Document Retention and Preservation Order of their continuing obligations under the Court Monitor's order. In consultation with the Court Monitor, the City of New York shall periodically audit the effectiveness of the document retention and preservation practices and procedures followed by individuals subject to the document retention and preservation duties created by the Court Monitor's order. Counsel for the City of New York shall maintain a list of all persons subject to the Document Retention and Preservation Order and promptly inform the Court Monitor whenever a Document Retention and Preservation Notice is sent to any individual who is currently subject or may become subject to the document retention and preservation duties created by the Court Monitor's order.

D. DISCOVERY BY PARTIES

52. No later than 30 days after the United States or the Injunctive Relief Subclass so requests in writing, the City shall make available to the United States and the Injunctive Relief Subclass any records maintained in accordance with Paragraph 50 and any additional documents relating to any dispute arising under this Order. Disputes between the Parties arising under this Paragraph shall be resolved by the Court Monitor.

53. No later than thirty 30 days after the United States or the Injunctive Relief Subclass so requests in writing, the City shall make available for interview or deposition (at the option of the United States or the Injunctive Relief Subclass) any agent, employee, or official of the City who has knowledge of information necessary to verify the City's compliance with the terms of this

Order or to resolve a dispute arising under this Order. Disputes between the Parties arising under this Paragraph shall be resolved by the Court Monitor.

E. SANCTIONS

54. A violation of the terms of this remedial order, including but not limited to violations of the document retention, preservation, and discovery provisions, by any party, may be punished by court-ordered sanction if another party moves for such sanction. Such sanction may include, but is not limited to, the use of contempt proceedings if the alleged violation is of sufficient gravity to warrant such proceedings.

III. ORDER APPOINTING COURT MONITOR

55. Pursuant to Federal Rule of Civil Procedure 53(a)(1)(C) and the court's inherent equitable powers, [XXXXXXXXXX] is appointed to serve as Court Monitor for post-trial compliance relief in this litigation;

(a) Prior to being appointed, the Court Monitor must file an affidavit "disclosing whether there is any ground for disqualification under 28 U.S.C. § 455." Fed. R. Civ. P. 53(b)(3); see also Fed. R. Civ. P. 53(a)(2) (discussing grounds for disqualification). Attached to this Order is the affidavit submitted to the court by the Court Monitor, dated [XXXXXX].

A. Duties

56. The duties of the Court Monitor shall include the following:

(a) Carrying out all responsibilities and tasks specifically assigned to the Monitor in this Order;

(b) Monitoring and reporting on the City's compliance with its obligations under this Order, and issuing any orders the Court Monitor believes will facilitate the City's timely compliance with the terms of this Order;

(c) Facilitating the Parties' resolution of any disputes concerning compliance with their obligations under this Order or any orders issued by the Court Monitor without the court's intervention, and recommending appropriate action by the court in the event an issue cannot be resolved by the Parties with the Court Monitor's assistance; and

(d) Proactively investigating any matters related to the Court Monitor's duties, and enforcing any orders related to the matters set forth in this Order.

(e) The Court Monitor shall have all authority provided under Federal Rule of Civil Procedure 53(c).

B. Periodic Reporting

57. The Court Monitor shall provide periodic reports to the court and to the Parties concerning the status of the Parties' compliance with this Order and other orders of the court or the Court Monitor, including their progress, any barriers to compliance, and potential areas of noncompliance. The Court Monitor shall file a report with the court under this provision at least once every 90 days.

58. The Court Monitor, in consultation with the Parties, shall require periodic reports from the City of New York on its compliance with and implementation of this Order and any other orders of the court or the Court Monitor, in a format specified by the Court Monitor, as reasonably required to enable the Court Monitor to perform the Monitor's duties under this Order.

C. Judicial Review

59. Except as otherwise provided in this Order, the Parties may file objections to—or a motion to adopt or modify—the Court Monitor's order, report, or recommendations no later than

10 calendar days after the order is filed on the docket. The court will review these objections under the standards set forth in Federal Rule of Civil Procedure 53(f).

60. If any Party desires to object to any decision made by the Monitor to grant or withhold approval of any request or action in cases where the Monitor's prior approval is required, or to any decision imposing any condition before the Court Monitor will give such approval, the Party shall notify the Monitor who shall promptly file on the court's docket a written order setting forth the Monitor's decision or conditions pursuant to Federal Rule of Civil Procedure 53(d). The Party shall then object to the Monitor's order in the manner prescribed in this Order.

61. The orders, reports, and recommendations of the Court Monitor may be introduced as evidence in accordance with the Federal Rules of Evidence.

62. Before a Party seeks relief from the court for alleged noncompliance with any court order that is based upon the Court Monitor's report or recommendations, the Party shall: (i) promptly notify the other Parties and the Court Monitor in writing; (ii) permit the Party who is alleged to be in noncompliance five business days to provide the Court Monitor and the other parties with a written response to the notice, which either shows that the party is in compliance, or proposes a plan to cure the noncompliance; and (iii) provide the Court Monitor and parties an opportunity to resolve the issue through discussion. The Court Monitor shall attempt to resolve any such issue of noncompliance as expeditiously as possible.

D. Recordkeeping

63. The Court Monitor shall file all written orders, reports, and recommendations on the court's docket, along with any evidence that the Court Monitor believes will assist the court in reviewing the order, report, or recommendation. The Court Monitor shall preserve any documents the Monitor receives from the Parties.

E. Access to Information

64. The Court Monitor shall have access, on short notice, to individuals, information, documents, materials, programs, services, facilities and premises under the control of the City of New York that the Monitor requires to perform his or her duties under this Order.

65. The Court Monitor may compel the City of New York to make available, on short notice, any elected or appointed officials, managers, employees, volunteers, paid or unpaid interns, independent contractors, or other agents of the City of New York, any person or entity over which any of the foregoing exercise direct or indirect control because of their affiliation with the City of New York, or any person or entity acting in concert or participation with any of the foregoing, to be interviewed or deposed at the discretion of the Court Monitor.

66. The Court Monitor may communicate with a Party or a Party's counsel or staff on an ex parte basis if reasonably necessary to carry out the Monitor's duties under this Order. The Court Monitor may communicate with the court on an ex parte basis concerning non-substantive matters such as scheduling or the status of the Monitor's work. The Court Monitor may communicate with the court on an ex parte basis concerning substantive matters with 24 hours written notice to the Parties.

67. The Court Monitor shall document all ex parte oral communications with a Party or a Party's counsel or staff in a written memorandum to file summarizing the substance of the communication, the participants to the communication, the date and time of the communication, and the purpose of the ex parte communication. At the time the Court Monitor submits his or her periodic reports to the court, the Monitor shall separately list his or her ex parte communications with the Parties in a letter to the court that shall not be filed on the court's docket or disclosed to the parties unless the court specifically directs it to be filed.

F. Engagement of Staff and Consultants

68. The Court Monitor may, consistent with a budget to be approved by the court, hire staff or expert consultants to assist the Monitor in performing his or her duties. The Court Monitor will provide the parties advance written notice of his or her intention to hire a particular consultant, and such notice will include a resume and a description of duties of the consultant.

G. Budget, Compensation, and Expenses

69. The City of New York shall fund the Court Monitor's work pursuant to a budget proposed by the Court Monitor and approved by the court. The Court Monitor shall incur only such fees and expenses as may be reasonably necessary to fulfill the Monitor's duties under this Order, or such other orders as the court may issue.

70. Every 60 days, the Court Monitor shall submit to the court an itemized statement of fees and expenses, which the court will inspect for regularity and reasonableness. If the court determines the itemized statement is regular and reasonable, the court will sign it and transmit it to the parties. The City shall then remit to the Court Monitor any court-approved amount, within 20 calendar days of court approval.

H. Other Provisions

71. As an agent and officer of the court, the Court Monitor and those working at his or her direction shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal judicial adjuncts performing similar functions. Nevertheless, any Party or non-party may request that the court direct the Court Monitor to disclose documents or other information reasonably necessary to an investigation or the litigation of legal claims in another judicial forum that are reasonably related to the Court Monitor's work under this Order. This may include, for example, an investigation by the EEP

into the FDNY's EEO policies and practices. The court shall not order the Court Monitor to disclose any information without providing the Parties notice and an opportunity to be heard.

72. As required by Rule 53(b)(2) of the Federal Rules of Civil Procedure, the court directs the Court Monitor to proceed with all reasonable diligence.

73. The Court Monitor shall be discharged or replaced only upon an order of this court.

74. The parties, their successors in office, agents, and employees will observe faithfully the requirements of this Order and cooperate fully with the Court Monitor, and any staff or expert consultant employed by the Court Monitor, in the performance of their duties.

IV. RETENTION OF JURISDICTION

75. The Court will retain jurisdiction to enforce and modify this Order until such time as the court finds that the City of New York has established, by a preponderance of the evidence, that:

(a) the City does not currently use, and will not use in the future, any examination that in any way results in a disparate impact upon black or Hispanic applicants and is neither job related for the position of entry-level firefighter and nor required by business necessity, or does not otherwise meet the requirements of Title VII as part of any entry-level firefighter selection process;

(b) the City currently complies with, and will in the future continue to comply with, all applicable provisions of federal, state, and City equal employment opportunity laws in the use of any process to hire entry-level firefighters in the absence of court supervision;

(c) the City has established policies, procedures, and other institutional mechanisms that are—in practice and actual effect—sufficient to ensure that the City complies with all provisions of federal, state, and City equal employment opportunity laws and policies applicable to any process or step in a process used by the City to hire entry-level firefighters;

(d) the City currently provides, and in the future will continue to provide, financial resources and other support to its agencies, officials, and other institutions responsible for ensuring its compliance with federal, state, and City equal employment opportunity laws and policies, that are—in practice and actual effect—sufficient to ensure that the City complies with applicable equal employment opportunity laws and policies with respect to any process or step in a process used by the City to hire entry-level firefighters;

(e) the City has removed all barriers that perpetuate the effects of its intentional discrimination against black firefighter candidates; and

(f) the City has eliminated all vestiges of its intentional discrimination against black firefighter candidates.

76. Under no circumstances will the court's jurisdiction to modify or enforce this Order lapse before the later of:

(a) January 1, 2022; or

(b) the expiration date of the second of the City's next two civil service hiring lists for the position of entry-level firefighter that are certified after the issuance of this Order.

77. On or after the occurrence of the last event specified in Paragraph 76, the City of New York may request that the court set a bench trial at which the City will be permitted to introduce evidence to satisfy its burdens of proof and persuasion under Paragraph 75.

V. COSTS AND FEES

78. Except as otherwise set forth in this Order, the City shall bear all costs incurred by the City, the United States, and the Injunctive Relief Subclass in the prosecution and implementation of the remedy phase of this case, including reasonably-incurred attorneys' fees and expenses,

expert fees and the cost of all notification procedures, except that the United States shall bear its own attorneys' and expert fees and expenses.

79. Upon filing by the United States of a bill of costs verified pursuant to 28 U.S.C. § 1924, the court will tax against the City all costs allowed by 28 U.S.C. § 1920 incurred by the United States, as a prevailing party in this litigation.

80. The Injunctive Relief Subclass being prevailing parties with respect to the disparate impact and disparate treatment claims that were the subject of this court's Disparate Impact and Disparate Treatment Opinions, the City shall make an interim payment to the Injunctive Relief Subclass of attorneys' fees, costs and expenses they reasonably incurred in prosecuting those claims, at a time and in an amount to be agreed upon by the City and Injunctive Relief Subclass provided that if agreement is not reached within 30 days of the entry of this Order, the Injunctive Relief Subclass will apply to the Court for a determination of the amount of attorneys' fees, costs and expenses to be awarded.

SO ORDERED.

Dated: Brooklyn, New York
October __, 2011

DRAFT
NICHOLAS G. GARAUFIS
United States District Judge