UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	Civil Action No.: 1:14cv533
	)	
THE CITY OF AUSTIN, TEXAS,	)	
	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF UNITED STATES' AND DEFENDANT CITY OF AUSTIN'S JOINT MOTION FOR PROVISIONAL ENTRY OF CONSENT DECREE AND SCHEDULING OF FAIRNESS HEARING

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I. INTRODUCTION

Plaintiff United States of America ("United States") and Defendant City of Austin, Texas ("City") (collectively, the "Parties") submit this memorandum in support of their Joint Motion for Provisional Entry of Consent Decree and Scheduling of Fairness Hearing ("Motion"). The Parties request that the Court provisionally enter the proposed Consent Decree (the "Decree") that is attached as Exhibit 1 and schedule an initial fairness hearing as soon as possible within the limitations set by Paragraph III.D.1 of the Decree. The initial fairness hearing will allow the Court to consider any objections to the terms of the Decree prior to final approval and entry.[1]

As set forth below, the Court should provisionally enter the Decree because its terms are lawful, reasonable and equitable. The terms of the Decree fulfill the goals of: (1) resolving all legal and factual issues in dispute between the Parties; (2) ensuring that employment practices used by the City to hire entry-level firefighters comply with Title VII of the Civil Rights Act of 1964 , as amended ("Title VII"), 42 U.S.C. § 2000e *et seq.* (3) establishing a new, lawful selection procedure for selecting entry-level firefighters that is based upon merit and does not unnecessarily exclude qualified African-American and Hispanic candidates; and (4) providing appropriate individual relief in the form of back pay and/or priority appointments with retroactive seniority to qualified firefighter candidates who were eliminated from the City's entry-level firefighter selection process because of the employment practices challenged by the United States in this case.

[1] After all objections are received as to the terms of the Decree, the Parties will file another brief before the fairness hearing addressing those objections and requesting final approval and entry of the Decree.

II. PROCEDURAL BACKGROUND

On June 9, 2014, pursuant to Section 707 of Title VII, 42 U.S.C. § 2000e-6, the United States commenced this action against the City to enforce Title VII. The United States' Complaint alleges that the City has engaged in unlawful employment practices by utilizing selection procedures that have the effect of depriving or tending to deprive African Americans and Hispanics of employment opportunities because of their race and/or national origin, in violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a). Specifically, the United States alleges that the City's (1) pass/fail use of the 2012 cognitive behavioral exam ("NFSI") and (2) certification of applicants in descending rank order based on a combination of applicants' written exam scores, structured oral interview scores, and military points have resulted in a disparate impact upon African-American and Hispanic applicants for entry-level firefighter positions and are not job related and consistent with business necessity.[2] The United States also alleges that the 2013 hiring process, though based on different selection devices, would violate Title VII if continued as planned, and thus ongoing injunctive relief is warranted.

The City does not concede the allegations of unlawful employment practices as alleged in the Complaint. Nonetheless, the City is agreeable to the terms of the Decree because those terms will allow the City to address its serious, longstanding need to hire additional qualified firefighters by completing its most recent fire cadet hiring process, which was started in 2013 but which the City suspended after the United States began to investigate that hiring process. The City is also agreeable to the terms of the Decree because the Decree will resolve claims that could be asserted against the City concerning the outcome of its 2012 firefighter hiring process, and will avoid the costs and uncertainties of contested litigation.

[2] The United States' Complaint in this action does not include any allegation of intentional discrimination.

The Parties have voluntarily engaged in a significant amount of pre-suit discovery. The City and its experts (at its request) have voluntarily provided extensive information during the United States' pre-suit investigation[3] relating to the issues of disparate impact and validity, and the United States engaged an expert in industrial/organizational psychology and an expert in statistics to analyze validity and disparate impact issues, respectively. The United States, with the City's cooperation, also provided extensive information to the Austin Firefighters' Association ("the AFA" or the "union"), the union that most recently had a collective bargaining agreement with the City regarding its firefighters.[4]

As a result of ongoing settlement discussions over a period of several months, the United States and the City have negotiated and executed the attached Decree, which is the subject of this Memorandum. *See* Exhibit 1.

III. FACTUAL BACKGROUND

For purposes of seeking provisional and final entry of the Decree, the United States contends, and the City does not dispute (except as expressly set out in any Answer it files in this case), the following factual statements.

[3] By letter dated April 22, 2013, the United States notified the City that it would be investigating whether the City had engaged in a pattern or practice of discrimination against African Americans and Hispanics. The United States then conducted an in-depth investigation involving document review, data analysis, and consultation with an expert. In addition, the United States Equal Employment Opportunity Commission ("EEOC") conducted its own investigation of the City in response to a Charge of Discrimination filed by an unsuccessful 2012 applicant for an Austin entry-level firefighter position, and transmitted the information it gathered during that investigation to the United States Department of Justice pursuant to Section 706 of Title VII. Since that time, the individual charge has been resolved privately.

[4] The AFA and the City have not had an operative collective bargaining agreement since the October 1, 2013 expiration of their last labor agreement.

A. 2012 Selection Process

In 2012, the City used a process to screen and select applicants for the position of fire cadet, which is the entry-level position in the Austin Fire Department. In that selection process, applicants who met the minimum qualifications set by the City were given two written examinations: one intended to test cognitive and non-cognitive skills and abilities (hereinafter, "NFSI") and another intended to test counterproductive work behaviors ("Integrity Inventory" or "I2"). The NFSI was administered on a pass/fail basis, with a nominal cut-off score of 70 on the examination. However, the City invited only the top 1,500 scorers on the NFSI who also passed the Integrity Inventory to proceed to the next step – a structured oral interview ("SOI") – which resulted in an "effective" passing score of 75.06 on the NFSI.[5] Those who passed both written exams and the SOI were given composite scores made up of 2/3 SOI score and 1/3 NFSI score. The City then added military points where applicable to arrive at final scores and placed applicants in descending rank order on a preliminary eligibility list based on these scores. The top group of candidates on the preliminary eligibility list were then given an additional battery of final pre-employment assessments, including a physical ability test, drug screen, background check, and others. Those candidates who successfully passed these final pre-employment assessments were placed in descending rank order on a final eligibility list based on their test scores computed as described above.

[5] Although the passing score for the 2012 NFSI was 70, the City made a decision for reasons of administrative efficiency to interview only those Integrity Inventory passers who also were among the top 1,500 NFSI scorers. This meant that those who scored lower than a 75.06 but above a 70 were eliminated from the hiring process. Thus, the effective NFSI passing score was a 75.06.

1. Disparate Impact

The City administered the written tests in 2012 to approximately 1,114 white candidates, 328 African-American candidates, and 902 Hispanic candidates. *See* Declaration of Bernard Siskin ("Siskin Decl."), attached as Exhibit 2, ¶ 2. African-American and Hispanic candidates obtained scores above the "effective" passing score on the NFSI at statistically significantly lower rates than white candidates. The disparity in pass rates between African-American and white candidates equates to 9.72 units of standard deviation. *Id.* at ¶ 5. The disparity in effective pass rates between Hispanic and white candidates equates to 8.75 units of standard deviation. *Id.* at ¶ 5.

In addition, the City's determination and use of final scores to certify candidates in descending rank order also separately resulted in statistically significant disparate impact upon African Americans and Hispanics. African Americans and Hispanics who passed the NFSI received statistically significantly lower ranks on eligibility lists than whites: the likelihood that an African-American candidate would be ranked high enough to be considered for appointment, as compared to a white candidate, equates to 5.05 units of standard deviation, and the likelihood that a Hispanic candidate would be ranked high enough to be considered for appointment, as compared to a white candidate, equates to 4.96 units of standard deviation. Siskin Decl. ¶ 6. In practical terms, absent the disparate impact resulting from the pass/fail and rank-order use of the NFSI, an estimated additional 12 African Americans and 18 Hispanics would have been hired as entry-level fire cadets in Austin. *Id.* at ¶ 8.

2. Validity

According to the United States' expert industrial/organizational psychologist, David P. Jones, Ph.D., the City's decision to use a cut-off score of 75.06 on the NFSI and its decision then to use descending rank order to select applicants from eligibility lists have not been

demonstrated, using professionally accepted validation standards, to be sufficiently job-related or consistent with business necessity to comply with Title VII. *See* Declaration of David P. Jones, Ph.D. ("Jones Decl."), attached as Exhibit 3, at ¶¶ 48 and 53. Dr. Jones found that when the test developer conducted a local criterion related validity study of the NFSI in Austin, it found no meaningful relationship between NFSI scores and the job performance of incumbent Austin firefighters. *Id.* at ¶ 33. He also found that the NFSI was designed and previously criterion-validated as a two-and-a-half hour examination, but the City inadvertently erred in its administration of the test by reducing the time limit to two hours. *Id.* at ¶ 42. This changed the examination from the format under which it was validated; therefore, there is insufficient evidence of criterion-related validity for the City's use of the NFSI. *Id.* at ¶ 43.

Also, according to Dr. Jones, the City's pass/fail use of the NFSI with an effective cut-off score of 75.06 did not distinguish meaningfully among those candidates who can better perform the job of entry-level firefighter because the City, through the test developer, did not utilize a professionally appropriate method in establishing it. Jones Decl. at ¶¶ 44-48. Rather, the test developer validated a qualifying score of 57.75 as an appropriate pass/fail standard, and not the City's nominal cut-off score of 70 or the effective cut-off score of 75.06. *Id.* at ¶¶ 45-48. Thus, the United States contends that the City cannot meet its burden of demonstrating that the 2012 selection process met Title VII's requirements.

B. 2013 Selection Process

The 2013 selection process, underway when the United States commenced its investigation in April of that year, was similarly problematic under Title VII. In 2013, the City used a new test developer and administered a different cognitive-behavioral test known as the NELF, along with a structured oral interview ("SOI"). Jones Decl. ¶ 54. These selection

devices, in combination with their planned method of use, resulted in statistically significant disparate impact against both African Americans and Hispanics based on the rank-order list that the City planned to use. Siskin Decl. ¶ 9.

As with the 2012 selection devices, Dr. Jones analyzed the available validity information. Jones Decl. ¶¶ 59-63. He initially found that the 2013 process was not supported by the test developer's validation study and that the steps followed in an attempt to transport validation evidence from another jurisdiction did not meet professionally acceptable standards for validity transportability. *Id.* at ¶¶ 63-67. Specifically, Dr. Jones concluded that the validation study used both the cognitive and behavioral items of the NELF, whereas the City had scored only the cognitive test items,[6] thus invalidating the test developer's claim of transportability. *Id.* at ¶ 63. Dr. Jones also noted that the 2013 test developer did not perform an analysis of selection procedure fairness in its validity study, *id.* at ¶¶ 65 and 66. He further determined there was nothing to show that the 2013 SOI questions were the same as those in the transported validation study that the 2013 test developer was using to support the validity of the SOI for the Austin Fire Department. *Id.* at ¶ 68. Further, because the test developer discarded the scoring sheets utilized by raters of the SOI in Austin, Dr. Jones was unable to analyze the criterion-related validity or fairness of that component of the process. *Id.* at ¶¶ 69-71. Taking into account these substantial limitations, Dr. Jones nonetheless conducted his own criterion-related validity analysis of the underlying data produced by the test developer and was able to find some evidence of validity. *Id.* at ¶¶ 73-76.

[6] The City and the 2013 test developer did consider alternative uses of the behavioral part of the NELF test, but never settled on a specific method for using it before the City suspended the 2013 hiring process due to the United States' investigation. Thus, only the cognitive scores from the NELF test have been used for this analysis.

Most importantly, however, in examining the underlying validity data the test developer provided, Dr. Jones found that the 2013 selection devices had an equally valid alternative use that would have resulted in less adverse impact while retaining the same validity. *Id.* at ¶¶ 77-82; *see also* Siskin Decl. at ¶ 10. Specifically, retaining two of the five cognitive subtests on the NELF predicted job performance substantially as well as retaining all five subtests and with less adverse impact. Jones Decl. ¶¶ 78 and 82; Siskin Decl. ¶ 10.

C. Overview of the Consent Decree

1. Injunctive Relief

Under the Decree's terms, the City, with review by the United States, will develop and administer a new, lawful procedure for selecting qualified applicants for entry-level firefighter positions. Decree at III.C.6. The Parties have agreed that the City may use the scores from the cognitive portion of the 2013 NELF test, and the 2013 SOI scores, weighted in the same manner as the original design of that hiring process (i.e., 80% weighting to the SOI, 20% weighting to the cognitive score) to establish a list from which it may, but is not required to, fulfill exigent hiring needs by hiring up to 90 entry-level fire cadets. Decree at App. B, ¶ 6. However, in light of the validity concerns raised with the 2013 selection procedures set forth above, once up to 90 cadets have been selected, or the City has designated an eligibility list using the new, lawful procedure developed under ¶ III.C.6 of the Decree, whichever occurs first, the City may no longer hire fire cadets using the 2013 test scores. Decree at App. B, ¶6.

2. Back Pay

Under the terms of the Decree, the City will pay $780,000 (gross) in back pay. An individual is eligible for back pay if he or she is African American or Hispanic, applied to be an entry-level fire cadet in Austin in 2012, was not hired, and either: (i) took and failed (with a

score of less than 70) the 2012 NFSI but passed the Integrity Inventory; (ii) effectively failed the 2012 NFSI (with a score of less than 75.06) but passed the Integrity Inventory; or (iii) passed both the 2012 NFSI (with a score of at least 75.06), and the Integrity Inventory but ranked too low to be selected for hire.[7] *Id.* at ¶ III.F.3. The Decree defines those eligible for relief as "Claimants." *Id*. Claimants who are eligible for back pay will receive a portion of the total back pay award, which is within the range of recovery based on the salary that 30 entry-level firefighters would have received if they had been hired in 2012 absent disparate impact. *See* Siskin Decl. ¶¶ 13 and 14. The total of 30 is derived directly from the estimated hiring shortfall from 2012 (18 Hispanics and 12 African Americans). *Id.* at ¶ 13. The $780,000 back pay settlement will be distributed pro rata among all eligible and interested Claimants.

3. Priority Appointments with Retroactive Seniority

The Decree obligates the City to ensure that thirty priority appointments are made to twelve African-American and eighteen Hispanic Claimants from the 2012 hiring process. Decree at ¶ III.F.5.d. Importantly, the Decree does not require the City to appoint anyone who is not qualified to be a fire cadet. All Claimants who wish to compete for a priority appointment must successfully complete the new, lawful selection procedure developed by the City under the Decree. *Id.* at ¶ III.C.6. All Claimants also must successfully complete the cadet academy to become entry-level firefighters.

Each Claimant who receives a priority appointment will be entitled to retroactive seniority dates which will be the same dates the Claimant would have been hired and commissioned, respectively, but for the challenged practices that adversely affected the protected group. *Id.* at App. A ¶ 9. These dates are the same hire and commission dates awarded to the

[7] The City did not consider 2012 applicants who did not achieve a minimum score of 70 on the SOI to have passed that test. Those individuals will not be eligible for relief.

actual applicants who were hired in 2012, and thus are in the range of recovery the United States would obtain if it prevailed at trial.

4. Fairness Hearings, Objections, and Individual Relief Claims Process

a. Initial Fairness Hearing

Pursuant to the terms of the Decree, the Parties move the Court to schedule two fairness hearings. *Id.* at ¶ III.D. At the first hearing (the "Initial Fairness Hearing"), the Court will determine whether the terms of the Decree are lawful, reasonable and equitable. *Id.* at ¶ III.D.1. Prior to the Initial Fairness Hearing, individuals whose interests may be affected by the Decree (including all known potential Claimants, the AFA , all incumbent Austin firefighters, and the individuals who participated in the two components of the 2013 hiring process administered to date) will be given notice of the Decree and an opportunity to file objections. Decree at ¶ III.D.3. Importantly, the United States has already presented proposed Decree terms to the union and received its input, and the Parties have made substantive changes to their agreement based on the union's feedback. Regardless, however, at the Initial Fairness Hearing, the Court will consider and resolve any objections received, including any submitted by the union. Assuming the Court concludes at the end of the Initial Fairness Hearing that the Decree is lawful, reasonable and equitable, the Parties will ask that the Court enter the Decree as a final Order. *Id.* at ¶ III.E.

b. Individual Relief Claims Pro cess and Fairness Hearing on Individual Relief

The Decree contains a process, to occur after the Court has finally entered the Decree, for persons who believe that they are entitled to individual relief to submit Interest-in-Relief forms to a claims administrator. *Id.* at ¶¶ III.F.3-4. The United States will make individual relief determinations for all Claimants after considering any timely raised objections by the City. *Id.* at

¶ III.F.6. Furthermore, the Decree provides for a second fairness hearing (the "Fairness Hearing on Individual Relief") for the Court to approve or modify the individual relief determinations made by the United States, and to review any timely made objections to the individual relief determinations. *Id.* at ¶ III.F.8.

5. Continuing Jurisdiction and Duration of the Decree

Under the Decree, the Court will retain jurisdiction over this matter for a minimum of four years, though the Parties will be obligated to engage in informal dispute resolution efforts before bringing any disagreements to the Court's attention. Decree at ¶ IV. The Decree will expire, and the case will be dismissed without further order of the Court, on the latest of the following occurrences: (i) complete fulfillment of the Parties' obligations regarding the individual relief to be awarded under the Decree; (ii) 30 days after the establishment of a final eligibility list based on the second administration of the new, lawful entry-level firefighter examination following the Date of Entry of the Decree; or (3) four years from entry of the Decree. *Id.* at ¶ V. If none of those events has occurred within four years of the Date of Entry of the Decree, either Party may move for a hearing to determine the appropriate next steps in the process. In addition, if one or both Parties establish good cause, the Decree may be extended, but only up to a cumulative total of eight years from the Date of Entry. *Id.*

IV. ARGUMENT

A. Standard of Review

"Voluntary settlement of Title VII suits was deliberately adopted by Congress as a means of accomplishing its goal of eliminating employment discrimination." *United States v. City of Miami* ("*City of Miami II*"), 664 F.2d 435, 442 (5th Cir. 1981). Indeed, "'[c]ooperation and voluntary compliance were selected as the preferred means of achieving this goal.'" *Id.* (quoting

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)); *see also Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) ("In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims."). As the Fifth Circuit has acknowledged, Congress places an "extremely high premium . . . on voluntary settlements of Title VII suits." *United States v. City of Miami* ("*City of Miami I*"), 614 F.2d 1322, 1331 (5th Cir. 1980), *modified per curiam*, 664 F.2d 435 (Former 5th Cir. Dec. 1981). Thus, "Title VII consent decrees should be viewed in light of Congress' determination that voluntary compliance is a preferred means of enforcing nondiscriminatory employment policies and practices." *Williams v. City of New Orleans*, 694 F.2d 987, 991 (5th Cir. 1983) (citation omitted).

"In Title VII litigation, consent decrees enjoy a presumption of validity." *Id*. (citing *United States v. City of Alexandria*, 614 F.2d 1358, 1359, 1362 (5th Cir. 1980), overruled on other grounds implicitly by *Dean v. City of Shreveport*, 438 F.3d 448, 452 n.1 (5th Cir. 2006); *see also City of Miami I*, 664 F.2d at 440 (indicating that consent decrees in Title VII cases are presumptively valid) (citations omitted). In particular, in cases where the United States is a plaintiff, that presumption "'is overcome only if the decree contains provisions which are unreasonable, illegal, unconstitutional, or against public policy.'" *Williams*, 694 F.2d at 991 (quoting *City of Alexandria*, 614 F.2d at 1362); *cf. E.E.O.C. v. Johnson & Higgins, Inc.*, No. 93 CIV 5481 LBS, 1999 WL 544721, at *3 (S.D.N.Y. Jul. 26, 1999) (well-settled that courts have limited role in reviewing proposed settlement agreements in litigation initiated by EEOC, which has responsibilities analogous to Department of Justice) (internal citation omitted).

When assessing whether a proposed consent decree is lawful, reasonable and equitable, the Fifth Circuit considers several factors, commonly known as the *Parker* factors. *See Salinas v. Roadway Express, Inc.*, 802 F.2d 787, 789 (5th Cir. 1986) (citing *Parker v. Anderson*, 667

F.2d 1204, 1209 (Former 5th Cir. 1982), *cert. denied*, 459 U.S. 828 (1982)); *see also San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio*, 188 F.R.D. 433, 453 (W.D. Tex. 1999)). Those factors are:

> (1) whether the settlement was a product of fraud or collusion; (2) the complexity, expense, and likely duration of litigation; (3) the stage of the proceedings and the actual am ount of discovery com pleted; (4) th e factual an d legal obs tacles to prevailing o n the m erits; (5) the po ssible range of recovery a nd the cer tainty of damages; and (6) the respective opinions of the participants, including class counsel, class representatives and the absent class members.

Salinas, 802 F.2d at 789 (citing *Parker*, 667 F.2d at 1209). Because this Decree satisfies the factors to be addressed prior to provisional entry of a decree, this Court should grant the Joint Motion.

B. In Light of the *Parker* Factors, the Decree Is Lawful, Reasonable and Equitable

As explained below, the Decree is not the product of fraud or collusion, the United States is likely to prevail on the merits, and the Decree-afforded relief strikes an appropriate balance between the strength of the United States' case and the uncertainty and delay inherent in contested and protracted litigation. Furthermore, two fairness hearings will occur to consider the respective views of those eligible for relief under the Decree and others whose interests may be affected. It is worth noting that, at this time the Parties cannot know the opinions of all absent, potentially interested parties, but at the same time, the Parties are only requesting provisional entry and thus the sixth *Parker* factor may not yet be at issue. Nevertheless, the Parties will address that factor in this brief to their best of their ability.

1. The Decree Is the Product of Arms' Length Bargaining

"In the absence of fraud or collusion, the trial court should be hesitant to substitute its own judgment for that of counsel." *Ruiz v. McKaskle*, 724 F.2d 1149, 1152 (5th Cir. 1984) (analyzing lower court's approval of modified settlement in prison conditions case). When "the

parties engaged in a lengthy, arms' length settlement process," they satisfy the first *Parker* factor. *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 287 (W.D. Tex. 2007); *see also San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio*, 188 F.R.D. 433, 458 (W.D. Tex. 1999) (finding no fraud or collusion where the parties were "vigorously represented" and engaged in long-term, arm's-length negotiations).

The Parties' agreement to settle this case was the product of extensive arm's-length negotiations by experienced Title VII counsel zealously representing their clients. The Parties' settlement communications and positions were informed by the results of the United States' in-depth investigation of the City's entry-level firefighter hiring practices. That investigation involved active participation by counsel for all Parties, the production and review of voluminous data in response to requests for information, and consultation with multiple experts regarding the disparate impact of the City's selection procedures, the validity of those procedures, and the City's methods of use (such as the selection of a cut-off score, the effective cut-off score, and the City's scoring, weighting, and ranking practices). Having gone through that process, the Parties are well-positioned to determine the strengths and weaknesses of their cases and, in light of their respective case assessments, the benefits and burdens associated with contentious litigation, as opposed to settlement. Finally, the Decree contains no terms – such as the provision of significant attorneys' fees for one side's counsel – that might incentivize the Parties to collude or seek to defraud. For those reasons, the first *Parker* factor favors entry of the Decree.

2. Substantial Pre-Suit Investigation Supports the Conclusion that the United States Has a Strong Case on the Merits

As this Court has explained, when it comes to evaluating the fairness and legality of a settlement, "[s]ufficiency of information does not depend on the amount of formal discovery

which has been taken because other sources of information may be available to show the settlement may be approved even when little or no formal discovery has been completed." *San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio,* 188 F.R.D. 433, 459 (W.D. Tex. 1999). Since late April 2013, when the United States commenced its pre-suit investigation, the Parties have collected more than ample information to assess the relative strengths and weaknesses of their positions in this matter, and to reach the conclusion that the United States has a strong case on the merits.

In response to the United States' requests for information about the City's hiring practices, the City produced numerous documents and datasets, and the Parties have communicated extensively about the City's responses to the requests. Additionally, the United States has shared data from the City with experts – namely, Dr. Jones and Dr. Siskin – who have advised the United States regarding matters affecting the viability of both its claims and defenses the City might raise. The United States also has reviewed documentary evidence and data submitted by the City to the Equal Employment Opportunity Commission, shared with the United States by the Commission pursuant to Section 706 of Title VII.

Based on this substantial exchange of information, the United States asserts that it has ample evidence to show that the City's 2012 selection process was vulnerable under Title VII. The City does not dispute that assertion. Title VII's disparate impact-related prohibitions require the removal of "employment procedures or testing mechanisms that operate as 'built-in headwinds' for [protected] groups and are unrelated to measuring job capability." *Griggs v. Duke Power Co.,* 401 U.S. 424, 432 (1971);[8] *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir.

[8] This theory was first articulated in *Griggs*, 401 U.S. at 432, by the United States Supreme Court. Congress later codified the disparate impact theory of discrimination in the 1991 Civil Rights Act, which amended Title VII.

1976). Accordingly, if a testing procedure produces a disparate impact based on the race or national origin of candidates for hire, then Title VII prohibits its use unless the employer proves that the device is "job-related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Zuniga v. Kleberg Cnty. Hosp., Kingsville, Tex.*, 692 F.2d 986, 989 (5th Cir. 1982). Moreover, even if an employer can make this showing, Title VII bars using the procedure if there is an alternative employment practice with less disparate impact that will meet the employer's needs. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *see also Dothard*, 433 U.S. at 329 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Zuniga*, 692 F.2d at 989.

In general, statisticians, testing experts, and social scientists consider a disparity to be "statistically significant" if the probability of the disparity occurring randomly is 5% or less. Siskin Decl.¶ 4. That probability standard is equivalent to approximately 1.96 units of standard deviation. *Id.* As a result, courts typically accept, as sufficient to establish a *prima facie* case of disparate impact, disparities that are statistically significant at the level of two to three units of standard deviation. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n.14 (1977); *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 279-80 (5th Cir. 2008) (affirming the district court's finding of disparate impact where the difference between salaried promotions of white versus African-American class members was equivalent to 2.02 standard deviations); *Bazile v. City of Houston*, Civil Action No. H-08-2404, 2012 WL 573633, at *46 (S.D. Tex. Feb. 6, 2012) ("'Social scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for a deviation could be random and the deviation must be accounted for by some factor other than chance.'") (quoting *Waisome v. Port Auth. of N.Y. and N.J.*, 948 F.2d 1370, 1376 (2d Cir. 1991)).

Based on the information exchanged pre-complaint, the United States asserts that it has ample evidence to show that the City's 2012 use of the NFSI had a statistically significant disparate impact on both African-American and Hispanic applicants for entry-level firefighter positions with the City. Siskin Decl. ¶¶ 5-8. Test data indicate that the disparity between the respective effective pass rates of African Americans and whites is equivalent to 9.72 units of standard deviation. *Id.* at ¶ 5. Similarly, the disparity of the respective pass rates of Hispanics and whites is equivalent to 8.75 units of standard deviation. *Id*. at ¶ 5. Both of those figures far exceed the threshold that courts typically deem sufficient to establish a *prima facie* case of disparate impact. The City does not dispute these calculations in the Siskin Declaration.

The United States further asserts that the City's 2012 ranking practice also had statistically significant disparate impact on each group, with a disparity between the respective mean ranks of Hispanics and whites equivalent to 4.88 units of standard deviation, and a disparity between the respective mean ranks of African Americans and whites equivalent to 4.18 units of standard deviation. Siskin Decl. ¶ 6. Notably, had it used a Title VII-compliant process, the City would have hired an estimated 18 additional Hispanics and an additional 12 African Americans as entry-level firefighters in 2012. *Id*. at ¶ 8. The City does not dispute these calculations in the Siskin Declaration.

Because the United States can make a *prima facie* case, the City can avoid liability only by proving that both its pass/fail use of the NFSI and its rank-ordering practice are "job-related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). (This part of the analysis is sometimes referred to as "Prong II.") In particular, *Guardians Ass'n of New York City Police Dep't, Inc. v. Civil Serv. Comm'n*, 630 F.2d 79 (2d Cir. 1980) , confirms that, when a city uses both cut-off scores and rank ordering as parts of its

selection process, each of those subsidiary practices must independently satisfy Title VII's requirement of job-relatedness. *See id.* at 100-05, 105-07. To satisfy that standard, each selection process must be "shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job." *Albemarle*, 422 U.S. at 431 (quoting 29 C.F.R. § 1607.4(C)); *see also Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 563-64 (5th Cir. 1988).

The available evidence strongly suggests that the City would be unable to meet this burden. First, as explained by the United States' I/O psychologist, Dr. David Jones, the local criterion-related study conducted by the City's test developer found no meaningful predictive value in assessing the job performance of incumbent Austin firefighters. Jones Decl. ¶ 33. Second, Dr. Jones also found an error in the administration of the 2012 NFSI that substantially undermined the City's ability, through its test developer, to transport results from the test developer's national study to the City. Specifically, the City inadvertently allowed candidates only two hours to complete the NFSI when the validation study allowed two-and-a-half hours. *Id.* at ¶¶ 40-43. Last, according to Dr. Jones's analysis, the City's use of the NFSI as a pass/fail device with a cut-off score of 75.06 was unsupported by the test developer's validation study, which recommended a cut-off score of 57.75 based on the data the developer had collected. In other words, the City did not have a proper basis to eliminate or retain candidates for further screening using that cut-off score because it did not distinguish meaningfully among those candidates who can better perform the job of fire cadet or entry-level firefighter, and instead excluded some candidates who would likely perform the job better than the candidates who were selected. *Id.* at ¶¶ 44-48; *see also Guardians* at 105-06. Thus, the United States contends that the City cannot meet its burden under Prong II of the Title VII disparate impact analysis.

Likewise with respect to the City's proposed use of the 2013 selection process, the United States asserts that it has evidence showing disparate impact against both African Americans and Hispanics through statistical evidence, and that the City did not, as was its obligation, meet its burden of establishing validity. Although the United States' expert, Dr. Jones, found some evidence of validity for the 2013 process by conducting *his own* analysis (which was limited by the fact that the City's test vendor did not retain the original scoring sheets created by the SOI raters that would be necessary to establish the transportability, fairness, and reliability of the SOI, which made up eighty percent of the final score), he also identified an alternative way to use the results of the 2013 examination that both reduces adverse impact on protected groups and retains the same validity as the previously planned use. Jones Decl. ¶¶ 77-82; Siskin Decl. ¶ 10. Nonetheless, and because there is some evidence of validity of the overall process, the Decree allows the City to use the cognitive and SOI scores from the 2013 process, as it had planned, for the limited purpose of hiring up to 90 cadets to meet the City's exigent hiring needs while a new lawful exam is being developed. Decree at ¶ III.C.6. The City does not contest these portions of the Jones Declaration.

In sum, based on the extensive amount of discovery already completed and the results of that discovery, which suggest the United States has a strong case on the merits, the proposed Decree satisfies the third and fourth *Parker* factors.

3. The Relief in the Consent Decree Falls Well Within the Range of Remedies the United States Could Recover if it Prevailed Under Title VII

District courts have "not merely the power but the duty to render a decree that will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle*, 422 U.S. at 418 (citation omitted). Here, the relief provided in the Consent Decree does this by: (1) providing individual relief including back pay and/or priority hire positions to Hispanics and African Americans who have been harmed by the challenged practices, and (2) ensuring through prospective injunctive relief that the City will develop and use a selection procedure that complies with Title VII and does not unnecessarily exclude qualified Hispanics and African Americans from the position of entry-level fire cadet. Further, as discussed in detail *infra* in Section IV.B.4, individuals whose interests may be affected by implementation of the Decree are afforded an opportunity to object and to have their objections resolved by this Court.

a. The Individual Relief Should Be Awarded

One of the central purposes of Title VII is to make whole persons who have been harmed by employment practices that violate the statute. In enacting Title VII, "Congress took care to arm the courts with full equitable powers," so that the courts may fashion relief for identifiable individuals. *Albemarle*, 422 U.S. at 418. To exercise those equitable powers, a court may order such relief as may be appropriate, "which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (quoting Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g)); *see also Booker v. Taylor Milk Co.*, 64 F.3d 860, 864 (3d Cir. 1995) (indicating that Title VII authorizes back pay); *United States v. New Jersey*, No. CIV.

88-5087 WGB, CIV. 88-4080(MTB), CIV. 87-2331(HAA), 1995 WL 1943013, at *20-22 (D.N.J. Mar. 14, 1995) (noting that circuit courts have repeatedly upheld lower court decisions granting seniority relief as a remedy in Title VII cases and that Title VII authorizes the creation of priority eligibility lists from which priority promotions will be made).

In Title VII pattern or practice cases like this, "[t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Albemarle*, 422 U.S. at 418-19 (citation omitted). Given these principles, courts have routinely entered consent decrees that confer the kinds of individual remedial relief included in this Decree – back pay, priority appointments, and retroactive seniority to those receiving priority appointments. *See, e.g.*, *United States v. New Jersey*, Civ. No. 10-91 (KSH)(MAS), 2012 WL 3265905, at *1 (D.N.J. Jun. 12, 2012), *aff'd*, 522 F. App'x 167 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 529 (2013); *United States & Corpus Christi Police Officers' Ass'n. v. City of Corpus Christi, Tex.*, 2:12-cv-00217 (S.D. Tex. May 16, 2013); *United States v. City of Portsmouth, Va.*, 2:09-cv-00133-MSD-FBS (E.D. Va. Jul. 23, 2009).

Importantly, individual remedial relief under the Decree is available only to those who were adversely affected by the practices the United States challenged – namely, African Americans and Hispanics who were never appointed as firefighters and who: (i) took and failed (with a score of less than 70) the 2012 NFSI but passed the Integrity Inventory; (ii) took the 2012 NFSI and scored at least 70 but who nonetheless "effectively failed" the 2012 NFSI (because their score was below 75.06, and they were thus not among the 1,500 highest-scoring applicants) but passed the Integrity Inventory; or (iii) passed both the 2012 NFSI (with a score of at least

75.06) and the Integrity Inventory but ranked too low to be selected for hire.[9] *See* Decree at ¶ III.F.3.

In terms of back pay, the settlement fund of $780,000 is reasonable and equitable because the total amount reflects a realistic estimate of what new Hispanic and African-American firefighters would have earned absent the challenged selection practices. The total amount represents the salary that thirty firefighters, half appointed in the first 2012 class and half appointed in the second 2012 class, would have made through late November 2013, around the time the Parties reached agreement on a monetary amount. Because this is a settlement, interest is not included, nor are incentive pay or overtime pay amounts, and a mitigation factor is taken into account.

Distributing the back pay amount among all eligible claimants (as opposed to only the thirty priority hires) also is equitable, and it will provide those individuals with relief that is within the range of what they could recover if the United States prevailed at trial. It is impossible to know exactly which thirty individuals would have been hired in a Title VII-compliant process. The Eleventh Circuit has explained "in the context of remedial backpay relief that a classwide remedy is appropriate when fashioning an individualized remedy would create a quagmire of hypothetical judgments as to which individuals, out of a large class, should receive remedial relief." *United States v. City of Miami*, 195 F.3d 1292, 1299 (11th Cir. 1999) (internal quotations and citations omitted)*; see also Segar v. Smith*, 738 F.2d 1249, 1290 (D.C. Cir. 1984) (same); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1974) (same). In

[9] The City did not consider 2012 candidates who failed to achieve the minimum cutoff score on the SOI to have passed that test. Since the United States does not contend that the minimum cutoff score on the SOI was an unlawful employment practice under Title VII, the Decree excludes those 2012 candidates who did not achieve the minimum SOI cutoff score from the pool of 2012 candidates who are eligible for individual relief.

addition, some individuals, including some of those who might have been hired at the time, may no longer be interested in employment at the Austin Fire Department. Thus, to award the entire monetary amount to only thirty people would necessarily be both under-inclusive and over-inclusive. Distributing the amount evenly to all interested and eligible claimants (a number likely be in the several hundreds) is therefore a more equitable and efficient solution.

The priority appointments also are within the range of recovery that the United States could obtain if it prevailed on the merits. The number of priority appointments required by the Decree (thirty) is the same as the estimated number of African-American and Hispanic appointments that would have been made in the absence of the discriminatory employment practices. Siskin Decl. ¶ 8. Importantly, the Decree ensures that only Claimants who demonstrate that they are presently qualified for the position of entry-level fire cadet will be eligible for priority appointments. *See* Decree at ¶ III.F.5.b; also App. E ¶¶ 4-5.

Finally, the Decree appropriately provides retroactive seniority to Claimants who receive priority appointments. Decree at ¶ III.F.5.k. Awarding retroactive seniority is a necessary element in placing qualified individuals – who, but for the challenged practices, would have been hired earlier – in the positions they would have occupied in the absence of the alleged discrimination. Such retroactive seniority relief ordinarily is necessary to achieve Title VII's "make whole" objective. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 765 (1976); *United States. v. New Jersey*, No. CIV. 88-5087 WGB, CIV. 88-4080(MTB), CIV. 87-2331(HAA), 1995 WL 1943013, at *19 (D.N.J. Mar. 14, 1995). In fact, courts have found that there is a presumption in favor of affording such seniority relief when the parties reach a voluntary settlement. *See Franks* at 780, n.41; *see also Moore v. City of San Jose*, 615 F.2d 1265, 1272 (9th Cir. 1980); *Bockman v. Lucky Stores, Inc.*, No. CIV S 83-039 RAR, 1986 WL 10821, at *4

(E.D. Cal. Aug. 11, 1986), *aff'd*, 826 F.2d 1069 (9th Cir. 1987). The retroactive seniority to be awarded under the Decree achieves the make-whole objective because the retroactive hire and commission dates are the exact same dates that those hired through the regular 2012 hiring process were given. Because the two classes hired in 2012 were of similar sizes, the Parties have agreed that half of the priority hires will have the hire and commission dates assigned to the first 2012 class, and the other half will have the hire and commission dates assigned to the second 2012 class.[10] All of these facts favor a finding that the retroactive seniority awarded under the Decree is appropriate.

b. The Prospective Injunctive Relief Should Be Awarded

When an employer has engaged in a pattern or practice of discrimination in violation of Title VII, an award of prospective injunctive relief is justified without any further showing. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977). Courts have routinely entered consent decrees that, like the Decree here, afford such relief. *See, e.g.*, *Vulcan Pioneers, Inc. v. New Jersey Dep't of Civil Serv.*, 832 F.2d 811, 816 (3d Cir. 1987) ("*Vulcan II*"). Appropriate prospective injunctive relief may include a bar against future discrimination, an order to maintain records and generate compliance reports, or any other directive that is "necessary to ensure the full enjoyment of the rights" Title VII protects. *See Teamsters*, 431 U.S. at 361. Such relief may also include prohibiting the use of an unlawful exam or other invalid selection criteria, restricting the ability to promote from eligible lists shaped by unlawful selection practices, and ordering the adoption of new, lawful selection procedures. *See, e.g.*, *Vulcan II*, 832 F.2d at 816 (affirming, in matter involving enforcement of consent decree, district

[10] The six highest-ranked African Americans and the nine highest-ranked Hispanics on the respective priority hire lists will be deemed to have been in the first fire cadet training academy. The next six African Americans and nine Hispanics will be deemed to have been in the second academy.

court's prohibitions on using discriminatory exams and making promotions from lists generated by unlawful exams).

Consistent with these parameters, and given the deficiencies with the 2013 selection process noted by Dr. Jones, the Decree in this case requires the City to develop a new, lawful procedure for screening and selecting entry-level fire cadets and firefighters. *See* Decree ¶ III.C.6. While the City will be free to decide the selection devices and processes for its fire cadet hiring while the Decree is in effect, the Decree provides the United States with the right to review the City's chosen selection devices and processes as a way of ensuring that the new selection practices comply with Title VII. In the event the United States objects to any part of a future hiring process while the Decree is in effect, the Decree provides a procedure by which the United States and the City will attempt to resolve the dispute, with ultimate resort to the Court for resolution if the parties are unable to agree. This relief is tailored directly to the United States' allegations, will be highly effective in resolving the problems associated with the City's recent hiring practices, and will preserve to the City the prerogative to develop a hiring process that meets its operational needs (subject to the United States' review as described above). Thus, the injunctive provisions of the Decree are within the range of relief the United States would obtain if it prevailed at trial.

4. The Respective Opinions of Counsel, the Claimants, and Others Whose Interests May Be Impacted Will Be Considered

"In reviewing the opinions of counsel, the Court is to bear in mind that counsel for each side possess the unique ability to 'assess the potential risks and rewards of litigation, and a presumption of correctness is said to attach to a class settlement reached in arms [sic] length negotiations between experienced, capable counsel after meaningful discovery.'" *Neff v. VIA Metro. Transit Auth.*, 179 F.R.D. 185, 211 (W.D. Tex. 1998) (citing *Lelsz v. Kavanagh*, 783 F.

Supp. 286, 297 (N.D. Tex. 1991) (quoting The Manual for Complex Litigation § 30.41), *aff'd*, 983 F.2d 1061 (5th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993)). As the preceding discussion shows, the Parties and their counsel have closely examined the facts and law at issue here. Further, all counsel have significant experience in Title VII litigation as well as in negotiating settlement agreements. Indeed, the Justice Department's Employment Litigation Section frequently investigates and litigates cases of this very nature. And, in connection with that work, attorneys in that Section often negotiate, implement, and enforce consent decrees, including ones that are substantially similar to the Decree. Given that backdrop and the discussion above concerning the other *Parker* factors, endorsement of the Decree by the Parties' legal counsel favors entry.

Also, pursuant to Title VII (42 U.S.C. § 2000e-2(n)(1)), the Decree contains a detailed protocol for providing potentially interested parties with notice and the opportunity to object. The Decree provides for two fairness hearings – an Initial Fairness Hearing, and a Fairness Hearing on Individual Relief, the latter occurring after final entry of the Decree but before individual relief awards are distributed. Before the Initial Fairness Hearing, written notice of the Decree and the date of the Initial Fairness Hearing, as well as instructions for submitting objections to the relief provided in the Decree, will be provided to persons whose interests may be affected, including the AFA and incumbent firefighters themselves. *See* Decree at ¶ III.D.3. Notice will be made in several ways including: (i) electronic mail; (ii) conspicuous postings on the City's websites; and (iii) in Austin's major newspaper. *Id.* At the Initial Fairness Hearing, the Court will determine, after considering timely filed objections, whether the terms of the Decree are lawful, reasonable and equitable.

Assuming the Decree is finally entered by the Court, a claims process will follow, after which Claimants will be given a second opportunity to object, this time to their awards of individual relief. During this second fairness hearing, the Court can evaluate whether the awards of individual relief are fair given the Claimant population and the total amount of relief available under the Decree. The Decree contemplates that the Court will, after considering timely filed objections, enter an order approving or modifying the proposed individual relief, as appropriate.

Importantly, the fairness hearings set forth in the Decree comport with 42 U.S.C. § 2000e-2(n)(1), which states, in relevant part, that:

> (1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).
>
> (B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--
>
> (i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--
>
> (I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and
>
> (II) a reasonable opportunity to present objections to such judgment or order; or
>
> (ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

42 U.S.C. § 2000e-2(n)(1). Thus, the fairness hearings will address due process concerns by affording all potentially interested parties the opportunity to be heard, and protect the Decree from collateral attack. *See generally Edwards v. City of Houston*, 78 F.3d 983, 991 n.8 (5th Cir. 1996) ("Section 2000e-2(n) protects consent judgments from certain subsequent collateral challenges by persons who, although not parties to the litigation that produced it, may have interests adversely affected by the judgment."); *U.S. v. New Jersey*, No. CIV. 88-5087 WGB, CIV. 88-4080(MTB), CIV. 87–2331(HAA), 1995 WL 1943013, at *23-4 (D.N.J. Mar. 14, 1995) (concluding that fairness hearing process consistent with 42 U.S.C. § 2000e-2(n)(1)(A) protected the procedural due process rights of all individuals potentially affected by the consent decree).

5. The Complexity, Expense, and Anticipated Duration of Litigation Weigh in Favor of Settlement

When the parties are faced with the likelihood of a lengthy trial and extensive risks and costs, courts in this Circuit have found that the second *Parker* factor favors settlement. *San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio,* 188 F.R.D. 433, 458 (W.D. Tex. 1999) (repeating the court's statement at the fairness hearing that, "[t]he full litigation route [involves] risks and costs, not only monetary costs, but also damage to the department and to the city."); *see also Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004) (noting, in approving a Title VI and Equal Protection Clause settlement using the *Parker* factors, that settlement would provide relief for the class sooner than litigation would).

Here, settlement will avoid years of expensive and time-consuming litigation. Absent settlement, the United States expects to move to bifurcate the proceedings for separate trials on liability and damages. Extensive discovery will ensue, including reports and depositions from experts who would assess the impact and validity of the City's use of the NFSI and its rank-order practice. Furthermore, based on how other cases like this have been handled, absent settlement,

the Parties expect extensive motions practice, which could include the filing of dispositive motions, motions *in limine*, motions challenging experts and/or their findings, and motions for reconsideration of adverse rulings. It is likely that appeals would follow. In short, engaging in contested litigation would almost certainly mean that this matter would not be resolved for years, and then only after both the United States and the City expend tremendous resources. Such a result would substantially delay any relief to the Claimants that is ultimately awarded by the Court. Moreover, the City asserts that contested litigation over hiring at the Austin Fire Department would throw into uncertainty the City's ability to continue hiring entry-level fire cadets during the litigation, which could create a serious operational risk for the City. Finally, if the United States prevails after litigation, the City will likely have incurred additional monetary liability, because back pay will continue to accrue on the claims associated with the 2012 process. Thus, the second *Parker* factor weighs on the side of entering the Decree.

C. The Proposed Consent Decree Is Consistent with the Standard Laid Out in *Ricci v. DeStefano*

In *Ricci v. DeStefano*, 557 U.S. 557 (2009), the Supreme Court held that "race-conscious" action taken to avoid Title VII disparate impact liability may in certain circumstances violate Title VII's prohibition against disparate treatment. *Ricci* at 563. To avoid such an outcome, an employer must possess a "strong basis in evidence" to conclude that, absent taking the race-conscious action, it would be liable for a Title VII disparate impact violation. *Id.* The *Ricci* case did not involve race-conscious employment actions (such as the individual relief and limitations on the use of the interim hiring list here) that were taken pursuant to a consent decree in an action brought by the United States under Section 707 of Title VII. Thus, the Parties believe that *Ricci* is inapplicable to this case, and does not preclude entry of the Decree by this Court.

Nonetheless, even if the Court concludes that the *Ricci* holding does apply here, the standard established by the Supreme Court in that case is easily satisfied. In this case, the United States' pre-suit investigation, along with the declarations of the United States' experts attached to this memorandum, demonstrate a strong basis in evidence to conclude: (1) there is a *prima facie* case of disparate impact discrimination, *see supra* Sec. III.A.1; and (2) the challenged 2012 and 2013 exams and their use by the City are not sufficiently job-related and consistent with business necessity, *see supra* Sec. III.A.2. In addition, the United States' expert identified less adverse practices that the City could use without loss of job-relatedness for the 2013 test scores. Thus, the *Ricci* standard is fully met in this case.

D. The Parties Have Consulted with the Austin Firefighters' Association and Modified the Proposed Decree Based on the Union's Input

The Parties recognize that in the Fifth Circuit the Court must consider the interests of third-party stakeholders who have a cognizable interest in the terms of a proposed decree. *See United States v. City of Miami* ("*City of Miami II*"), 664 F.2d 435, 441 (5th Cir. 1981). In that spirit, the Parties have voluntarily consulted extensively with the AFA, which is the union that most recently had a collective bargaining agreement with the City regarding current Austin firefighters (but not job applicants), and have incorporated multiple suggestions from the AFA into the Decree.

Specifically, when the Parties had reached tentative agreement on many of the major terms of the Decree, although there was no, and is no, collective bargaining agreement in place, counsel for the United States, along with Dr. Jones, traveled to Austin to meet with representatives of the AFA, their legal counsel, and their retained I/O psychologist ("first meeting"). During the first meeting, counsel for the United States outlined the major terms the Parties had discussed. The AFA representatives had the opportunity to ask questions and

provide their input on any aspects of the Decree with which the AFA might have concerns. The AFA expressed that it did not oppose awarding retroactive seniority to priority hires, but that it did want to make sure the firefighters' pension fund was made whole if back pension credit was to be awarded in a settlement.[11]

After the first meeting, the AFA requested by letter information and data that the United States had used to arrive at its findings of liability as well as in calculating individual relief. The United States, in cooperation with the City, provided all of the requested information, with only minor modifications made to address individual privacy concerns. The United States also arranged for Dr. Jones to speak a second time with the AFA's retained I/O psychologist to answer questions raised by the AFA. Ultimately, the union transmitted a letter to the United States that detailed the union's positions on the relief that the United States and City had tentatively agreed upon.

At the AFA's request, the United States later set up an all-day meeting in Austin facilitated by an experienced mediator ("second meeting"). Representatives from and counsel for the AFA, the United States Department of Justice, the U.S. Equal Employment Opportunity Commission, and the City all attended the second meeting. During the second meeting, the United States again heard the AFA's concerns and attempted to resolve them through negotiation with both the AFA and the City.

[11] This concern has since become moot. The Austin fire fighters' pension system (the "System") is an entity created by state statute, and is a separate legal entity from either the City or the AFA. *See* Vernon's Tex. Civ. Stat. Art. 6243e.1. The System is not a party to this litigation. On March 3, 2014, the Parties made a formal request to the System for a determination whether the governing statute would permit the System to recognize back pension service credit. The System's Board of Trustees considered the request and advised the Parties that under its governing state statute the System cannot recognize back pension service credit based upon the facts of this case.

As noted in a letter posted on the AFA's website and sent to the DOJ after the second meeting, the AFA's positions were as follows: (1) the AFA had no opposition to the City making thirty remedial, fire cadet priority hires, eighteen of whom would be Hispanic and twelve of whom would be African-American; (2) the AFA opposed the Parties' proposed method of selecting priority hires as part of remedial relief for unsuccessful 2012 African-American and Hispanic candidates; and (3) the AFA disputed the United States' conclusions regarding the need for an alternative use of the 2013 process and the need for injunctive relief based on that process. *See* Letter from C. Deats to S. Bloom dated April 29, 2014, attached as Exhibit 5, *available at* http://gallery.mailchimp.com/8da3f85834ed23802b19db6e9/files/21ff10f3-b226-4afb-bf53-1255e722bec9.pdf (last visited June 2, 2014).

The Parties have addressed the AFA's concerns listed above in the Decree, including making significant changes to some of its provisions. First, the AFA wanted the City to select 2012 priority hires using the 2013 selection devices instead of using a modified version of the 2012 process because, the AFA argued, the 2012 test results were flawed. *See* Letter at 2. Because of the problems with the 2013 process described above, the Parties could not agree to use those test results either. Further, given that the AFA does not represent fire cadet job applicants, only incumbents, the Parties do not believe the AFA has a cognizable interest in that portion of the injunctive relief provided under the Decree. (Frankly, because the AFA and the City do not have an operative collective bargaining agreement, it is questionable whether the AFA has any cognizable interest affected by the Decree at all.) Nonetheless, the Parties considered the suggestion of the AFA not to use the 2012 test scores, and have agreed that the City will instead use the new, lawful process to be developed under the Decree. Decree at ¶ III.F.5.b.

As to the 2013 selection process, although the United States initially held to its position that the 2013 hiring process must be modified to comply with Title VII, the Parties have since agreed that the City may use the cognitive and SOI test scores from the 2013 process, in accordance with the method for which the AFA advocated, for the limited purpose of hiring up to 90 cadets in order to address the City's short term need to hire fire cadets. Decree at App. B, ¶ 6.

The Parties anticipate that the AFA may also oppose the method of distribution of the back pay fund set forth in the Decree at Paragraph III.F.6.a. However, as set forth in Section IV.B.3.a above, the Decree's pro rata distribution of back pay among all eligible Claimants is equitable and consistent with the applicable standards for whether the Decree should be approved. In any event, since the AFA is not responsible for providing the monetary relief, and is not the bargaining representative for these individuals, the Parties maintain that the AFA has no cognizable interest in that component of the Decree.

Finally, after the second meeting, the AFA expressed its desire that use of the 2013 eligibility list be governed by a new collective bargaining agreement. *See* Letter at 2. That issue is beyond the scope of this case: the United States simply has no basis to make a collective bargaining agreement between the City and the AFA a condition of, or part of, a consent decree resolving allegations of hiring discrimination under Title VII against the City. Such collective bargaining is primarily a matter of state law between the City and the AFA, and would not and cannot involve the United States Department of Justice.

In sum, the AFA was provided and took advantage of ample opportunities for input on the Decree, and was given all requested and relevant data to review the terms of the Decree. The Parties made meaningful, major changes to the proposed Decree in order to address the AFA's

concerns. The fact that the Parties were unable to agree to all requests from the AFA for changes to the Decree does not undermine the lawfulness or reasonableness of the Decree.

V. CONCL USION

For the foregoing reasons, the Parties respectfully request that the Court enter the accompanying proposed Order, which provisionally approves and enters the proposed Consent Decree and sets the time, date, and location of an initial fairness hearing.

[Signature Page Following]

Date: June 9, 2014

Respectfully submitted,

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