

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

PLAINTIFF,

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,

PLAINTIFFS-INTERVENORS

v.

CITY OF NEW YORK, ET AL.,

DEFENDANTS.

CIV. ACTION No. 07-cv-2067 (NGG)(RLM)

**MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PROVISIONAL ENTRY OF
MONETARY RELIEF CONSENT DECREE AND SCHEDULING OF FAIRNESS
HEARING**

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I. INTRODUCTION

Plaintiff United States of America (“United States”), the Plaintiffs-Intervenors’ Nonhire and Delayed-Hire Subclasses, and Defendant City of New York (the “City”) (collectively “the parties”) submit this joint memorandum in support of their Joint Motion for Provisional Entry of Monetary Relief Consent Decree and Scheduling of Fairness Hearing (“Joint Motion”). The parties have requested provisional entry of the accompanying proposed Monetary Relief Consent Decree (“Decree”) and attached Proposed Relief Awards List, subject to final approval and entry by the Court after a fairness hearing to allow the Court to consider any objections to the terms of the Decree and to the proposed individual monetary relief awards. The parties desire that the back pay and fringe benefits claims be settled by this Decree to avoid the burden and uncertainty of protracted litigation.

As set forth below, the Court should enter the Decree because its terms are lawful, fair, reasonable, adequate, and consistent with the public interest. These terms fulfill the goal of providing appropriate individual relief in the form of back pay and fringe benefits to black and Hispanic applicants who were not hired or who were delayed in their hiring as entry-level firefighters with the New York City Fire Department (“FDNY”) due to the employment practices held to be discriminatory in this case.

II. BACKGROUND

In May 2007, the United States filed a complaint alleging that the City violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (“Title VII”), by engaging in a pattern or practice of discrimination against black and Hispanic applicants for the entry-level firefighter position in the FDNY. Specifically, the United States challenged the City’s pass/fail use of Written Exams 7029 and 2043, as well as the City’s rank-order processing

and selection of applicants from eligibility lists based on a combination of applicants' scores on those written exams and a physical ability test. The United States alleged that each of these practices resulted in a disparate impact upon black and Hispanic applicants and was not job-related and consistent with business necessity, as required by Title VII. *See* Dkt. 1. In September 2007, the Vulcan Society, Inc., an association of black firefighters, and several individuals (collectively, the "Plaintiffs-Intervenors")¹ intervened in the case, alleging that the same practices challenged by the United States resulted in an unlawful disparate impact upon black applicants in violation of Title VII and state and local human rights laws.² *See* Dkt. 47 at 13-20.

In July 2009, the Court entered summary judgment in favor of the United States and the Plaintiffs-Intervenors, finding that the City's pass/fail and rank-order uses of Written Exams 7029 and 2043 had an unlawful disparate impact under Title VII. *See* Dkt. 294. In March 2012, to remedy the City's disparate impact liability, the Court established the aggregate amount of back pay damages at approximately \$128 million. *See* Dkt. 825. The Court's order held that the City would have the opportunity to reduce the aggregate amount of back pay damages by

¹ In July 2011, the Court certified two subclasses related to individual make-whole relief for the remedial phase of this case: (1) the Plaintiffs-Intervenors' subclass of Nonhire victims ("Nonhire Subclass"), comprised of all black firefighter applicants who sat for one of the challenged exams and were not hired from the eligibility lists created from either exam; and (2) the Plaintiffs-Intervenors' subclass of Delayed-Hire victims ("Delayed-Hire Subclass"), comprised of all black firefighter applicants who sat for one of the challenged exams and who were hired by the FDNY after the first Academy classes hired from the eligibility lists created from the challenged exams. *See* Dkt. 665 at 55-57.

² The Plaintiffs-Intervenors also asserted a disparate treatment claim, alleging that the City adopted and maintained the challenged practices with a discriminatory intent, in violation of Title VII, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and state and local human rights laws. *See* Dkt. 47 at 13-20. The City denied this claim, and the Plaintiffs-Intervenors and the City reached a settlement resolving the disparate treatment claim, which the Court preliminarily approved on April 28, 2014. *See* Dkt. 1293.

proving, on an individualized basis, that applicants harmed by the City's discrimination mitigated their losses through interim employment. In the order, the Court clarified that the \$128 million in aggregate back pay damages was calculated only through December 31, 2010, and that at a later date, the Court would determine the additional amount of back pay damages covering the period from January 1, 2011, through the date the priority hires joined the FDNY. *See id.* at 46 n.12. In addition, the Court subdivided the \$128 million into eight different categories of back pay damages (hereinafter referred to as "damages categories"), each of which is based on the race of the applicant harmed, the applicable exam, and whether the applicant was denied hire (Nonhire Claimant) or his/her hiring was delayed (Delayed-Hire Claimant) due to the City's use of the exams held to be discriminatory. *See id.* at 46. Further, the Court decided that the value of lost fringe benefits was to be determined based on expenses each individual applicant actually incurred. *See id.* at 39. Finally, the Court held that pre-judgment interest would be applied after the completion of the individual proceedings necessary to determine each individual Claimant's back pay and fringe benefits award. *See id.* at 46. In a subsequent order, the Court adopted the United States' proposed method of awarding back pay damages to individual Nonhire and Delayed-Hire Claimants. *See* Dkt. 888 at 2-15, *amended by* Dkt. 1101, May 7, 2013 Minute Order.

In May 2012, the City sent notice and claim form documents to all black and Hispanic applicants who took the discriminatory written exams and published notice of the individual relief claims process. *See* Dkt. 850; Dkt. 861. Approximately 5,000 individuals submitted claim forms seeking individual relief, as well as authorizations allowing the United States to obtain

their earnings statements covering the years 2001 through 2011 from the Social Security Administration (“SSA”).³

In October 2012, after a four-day fairness hearing, the Court issued a Final Relief Order regarding individual relief to remedy the City’s past discrimination. The Final Relief Order set forth the eligibility criteria to determine which black and Hispanic applicants who submitted claim forms would be eligible for relief. The Court imposed these eligibility criteria to ensure that only applicants who were harmed by the City’s use of exams held to be discriminatory would be eligible for relief. Under the Final Relief Order, applicants who timely submitted claim forms and were determined to meet the eligibility criteria would be entitled to monetary relief, priority hiring relief for up to 293 eligible applicants currently qualified to be FDNY firefighters,⁴ and retroactive seniority to priority hires and Delayed-Hire Claimants who currently work for the FDNY.⁵ *See* Dkt. 1012.⁶

³ In May 2013, the Court issued an order stating that no claim forms submitted after June 10, 2013, would be considered for relief. *See* Dkt. 1118.

⁴ In order to be appointed as priority hires, individuals who submitted claim forms and whom the Court deemed eligible for priority hiring relief were required to take and pass all of the same tests and other steps in the hiring process as the other candidates for employment with the FDNY, including taking and passing Exam 2000, the City’s new entry-level firefighter exam, which was developed jointly by the parties and approved by the Court in September 2012. *See* Dkt. 986. The first groups of priority hires joined the FDNY in July 2013 and January 2014, and additional priority hires are expected to join the FDNY in July 2014.

⁵ In accordance with the Final Relief Order, the City awarded retroactive seniority relief as of the relevant presumptive hire date to all priority hires and to those Delayed-Hire Claimants who currently work for the FDNY and whose appointment dates are later than their presumptive hire dates.

⁶ The Court also indicated that black Claimants will be entitled to compensatory damages for noneconomic harm, based on claims raised solely by the Plaintiffs-Intervenors. Because the Court has ruled that individual claims for compensatory damages are not subject to class treatment, *see* Dkt. 665 at 10-35, the City is making Rule 68 offers of judgment to each black Claimant who made a compensatory damages claim.

Pursuant to Federal Rule of Civil Procedure 53(a)(1)(B)(i), the Court appointed four Special Masters to oversee the individual relief claims process. *See* Dkt. 883. At the Court's direction, the Special Masters determined which individuals who had submitted claim forms were eligible for relief and issued reports and recommendations to the Court of their determinations. The Special Masters notified via letter each individual of his/her eligibility determination and included instructions for objecting to that determination. The Court issued orders determining the eligibility for relief of all individuals who submitted claim forms, including independently reviewing the eligibility of each individual who objected to the Special Masters' determination. *See* Dkt. 1012 at 15-17. The Court ultimately determined that 1,470 individuals who submitted claim forms are eligible for relief. *See* Dkt. 1251; Dkt. 1236; Dkt.1201; Dkt.1195; Dkt. 1190; Dkt. 1184; Dkt. 1182; Dkt. 1144; Dkt.1135; Dkt.1112; Dkt.1106; Dkt.1059. These eligible individuals will hereinafter be referred to as "Claimants."

Between May 2012 and the present, as part of the individual relief claims process, the parties collected certain information related to Claimants' interim employment earnings and Claimants also made individual claims for lost fringe benefits. Using the authorizations submitted along with claim forms, the United States obtained from SSA statements showing Claimants' interim employment earnings for all but one Claimant.⁷ The City identified payments for unemployment insurance and worker's compensation that it made to Claimants who had worked for the City, pursuant to Court order that such payments to City employees should reduce a Claimant's recovery. *See* Dkt. 952 at 6-7. In addition, because earnings from railroad employers were not included on Claimants' SSA earnings statements, the parties

⁷ This claimant failed to submit a fully-executed SSA authorization along with his claim form, and despite numerous attempts to reach him over the course of a year, as well as again in May 2014, this claimant never produced a fully-executed claim form.

obtained railroad earnings information for Claimants who indicated that they worked for a railroad employer.⁸ All three categories of earnings information were limited to the period in which each Claimant's back pay accrued (his/her "damages period"). Finally, during the individual relief claims process, all Claimants were sent a Fringe Benefits Claim Form and provided a date certain by which they had to submit those claim forms and any supporting documentation. Only Fringe Benefits Claim Forms and/or supporting documentation submitted on or before May 9, 2014, were considered.

On March 18, 2014, the parties announced an agreement in principle to settle the claims of the United States and the Plaintiffs-Intervenors for back pay and fringe benefits lost by Claimants, as well as the United States' taxable costs related to bringing this case. The Decree formalizes that agreement and resolves the individual relief claims process. In the absence of settlement, resolving the individual relief claims process would require at least another year of litigation, including discovery from and individual hearings for Claimants before the Special Masters. The parties' settlement will speed relief to Claimants and avoid the continued use of resources of the parties, the Special Masters, and the Court.

III. CENTRAL PROVISIONS OF THE MONETARY RELIEF CONSENT DECREE

The central substantive provisions of the Decree are summarized below.

A. Individual Monetary Relief

The City will provide individual monetary relief in the form of back pay, lost fringe benefits, and interest to Claimants who were not hired by the FDNY as entry-level firefighters or

⁸ The parties obtained railroad earnings through Claimants' responses to the City's discovery requests, as well as through authorizations signed by Claimants allowing the United States to obtain their railroad earnings during the relevant back pay periods from the United States Railroad Retirement Board. However, eighteen Claimants failed to respond to either the City's discovery requests or to a mailing inquiring whether they worked for a railroad employer and seeking authorizations from Claimants who reported railroad employment.

whose hiring as entry-level firefighters was delayed. Relief will be granted only to individuals actually harmed by the practices held to be discriminatory in this case -- that is, to Claimants whom the Court has already determined are eligible for relief.

1. Back Pay

Under the terms of the Decree, the City will pay \$80,964,657.97 in back pay, which will be divided among the eight damages categories as set forth in the table below and allocated among Claimants within each damages category as described in Section IV.B.2.b, below.

2. Fringe Benefits

Under the terms of the Decree, the City will pay \$6,209,619.53 in fringe benefits, which will be divided among the eight damages categories as set forth in the table below and allocated among Claimants within each damages category as described in Section IV.B.2.b, below.

3. Interest

Under the terms of the Decree, the City will pay interest on the back pay and fringe benefits awards through the end of 2014, totaling \$11,924,081.79, which will be divided among the eight damages categories as set forth in the table below and allocated among Claimants within each damages category as described in Section IV.B.2.b, below.

Damages Category	Aggregate Back Pay Amount	Interest on Aggregate Back Pay Amount	Aggregate Fringe Benefits Amount	Interest on Aggregate Fringe Benefits Amount
Exam 7029 Nonhire Claimants				
Black Exam 7029 Nonhire Claimants	\$38,818,871.58	\$5,892,695.44	\$2,564,188.85	\$389,243.26
Hispanic Exam 7029 Nonhire Claimants	\$17,097,828.56	\$2,595,446.30	\$1,394,558.83	\$211,693.69
Exam 2043 Nonhire Claimants				
Black Exam 2043 Nonhire Claimants	\$15,495,383.14	\$1,562,726.43	\$1,314,375.43	\$132,556.20
Hispanic Exam 2043 Nonhire Claimants	\$8,359,839.74	\$843,099.03	\$821,484.33	\$82,847.60
Exam 7029 Delayed-Hire Claimants				
Black Exam 7029 Delayed-Hire Claimants	\$ 444,509.77	\$93,679.44	\$30,677.17	\$6,465.14
Hispanic Exam 7029 Delayed-Hire Claimants	\$443,638.42	\$93,495.80	\$36,121.84	\$7,612.60
Exam 2043 Delayed-Hire Claimants				
Black Exam 2043 Delayed-Hire Claimants	\$175,039.37	\$6,212.16	\$24,600.69	\$873.08
Hispanic Exam 2043 Delayed-Hire Claimants	\$129,547.39	\$4,597.65	\$23,611.39	\$837.97
TOTAL	\$80,964,657.97	\$11,091,952.54	\$6,209,618.53	\$832,129.54

B. Fairness Hearing

The Decree requests that the Court set a Fairness Hearing to determine whether the terms of the Decree are lawful, fair, reasonable, adequate, and consistent with the public interest. In addition, at the Fairness Hearing, the Court will consider and resolve any objections to the proposed individual monetary relief determinations set forth in the Proposed Relief Awards List.

Prior to the Fairness Hearing, Claimants will be given notice of the Decree and of their proposed individual monetary relief determinations and an opportunity to file objections with the Court.

At the Fairness Hearing, the Court will consider and resolve any objections to the final approval of the Decree that have been timely filed by Claimants, as well as any objections timely filed by Claimants objecting to their proposed individual relief determinations.

C. United States' Taxable Costs

The City will reimburse the United States \$150,000 for its taxable costs under 28 U.S.C. § 1920.

D. Attorneys' Fees to Plaintiffs-Intervenors

Plaintiffs-Intervenors and the City will negotiate in good faith for a period of thirty days after approval of the settlement, in an attempt to resolve their disputes concerning attorneys' fees and costs due to Plaintiffs-Intervenors. If they are unable to reach agreement, Plaintiffs-Intervenors will submit an application for attorneys' fees to the Court.

IV. ARGUMENT

A. Standard of Review

“In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims.” *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). Congress placed an “extremely high premium . . . on voluntary settlements of Title VII suits.” *United States v. City of Miami*, 614 F.2d 1322, 1331 (5th Cir. 1980), *modified per curiam*, 664 F.2d 435 (5th Cir. 1981). *See also Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)); *Kirkland v. New York State Dep't of Corr. Servs.*, 711 F.2d 1117, 1128 (2d Cir. 1983); *Berkman v. City of New York*, 705 F.2d 584, 597 (2d Cir. 1983).

The proper standard for approval of a consent decree resolving a pattern or practice action brought under Title VII is whether the proposed agreement is lawful, fair, reasonable, adequate, and consistent with the public interest.⁹ *See United States v. North Carolina*, 180 F.3d

⁹ Court-approved settlement agreements (including class action settlements) and consent decrees are often analyzed in the same manner. *See Hutchinson ex. rel. Julien v. Patrick*, 636 F.3d 1, 9-11 (1st Cir. 2011). *See also EEOC v. Hiram Walker & Sons*, 768 F.2d 884, 888 (7th Cir. 1985)

574, 581 (4th Cir. 1999); *Vulcan Soc’y v. City of New York*, 96 F.R.D. 626, 629 (S.D.N.Y. 1983).¹⁰ Typically, in determining the fairness of a proposed consent decree, courts should “weigh[] the plaintiff’s likelihood of success on the merits against the amount and form of relief offered in the settlement.” *Carson*, 450 U.S. at 88 n.14.

In a Title VII action, an agreement that has been negotiated by the parties to that suit is presumptively valid. *See Kirkland*, 711 F.2d at 1128; *see also Vulcan Soc’y*, 96 F.R.D. at 629. Significantly, the presumption of validity can be overcome only if the settlement contains “provisions that are unreasonable, unlawful, or against public policy.” *Kirkland*, 711 F.2d at 1129. *See also Berkman*, 705 F.2d at 597.

B. The Standard for Approval of a Consent Decree Has Been Met in This Case and the Consent Decree Should Be Approved

1. The United States and the Plaintiffs-Intervenors Have Already Prevailed on the Merits

As noted above, typically, when deciding whether to enter a consent decree, a court must consider the strength of the plaintiff’s case balanced against the settlement offer. *See, e.g., Carson*, 450 U.S. at 88 n.14. Prior to a liability ruling, this balancing test is necessary before a court can conclude that a consent decree is fair, reasonable, and adequate. Here, however, the United States and the Plaintiffs-Intervenors have already prevailed on the merits; the Court found the City liable for disparate impact discrimination under Title VII. *See Dkt. 294.*

(“The same standards generally apply to district . . . court review of Title VII settlements as apply to any class action settlement.”).

¹⁰ *See also Kirkland*, 711 F.2d at 1124 (noting that district court approved settlement on grounds that it was fair, reasonable and lawful in all respects); *Comm’n Workers of Am. v. New Jersey Dep’t of Personnel*, 282 F.3d 213, 219 (3d Cir. 2002) (“settlement agreements . . . are agreed to be subject to a universal standard, that of fairness, adequacy and reasonableness”).

2. The Decree Provides Relief That Is Appropriate Under Title VII

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 Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (citation omitted). Here, the relief provided in the Decree is lawful, fair, reasonable, adequate, and consistent with the public interest because it provides appropriate individual monetary relief to black and Hispanic Claimants who were not hired or who were delayed in their hire as entry-level firefighters with the FDNY due to the employment practices held to be discriminatory in this case.

a. The Individual Monetary Relief Should Be Awarded

One of the central purposes of Title VII is to provide make-whole relief to persons who have been harmed by employment practices that violate the statute. *See Albemarle Paper Co.*, 422 U.S. at 418. In enacting Title VII, “Congress took care to arm the courts with full equitable powers” so that the courts may fashion relief for those harmed by unlawful employment practices. *Id.* In exercising those equitable powers, a court should order all appropriate relief “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., Inc.*, 424 U.S. 747, 763 (1976) (quoting Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g)). In Title VII pattern or practice cases, “[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).

Here, the Court has already ordered the types of relief afforded in this Decree, holding that individuals who submitted claim forms and were found eligible for relief are entitled to individual monetary relief consisting of back pay, lost fringe benefits, and interest. *See* Dkt.

1012; Dkt. 946; Dkt. 888; Dkt. 825. Indeed, the Court held that the City must pay \$128 million (less mitigation) in aggregate back pay damages through December 31, 2010. *See* Dkt. 825. The parties propose to settle the back pay and fringe benefits claims, plus interest, for \$99,098,358.29. This amount represents an approximately fifteen percent discount from the parties' best estimates of the City's total exposure if the parties had continued to litigate Claimants' individual monetary relief. In light of the expenses and burdens of continued protracted litigation that are obviated by the parties' settlement, this figure represents a fair and reasonable compromise that provides substantial monetary relief to those harmed by the City's use of the exams held to be discriminatory.¹¹

Moreover, the individual monetary relief provided for in the Decree is appropriate in light of the broad power afforded to the courts to grant relief to those harmed by employment practices that violate Title VII. *See Wrenn v. Dep't of Veterans Affairs*, 918 F.2d 1073, 1076 (2d Cir. 1990). Under the Decree, the availability of monetary relief is limited to individuals actually harmed through the practices held to be discriminatory in this case -- that is, to Claimants already determined by the Court to be eligible for relief.

b. The Allocation of Individual Relief Is Fair and Equitable

The parties have agreed that the City will provide to Claimants a total of \$99,098,358.29 in monetary relief, consisting of back pay, fringe benefits, and interest, as set forth in Section III.A, above. The United States and Plaintiff-Intervenors have agreed to an allocation

¹¹ The burdens of the claims process fall heavily upon the Claimants themselves, who would be subjected to additional discovery, individual hearings, motions to dismiss and/or reduce their awards, and objection procedures absent a settlement of the back pay and fringe benefits claims. Moreover, the greater the amount of time that passes in the case, the greater the risk that deserving Claimants will become unreachable due to changes in their contact information that are not communicated to the parties or the claims administrator, The Garden City Group, Inc. ("GCG").

methodology apportioning this back pay, fringe benefits, and interest among Claimants. The City did not participate in negotiations over this allocation methodology, because the City concluded that, in this case, allocation issues were for the United States and the Plaintiffs-Intervenors to resolve. The City has no objection to the allocation methodology agreed to by the United States and the Plaintiffs-Intervenors.

As described more fully below, back pay will be allocated to Nonhire Claimants based on their average annual interim earnings during their respective damages periods, and back pay will be allocated to Delayed-Hire Claimants based on the length of delay they experienced before hire. In addition, fringe benefits will be allocated to Claimants: (1) by providing to all Claimants a fixed, minimal award (“Fixed Share”); and (2) by reimbursing Claimants for a proportion of their claimed expenses, subject to a cap on reimbursable expenses (“Claimed Expenses Share”). Finally, interest will be allocated to Claimants proportionately based on their back pay and fringe benefits awards. Such allocation of individual monetary relief is fair and equitable because it is consistent with this Court’s prior orders, which require that Claimants’ individual awards be reflective of their individual losses. *See, e.g.*, Dkt. 825; Dkt. 888; Dkt. 1012. The result of this allocation methodology is set forth in the Proposed Relief Awards List, attached to the Decree as Attachment A.

(i) *The Assignment of Each Claimant into A Damages Category*

Consistent with the Court’s orders on back pay, *see* Dkt. 888; Dkt. 825, the settlement is divided into eight different damages categories. Accordingly, each Claimant was assigned to one, and only one, damages category based on the race identified on his/her claim form (black or

Hispanic),¹² as well as the Court's determination of the exam for which the Claimant is eligible for relief (Exam 7029 or Exam 2043) and the Claimant definition met (Nonhire Claimant or Delayed-Hire Claimant), *see* Dkt. 1012 at 4-6. Claimants whom the Court found eligible for relief based on both Exam 7029 and Exam 2043 were assigned only to the Exam 7029 damages category, in order to compensate them for the entire time period during which they suffered monetary damages.

(ii) *The Allocation of Back Pay to Nonhire Claimants*

Consistent with the Court's orders that interim employment earnings be calculated on an individual basis, back pay will be distributed to Nonhire Claimants using a methodology agreed upon by the United States and the Plaintiffs-Intervenors that accounts for their average annual interim earnings during their respective damages periods. *See* Dkt. 888; Dkt. 825 at 46; Dkt. 640 at 20, 23. As explained further below, under this methodology, each Claimant will be assigned to one of seven possible earnings bands based on his/her average annual interim earnings during the relevant damages period. Each Claimant's back pay award will be determined by the value assigned to his/her earnings band and damages category.

The Court-appointed claims administrator, The Garden City Group, Inc. ("GCG"), prepared the Proposed Relief Awards List at the direction of the United States and the Plaintiffs-Intervenors. First, GCG calculated each Nonhire Claimant's average annual interim earnings as the sum of the annual earnings listed on his/her SSA earnings statement, any payments made by the City to the Claimant for unemployment insurance or worker's compensation, and any additional earnings earned by the Claimant from railroad employers, if the Claimant indicated

¹² The Plaintiffs-Intervenors filed a motion on behalf of one Claimant, Claimant 200001793, who sought to change the race listed on his claim form from Hispanic to black. The Court granted the motion. *See* Dkt. 1235.

working for a railroad employer, averaged over the applicable damages period. *See* Barrero Decl.. Attachment B to Decree, ¶¶ 7-8. Nineteen Claimants lack complete interim earnings information because they failed to respond to multiple requests for information about their interim earnings. Based on the Court's instruction at the May 7, 2014, status conference that no Claimant who fails to respond should receive a windfall, the United States and the Plaintiffs-Intervenors have assumed that these nineteen Claimants earned the maximum amount of interim earnings during their damages periods. *See* Barrero Decl. ¶ 9.

Next, GCG placed each Nonhire Claimant into the appropriate earnings band, based on his/her average annual interim earnings and the exam for which the Claimant is eligible for relief. *See* Barrero Decl. ¶ 10. The earnings bands are based on the average annual earnings of firefighters hired off of the applicable exam during the appropriate damages period.¹³ For each exam, the earnings band cutoffs are set as a proportion of the average annual firefighter earnings, with each earnings band corresponding to fifteen percent of average annual firefighter earnings. The nineteen Claimants whom the United States and the Plaintiffs-Intervenors have assumed earned the maximum amount of interim earnings during their damages period have been placed into the one-point earnings bands, and they will receive the lowest amount of back pay for their damages categories. *See id.*

¹³ The United States and the Plaintiffs-Intervenors calculated the average annual firefighter earnings using data provided by the City showing the actual earnings of all firefighters hired off of the eligible lists for Exams 7029 and 2043, identified by class of hire, between 2001 and 2011. The annual firefighter earnings for each Academy class were averaged across the years in the damages period (through 2011, the last year for which both firefighter earnings data *and* Claimant interim earnings data are available), and these earnings were then averaged across all Academy classes hired off of each exam. The average annual earnings of firefighters hired off of the Exam 7029 eligible list between 2001 and 2011 is \$75,939.05, and the average annual earnings of firefighters hired off of the Exam 2043 eligible list between 2005 and 2011 is \$61,801.05.

Each earnings band has an associated point value, and the point values of the bands dictate the Claimants' award ratios. Specifically, the point values associated with the earnings bands approximate the ratio of awards that Claimants could have expected to receive under a litigated claims process. For example, if the parties had continued to litigate individual Claimants' back pay amounts, the ultimate back pay award for a Claimant with seventy-five percent mitigation would have been half that of a Claimant with fifty percent mitigation. Similarly, a Claimant with twenty-five percent mitigation would have received a back pay award that was three times that of a Claimant with seventy-five percent mitigation. The earnings bands and associated point values were chosen in order to maintain this award ratio for Claimants as closely as possible. The following table lists the seven earnings bands for each exam, with the corresponding earnings cutoffs and point values.

Earnings Bands

Point Value	Percent Mitigation	Earnings Bands for Exam 7029 Nonhire Claimants		Earnings Bands for Exam 2043 Nonhire Claimants	
		Minimum Average Annual Interim Earnings	Maximum Average Annual Interim Earnings	Minimum Average Annual Interim Earnings	Maximum Average Annual Interim Earnings
7 points	0 - <15%	\$0	\$11,390.85	\$0	\$9,270.15
6 points	15 - <30%	\$11,390.86	\$22,781.71	\$9,270.16	\$18,540.30
5 points	30 - <45%	\$22,781.72	\$34,172.56	\$18,540.31	\$27,810.46
4 points	45 - <60%	\$34,172.57	\$45,563.42	\$27,810.47	\$37,080.62
3 points	60 - <75%	\$45,563.43	\$56,954.28	\$37,080.63	\$46,350.78
2 points	75 - <90%	\$56,954.29	\$68,345.14	\$46,350.79	\$55,620.93
1 point	>90%	\$68,345.15	--	\$55,620.94	--

After placing each Nonhire Claimant into the appropriate earnings band, GCG determined the allocation of back pay to Nonhire Claimants based on the value of one point. *See Barrero Decl.*

¶¶ 11-12, Ex. B.

(iii) *The Allocation of Back Pay to Delayed-Hire Claimants*

Consistent with the Court's order on the allocation of back pay to individual Claimants, back pay will be allocated to Delayed-Hire Claimants proportionately based on the delay in hiring that they experienced. *See* Dkt. 888 at 11-12. Each Delayed-Hire Claimant's back pay award will be based on the number of months of delay s/he experienced between the first FDNY Academy class hired off of the relevant eligible list and the Academy class to which s/he was appointed. If a Delayed-Hire Claimant was appointed to the FDNY more than once – for example, if the Claimant resigned from an FDNY Academy class and then the City appointed him/her to a subsequent FDNY Academy class – then the Claimant's period of delay ends at his/her first appointment to the FDNY, rather than his/her ultimate appointment date. *See* Barrero Decl. ¶¶ 13-16, Ex. C.

(iv) *The Allocation of Fringe Benefits*

Fringe benefits will be allocated to Claimants: (1) by providing to all Claimants a fixed, minimal award ("Fixed Share"); and (2) by reimbursing Claimants for a proportion of their claimed expenses, subject to a cap on reimbursable expenses ("Claimed Expenses Share"). The Fixed Share is a *pro rata* distribution to all Claimants of approximately twenty percent of the fringe benefits settlement. The Claimed Expenses Share is paid out from the remaining eighty percent of the fringe benefits settlement, with each Claimant's claimed expenses capped at the 97.5th percentile of the amount of expenses claimed. *See* Barrero Decl. ¶¶ 17-24, Ex. D-F. This two-pronged approach is consistent with the Court's orders that fringe benefits must be calculated on an individual basis based on expenses that Claimants actually incurred, *see* Dkt. 946 at 1; Dkt. 825 at 39, while recognizing that the parties had only recently begun addressing the fringe benefits claim prior to reaching a settlement agreement. Moreover, had the parties

continued to litigate individual Claimants' fringe benefits claims, a Claimant's fringe benefits award would have been reduced proportionately based on the probability that the Claimant would have been hired by the FDNY. *Cf.* Dkt. 888 at 4-7. Thus, it is appropriate that, under the settlement, no Claimant's Claimed Expenses Share will constitute one hundred percent of his/her claimed expenses.

(v) *The Calculation and Allocation of Interest*

As ordered by the Court, interest will be applied to Claimants' monetary relief awards. *See* Dkt. 825 at 46. In accordance with the Court's order on the calculation of individual back pay awards, to calculate the total amount of interest, an interest rate based on the United States one-year constant maturity Treasury yield, referenced in 28 U.S.C. § 1961(a), will be applied, and the interest will be compounded annually. *See* Dkt. 888 at 11, 15. Interest will be allocated to Claimants proportionately based on their back pay and fringe benefits awards, thus ensuring that Claimants' individual relief awards take into account the length of time between the discrimination they experienced and their ultimate recovery. *See id.* ¶¶ 25-31, Ex. G-H. The parties agreed that the City's liability for interest will cease accruing at the end of 2014.

3. To Avoid Future Challenges to the Relief Awarded by the Court, the Decree Provides for a Fairness Hearing Prior to Entry

The Decree provides for a Fairness Hearing, which will give the Court the opportunity to satisfy itself that the terms of the Decree are lawful, fair, reasonable, adequate, and otherwise consistent with the public interest. In addition, the Fairness Hearing will give the Court the chance to ensure that the proposed awards of individual remedial relief are fair and equitable given the total amount of relief available under the Decree. Importantly, the Fairness Hearing comports with the provisions of Title VII that protect a Title VII settlement agreement or consent decree from collateral attack, while addressing due process concerns, because Claimants will

have notice of the Decree and of their individual relief awards and will have an opportunity to object.¹⁴ *See* 42 U.S.C. § 2000e-2(n)(1).

V. CONCLUSION

For the foregoing reasons, the Court should enter the accompanying proposed Order, which provisionally approves and enters the proposed Monetary Relief Consent Decree and sets the time, date, and location of the Fairness Hearing.

¹⁴ Because Claimants are the only persons whose interests may be adversely affected by the Decree, notice need be provided only to Claimants. Individuals who submitted claim forms and whom the Court determined to be ineligible for relief have no legitimate interests affected by the Decree because both the Special Masters and the Court already considered their eligibility for relief, as well as any objections they may have filed to the United States' and the Special Masters' determinations of ineligibility.

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Respectfully submitted,

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