

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 FINAL ENTRY OF PROPOSED
STIPULATION AND ORDER RESOLVING INTENTIONAL
DISCRIMINATION CLAIMS AND IN RESPONSE TO OBJECTIONS**

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Plaintiffs-Intervenors, The Vulcan Society, Jamel Nicholson, Rusebell Wilson, Roger Gregg, Marcus Haywood, Kevin Walker, Candido Nuñez and Kevin Simpkins submit this memorandum in support of the Plaintiffs-Intervenors' motion for final approval and entry of the Stipulation and Order resolving Plaintiffs-Intervenors' intentional discrimination claims under

discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981 and the State and City Human Rights Laws (“Intent Stipulation & Order”). Defendant City of New York (the “City”) does not oppose the relief sought or the positions stated in this memorandum.

Introduction

On April 28, 2014, this Court preliminarily approved the Intent Stipulation & Order and provided that a fairness hearing would be scheduled at a later date (Dkt. # 1293). The Court found, as a preliminary matter, that the proposed settlement was “‘the product of serious, informed, non-collusive negotiations,’ and includes no obvious deficiencies or preferential treatment for any segments of the class.” Citing In re Initial Pub. Offering Sec. Litig., 243 F.R.D. 79, 87 (S.D.N.Y. 2007), adhered to on reconsideration, 21-MC-92 (SAS), 2007 WL 844710 (S.D.N.Y. Mar. 20, 2007). Further, the Court stated that, pending resolution of any objections that might be made, “the Court intends to grant approval of the settlement terms and entry of the Intent Stipulation & Order.” Id. at 2.

Subsequently, this Court, in conference with the parties, ordered that the Fairness Hearing for this Intent Stipulation & Order coincide with the fairness hearing for the Monetary Relief Settlement, and scheduled those hearings for October 1, 2014 and if necessary, October 2, 2014. (Dkt. 1437).

This memorandum addresses the small number of objections submitted to the Court-appointed claims administrator, The Garden City Group, Inc. (“GCG” or “Claims Administrator”) in response to the Notice regarding settlement of the intentional discrimination claims. While 20 class members used the Intent Settlement Objection Form in response to the Claims Administrator’s Notice of Settlement, four claimants stated no objections whatsoever, and 12 claimants used the Intent Settlement Objection Form to object to the Monetary Relief

Settlement.¹ Only four claimants filed substantive objections to the Intent Stipulation & Order, and none of them states sufficient grounds to warrant its modification or non-entry.

After the Court scheduled the fairness hearing for both the Monetary Relief Settlement and the Intent Stipulation & Order on October 1 & October 2 (5/07/14 Tr., at 15-16), GCG provided all claimants with separate notices of the upcoming fairness hearings and an opportunity to file objections to the terms of the Intent Stipulation & Order. The “Notice of Proposed Settlement of Intentional Discrimination Claims” along with “Instructions for Objecting to the Proposed Stipulation & Order” and a blank form—“Objection to Proposed Stipulation & Order”—were mailed and emailed on July 14, 2104 along with a copy of the Intent Stipulation & Order. GCG also uploaded these documents to each Claimant’s password-protected portal on GCG’s website, fdnylitigation.com. In addition, GCG posted the Intent Stipulation & Order and notices on the publicly-available section of fdnylitigation.com.

The Notice of Proposed Settlement advised class members who wished to object to the terms of the Intent Stipulation & Order to file an Objection Form by August 12, which was 30 days after the notice documents were mailed to claimants. As the parties have noted in their Monetary Relief Memo, this process is sufficient to provide notice and a reasonable opportunity to object as set forth in 42 U.S.C. § 2000e-2(n). *Id.* at 4.

POINT I. SUMMARY OF THE OBJECTIONS

The following chart identifies those class members filing the Objection to Proposed Stipulation & Order Form, the Bates numbers of their form and related filings with GCG,² and a summary of their objection, if any:

¹ Those objections are addressed in the parties’ Memorandum in Support of Final Entry of Monetary Relief Consent Decree and Response to Objections (“Monetary Relief Memo”).

Claimant #	Claimant Name	Bates ##	Basis of Objection
200000486	De Costa, Emmett	GCG 49368-70	No objection stated
200000718	Gillis, Dereck	GCG 49264-66	No objection stated
200000915	Howell, Errol	GCG 49386-97	No objection stated
200001881	Smith, Frederick	GCG 49271-73	No objection stated
200000145	Batson, Wayland	GCG 49277-80	Monetary Relief
200000471	Darby, Devin	GCG 49383-85, 49636-40, 49585-49620, 49699-706	Monetary Relief
200000483	Davis, Sharif	GCG 49472-74	Monetary Relief
200000889	Hill, Dwayne	GCG 49378-82, GCGE 99665	Monetary Relief
200000896	Holder, Rivolena	GCG 49485-87	Monetary Relief
200000924	Hutchinson, Daren	GCG 49374-77	Monetary Relief
200001052	Laurenceau, Jerry	GCG 49621-23	Monetary Relief
200001920	Stewart, Donald	GCG 49568-69	Monetary Relief
200001941	Tanis, Jean	GCG 49693-95	Monetary Relief
200006524	Thomas, Abundi	GCG 49479-81	Monetary Relief
200006841	Waite, Damion	GCG 49371-73	Monetary Relief
200001975	Whyte, Lauriette	GCG 49351-56	Monetary Relief
200001293	Molina, Aaron	GCGE 99704	Confusing/Vague/Misleading/Ambiguous
200000219	Bresilien, Henry	GCGE 99696-98	Fire Department continues a pattern and practice of discrimination against members of protected classes.
200001690	Rodriguez, Arnaldo	GCGE 99730-31	Fire Department continues a pattern and practice of discrimination against members of protected classes.
200006013	Romero, Rolando	GCGE 99737-38	Fire Department continues a pattern and practice of discrimination against members of protected classes.

The Intent Stipulation & Order Objections fall into four categories: (1) four Objectors who state no objection at all; (2) 12 Objectors who mistakenly filed objections to the Monetary Relief Settlement using the Objection to Proposed Stipulation & Order Form; (3) one Objector who asserted that the Intent Stipulation & Order is “confusing/vague/misleading/ambiguous;”

² These Objections to the Intent Stipulation & Order are attached to the accompanying Declaration of Richard A. Levy as Exhibits 1-20.

and (4) three Objectors who object on the grounds that the “Fire Department continues a pattern and practice of discrimination against members of protected classes.” None provide a basis to modify or reject the Intent Stipulation & Order.

**POINT II.
STANDARD OF REVIEW**

As the parties have outlined in their Monetary Relief Memo, at 8, 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. See United States v. North Carolina, 180 F.3d 574, 581 (4th Cir. 1999); Vulcan Soc’y v. City of New York, 96 F.R.D. 626, 629 (S.D.N.Y. 1983). As this Court has previously recognized, “[I]n reviewing objections to a consent decree or settlement agreement, courts have analyzed whether the proposed settlements are fair, reasonable, and legal, and whether any of the objections has sufficient merits to overcome the presumption of validity accorded to the relief agreement.” This Court also applied the standard set forth in Kirkland v. N. Y. State Dep’t of Corr. Servs., 711 F.2d 1117, 1132 (2d Cir. 1983) where the Second Circuit “approved a district court’s analysis of a settlement agreement where the district court reviewed objections and ultimately asked whether the proposed remedies were (1) ‘substantially related to the objective of eliminating the alleged instance of discrimination,’ and (2) did not ‘unnecessarily trammel the interests of affected third parties.’” October 26, 2012 Mem. & Order, (Dkt. # 1011) at 6.

Applying these standards to the Intent Stipulation & Order, the Court should find the objections insufficient and approve and enter the Intent Stipulation & Order.

Argument

**POINT III.
NONE OF THE OBJECTIONS WARRANTS MODIFICATION OR NON-ENTRY OF
THE INTENT STIPULATION AND ORDER**

A. THE BLANK FORMS

Just as Plaintiffs-Intervenors and the United States noted in their Monetary Relief Memo, at 30 with respect to blank forms filed concerning the Monetary Relief Settlement, so the Plaintiffs-Intervenors here note that they are unable to comment on these submissions except to state that they do not provide any basis for denying final entry of the Intent Stipulation & Order.

B. THE OBJECTIONS TO THE MONETARY RELIEF

The 12 objections regarding monetary relief that were made on the Objection to Proposed Stipulation & Order Form also provide no basis to deny final entry of the Intent Stipulation & Order. The substance of each of these objections has been addressed in the Plaintiff's and Plaintiffs-Intervenors' Monetary Relief Memo³ and the Court should view these as intended to be objections to the Monetary Relief Settlement, rather than the Intent Stipulation & Order.

**C. THE OBJECTION THAT THE STIPULATION IS
"CONFUSING/VAGUE/MISLEADING/AMBIGUOUS"**

This objection too falls short of meeting the standard for requiring modification or rejection of the Stipulation and Order. The objection fails to state how the Stipulation and Order is any of those things, and therefore is without merit. Plaintiffs-Intervenors address each element of the Intent Stipulation & Order at Point IV and clearly describe the purpose of each. The

³ These 12 objectors raised objections categorized in the Monetary Relief Memo as follows: Claimant 200000145: Categories 2, 2-b; Claimant 200000471: Category 3, 3-f; Claimant 200000483: Categories 2, 2-a; Claimant 200000889: Categories 2, 2-a, 2-b, 4, 5; Claimant 200000896: 3, 3-a; Claimant 200000924: 2, 2-a; Claimant 200001052: Categories 2, 2-a, 8; Claimant 200001920: Categories 2, 2-b, 5; Claimant 200001941: Categories 2, 2-a, 8; Claimant 200006524: 2, 2-a; Claimant 200006841: 2, 2-a; Claimant 200001975: Categories 4, 5.

confusing, vague, misleading or ambiguous character of the Stipulation is not apparent to Plaintiffs-Intervenors and only one claimant has raised this objection.

D. THE OBJECTION ON THE GROUNDS THAT THE “FIRE DEPARTMENT CONTINUES A PATTERN AND PRACTICE OF DISCRIMINATION AGAINST MEMBERS OF PROTECTED CLASSES”

This objection too is insufficient to modify or reject the Intent Stipulation & Order. The Objectors fail to state how they contend that the Fire Department continues a pattern and practice of discrimination against members of protected classes. For example, they fail to state whether their objection is based upon the FDNY’s hiring practices or other FDNY employment practices. If the objection is to a pattern or practice of discrimination in the City’s hiring practices, the Objectors do not identify what aspects of the hiring practices show a continuing pattern or practice of discrimination. Thus, the objection provides no basis for modification or rejection of the Intent Stipulation & Order. On the other hand, if the objection is to a pattern or practice of discrimination in other employment practices, those claims were not litigated here and the Objectors are not precluded from bringing their own pattern or practice lawsuits to challenge those practices. Nor do the objections identify the grounds for the alleged discrimination, whether it is race, national origin, sex, or some other protected classification. If the allegation is that there is a pattern or practice of discrimination on some basis other than race or national origin, entry of the Intent Stipulation & Order does not preclude claimants from bringing such claims. Finally, two of the three claimants raising this objection, Claimant 200001690 and Claimant 200006013, are not members of the Plaintiffs-Intervenors’ class, and therefore, entry of the Intent Stipulation & Order does not foreclose them from bringing a separate pattern or practice claim for a continuing pattern or practice of discrimination.

POINT IV.
**THE INTENT STIPULATION AND ORDER MEETS APPLICABLE STANDARDS
FOR APPROVAL OF CLASS SETTLEMENTS, AND SHOULD BE APPROVED**

The provisions of the Intent Stipulation & Order complement and buttress this Court's prior Relief Orders, and does so in a way that is fair, reasonable and lawful. Applying the more specific Kirkland factors to evaluate the provisions of the Intent Stipulation & Order, the settlement meets those standards and should be approved. The relief provided is substantially related to the objective of ending racial discrimination in the City's firefighter hiring practices and removing the effects of the City's long history of racial discrimination in firefighter hiring and does not unnecessarily trammel the interest of affected third parties.

A. EACH OF THE PROVISIONS ARE APPROPRIATE

Reviewing each of the provisions of the Intent Stipulation & Order, it is plain that they are all substantially related to the objective of eliminating the unlawful hiring discrimination in this case and do not unnecessarily trammel the interests of others.

1. The Intent Stipulation & Order provides that the City will use its best efforts to recruit African American test-takers for the civil service exam in proportions closely approximating the representation of age-eligible blacks in the city's labor market, plus 3% to remedy the history of underrepresentation of blacks in the firefighter ranks. This provision is in recognition of the continuing issues of attrition in the firefighter hiring process. This Court has previously recognized that issue of high rates of attrition in the hiring process. (June 6, 2013 Modified Remedial Order, at 11-12) (Dkt. # 1143) (October 5, 2011 Memorandum & Order, at 26-27 (Dkt. # 743)). Data provided by the City to the parties regarding attrition in the administration of Exam 2000 also show a continuing higher drop-out rate for black applicants appearing for the hiring exam. While 74% of all white applicants appeared for the exam, only 64% of black applicants did so. (September 22, 2014 Declaration of Richard A. Levy, Ex. 21).

As the Supreme Court noted in Teamsters v. United States, 431 U.S. 324, 340, n. 20 (1977), “absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.” Thus, a recruitment goal based upon the relevant labor market is appropriate, and further, courts have long recognized that recruitment efforts are an appropriate means for race-conscious relief, particularly in cases involving long histories of discrimination. Local 28 of the Sheet Metal Workers Int’l Ass’n v. EEOC, 478 U.S. 421, 432-33, & 433 n.8 (1986) (Supreme Court noted that the district court had ordered a program to “conduct extensive recruitment and publicity campaigns aimed at minorities” because of the reputation that the defendants had created for intentionally discriminating against nonwhites); Richmond v. J. A. Croson Co., 488 U.S. 469, 500 (1989) (recognizing that a strong basis in evidence of a history of discrimination provided a compelling interest supporting race-conscious relief); Horan v. City of Chicago, 98 C 2850, 2003 WL 22284090 (N.D. Ill. Sept. 30, 2003) (in firefighter promotions, noting the compelling governmental interest in remedying its previous discrimination and citing cases on the permissible use of racial preference to rectify past discrimination). The additional goal of 3% above the representation in the applicable labor market is appropriate in light of the continuing issue of greater rates of attrition for blacks in the application process and the fact that the decades-long history of discrimination has likely discouraged applications from those who would otherwise have applied. The relief here, on a demonstrated record of a long history of discrimination, is narrowly tailored to remedy that discrimination without unnecessarily trammeling the rights of others. The goal here is a flexible one, not a rigid quota.

2. The City has also agreed that it will create an executive staff position of Chief Diversity and Inclusion Officer (CDIO) for the FDNY, who will report directly to the Fire Commissioner and who will have responsibility, among other things, for promoting diversity in the FDNY and expanding awareness of the value of full inclusion of firefighters from “all racial and ethnic groups.” This is in recognition of the need for enhanced minority recruiting and fairness in the selection process as well as for stronger internal EEO enforcement to provide protections to blacks and Hispanics. Notably, this relief will also assist any person, regardless of particular race or national origin, who is aggrieved by discriminatory practices within the FDNY.

3. The City agrees that it will create a Diversity Advocate position to be filled by a uniformed firefighter who will be empowered to raise concerns relating to fairness, transparency, and respect for firefighter candidates during the hiring process and probationary firefighters in the Fire Academy. This position is designed to alleviate the continuing issue of attrition in the hiring process, including the Academy and to monitor for any unfairness toward priority hires and other applicants. The need for this provision was demonstrated at the last fairness hearing where the Court found existing hostility amongst incumbent firefighters toward beneficiaries of this Court’s remedial orders. 10/26/12 Order, at 2, 9, 17-18 (Dkt. # 1011).

The Intent Stipulation & Order provides that Lt. Mike Marshall, a long-standing FDNY employee who has been involved extensively in the Vulcans’ efforts to remedy discrimination in the FDNY, will serve as the first occupant of this position. Lt. Marshall has already begun his work in this position. This provision also provides an avenue for black and Hispanic firefighters who do not have family members or other connections within the FDNY with a resource to help them navigate the Academy and the probationary period. The Stipulation & Order provides that the Diversity Advocate’s role is not limited to advocacy for blacks and

Hispanics, but rather includes applicants and probationary firefighters “from underrepresented groups in the FDNY.” As a consequence, it affects no one adversely.

4. The City has committed to increasing transparency regarding the FDNY’s medical standards and components of the medical exam applicable to firefighter candidates. The City will provide complete information in their intake packets regarding the components of the medical exam and the standards that must be met to pass each component. This provision addresses a frequent complaint of black and Hispanic applicants regarding administration of the medical exam as part of the hiring process. The relief extends to all firefighter candidates, not just blacks and Hispanics and therefore, no one can claim any disadvantage from this provision.⁴

5. The Intent Stipulation & Order also gives New York City residents who graduate from the Fire Academy first priority for placement into a fire company within the division in which they live, to the extent reasonable, practical and consistent with operational needs. This is a provision designed to increase opportunities for the placement of black and Hispanic firefighters, on a completely voluntary basis, in firehouses near their homes. To the extent black or Hispanic firefighters live in predominantly black or Hispanic neighborhoods, it enhances the chances that the minority firemen will be a source of encouragement to the youth in these communities to envision firefighting as a viable career option. It does not require that the City create firehouses that are disproportionately black or Hispanic, nor does it disadvantage other applicants who have the same right to express preferences for placement. The provision includes a standard of reasonableness which also stands as a limit upon the development over time of racially-identifiable firehouses.

⁴ These explanatory materials for the intake packets have been drafted and reviewed by the parties and the Court Monitor.

6. The City has committed to engage with the NYC Department of Education and NYC colleges and other City agencies to create educational and other opportunities to enhance the ability of New York City students to pursue careers as New York City firefighters. This provision is designed to build upon the experience of the Fire Cadet program and expressly recognizes that these educational and other opportunities may include the creation of a Fire Cadet title or special credit for completion of job-related fire science courses. This provision, like others above, is not restricted to black and Hispanic students, although the goal is to increase black and Hispanic opportunities for careers in firefighting.

7. Full Enforcement of Relief Provisions by Monitor and the Court

The provisions of the Intent Stipulation & Order are over and above the relief provisions already provided in the Court's June 6, 2013 Modified Remedial Order (Dkt. # 1143) and the October 26, 2012 Final Relief Order (Dkt. # 1012), which remain in full force and effect. Further, the Intent Stipulation & Order expands the authority of the Court and Court Monitor "to administer and enforce" its provisions. See "General Provisions," at ¶ 4.

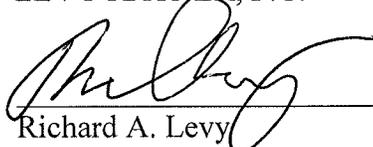
The Intent Stipulation & Order meets applicable standards for its entry. It is fair, reasonable and lawful. Further, in applying the Kirkland factors, its provisions are substantially related to the objective of ending racial discrimination in the City's firefighter hiring practices and removing the effects of the City's long history of racial discrimination in firefighter hiring. Further, it does not unnecessarily trammel the interest of any affected third parties.

Conclusion

Based upon the foregoing, the Court should overrule the objections to the Intent Stipulation & Order, find that it is fair, reasonable and lawful and therefore approve this settlement and enter the Intent Stipulation & Order.

Dated: September 22, 2014
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