

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

UNITED STATES OF AMERICA,

PLAINTIFF,

-AND-

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

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

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

PLAINTIFFS-INTERVENORS,

V.

CITY OF NEW YORK, ET AL.,

DEFENDANTS.

X

**PROPOSED
STIPULATION AND
ORDER**

07 CV 2067
13 CV 3123

(NGG)(RLM)

WHEREAS, The Vulcan Society, Inc., et al. (“Plaintiffs-Intervenors”), intervened in this action to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., as amended (“Title VII”), 42 U.S.C. §1981, 42 U.S.C. §1983, New York Executive Law §§ 290 and 296, and N.Y. City Admin. Code §§8-101et seq.; and

WHEREAS, Plaintiffs-Intervenors allege, *inter alia*, that the pass/fail and rank-ordered use of Written Exam 7029 and Written Exam 2043 constituted intentional discrimination against black applicants for the New York City firefighter job; and

WHEREAS, defendants deny any and all liability for intentional discrimination

arising out of the allegations in the Plaintiffs-Intervenors' complaint and admit no liability and specifically deny that defendants engaged in intentional discrimination against black applicants; and

WHEREAS, the Defendants and Plaintiffs-Intervenors (the "Parties") have the mutual goals of ensuring equal employment opportunity within the FDNY and of settling this action to avoid additional protracted and expensive litigation; and

WHEREAS, Plaintiffs-Intervenors believe that a resolution of their intentional discrimination claims, as set forth herein, accomplishes the goals reasonably achievable through litigation of the claims; and

WHEREAS, Defendants and Plaintiffs-Intervenors agree to the entry of this Stipulation and Order to resolve all claims of intentional discrimination that were or could have been raised by Plaintiffs-Intervenors, individually or as members of a subclass, arising out of the allegations in the Plaintiffs-Intervenors' complaint;

NOW, THEREFORE, in resolution of the Plaintiffs-Intervenors' claims of intentional discrimination and with the agreement of all parties, it is hereby **ORDERED, ADJUDGED AND DECREED**, as follows:

1. To resolve the intentional discrimination claims, defendants agree to the following, in addition to the other provisions of this Stipulation and Order:

(a) Recruitment

The City will use its best efforts to recruit black test-takers for open-competitive firefighter entrance exams in proportions closely approximating the representation of age-eligible blacks in the New York City labor market, plus an additional 3% to remedy a history of underrepresentation of blacks in the New York City firefighter ranks.

(b) Diversity and Inclusion

(i.) The FDNY will create an executive staff position of Chief Diversity and Inclusion Officer (“CDIO”) who reports directly to the Fire Commissioner. The CDIO shall be appointed by the Fire Commissioner in consultation with the Mayor. In making this appointment, the Commissioner and Mayor will consider recommendations from underrepresented groups in the FDNY. The CDIO will have responsibility, *inter alia*, for promoting diversity in the FDNY and expanding awareness of the value of full inclusion of firefighters from all racial and ethnic groups.

(ii.) The Fire Commissioner and CDIO will appoint a full-time Diversity Advocate from the uniformed force. The Diversity Advocate will be responsible for raising concerns relating to fairness, transparency and respect for firefighter candidates during the hiring process and during probationary firefighter school.

(iii.) The Diversity Advocate will have ready access to individuals going through the hiring process and the Academy and to information relating to his/her task. S/he will have offices at FDNY headquarters and at the Fire Academy. The Diversity Advocate will identify issues of concern to the appropriate officials and departments within the FDNY, or elsewhere if necessary, and will have meetings no less frequently than quarterly with the Fire Commissioner to bring to his/her attention the concerns of and conditions affecting applicants and probationary firefighters from underrepresented groups.

(iv.) Lieutenant Michael Marshall shall serve as the inaugural Diversity Advocate for a 2-year term after which a panel comprised of representatives from underrepresented groups in the FDNY will screen candidates for the position of Diversity Advocate and

make nominations for appointment of the Diversity Advocate. Selection of the Diversity Advocate shall be made from among the nominations of the panel.

(c) Candidate Medical Screening

The City will provide firefighter candidates complete information in their intake packets regarding the components of the medical exam and the standards that must be met to pass each component of the medical exam. In addition, candidates will be able to view their heart rates on the stairmill test while the test is being administered.

(d) Fire Company Assignments

The FDNY will give 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, practicable and consistent with operational needs.

(e) Enhancing Opportunities for New York City High School and College Students to Join the FDNY

The City shall engage with the New York City Department of Education, colleges in New York City, including the CUNY system, and other city agencies to create educational and other opportunities that will enhance the ability of New York City students to pursue careers as New York City firefighters. This may include, among other things, the creation of a Fire Cadet title or special credit for completion of job-related fire science courses. Within 90 days of the execution of this Stipulation and Order, the Parties will create an initial plan for this initiative. The Parties' proposals will be submitted to the Court Monitor appointed by this Court on November 9, 2011 (Dkt No. 758).

General Provisions

2. Nothing contained herein shall be deemed to be an admission by any of the defendants that they have in any manner engaged in intentional discrimination against any

member of the Plaintiffs-Intervenors' subclasses, or of any other person or entity, as defined in the constitutions, statutes, ordinances, rules or regulations of the United States, the State of New York, or the City of New York or any other rules, regulations or bylaws of any department or subdivision of the City of New York.

3. Plaintiffs-Intervenors' claims of intentional discrimination shall be withdrawn upon final approval of this Settlement.

4. Nothing contained herein shall be deemed to be a withdrawal or compromise of any relief or request for relief based on the Plaintiffs' and Plaintiffs-Intervenors' disparate impact claims, nor shall it in any way alter the provisions of the Modified Remedial Order entered by the Court on June 6, 2013 (Dkt No. 1143) except to expand the authority of the Court and the Court Monitor to administer and enforce the provisions of this Stipulation and Order, per paragraph 15 of this Stipulation and Order. This Stipulation and Order contains all the terms and conditions agreed upon by the Parties hereto relating to the resolution of the intentional discrimination claims, and no oral agreement entered into at any time nor any written agreement entered into prior to the execution of this Stipulation and Order regarding the intentional discrimination claims shall be deemed to exist, or to bind the Parties hereto, or to vary the terms and conditions contained herein.

5. Any amendments or modifications to this Stipulation and Order shall be in writing and signed by Defendants' counsel and Class Counsel on behalf of their respective clients.

6. Counsel for the Parties agree that they will take all reasonable steps to ensure that this Stipulation and Order is approved by the Court and becomes effective. Specifically, the Parties will request that the Court preliminarily approve the settlement, schedule

a Fairness Hearing, and provide notice to the Class of the proposed Stipulation and Order and their opportunity to object thereto, after which the Parties shall move the Court for final approval of this Stipulation and Order.

7. If any collateral challenge to the settlement or this Stipulation and Order arises in a court, the Parties are obligated to inform one another of such a challenge and defend each and every term. The representatives of the Class, Class Counsel, the Defendants and the Office of the Corporation Counsel each agree that they shall use their best efforts to defend this settlement and Stipulation and Order from any legal challenge, whether by objection, appeal or collateral attack.

8. Only Class Counsel may bring a motion to enforce any provision of this Stipulation and Order, including a motion alleging a violation of the Stipulation and Order for contempt.

9. The Parties shall attempt to resolve informally any dispute, concerns, or perceived violations that may arise under this Stipulation and Order. To that end, Class Counsel will notify Defendants' Counsel in writing of any perceived instances of non-compliance by the FDNY or the City with the Stipulation and Order's terms. The Parties also agree to meet and confer in good faith to discuss such matters and try to resolve them with the assistance of the Court Monitor prior to any party seeking Court intervention.

10. If Class Counsel has reason to believe that Defendants have violated the terms of this Stipulation and Order, it shall notify counsel for Defendants, in writing, thirty (30) days prior to raising the issue with the Court Monitor or bringing any motion to enforce the Stipulation and Order including a motion for contempt, provided however, it may give less notice if it demonstrates to the Court that an emergency need prevented it from giving the thirty

(30) days notice and that the amount of notice it did give was warranted under the circumstances.

11. Any application to the Court in connection with this Stipulation and Order shall be on notice to Defendants and Class Counsel.

12. The Parties agree that this Stipulation and Order is subject to Rule 108 of the Federal Rules of Evidence. It is therefore the Parties' understanding that the Stipulation and Order is not admissible to prove Defendants' liability for any of the individual or Class Claims that allege that Defendants engaged in intentional discrimination against members of the Class.

13. The terms and conditions contained herein do not constitute an official policy or practice of the City of New York for purposes other than enforcement of this Stipulation and Order.

Attorneys' Fees

14. The Parties agree that upon Plaintiffs-Intervenors' submission of an interim fee application for work performed on all aspects of the litigation up to the date of the entry of this Stipulation and Order by this Court, the Parties will negotiate in good faith to agree upon a payment of attorneys' fees. If the Parties are unable to agree upon the issue of attorneys' fees within thirty (30) days of such application, the dispute will be submitted to the Court for resolution. Payment of attorneys' fees will be made by the City within thirty (30) days of any agreement by the Parties or Court Order regarding attorneys' fees.

Court's Jurisdiction

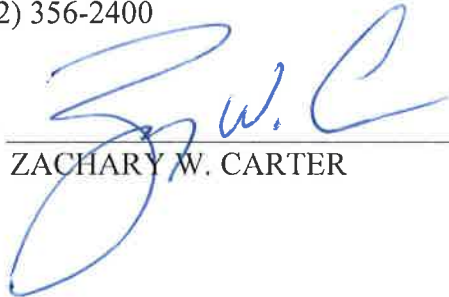
15. The Court shall retain jurisdiction over the Parties to enforce and administer the terms of this Stipulation and Order for the same period and under the same conditions as set forth in the Modified Remedial Order entered by the Court (Dkt. No. 1143).

Dated: New York, New York
April __, 2014

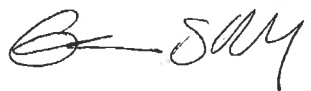
LEVY RATNER, P.C.
80 Eighth Avenue, Floor 8
New York, NY 10011
(212) 627-8100

By: 
RICHARD A. LEVY

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street
New York, N.Y. 10007
(212) 356-2400

By: 
ZACHARY W. CARTER

THE CENTER FOR CONSTITUTIONAL
RIGHTS
666 Broadway, 7th Floor
New York, NY 10012-2399
(212) 614-6438


By: _____
GHITA SCHWARZ

SCOTT + SCOTT, LLP
405 Lexington Avenue Floor 40
New York, NY 10174
(212) 223-6444

By: 
JUDITH S. SCOLNICK
Attorneys for Plaintiffs-Intervenors

SO ORDERED:

U.S.D.J.