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 AMENDED MONETARY RELIEF CONSENT DECREE AND RESPONSE TO OBJECTIONS

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Plaintiff United States of America ("United States") and the Plaintiffs-Intervenors' Nonhire and Delayed-Hire Subclasses submit this memorandum in support of the parties' Joint Motion for Final Entry of Amended Monetary Relief Consent Decree. The parties have requested final entry of the Amended Monetary Relief Consent Decree ("Decree"), including approval of the Amended Proposed Relief Awards List[1] attached thereto as the Final Relief Awards List. Final entry of the Decree, including approval of the Final Relief Awards List, will settle the United States' and the Plaintiffs-Intervenors' claims for back pay and fringe benefits lost by 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 and will allocate the individual back pay, fringe benefits, and interest awards to Claimants.[2] Defendant City of New York (the "City") does not oppose the relief sought or the positions stated in this memorandum.

I. INTRODUCTION

On June 30, 2014, the Court provisionally approved the Monetary Relief Consent Decree (Dkt. 1435) pending consideration of any objections submitted and the completion of the Fairness Hearing, which the Court will conduct on October 1, 2014, and, if necessary, October 2, 2014. *See* Order on Joint Mot. for Provisional Entry of Monetary Relief Consent Decree &

[1] Attached to the Decree in support of the Amended Proposed Relief Awards List is the Amended Declaration of Ed Barrero, which incorporates the recommendations discussed below to sustain the objections of seven Claimants and to recalculate the individual monetary relief awards that were originally contained in the Proposed Relief Awards List (Dkt. 1435-1) and supported by the Declaration of Ed Barrero (Dkt. 1435-2).

[2] As defined in the Decree, "Claimants" refers to the 1,470 individuals who submitted claim forms seeking relief in this case and whom the Court determined were eligible for relief because they met the definition of a Delayed-Hire or Nonhire Claimant and satisfied the other lawful qualifications that were mandatory, minimum qualifications at the time the Claimants applied for an entry-level firefighter position. *See* Decree, ¶ 3.

Scheduling of Fairness Hr'g, Dkt. 1437. On September 22, 2014, the parties filed an amended Decree containing only technical changes to reflect that the City will be issuing payment to Claimants for the back pay portions of their awards, from which required withholdings will be made, and the Court-appointed claims administrator, The Garden City Group, Inc. ("GCG"), will be issuing payment to Claimants for the fringe benefits and interest portions of their awards.[3] The United States, the Plaintiffs-Intervenors' Nonhire and Delayed-Hire Subclasses, and the City (collectively "the parties") jointly move for final entry of the Decree, including approval of the attached Amended Proposed Relief Awards List as the Final Relief Awards List. *See* Joint Mot. for Final Entry of Amended Monetary Relief Consent Decree.

This memorandum addresses objections submitted by 101 Claimants, which relate to the terms of the parties' proposed settlement of the back pay and fringe benefits claims and to the proposed individual monetary relief awards set forth in the Proposed Relief Awards List (Dkt. 1435-1). Pursuant to Paragraph 21 of the Decree, attached hereto as Appendix A is a list of the objections submitted by these 101 Claimants, and as Appendix B are the Objection Forms and other documents submitted by these Claimants,[4] set forth as Exhibits 1-101.

For the reasons set forth below, the Court should sustain the objections of seven Claimants and overrule the objections of the remaining 94 Claimants, as their objections do not warrant modification or non-entry of the Decree or of the Amended Proposed Relief Awards

[3] These technical changes were necessitated by recently-discovered administrative reasons prohibiting the City from issuing payment of the entire individual monetary relief awards to Claimants. These changes do not implicate the notice addressed in Section III, *infra*, because they do not impact any interests from which a collateral attack on the Decree may arise.

[4] Where applicable, Appendix B contains other submissions that relate to Claimants' objections, such as claims for additional fringe benefits expenses, responses confirming that they had no earnings from railroad employers, and a claim form. Certain personal information has been redacted from these submissions in compliance with Federal Rule of Civil Procedure 5.2(a).

List.[5] The Court should then enter as final the Decree, including approval of the Amended Proposed Relief Awards List as the Final Relief Awards List, because the Decree's terms and the individual monetary relief awards set forth in the Amended Proposed Relief Awards List, which incorporates the changes necessitated by sustaining the recommended seven Claimants' objections, are fair, reasonable, and legal.

II. BACKGROUND

The Memorandum in Support of Joint Motion for Provisional Entry of Monetary Relief Consent Decree and Scheduling of Fairness Hearing ("Provisional Entry Memorandum") sets forth the background of the case. *See* Dkt. 1434 at 4-9.

III. NOTICE OF FAIRNESS HEARING

As set forth in the Decree, GCG provided all Claimants, the individuals affected by the Decree, with notice of the upcoming Fairness Hearing and an opportunity to file objections to the terms of the Decree and/or to their proposed individual monetary relief awards. *See* Decree, Dkt. 1435 ¶¶ 18-20; Order on Joint Mot. for Provisional Entry of Monetary Relief Consent Decree & Scheduling of Fairness Hr'g, Dkt. 1437. This notice process was implemented to comply with Section 703(n) of Title VII, 42 U.S.C. § 2000e-2(n) and to ensure the fairness of the Decree.[6] Accordingly, pursuant to Paragraph 18 of the Decree, on July 14, 2014, GCG sent, via first-class U.S. mail and email, to each Claimant at his or her last known mailing and email address, a "Notice of Monetary Relief Settlement & Fairness Hearing" along with "Instructions for Filing

[5] The Plaintiffs-Intervenors take a position only with regard to objections that affect the Decree as it applies to black Claimants.

[6] Section 703(n) of Title VII protects relief orders from subsequent collateral attack by prohibiting later challenges by persons who had a reasonable opportunity to present their objections. *See* 42 U.S.C. § 2000e-2(n)(1)(A)(ii).

an Objection Prior to the Fairness Hearing" and a blank "Objection Form." GCG attached a cover letter to this mailing, which notified each Claimant of the amount of his or her proposed individual monetary relief award listed on the Proposed Relief Awards List (Dkt. 1435-1).[7] GCG also uploaded these documents to each Claimant's password-protected portal on GCG's website, www.fdnylitigation.com. In addition, GCG posted the provisionally-entered Decree, including all of its attachments, on the publicly-available section of www.fdnylitigation.com.

Claimants who wished to object to the terms of the Decree and/or to their proposed individual monetary relief awards were instructed to file an Objection Form by August 12, which was 30 days after the notice documents were mailed to Claimants.[8] This process satisfies the requirements for providing notice and a reasonable opportunity to object set forth in 42 U.S.C. § 2000e-2(n). *See* Mem. & Order, Dkt. 1011 at 5 (concluding that the process set forth for

[7] GCG sent the notice documents via first-class U.S. mail to each of the 1,470 Claimants. Fifteen of these notice document mailings were returned to GCG as undeliverable. For each of these 15 Claimants, GCG either located a new address or confirmed the accuracy of the last-known address and remailed the notice documents. None of these remailed notice documents was returned as undeliverable. In addition, GCG sent the notice documents via email to the 1,394 Claimants with email addresses on file. Of these 1,394 emails, 1,347 were delivered to the Claimant's email address, and 47 bounced back to GCG. Thus, each Claimant received the notice documents via first-class mail, and the vast majority of Claimants also received the notice documents via email.

[8] In addition to requiring Claimants to submit objections by August 12, the instructions stated that objections must be submitted on the provided Objection Form and must contain responses to all required fields on the Objection Form, except for good cause as determined by the United States and the Plaintiffs-Intervenors. *See* Decree, Dkt. 1435 ¶ 20. As indicated on Appendix A, seven Claimants submitted an objection after the deadline and 32 Claimants failed to complete each of the required fields on the Objection Form. In addition, seven Claimants submitted an objection without using the Objection Form or used the objection form provided to object to the Proposed Stipulation and Order settling the Plaintiffs-Intervenors' intentional discrimination claims (rather than the Objection Form provided to object to the Monetary Relief Consent Decree and/or proposed individual monetary relief award). Despite the failure of these Claimants to comply with the instructions, the United States and the Plaintiffs-Intervenors have considered and responded to each of their objections.

consideration of the Proposed Relief Order satisfied the requirements for providing notice and a reasonable opportunity to object under 42 U.S.C. § 2000e-2(n) and that, therefore, the Final Relief Order could not be challenged by any nonparty who received the notice documents).

IV. SUMMARY OF OBJECTIONS

The 101 Claimants listed on Appendix A objected to the terms of the Decree and/or to their proposed individual monetary relief determinations. These objections fall within one or more of the following eight categories, as set forth on Appendix C:[9]

(1) 8 Claimants object to the settlement amounts agreed to by the parties;

(2) 68 Claimants object to their individual back pay awards based on the allocation methodology, including objections that fall into one or more of the following subcategories:

(a) 59 Claimants object that their proposed back pay awards do not equal what they would have earned as firefighters,

(b) 8 Nonhire Claimants object either to the fact that interim earnings were used to calculate their back pay awards or to the way in which their interim earnings were used,

(c) 5 Delayed-Hire Claimants object that their back pay awards do not equal the difference between their interim earnings and what they would have earned as firefighters during their months of delay,[10] and

[9] The total number of Claimants listed in the following categories exceeds the total number of Claimants who submitted objections (101). This occurred because a significant number of Claimants include multiple bases for objecting and, as such, one Claimant may be counted several times in the different categories of objections listed below. *See* Appendix C for a listing of Claimants' objections by category.

[10] As defined in the Decree, "months of delay" refers to the delay in hiring experienced by a Delayed-Hire Claimant, which is the number of months between the first FDNY Academy class appointed off of the eligible list of the exam for which the Claimant is eligible for relief and the Claimant's FDNY appointment date. *See* Decree, ¶ 10.

(d) 1 Nonhire Claimant objects that Nonhire Claimants appointed to the FDNY as priority hires should receive greater back pay awards than Nonhire Claimants who were not subsequently appointed to the FDNY because the priority hires have proven themselves qualified for the entry-level firefighter position;

(3) 13 Claimants object to the calculation of their individual awards, including objections that fall into one or more of the following subcategories:

(a) 5 Nonhire Claimants object that their back pay awards were calculated assuming that they earned the maximum average annual interim earnings during their damages periods because they provided additional interim earnings information regarding their earnings from railroad employers or such additional interim earnings information from railroad employers was unnecessary,

(b) 1 Claimant objects to the damages category used to calculate his award,

(c) 1 Claimant objects to receiving an award and requests to withdraw his claim for relief in this case,

(d) 2 Nonhire Claimants object that their interim earnings should have been discounted when calculating their back pay awards,

(e) 2 Delayed-Hire Claimants object that the months of delay used to calculate their back pay awards are incorrect, and

(f) 3 Claimants object that they were not awarded additional fringe benefits;

(4) 2 Claimants object to their employee pension contributions being withheld from their back pay awards;

(5) 17 Claimants' objections fall outside of the scope of the Decree, including objections regarding compensatory damages, the priority hiring process, damages other than back pay or fringe benefits (*e.g.*, training opportunities leading to increased pay, student loan debt, etc.), and retroactive seniority;

(6) 7 Claimants submitted blank objections or objections whose bases cannot be determined;

(7) 4 Claimants returned submissions that were supportive of the Decree or did not object to the Decree; and

(8) 7 Claimants submitted objections after the deadline for submitting objections had passed. One of these Claimants established good cause for his untimely objection. Although the remaining six objections are untimely, the United States and the Plaintiffs-Intervenors reviewed all seven objections and included them in categories (1)-(7), above, as appropriate.

As explained below, the United States and the Plaintiffs-Intervenors, to the extent that the objections impact the Decree as it applies to black Claimants, recommend that the Court sustain the seven Claimants' objections discussed in categories (3)(a), (3)(b), and (3)(c), to which the City does not object, and the United States and the Plaintiffs-Intervenors also recommend that the Court overrule the objections submitted by the remaining 94 Claimants. The Amended Proposed Relief Awards List incorporates the changes necessitated by sustaining the recommended seven Claimants' objections. None of the remaining objections warrants modification or non-entry of the Decree or of the Amended Proposed Relief Awards List.

V. STANDARD OF REVIEW

As the parties' Provisional Entry Memorandum set forth, 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 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."[11] Mem. & Order, Dkt. 1011 at 6 (citations omitted). The Court should enter as final the Decree, including approval of the Amended Proposed Relief Awards List as the Final Relief Awards List, because they are fair, reasonable, and legal and because none of the objections has sufficient merit to warrant non-entry or modification of the Decree or the Amended Proposed Relief Awards List.

[11] However, in reviewing objections to the Proposed Relief Order, this Court applied the standard set forth in *Kirkland v. New York State Department of Correctional Services*, in which 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.'" Mem. & Order, Dkt. 1011 at 6 (citing 711 F.2d 1117, 1132 (2d Cir. 1983)). Because the Court has already held that the award of back pay and fringe benefits meets the *Kirkland* standard, *see id.* at 6-10, the Court need not apply the *Kirkland* standard again to review the 101 Claimants' objections. Rather, the Court should determine whether the Decree and the Amended Proposed Relief Awards List are fair, reasonable, and legal, and whether any of the objections has sufficient merit to overcome the presumption of validity accorded to the Decree.

VI. ARGUMENT

As discussed in the Provisional Entry Memorandum, the parties have demonstrated that the Decree meets the standard for approval of a consent decree because its terms are lawful, fair, reasonable, adequate, and consistent with the public interest. *See* Provisional Entry Mem., Dkt. 1434 at 12-22. For the reasons discussed below, the United States and the Plaintiffs-Intervenors recommend that the Court sustain the seven Claimants' objections discussed below in Sections C.1 through C.3, to which the City does not object, and overrule the objections submitted by the remaining 94 Claimants, which do not warrant modification or non-entry of the Decree or of the Amended Proposed Relief Awards List.[12]

A. Response to Objections to Settlement Amounts (Appendix C: Category 1)

Eight Claimants object to the settlement amounts agreed to by the parties, including objections to the total settlement amount of $99,098,358.29 and to the aggregate amounts for individual relief awards for each of the eight damages categories set forth in Paragraph 12 of the Decree. Each of these objections should be overruled for the reasons discussed below.

In March 2012, 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 Court indicated that it would determine, at a later date, the additional 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. The Court's order also held that the City would have the opportunity to reduce the aggregate back

[12] Of the 101 Claimants who submitted objections, 37 requested an opportunity to state his or her objection in person at the Fairness Hearing. For the Court's convenience, a list of those Claimants is attached as Appendix D. The list also provides an attorney's name if the Claimant is represented by counsel. According to the "Instructions for Filing an Objection Prior to the Fairness Hearing" provided to the Claimants, a Claimant's right to state his or her objection at the Fairness Hearing may be waived by failing to indicate his or her request to appear on the Objection Form. *See* Attach. C to Decree, Dkt. 1435-3 at 4 ¶ 5.

pay damages by proving, on an individualized basis, that applicants harmed by the City's discrimination mitigated their losses through interim employment. The Court clarified that the period in which each Claimant's damages accrued (his or her "damages period") differed based on the exam taken and whether the Claimant was denied hire (Nonhire Claimant) or his or her hiring was delayed (Delayed-Hire Claimant).[13] *See* Dkt. 825 at 29-35; Dkt. 888 at 11 and 13, as amended by Dkt. 1101 per minute order dated May 7, 2013. Further, the Court decided that the value of lost fringe benefits was to be determined based on expenses each individual applicant actually incurred. *See* Dkt. 825 at 39. The parties were in the midst of gathering information to enable such individualized determinations when they agreed in principle to settle the back pay and fringe benefits claims.

The parties' proposal to settle the back pay and fringe benefits claims, including interest, for $99,098,358.29 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, and provides such relief more quickly, to those harmed by the City's use of the exams held to be discriminatory.[14] Thus, objections to the total settlement

[13] The damages period for Exam 7029 Nonhire Claimants begins in 2001, and the damages period for Exam 2043 Nonhire Claimants begins in 2005. The damages periods for Delayed-Hire Claimants consist of the time period between the first Academy class appointed off of the eligible list for the exam for which they are eligible and their appointment dates; the damages period for Exam 7029 Delayed-Hire Claimants begins on February 4, 2001, and the damages period for Exam 2043 Delayed-Hire Claimants begins on May 25, 2004.

[14] 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

amount of $99,098,358.29 and to the aggregate amounts for individual relief awards for each of the eight damages categories set forth in Paragraph 12 of the Decree should be overruled.

In addition, Claimant 200001140 objects to the Decree on the grounds that the settlement, which is broken down by damages categories, violates his rights under the Equal Protection Clause because the settlement treats Claimants differently based on their race. This objection should be overruled because the Decree's provisions do not implicate the Equal Protection Clause. 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 harmed by unlawful employment practices. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Indeed, one of the central purposes of Title VII is to provide make-whole relief, including back pay and fringe benefits, to persons who have been harmed by employment practices that violate the statute. *See id. See also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976); *Berkman v. City of New York*, 705 F.2d 584, 594 (2d Cir. 1983). Make-whole relief, including the individual monetary relief set forth in the Decree, does not implicate the Equal Protection Clause. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 529 (1989) (Scalia, J., concurring); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 375 n.61 (1977); *Franks*, 424 U.S. at 792 (Powell, J., concurring in part and dissenting in part); *Acha v. Beame*, 531 F.2d 648, 656 (2d Cir. 1976). Indeed, the remedial provisions in the Decree provide no more than such make-whole relief to victims of the employment practices challenged in this action; thus, this Decree does not implicate the Equal Protection Clause.

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deserving Claimants will become unreachable due to changes in their contact information that are not communicated to the parties or to GCG. Finally, the parties' settlement speeds relief to Claimants who took the discriminatory exams at issue either 12 or 15 years ago.

When the Court found that the City's use of Written Exams 7029 and 2043 had an unlawful disparate impact under Title VII, it identified the additional number of black and Hispanic applicants who took each exam and who would have been hired, or would have been hired earlier, in the absence of the City's discrimination. *See* Mem. & Order, Dkt. 294. Specifically, the Court found that the discriminatory exams caused a hiring shortfall of 293 black and Hispanic applicants. Absent the disparities caused by the discriminatory exams, the Court found that 114 additional black entry-level firefighters and 62 additional entry-level Hispanic firefighters would have been appointed off of the Exam 7029 eligible list, and 72 additional black entry-level firefighters and 45 additional entry-level Hispanic firefighters would have been appointed off of the Exam 2043 eligible list. *See id.* at 16-19, 23. The Court also found that the discriminatory exams caused a delay shortfall of 249 black and Hispanic entry-level firefighters whose hiring was cumulatively delayed for approximately 70 years. Absent the disparities caused by the discriminatory exams, the Court found that 68 black entry-level firefighters appointed off of the Exam 7029 eligible list would have been appointed 20.03 years earlier, 86 Hispanic entry-level firefighters appointed off of the Exam 7029 eligible list would have been appointed 23.11 years earlier, 44 black entry-level firefighters appointed off of the Exam 2043 eligible list would have been appointed 14.08 years earlier, and 51 Hispanic entry-level firefighters appointed off of the Exam 2043 eligible list would have been appointed 12.36 years earlier. *See id.* at 20-22.

The Court's order on back pay allocated the aggregate back pay award according to the shortfalls found during the liability phase over the relevant damages periods, subdividing the aggregate back pay amount into eight different damages categories based on the race of the applicant harmed, the applicable exam, and whether the applicant was denied hire (Nonhire

Claimant) or his or her hiring was delayed (Delayed-Hire Claimant) due to the City's use of the exams held to be discriminatory. *See* Mem. & Order, Dkt. 825 at 46. Indeed, the Court recognized that each Claimant must be placed in the appropriate damages category by race and exam because "each category suffered a unique economic loss produced by that category's hiring shortfall." Mem. & Order, Dkt. 888 at 9. Accordingly, the parties agreed to distinct settlement amounts for each damages category based on that category's hiring shortfall and damages period. Because the agreed-upon settlement amounts provide no more than make-whole relief to victims of the employment practices challenged in this action, they do not implicate the Equal Protection Clause.

However, even if the Court considers Claimant 200001140's Equal Protection Clause argument, the Court should reject the argument because the Decree does not violate the Equal Protection Clause. Constitutional standards of equal protection require that the remedies provided by the Decree "are sufficiently narrowly tailored to remedy the discrimination alleged in this case." *Teamsters*, 431 U.S. at 376 n.62. Because the settlement amounts agreed to for each damages category were calculated based on that category's hiring shortfall, the settlement amounts at issue meet this constitutional standard. Thus, this objection should be overruled.

B. Response to Objections to Individual Back Pay Awards Based on Allocation Methodology (Appendix C: Category 2)

Sixty-eight Claimants object to their individual back pay awards based on the allocation methodology, including objections that fall into one or more of the four subcategories discussed below. For the reasons discussed below, each of these objections should be overruled.

1. Claimants Are Not Entitled to Back Pay Awards That Equal What They Would Have Earned as Firefighters (Appendix C: Category 2-a)

Fifty-nine Claimants, including 16 Nonhire Claimants and 43 Delayed-Hire Claimants, object to their proposed back pay awards because they are not equal to what the Claimants would have earned as firefighters. For the reasons discussed below, these objections should be overruled.

a. Nonhire Claimants Are Not Entitled to Back Pay Awards That Equal What They Would Have Earned as Firefighters

Sixteen Nonhire Claimants submitted objections to their proposed back pay awards, objecting to the fact that their awards are less than the amount they would have earned if they had been hired as firefighters during their damages periods. In its back pay order, the Court recognized:

> Backpay can be awarded in class actions; however, where the facts are not so clear as to allow a determination as to which class members should be awarded back pay, a court may equitably "compute a gross award for all the injured class members and divide it among them on a pro rata basis." [*Ingram v. Madison Square Garden, Inc.*, 709 F.2d 807,] 812 [(1983)]. For example, "where the number of qualified class members exceeds the number of openings lost to the class through discrimination and identification of individuals entitled to relief would drag the court into a quagmire of hypothetical judgments and result in mere guesswork," *Catlett v. Mo. Highway & Transp. Comm'n*, 828 F.2d 1260, 1267 (8th Cir. 1987), a case "may require class-wide, rather than individualized, assessments of monetary relief." *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 161 n.6 (2d Cir. 2001) *overruled in part*, *Wal-Mart v. Dukes*, No. 10-277, 2001 WL 2437013, at *12-15 (U.S. June 20, 2011).

Mem. & Order, Dkt. 825 at 15. Accordingly, the Court calculated the aggregate back pay award for Nonhire Claimants based on the income that would have been earned during the relevant damages periods by the previously-determined hiring shortfall of 293 additional black and Hispanic applicants who would have been hired as entry-level firefighters but for the exams held

to be discriminatory.[15] *See id.* at 17-35. *See also* Mem. & Order, Dkt. 294 at 16-19, 23. Consistent with the Court's previous orders, the parties' agreed-upon settlement amounts for Nonhire Claimants are fixed amounts based on what these 293 additional black and Hispanic applicants would have earned if they had been hired as entry-level firefighters.

The Court determined that 995 of the 1,470 Claimants are eligible for monetary relief as Nonhire Claimants. *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. Because it is impossible to know which of the 995 Nonhire Claimants would have been hired by the FDNY in the absence of the exams held to be discriminatory, the back pay settlement amounts based on the earnings of the 293 additional black and Hispanic applicants are divided among the 995 Nonhire Claimants, taking into account each Claimant's average annual employment earnings. Thus, the salary that would have been earned by 293 firefighters (less mitigation and a discount for settlement) must be shared among the 995 individuals who are eligible for monetary relief as Nonhire Claimants. As a result, each individual Nonhire Claimant's back pay award is necessarily less than what he or she would have earned if he or she had been hired as a firefighter with the FDNY, and each of these objections should be overruled.

b. Delayed-Hire Claimants Are Not Entitled to Back Pay Awards That Equal What They Would Have Earned During Their Months of Delay

Forty-three Delayed-Hire Claimants submitted objections to their proposed back pay awards, objecting to the fact that their awards are less than the amount they would have earned as firefighters during their months of delay. In its back pay order, the Court opted to calculate a gross back pay award for each class of victims and distribute the award among the class

[15] *See supra* Section VI.A at 12 for a breakdown of the hiring shortfall by exam taken and race of applicant.

members, rather than attempting to identify precisely which class members would have been hired or hired earlier in the absence of discrimination. *See* Mem. & Order, Dkt. 825 at 15. Accordingly, the Court calculated the aggregate back pay award for Delayed-Hire Claimants based on the income that would have been earned during the relevant damages periods by the previously-determined delay shortfall of 249 black and Hispanic firefighters who, cumulatively, would have been hired approximately 70 years earlier but for the exams held to be discriminatory.[16] *See id.* at 41-45. *See also* Mem. & Order, Dkt. 294 at 20-22. Consistent with the Court's previous orders, the parties' agreed-upon settlement amounts for Delayed-Hire Claimants are fixed amounts based on what these 249 black and Hispanic firefighters would have earned during their combined approximately 70 years of delay if their hiring had not been delayed.

The Court determined that 475 of the 1,470 Claimants are eligible for monetary relief as Delayed-Hire Claimants. *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 Claimants experienced a combined delay of nearly 1,106 years. *See* Amended Proposed Relief Awards List. Because it is impossible to know which of the 475 Delayed-Hire Claimants would have been hired earlier in the absence of the exams held to be discriminatory, the back pay settlement amounts based on the earnings of the 249 black and Hispanic firefighters over their approximately 70 years of delay are divided among the 475 Claimants, according to the specific number of months each Claimant was delayed. Thus, the salary that would have been earned by 249 firefighters over approximately 70 years (less mitigation and a discount for settlement) must be shared among 475 eligible Delayed-Hire Claimants over their combined nearly 1,106 years of

[16] *See supra* Section VI.A at 12 for a breakdown of the delay shortfall by exam taken and race of applicant.

delay.[17] As a result, each individual Delayed-Hire Claimant's back pay award is necessarily less than what he or she would have earned as a firefighter during his or her months of delay, and each of these objections should be overruled.

2. The Court Ordered Interim Earnings to Factor into the Individual Back Pay Awards for Nonhire Claimants (Appendix C: Category 2-b)

Eight Nonhire Claimants object either to the fact that interim earnings were used to calculate their back pay awards or to the way in which their interim earnings were used. The Court previously held that each Claimant's back pay award must be calculated based on an individualized assessment of whether he or she breached the duty to mitigate damages, including the Claimant's interim employment earnings. *See, e.g.*, Final Relief Order, Dkt. 1012 at 8-11; Mem. & Order, Dkt. 888 at 9-11; Mem. & Order, Dkt. 825 at 37; Mem. & Order, Dkt. 640 at 18-25. Consistent with the Court's orders, the methodology used to allocate the back pay settlement amount for Nonhire Claimants accounts for Nonhire Claimants' average annual interim earnings during their respective damages periods. As explained in the Provisional Entry Memorandum, under this methodology, each Claimant was assigned to one of seven possible earnings bands based on his or her average annual interim earnings during the relevant damages period.[18] Each Claimant's back pay award was then determined by the value assigned to his or her earnings band within his or her damages category. Because the Court ordered that interim earnings be

[17] Black Delayed-Hire Claimants experienced nearly 432 years of delay; Hispanic Delayed-Hire Claimants experienced 674 years of delay.

[18] In the absence of settlement, each Claimant's interim earnings would have been considered on an annual basis as opposed to taking the average over the applicable damages period. However, the United States and the Plaintiffs-Intervenors' Nonhire Subclass opted to consider average annual interim earnings in the allocation of the back pay settlement to Nonhire Claimants, concluding that this approach fairly and adequately compensates each Nonhire Claimant for his or her individual losses without making the allocation process unduly and unnecessarily burdensome.

used for calculating back pay awards, and because the methodology used to incorporate the interim earnings into the back pay awards was applied evenhandedly to all Nonhire Claimants, these objections should be overruled.

3. Interim Earnings Were Not Part of the Delayed-Hire Claimants' Individual Back Pay Award Calculations (Appendix C: Category 2-c)

Five Delayed-Hire Claimants object that their proposed back pay awards do not properly reflect the difference between their interim earnings and what they would have earned during their months of delay. For the reasons discussed below, these Claimants' objections should be overruled.

As a threshold matter, these Claimants' back pay awards were properly calculated under the allocation methodology, and as previously discussed, each Claimant's back pay award is necessarily less than what he or she would have earned as a firefighter during his or her months of delay. *See supra* Section VI.B.1.b. As explained in the Provisional Entry Memorandum, the Decree allocates back pay to Delayed-Hire Claimants proportionately based on the delay in hiring that they experienced. *See* Dkt. 1434 at 20. Accordingly, each Delayed-Hire Claimant's back pay award is based on the number of months of delay he or she experienced between the first FDNY Academy class hired off of the relevant eligible list and the Academy class to which he or she was appointed.

In the absence of settlement, each Delayed-Hire Claimant's back pay award would have been impacted by both his or her months of delay and his or her interim earnings. *See* Dkt. 888 at 12. The parties began the lengthy process of gathering sufficient interim earnings information to enable such determinations and were also engaged in extensive briefing regarding whether, as the City claimed, numerous individual Claimants had been responsible for their own delay and/or had failed to provide the City with responses to detailed information requests regarding their

interim earnings. Such a process, which was to include adjudication of each individual contested case by a Special Master, was expected to take many months or longer and to cause delay and uncertainty to all of the Claimants. It was in the midst of this process when the parties agreed in principle to settle in order to obtain finality and fairness for the Claimants as a group. The allocation methodology for Delayed-Hire Claimants does not take into account interim earnings because the United States and the Plaintiffs-Intervenors lack complete interim earnings information for Delayed-Hire Claimants. Moreover, a *pro rata* approach based on months of delay is supported by the case law. *See, e.g.*, *Ingram*, 709 F.2d at 812; *Catlett*, 828 F.2d at 1267, *Robinson*, 267 F.3d at 161 n.6.

Because interim earnings were not considered in the allocation of back pay to Delayed-Hire Claimants and Delayed-Hire Claimants' back pay awards are necessarily less than what they would have earned as firefighters (*see* Section VI.B.1.b, above), each of these objections should be overruled.

4. Priority Hires Should Not Receive Greater Back Pay Awards Than Nonhire Claimants Who Were Not Appointed by the FDNY (Appendix C: Category 2-d)

One Nonhire Claimant, Claimant 200001113, objects that Nonhire Claimants appointed to the FDNY as priority hires should receive greater back pay awards than Nonhire Claimants who were not subsequently appointed to the FDNY because the priority hires have proven themselves qualified for the entry-level firefighter position. However, monetary relief (such as back pay) and hiring relief are distinct types of relief, one of which is not dependent on the other. *See* Mem. & Order, Dkt. 390 at 19-22. In addition, in the absence of settlement, the Court did not contemplate that a Nonhire Claimant's priority hire status would have any impact whatsoever on his or her back pay award. Rather, the Court previously approved a method for allocating

back pay awards to eligible Nonhire Claimants and reducing those awards by Claimants' interim earnings that did not take into account whether the Claimants were ultimately hired by the FDNY. *See* Mem. & Order, Dkt. 888 at 2-11. Indeed, it would be unfair to allocate back pay based on a Claimant's ability to become a firefighter more than a dozen years after he or she first applied for the position because present ability to become a firefighter has no bearing on the past financial harm incurred by victims of discrimination. Thus, this objection should be overruled.

C. Response to Objections to the Calculation of Individual Awards (Appendix C: Category 3)

Thirteen Claimants object to the calculation of their individual awards, including objections that fall into one or more of the following four categories. As indicated below, the United States and the Plaintiffs-Intervenors recommend that the Court sustain objections from seven of these Claimants.

1. Back Pay Awards Should Be Recalculated for Nonhire Claimants for Whom Additional Interim Earnings Information from Railroad Employers Was Provided or Unnecessary (Appendix C: Category 3-a)

Five Nonhire Claimants submitted objections (and/or responses that the parties recommend that the Court treat as objections) indicating that their back pay awards should not have been calculated assuming that they earned the maximum average annual interim earnings during their damages periods because they provided additional interim earnings information regarding their earnings from railroad employers or because such additional interim earnings information from railroad employers was unnecessary. As discussed below, each of these objections should be sustained, and each of these Claimant's back pay awards should be recalculated using his or her actual interim earnings.

In order to allocate back pay awards to Nonhire Claimants, GCG first calculated each Nonhire Claimant's average annual interim earnings as the sum of the annual earnings listed on

his or her earnings statement from the Social Security Administration ("SSA"), 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 working for a railroad employer, averaged over the applicable damages period. *See* Barrero Decl., Attach. B to Decree, Dkt. 1435-2 ¶¶ 7-8. The parties obtained earnings from railroad employers through Claimants' responses to the City's discovery requests, as well as through authorizations signed by Claimants allowing the United States to obtain their earnings from railroad employers during the relevant damages periods from the United States Railroad Retirement Board. When the Proposed Relief Awards List was filed with the Court in June 2014, 19 Claimants lacked complete interim earnings information: one Claimant had failed to respond to multiple requests to authorize the Department of Justice to obtain his SSA earnings statement and the remaining 18 Claimants – including the five Claimants whose objections are at issue – had failed to respond to either the City's discovery requests or to a May 13, 2014, mailing inquiring whether they worked for a railroad employer and seeking authorizations from Claimants who reported railroad employment by the deadline of May 23, 2014. Accordingly, based on the Court's instruction at the May 7, 2014, status conference that no Claimant who fails to respond to the inquiry regarding whether he or she worked for a railroad employer should receive a windfall, the United States and the Plaintiffs-Intervenors assumed that these Claimants earned the maximum amount of interim earnings during their damages periods. *See id.* ¶ 9.

Objections and/or responses from Claimant 200000216, Claimant 200000323, Claimant 200000459, and Claimant 200000896 demonstrate that they received no earnings from a railroad

employer during their damages periods.[19] Claimant 200000431's objection established that he should not have received the mailing inquiring as to whether he worked for a railroad employer because he had, in fact, responded to the City's discovery requests. In his discovery response, Claimant 200000431 indicated that he had no additional earnings beyond what was reported on his SSA earnings statement.[20]

Given that these five Claimants have confirmed that they did not receive earnings from a railroad employer during their damages periods, equity and fairness dictate that their objections be sustained and their back pay awards be recalculated using their actual interim earnings, rather than assuming that they earned the maximum amount of interim earnings.[21] The Amended Proposed Relief Awards List includes revised back pay and interest awards for these five Claimants and, as necessary, the awards of other Claimants in the relevant damages categories to demonstrate for the Court the result of sustaining these five Claimants' objections.

2. The Correct Damages Category Should Be Used for Claimant 200000337 (Appendix C: Category 3-b)

Claimant 200000337, who was listed on the Proposed Relief Awards List as a Hispanic Exam 2043 Nonhire Claimant, submitted an objection stating that he identifies as black, not

[19] Although Claimant 200000216 and Claimant 200000459 did not submit Objection Forms, they returned responses to the mailing inquiring whether they worked for a railroad employer on July 7, 2014, and July 11, 2014, respectively, which was after the parties filed the Proposed Relief Awards List with the Court.

[20] Appendix B contains not only these Claimants' Objection Forms (where applicable) but also the responses confirming that they did not receive earnings from a railroad employer during their damages periods.

[21] Moreover, when these Claimants were notified of their back pay awards, they were informed that if they provided the outstanding requested information related to interim earnings from railroad employers, "the Court may agree to provide you with an increased back pay award." Attach. D to Decree, Dkt. 1435-4 at 2-3.

Hispanic. Upon review, the United States determined that Claimant 200000337 did, in fact, indicate on his claim form that his race is black, but the United States inadvertently recorded him as Hispanic.[22] Because this was an administrative error on the part of the United States through no fault of the Claimant, his objection should be sustained, and he should be awarded relief as a Black Exam 2043 Nonhire Claimant. The Amended Proposed Relief Awards List revises this Claimant's damages category accordingly and recalculates his back pay, fringe benefits, and interest awards, as well as the back pay, fringe benefits, and interest awards of other Claimants in both the Black and Hispanic Exam 2043 Nonhire Claimant damages categories, to demonstrate for the Court the result of sustaining his objection.

In addition to sustaining Claimant 200000337's objection, the United States and the Plaintiffs-Intervenors request that the Court modify its order dated June 13, 2013, approving the priority hire eligibility lists submitted by the City. *See* Dkt. 1147, as amended by Dkt. 1235. Given that Claimant 200000337 identified as black on his claim form, he should be moved from the Hispanic Eligible Priority Hire List to the Black Eligible Priority Hire List.

3. Claimant 200007062's Request to Withdraw His Claim for Relief Should Be Granted (Appendix C: Category 3-c)

Claimant 200007062, an Hispanic Exam 2043 Delayed-Hire Claimant, filed an objection seeking to withdraw his claim for relief in this case. The United States and the Plaintiffs-Intervenors' Delayed-Hire Subclass recommend that the Court grant the Claimant's request to withdraw and sustain his objection. The Amended Proposed Relief Awards List excludes this Claimant and redistributes his proposed award among the remaining Claimants in the Hispanic Exam 2043 Delayed-Hire Claimant damages category.

[22] Appendix B contains not only this Claimant's Objection Form but also the claim form he submitted in May 2012, indicating that he identifies as black.

4. Interim Earnings Should Not Be Discounted When Calculating Back Pay Awards (Appendix C: Category 3-d)

Two Claimants contend that the interim earnings used to calculate their back pay awards should have been less than what SSA reported. Claimant 200001293 objects that his back pay award should have been higher because a portion of his annual employment earnings during his damages period went toward paying for school. Claimant 200001806 objects that his back pay award should have been based on his net income, rather than his gross income as reported by SSA. These objections should be overruled because the methodology used to incorporate Nonhire Claimants' interim earnings into their back pay awards was applied evenhandedly to all Nonhire Claimants: no Claimant's interim earnings were reduced for any category of expenses, including educational expenses, and each Claimant's back pay award was calculated based on his or her gross income as reported by SSA, not his or her net income. Reducing Claimants' interim earnings for certain categories of expenses, as Claimant 200001293 suggests, would require an unnecessary and burdensome evaluation of each Claimant's individual circumstances involving extensive determinations about which expenses justify a reduction of interim earnings, but these determinations would not meaningfully increase the fairness of the allocation methodology. Moreover, the parties used Claimants' gross income to calculate individual Nonhire Claimants' back pay awards because the Court used gross firefighter income to calculate the unmitigated back pay amounts, *see* Dkt. 825 at 29 and 43, and the parties used the Claimants' gross income to estimate the City's overall exposure when determining the aggregate back pay amounts for settlement.

5. Correct Appointment Dates Were Used to Calculate Months of Delay (Appendix C: Category 3-e)

Two Delayed-Hire Claimants contend that their back pay awards should have been larger because they contend that they experienced more months of delay. Claimant 200003152 objects that he took both Exam 7029 and Exam 2043, so his back pay award should reflect the months of delay between the first Exam 7029 Academy class and his appointment date. However, even though Claimant 200003152 took both exams, the Court found that he is eligible for relief based only on Exam 2043. *See* Dkt. 1182; 1145-1 at 10. Thus, the number of months of delay used to calculate his back pay award is correct.

Claimant 200003312 objects that the number of months of his delay should be based on his actual appointment date, July 29, 2013, rather than January 20, 2008, the date used to calculate his months of delay for his back pay award. When Special Master Cohen initially reviewed Claimant 200003312's claim for relief in this case, he found that the Claimant did not meet the eligibility criteria set forth by the Court in the Final Relief Order (Dkt. 1012). *See* Report & Recommendation of Special Master Cohen, Dkt. 1098-3 at 7. However, Special Master Cohen recommended that the Court grant Claimant 200003312 an equitable exception to the eligibility criteria and find that he is eligible for monetary relief as a Delayed-Hire Claimant and eligible for priority hiring relief. *See id.*, *adopted in full by* Mem. & Order, Dkt. 1144.

The Special Master recounted that Claimant 200003312 took and passed Exam 2043 but was called to active duty by the United States Marine Corps before he could proceed through the City's hiring process. Following his military service, Claimant 200003312 took the physical exam, passed the physical exam, and was inserted into the Exam 2043 eligible list at list number 4882.5. *See id.* The City represented that with that list number, if Claimant 200003312 had not been on active military duty, he would have been considered for appointment to the Academy

class beginning on January 20, 2008. Due to his military service, however, the first Academy class for which Claimant 200003312 could be considered was the January 2009 class to which he was offered appointment, but which was ultimately canceled due to budget constraints. *See id.* Based on his eligibility for priority hiring relief, Claimant 200003312 was ultimately appointed to the July 2013 Academy class as a priority hire.

Because Claimant 200003312's delay in appointment was due in part to his military service, and not due solely to the use of the exam held to be discriminatory, the Claimant was assigned an appointment date of January 20, 2008, for purposes of calculating his back pay award. Moreover, if Claimant 20003312's back pay award had been calculated using his actual appointment date of July 29, 2013, it would have unfairly diluted the aggregate settlement amount to the detriment of the other Delayed-Hire Claimants in his damages category.

For the reasons stated above, both of these objections should be overruled.

6. Additional Fringe Benefits Expenses Submitted After the Deadline Should Not Be Considered (Appendix C: Category 3-f)

Three Claimants object that their fringe benefit awards should be greater based on additional fringe benefits expenses. Each of these objections should be overruled because the additional fringe benefits expenses were submitted after May 9, 2014, the final deadline for Claimants to submit Fringe Benefits Claim Forms and/or supporting documentation. *See* Barrero Decl., Attach. B to Decree, Dkt. 1435-2 ¶ 21.

As directed by the Special Masters, *see* Dkt. 1026 at 11, on January 14, 2013, the United States sent an email to notify all preliminarily eligible claimants that they may be entitled to compensation for fringe benefits expenses and that they should gather and preserve documentation to support their fringe benefits claims. *See* Appendix E at 1. On December 2, 2013, GCG sent all Claimants a Fringe Benefits Claim Form with a submission deadline of

February 3, 2014. *See* Appendix B, Exhibit 17 at MRCD_OBJ_000086. In April 2014, after notifying Claimants of the parties' settlement in principle of the back pay and fringe benefits claims, GCG sent all Claimants an email and a postcard informing them that no additional information or documentation in support of their fringe benefits claims would be accepted after May 9, 2014. *See* Appendix E at 2-4. In total, Claimants were notified over fifteen months in advance of the final deadline that information and documentation regarding fringe benefits claims must be submitted, and Claimants were subsequently afforded over five months to complete the Fringe Benefits Claim Form and to submit any additional information or documentation in support of their fringe benefits claims.

Claimant 200001078 requests that his fringe benefits award be increased to include fringe benefits expenses that were submitted on May 28, 2014; Claimant 200000471 requests that his fringe benefits award be increased to include fringe benefits expenses submitted in July and August 2014; and Claimant 200001293 requests that his fringe benefits award be increased to include additional fringe benefits expenses submitted in August 2014.[23] Each of these objections should be overruled because the additional fringe benefits expenses were submitted after the May 9, 2014, final deadline for submitting Fringe Benefits Claim Forms and/or supporting documentation.

D. Response to Objections to the Withholding of Employee Pension Contributions from Back Pay Awards (Appendix C: Category 4)

Claimant 200000889 and Claimant 200001975 object to the withholding of their employee pension contributions from their back pay awards. These objections should be overruled.

[23] Appendix B contains not only these Claimants' Objection Forms but also the recently-submitted documentation supporting their additional fringe benefits claims.

In October 2012, the Court awarded retroactive seniority relief, including retroactive pension benefits, to all eligible Nonhire Claimants appointed to the FDNY as priority hires and to those eligible Delayed-Hire Claimants who were appointed to the FDNY after their presumptive hire dates. *See* Final Relief Order, Dkt. 1012 at 14-15. In July 2013, the City began providing the relevant Claimants with all of the benefits of the Court-ordered retroactive seniority relief, except for retroactive pension benefits. According to the City, in order to fund the pension benefits to which the relevant Claimants are entitled, each Claimant's pension must contain the contributions that the Claimant and the City would each have made if the Claimant had been hired on his or her presumptive hire date, plus the interest that such contributions would have generated for the Claimant if the contributions had been made in a timely fashion.[24] During the process of memorializing the Decree, the City indicated that it intends to provide retroactive pension benefits when it issues Claimants' back pay award payments so that it can withhold the employee portion of the pension contribution from their back pay awards.

The Decree permits the City to withhold from Claimants' back pay awards "amounts that are required to be withheld by law, such as . . . employee pension contributions for Claimants who were awarded retroactive seniority." Decree ¶ 39. The "Notice of Monetary Relief Settlement & Fairness Hearing," which was sent to Claimants and discussed in Section III, above, informed Claimants that their proposed individual monetary relief award would "be decreased by any applicable amounts required to be withheld by law, such as . . . employee pension contributions for priority hires and Delayed-Hire Claimants who have been awarded retroactive seniority." Attach. C to Decree. Prior to the payment of the individual monetary

[24] The parties agree that Claimants who were awarded retroactive seniority relief should make the minimum employee pension contribution. However, the parties disagree as to whether the City or the Claimants should pay the interest on the Claimants' minimum employee pension contributions. This issue is currently pending before the Court. *See* Dkt. Nos. 1456-1461.

relief awards, the parties intend to offer Claimants an opportunity to reject their awards of retroactive pension benefits and avoid payment of the minimum employee pension contribution. Claimants who do not reject their retroactive pension benefits will have at least their minimum employee pension contributions withheld from their back pay awards.

The two Claimants' objections to the withholding of the minimum employee pension contributions from Claimants' back pay awards should be overruled because Claimants who received retroactive seniority relief would have been required to make these minimum employee pension contributions if they had been hired on their presumptive appointment dates. In addition, the City has represented that it is statutorily required to withhold payment for the minimum employee contributions from Claimants' wages, including back pay awards. If the Claimant's back pay award is less than his or her minimum employee pension contribution, the FDNY will withhold additional employee pension contributions from Claimants' future paychecks in order to fund their retroactive pension benefits. *See* amended "Acceptance of Individual Monetary Relief Award & Release of Claims," Attach. F to Decree. In addition, Claimants who wish to reject their retroactive pension benefits and avoid payment of their minimum employee pension contribution will have the opportunity to do so.

E. Response to Irrelevant Objections (Appendix C: Category 5)

Seventeen Claimants filed objections that fall outside of the scope of the Decree, including objections regarding compensatory damages, the priority hiring process, retroactive seniority, and Claimants' purported entitlement to damages other than back pay or fringe benefits (*e.g.*, training opportunities leading to increased pay, student loan debt, etc.). Because these objections fall outside of the scope of the Decree, which resolves only the back pay and fringe benefits claims, they should be overruled as irrelevant.

F. Response to Blank or Unknown Objections (Appendix C: Category 6)

Seven Claimants returned blank Objection Forms or submitted objections whose bases could not be determined from the wording of the objection. The United States and the Plaintiffs-Intervenors are unable to comment on these submissions except to state that they do not provide any basis for denying final entry of the Decree or the Amended Proposed Relief Awards List as the Final Relief Awards List.

G. Response to Non-Objections (Appendix C: Category 7)

Four Claimants provided submissions that were either supportive of the Decree or did not object to the Decree. Because these submissions provide no objection to the Decree and/or to the proposed individual monetary relief awards, they do not provide any basis for denying final entry of the Decree or the Amended Proposed Relief Awards List as the Final Relief Awards List.

VII. CONCLUSION

For the foregoing reasons, the Court should sustain the objections of Claimant 200000216, Claimant 200000323, Claimant 200000337, Claimant 200000431, Claimant 200000459, Claimant 200000896, and Claimant 200007062 and enter the accompanying proposed Order, which enters as final the proposed Amended Monetary Relief Consent Decree, including approval of the attached Amended Proposed Relief Awards List as the Final Relief Awards List.

Date: September 22, 2014

Respectfully submitted,

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