

THOMAS E. PEREZ
Assistant Attorney General
DELORA L. KENNEBREW
Chief
ESTHER G. LANDER
Deputy Chief
VARDA HUSSAIN
HILARY J. FUNK
ELIZABETH B. BANASZAK
Trial Attorneys
United States Department of Justice
Civil Rights Division, Employment Litigation Section
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 305-4267

Counsel for Plaintiff United States

KEVIN JESPERSEN
Assistant Attorney General
LISA DORIO RUCH
Deputy Attorney General
Department of Law and Public Safety
Division of Law
Richard J. Hughes Justice Complex
Post Office Box 112
Trenton, New Jersey 08625-0112
Telephone: (609) 292-8866

Counsel for Defendants State of New Jersey
and New Jersey Civil Service Commission

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NEW JERSEY AND NEW
JERSEY CIVIL SERVICE
COMMISSION,

Defendants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VICINAGE OF NEWARK

Civil Action No.
2:10-cv-00091-KSH-MAS

Hon. Katharine S. Hayden

**JOINT MOTION FOR FINAL ENTRY OF CONSENT DECREE
AND RESPONSE TO OBJECTIONS**

Plaintiff United States of America (“United States”) and Defendants State of New Jersey and New Jersey Civil Service Commission (collectively, the “State”) request that this Court approve final entry of the Second Amended Consent Decree (the “Decree”) (Dkt. 60), provisionally approved and entered by the Court on November 22, 2011 and set for a fairness hearing on March 12, 2012. Plaintiff United States also attaches an unopposed Memorandum in Support of this Motion and proposed Order (Appendix A and B, respectively).

On August 1, 2011, the United States filed the United States’ Memorandum in Support of Provisional Entry of the Consent Decree (Dkt. No. 38-1) along with a Consent Decree and a Joint Motion requesting provisional entry and approval of the Consent Decree. (Dkt. Nos. 38-2 and 38, respectively). The Decree resolves the United States’ allegation that the State engaged in a pattern or practice of race and national origin discrimination against African Americans and Hispanics in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (“Title VII”). On November 22, 2011, at the time the Court provisionally approved the Decree, it scheduled a fairness hearing for March 12, 2012 to consider any objections to the terms of the Decree.

As set forth in the United States’ Memorandum in Support of Final Entry and Response to Objections, the Decree is lawful, fair, reasonable, adequate, and consistent with the public interest, and none of the objections warrants modification or non-entry of the Decree. The Decree ensures that the employment practices used by the State to promote candidates to the position of police sergeant do not violate Title VII on the basis of race and/or national origin. It requires the development of a new, lawful selection procedure that ensures promotions to police sergeant are based upon merit and does not unnecessarily exclude qualified candidates. The Decree also provides appropriate individual relief in the form of back pay and/or priority promotions to

qualified persons who were denied promotion to police sergeant because of the employment practices challenged by the United States in this case.

Accordingly, the parties respectfully request that the Court enter the accompanying proposed Order, which approves final entry of the Decree.

Date: March 1, 2012

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General
DELORA L. KENNEBREW
Chief

By: s/ Varda Hussain
ESTHER G. LANDER
Deputy Chief
VARDA HUSSAIN
HILARY J. FUNK
ELIZABETH B. BANASZAK
Trial Attorneys
United States Department of Justice
Civil Rights Division
Employment Litigation Section
950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Room 4908
Washington, D.C. 20530
(202) 305-4267

Counsel for Plaintiff United States

KEVIN JESPERSEN
Assistant Attorney General
LISA D. RUCH
Deputy Attorney General

By: s/ Lisa Ruch
LISA D. RUCH
Department of Law and Public Safety,
Division of Law
Richard J. Hughes Justice Complex
Post Office Box 112
Trenton, New Jersey 08625-0112
Telephone: (609) 292-8866

Counsel for Defendants State of New Jersey
and New Jersey Civil Service Commission

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2012, I electronically filed the Joint Motion for Final Entry of Consent Decree and Response to Objections, the United States' Memorandum in Support of Final Entry and Response to Objections, and a Proposed Order with the Clerk of the Court using the CM/ECF system, which will then send a notification of electronic filing to the following:

Kevin Jespersen, Esquire
Assistant Attorney General
Lisa Dorio Ruch, Esquire
Deputy Attorney General
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625-0112
kevin.jespersen@dol.lps.state.nj.us
lisa.ruch@dol.lps.state.nj.us

Joseph S. Murphy, Esquire
48 Ringwood Avenue
Ringwood, NJ 07456
jsmurphy@optonline.net

By: s/ Varda Hussain
VARDA HUSSAIN
Senior Trial Attorney
U.S. Department of Justice
Civil Rights Division
Employment Litigation Section
950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Room 4908
Washington, D.C. 20530
(202) 305-4267

Counsel for Plaintiff United States

APPENDIX

A

THOMAS E. PEREZ
Assistant Attorney General
DELORA L. KENNEBREW
Chief
ESTHER G. LANDER
Deputy Chief
VARDA HUSSAIN
HILARY J. FUNK
ELIZABETH B. BANASZAK
Trial Attorneys
United States Department of Justice
Civil Rights Division
Employment Litigation Section
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 305-4267

Counsel for Plaintiff United States

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NEW JERSEY AND NEW
JERSEY CIVIL SERVICE
COMMISSION,

Defendants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VICINAGE OF NEWARK

Civil Action No.
2:10-cv-00091-KSH-MAS

Hon. Katharine S. Hayden

**UNITED STATES' MEMORANDUM IN SUPPORT OF FINAL ENTRY
OF CONSENT DECREE AND RESPONSE TO OBJECTIONS**

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND..... 2

III. NOTICE OF INITIAL FAIRNESS HEARING 3

IV. SUMMARY OF OBJECTIONS..... 5

V. ARGUMENT 6

 A. There Is a Strong Basis in Evidence to Justify the Relief Provided by the Decree.... 8

 B. The Decree Does Not Violate Title VII or the United States Constitution. 12

 1. The individual relief does not exceed “make whole” relief to identifiable victims of the employment practices challenged by the United States..... 12

 2. Priority promotion relief with retroactive seniority is a lawful remedy. ...15

 C. Objections Claiming that the Written Exam Is Not Discriminatory Misunderstand Disparate Impact Violations Under Title VII..... 17

 D. Only Qualified Candidates Will Receive Priority Promotions. 19

 E. The Decree Provides Adequate Relief to Actual Victims of Discrimination.....21

 1. Only African American and Hispanics have been shown to be victims of discrimination based on the State’s challenged uses of the police sergeant written exam..... 21

 2. Back pay is appropriately limited to the 43 jurisdictions listed in Attachment A to the Decree, and priority promotions are appropriately limited to the thirteen jurisdictions listed in Attachment K to the Decree..... 22

 4. Individual relief is appropriately limited to candidates defined as “Claimants” in the Decree. 24

 5. One million dollars in back pay is an appropriate amount of monetary relief. 26

 F. Adequate Notice Was Provided to Persons Whose Rights May Be Affected.28

 G. Blank or Unknown29

 H. Untimely29

VI. CONCLUSION..... 29

TABLE OF AUTHORTIES

Cases

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)..... 13

Booker v. Taylor Milk Co., 64 F.3d 860 (3d Cir. 1995)..... 13

Bouman v. Block, 940 F.2d 1211, (9th Cir. 1991) 19

City of Richmond v. J.A. Croson, 488 U.S. 469 (1989)..... 9

Connecticut v. Teal, 457 U.S. 440 (1982)..... 10, 18

Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)..... 13, 15, 16

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 17, 18

Int’l. Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977) 13

Local 28 of Sheet Metal Workers’ Intern. Ass’n v. EEOC, 478 U.S. 421 (1986)..... 15

Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792 (3d Cir. 1991) 18

Nu-Look Design, Inc v. C.I.R., 356 F.3d 290 (3d Cir. 2004)..... 28

Ricci v. DeStefano, 129 S. Ct. 2658 (2009) 5, 8, 9

Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001)..... 18

Stagi v. Nat’l R.R. Passenger Corp., 391 F. App’x 133 (3d Cir. 2010) 10, 18

Stagi v. Nat’l R.R. Passenger Corp., Civ. No. 03-cv-5702, 2009 WL 2461892 (Aug. 12, 2009 E.D. Pa.), rev’d on other grounds, 391 Fed. App’x 133 (3d Cir 2010) 18

U.S. v. New Jersey, Civ. Nos. 88-5087, 88-4080, 87-2331, 1995 WL 1943013 (D.N.J. Mar. 14, 1995) passim

Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989)..... 7

Statutes

42 U.S.C. § 2000e, *et seq.*..... 2

42 U.S.C. § 2000e-2(k)..... 17

42 U.S.C. § 2000e-2(n) 3
42 U.S.C. § 2000e-2(n)(1) 15
42 U.S.C. § 2000e-2(n)(1)(A)(ii) 3

Regulations

28 C.F.R. § 50.14 11

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NEW JERSEY AND NEW
JERSEY CIVIL SERVICE
COMMISSION,

Defendants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VICINAGE OF NEWARK

Civil Action No.
2:10-cv-00091-KSH-MAS

Hon. Katharine S. Hayden

**UNITED STATES' MEMORANDUM IN SUPPORT OF FINAL ENTRY
OF CONSENT DECREE AND RESPONSE TO OBJECTIONS**

Plaintiff United States of America ("United States") submits this memorandum in support of final entry of the Second Amended Consent Decree ("Decree"), provisionally approved and entered by the Court on November 22, 2011 and set for a fairness hearing on March 12, 2012.¹

I. INTRODUCTION

The parties seek final approval of the Consent Decree that resolves the United States' allegation that defendants State of New Jersey and New Jersey Civil Service Commission

¹ On August 1, 2011, the United States filed the United States' Memorandum in Support of Provisional Entry of the Consent Decree (Dkt. No. 38-1) along with a Consent Decree ("Initial Consent Decree") and a Joint Motion requesting provisional entry and approval of the Consent Decree. (Dkt. Nos. 38-2 and 38, respectively). The parties re-filed the Initial Consent Decree on September 23, 2011 (Dkt. No. 46) with ministerial edits. The parties filed an amended decree on October 20, 2011 (Dkt. No. 47) to reflect a revised definition of "Claimant" and to clarify the interim use of existing eligible lists in select jurisdictions, and submitted a second amended Decree on November 20, 2011 to correct the date of the initial fairness hearing and to amend the list of claimants based on the revised definition of "Claimant." The operative Decree for which the parties seek final approval and entry is the version provisionally entered and approved by the District Court on November 22, 2011 (Dkt. No. 49).

(collectively, the “State”) engaged in a pattern or practice of race and national origin discrimination against African Americans and Hispanics in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (“Title VII”).

The background of this action, including a summary of the allegations in the United States’ Complaint and the breadth of discovery the parties engaged in before reaching a settlement, is set forth in the United States’ Memorandum in Support of Provisional Entry of the Consent Decree (“Provisional Entry Memorandum”) (Dkt. No. 38-1), pp. 2-3. This memorandum addresses the 467 objections received by the United States to the terms of the Decree. For the reasons discussed below, the Court should approve final entry of the Decree because its terms are lawful, fair, reasonable, adequate, and consistent with the public interest, and because none of the objections warrants modification or non-entry of the Decree. The Decree ensures that the employment practices used by the State to promote candidates to the position of police sergeant do not violate Title VII on the basis of race and/or national origin. It requires the development of a new, lawful selection procedure that ensures promotions to police sergeant are based upon merit and does not unnecessarily exclude qualified candidates. The Decree also provides appropriate individual relief in the form of back pay and/or priority promotions to qualified persons who were denied promotion to police sergeant because of the employment practices challenged by the United States in this case.

II. FACTUAL BACKGROUND

As noted above, the Provisional Entry Memorandum sets forth the facts in support of entry of the Decree. These facts are based on the findings of the United States’ experts with respect to the disparate impact of the challenged practices, as well as the failure of these practices to meet professionally accepted standards for demonstrating validity, also referred to as

the job-relatedness and business necessity of a selection procedure. *See Provisional Entry Memo.*, pp. 3-7; *Declaration of Dr. Bernard R. Siskin* (“Siskin Decl.”), Dkt. No. 38-3; *Declaration of Dr. David P. Jones* (“Jones Decl.”), Dkt. No. 38-4. For purposes of seeking final approval and entry of the Decree, the United States relies on these findings.

The United States also relies on the amended declaration of the United States’ expert on disparate impact. *See Second Amended Declaration of Dr. Bernard R. Siskin* (“Second Am. Siskin Decl.”) (Appendix E, Exh. 468). Dr. Siskin’s amended declaration at Paragraphs 28 through 30 sets forth additional facts in response to objections challenging the use of a “shortfall” analysis to calculate individual relief.² These facts are discussed in Section V.E.2.

III. NOTICE OF INITIAL FAIRNESS HEARING³

Prior to the Initial Fairness Hearing, individuals whose interests may be affected by the Decree were given notice of the Decree and an opportunity to file objections. Decree, ¶¶ 21-23. 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.⁴ Accordingly, pursuant to Paragraph 21 of the Decree, in December 2011, the State sent notice of the Decree and fairness hearing, along with instructions for filing objections to the Decree: to the last known address of each African-American or Hispanic candidate who met the Decrees’ definition of “Claimant,” as discussed

² The shortfall is the additional number of African Americans or Hispanics who would have been promoted but for the State’s challenged uses of the police sergeant written exam.

³ The Provisional Entry Memorandum sets forth the major terms of the Decree. *See* pp. 7-11. This section of the memorandum addresses only the notice provisions related to the Initial Fairness Hearing on March 12.

⁴ 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).

further in Section V.E.4; to each police sergeant and the appointing authority in each local jurisdiction participating in the State's civil service system; to each union or association recognized as being authorized to represent police sergeants in each local jurisdiction; and to all police officers in the local jurisdictions identified in Attachments D and K.⁵ *Second Declaration of Dan Hill* ("Second Hill Decl.") (Appendix E, Exh. 469), ¶ 2. The notices provided a toll-free telephone number that interested individuals could telephone to obtain information about filing an objection to the Decree. *See* Decree, Attachment E.

In addition, to comply with the notice provisions set forth in Paragraphs 22 and 23 of the Decree, the State established a website at www.state.nj.us/csc/ on December 28, 2011, which provides information about the case, including links to the Decree and Attachments, a description of the proposed relief process and contact information. *Second Hill Decl.*, ¶ 3. The State also published notice of the Decree and the fairness hearing in the *Trenton Times* beginning on December 29, 2011 and continuing for two consecutive weeks prior to the deadline for submitting objections. *Id.*, ¶ 4. This information was also available at www.nj.com. In addition, the United States established a website at www.justice.gov/njcsc, which provides information about this case, including links to the Decree and Attachments, an explanation of relief, an overview of the proposed relief process and contact information for those who have questions.

⁵ Certifications from current eligible lists in jurisdictions listed in Attachment D are subject to review and approval by the United States. Decree, ¶ 16. Jurisdictions listed in Attachment K are ones in which priority promotions will occur. *Id.*, ¶ 17.

IV. SUMMARY OF OBJECTIONS

The United States received 467⁶ objections to the Decree that fall within eight different categories:⁷

(1) 219 objections claim that because there is insufficient evidence of unlawful disparate impact and/or sufficient evidence that the police sergeant written exam is valid, the parties cannot justify the relief provided by the Decree. This category also includes requests for additional evidence of unlawful disparate impact, as well as allegations claiming that the terms of the Decree contravene the United States Supreme Court's ruling in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009);

(2) 297 objections allege that the Decree violates the United States Constitution and/or Title VII in that the Decree constitutes reverse discrimination and/or establishes a quota system. This category also challenges the award of priority promotion relief with retroactive seniority;

(3) 247 objections allege that the police sergeant written exam was not discriminatory because all candidates were given the same exam, or because all candidates had equal access to test preparation materials, or because there is no evidence that the exam was intentionally biased;

⁶ At least one hundred and twenty of these objections appear to be form objections that make identical or virtually identical allegations. The United States also notes that it has received information that individuals in some jurisdictions have encouraged officers and sergeants to file objections to the Decree. *See* Appendix E, Exh. 71, p. 2.

⁷ The District Court for New Jersey has approved grouping objections into categories when evaluating a consent decree for final entry and approval. *See U.S. v. New Jersey*, Civ. Nos. 88-5087, 88-4080, 87-2331, 1995 WL 1943013 (D.N.J. Mar. 14, 1995). Some objectors raise multiple arguments against final entry. Therefore, their objections may fall into more than one of the eight categories. *See* Appendix C for a listing of objections by category.

(4) 68 objections allege that the Decree will promote unqualified candidates to the position of police sergeant and thereby compromise public safety, including allegations that candidates receiving priority promotion will be stigmatized by their peers, superiors and subordinates;

(5) 67 objections claim that the relief provided by the Decree is improper or inadequate;

(6) Two objections allege that the Decree did not provide adequate notice to persons whose interests may be affected;

(7) 33 objections are either blank or provide insufficient information as to the nature of the objection; and

(8) Nine objections were submitted after the deadline for submitting objections had passed.

As explained below, none of the eight categories of objections warrants modification or non-entry of the Decree.

V. ARGUMENT

As discussed in the Provisional Entry Memorandum, the parties have demonstrated that the Decree meets the standard for approval of a consent decree as its terms are lawful, fair, reasonable, adequate and consistent with the public interest. *See Provisional Entry Memo.*, pp. 13-27. For the reasons set forth below, none of the objections undermines the bases for final entry or even warrants modification of the Decree.⁸

⁸ Of the objections received, 151 objectors request an opportunity to address the Court at the Initial Fairness Hearing. For the Court's convenience, a list of those objectors is attached as Appendix D. This list also indicates whether an objector is represented by counsel.

Before responding to specific objections, the United States addresses two common misconceptions about the Decree, both of which appear to be the source for the majority of the objections. First, one of the principle objections to the Decree is that there is no evidence of intentional bias by the State against African-American and Hispanic candidates. This opposition to the Decree appears to be grounded in the belief that the United States alleged that the State intentionally discriminated against African-American and Hispanic candidates by administering a police sergeant written exam that the State knew to be unfair to these candidates. But, as discussed in further detail below in Section V.C, the United States has not alleged that the State intentionally discriminated against African-American and Hispanic candidates. Instead, the United States relies on the disparate impact theory of liability, under which “a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer’s subjective intent to discriminate that is required in a ‘disparate-treatment’ case.” *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 645-46 (1989).

Second, many objectors appear to believe that the Decree mandates the cancellation of all current eligible lists. As discussed in the United States’ Brief in Opposition to the Motion to Intervene, *et al.* (Dkt. 60) (“Opposition Brief”), the Decree does not require the cancellation of any current eligible lists. *See Opp. Br.*, pp. 19-20. Indeed, the Decree expressly permits the use of existing eligible lists until they expire. Decree, ¶ 17. The Decree merely provides that certifications from a small number of current eligible lists must be approved in advance by the United States to ensure that continued use does not create additional African-American or Hispanic victims. *Id.*, ¶ 16.⁹ Since provisional entry of the Decree, the United States has been

⁹ Paragraph 16 of the Decree provides that, for the ten jurisdictions listed in Attachment D to the Decree, the State must provide certification requests to the United States. *See Decree*, ¶ 16. The

asked to approve – and has approved after careful review – certifications of candidates for promotion to police sergeant in three jurisdictions where certifications were subject to review and approval. *First Hill Declaration* (Dkt. No. 60-1), ¶ 15.¹⁰

A. There Is a Strong Basis in Evidence to Justify the Relief Provided by the Decree.

The United States received 219 objections claiming that the parties cannot justify the relief provided by the Decree because there is insufficient evidence of unlawful disparate impact and/or sufficient evidence that the police sergeant written exam is valid. This category also includes objections requesting additional evidence of unlawful disparate impact, as well as objections claiming that the terms of the Decree contravene the United States Supreme Court’s ruling in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009). Each of these objections should be overruled for the reasons already stated in the United States’ Provisional Entry Memorandum and Opposition Brief.

First, the United States has demonstrated a sufficient evidentiary foundation to support the lawfulness of the Decree. The United States easily satisfies the standard for establishing a *prima facie* case of discrimination under Title VII. *See Opp. Br.*, pp. 14-17 (demonstrating that both the pass/fail and rank disparities between African-American and white candidates, and

United States reviews any such requests to determine if the requested certifications will result in an additional shortfall of African-American or Hispanic candidates who would have been promoted but for the State’s uses of the challenged exam. *Id.* If no such shortfall will result, the State may approve the certification. *Id.* Barring an objection by the United States, these lists will continue to be in effect until their expiration dates. The ten jurisdictions listed in Attachment D to the Decree were selected using the methodology outlined in Paragraphs 11 through 14 of Dr. Siskin’s Declaration.

¹⁰ The United States has also not objected to certifications from two additional Attachment D jurisdictions, where those certifications were from special reemployment lists. *Id.*, ¶ 16.

between Hispanic and white candidates, are far greater than needed to establish a *prima facie* case of disparate impact).

Second, *Ricci* is not directly applicable to this action. In *Ricci*, the Supreme Court held that, after an employer has administered a selection device and expectations have developed, a “race-based” action taken to avoid Title VII disparate impact liability based on statistics alone may violate Title VII’s prohibition against disparate treatment. *Ricci*, 129 S. Ct. at 2664.¹¹ To avoid such an outcome, an employer must possess a “strong basis in evidence” to conclude that if it does not take race-based action, it will be liable for a Title VII disparate impact violation. *Id.* Here, *Ricci* is inapplicable because the State did not take a “race-based action;” it entered into a consent decree designed to provide remedial relief only to victims of discrimination. *See Opp. Br.*, pp. 14-17. Moreover, even if the *Ricci* standard does apply, the United States has submitted more than sufficient evidence to establish a “strong basis in evidence” to support the relief sought in the Decree. *See Provisional Entry Memo.*, pp. 25-26.¹² Because the United States has demonstrated sufficient evidence to justify the lawfulness of the Decree, no additional

¹¹ Moreover, there is no basis for the contention made by some objectors that the Decree awards “race-conscious relief.” The individual relief provided to eligible Claimants is based on their status as victims, not because of their race. *See City of Richmond v. J.A. Croson*, 488 U.S. 469, 529 (1989) (Scalia J., concurring in judgment) (in holding preference for minority contractors unconstitutional, Court stated that “the situation would be different if Richmond’s plan were ‘tailored’ to identify” contractors who “suffered from the effects of past discrimination” because in that case, “neither the beneficiaries or those disadvantaged . . . would be identified on the basis of their race”).

¹² The United States’ extensive pre-suit investigation and the discovery that occurred (which involved the parties exchanging various expert reports and taking numerous depositions), along with the declarations of the United States’ experts offered in support of its Provisional Entry Memorandum, demonstrate a strong basis in evidence to conclude: (1) there is a *prima facie* case of disparate impact discrimination; and (2) the challenged exams and their uses by the State are not job-related and consistent with business necessity. *See Provisional Entry Memo.*, pp. 3-7, 25-26.

information regarding the underlying merits of the claim is necessary. *See Opp. Br.*, pp. 23-29 (explaining why any request for additional discovery in this action is unnecessary and undermines voluntary resolution in Title VII cases).

Furthermore, no objection refuted either the statistically significant disparities set forth by the United States' expert on disparate impact or the evidence that the challenged employment practices lacked content validity.¹³ With respect to disparate impact, the most specific objections stated that the United States did not prove disparate impact because African-American and Hispanic candidates passed at the rate of at least eighty percent as compared to white candidates. As discussed in the United States' Opposition Brief, the "80% Rule" does not trump a showing of statistically significant disparities; it is simply a "rule of thumb" that "has come under substantial criticism, and thus, has not been particularly persuasive as compared to tests of statistical significance." *See Stagi v. Nat'l R.R. Passenger Corp.*, 391 F. App'x 133, 138-39 (3d Cir. 2010); *Opp. Br.*, pp. 29-30.¹⁴

¹³ The State contended that the disparate impact resulting from the employment practices challenged by the United States in this action was justified by content validity. *Jones Decl.*, ¶ 5.

¹⁴ A small number of objections also challenge the United States' findings of statistically significant disparities on the basis that their particular jurisdiction has a diverse police sergeant force. These objections should be rejected. The United States examined the disparate impact of the written exam on a statewide basis because the State administered the same exam to candidates in all jurisdictions and used the same cut off score across jurisdictions. *See Second Am. Siskin Decl.*, ¶ 28 n.5. Moreover, an employer cannot escape liability under Title VII by demonstrating that, "at the bottom line," the work force is racially balanced when there is evidence that an employment practice results in a disparate impact on the basis of race and/or national origin. *See Connecticut v. Teal*, 457 U.S. 440, 450 (1982). For example, objectors who are also proposed Intervenors in this action, allege that no disparate impact can be shown in Paterson because the percentage of African-American and Hispanic police officers is roughly equivalent to the percentage of African-American and Hispanic police sergeants. Dkt. No. 63, pp. 2-4. However, African-American and Hispanic police officers took and failed the

With respect to validity, no objection contains any facts refuting the conclusions by the United States' expert that: (a) the State cannot show that its job analysis met professionally accepted standards; (b) the State is unable to establish that it used reasonable competence in developing the police sergeant written exam; (c) the State cannot demonstrate that the content of the police sergeant written exam is either related to, or representative of, the content of the police sergeant position; and (d) the State is unable to show that its two methods of use of the police sergeant written exam, the pass/fail use and rank-order use, distinguish meaningfully among those candidates who can better perform the job of police sergeant. *Jones Decl.*, ¶¶ 6-11.

Instead, the most specific of these objections state that the police sergeant written exam is "job-related" because the exam questions were derived from New Jersey criminal statutes and other source materials relevant to the job of police sergeant. This type of objection lacks merit for two reasons. First, the Uniform Guidelines on Employee Selection Procedures dictate that "non-empirical or anecdotal" assertions that an exam is representative of the job in question amounts to an inappropriate "assumption of validity" that is insufficient to justify disparate impact. *See* 28 C.F.R. § 50.14 (1978). Second, this type of objection ignores the majority of the factors that an employer must prove in order to demonstrate the content validity of a selection procedure and ignores altogether the United States' challenge to the State's use of the police sergeant written exam in certifying candidates in descending rank order based on a combination of candidates'

challenged written exam at a significantly higher rate than white police officers in Paterson. *See Second Am. Siskin Decl.*, ¶ 30. Thus, proposed-Intervenors' bottom line assertion, even if correct, would not refute disparate impact as one would expect that African-American and Hispanic representation among those promoted during the period should exceed the African-American and Hispanic representation among Paterson police officers. *Id.*

written exam scores and seniority credits. *See Provisional Entry Memo.*, p. 18 (setting forth the five factors that an employer must prove to demonstrate content validity).

B. The Decree Does Not Violate Title VII or the United States Constitution.

The United States received 297 objections that the Decree violates the rights of the objectors under the United States Constitution and/or Title VII in that the Decree violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, constitutes reverse discrimination, and/or establishes a quota system.¹⁵ Several of these objections also challenge the award of priority promotion relief with retroactive seniority. The common strain in all of these objections is that the Decree provides jobs and other forms of remedial relief for African-American and Hispanic candidates solely on the basis of race which, in turn, discriminates against white police officers and sergeants on the basis of race. Each of these objections should be overruled because all of the remedial provisions in the Decree provide no more than make-whole relief to victims of the employment practices challenged in this action.

1. The individual relief does not exceed “make whole” relief to identifiable victims of the employment practices challenged by the United States.

The lawfulness of the Decree must be evaluated against one of the central purposes of Title VII, which is to provide make-whole relief to persons who have been harmed by employment practices that violate the statute. In enacting Title VII, “Congress took care to arm

¹⁵ The United States also received fifty objections claiming that the Decree violates the Merit and Fitness Clause and/or Due Process Clause of the New Jersey State Constitution. As discussed on page 18 of the Opposition Brief, to the extent that there is in fact any conflict between the Merit and Fitness Clause and the terms of the Decree, the remedial requirements of Title VII must trump contradictory provisions of state law. Furthermore, without any additional information on the basis of the state Due Process Clause objection, the United States assumes it is equivalent to objections based on the federal Due Process Clause and addresses them together in this section.

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). To exercise those equitable powers, a court may order remedial relief “as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate.” *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (quoting Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g)). See also *Booker v. Taylor Milk Co.*, 64 F.3d 860, 864 (3d Cir. 1995) (indicating that Title VII authorizes back pay); *U.S. v. New Jersey*, 1995 WL 1943013, at *20-22 (finding lawful a consent decree that affords retroactive seniority and priority promotion relief, and noting that circuit courts have repeatedly upheld lower court decisions granting retroactive seniority relief and the creation of priority eligibility lists as remedies in Title VII cases). Under the Decree, all of the individual remedial relief provided – back pay, priority promotions, and retroactive seniority in the form of seniority credits for future promotions to those receiving priority promotions – is appropriate in light of the broad power afforded to courts to grant relief to individuals harmed by employment practices that violate Title VII. *Id.*

The Decree is also not vulnerable to an Equal Protection Clause challenge. 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.” *Id.*, at *11 (citing *Int’l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 376 n.62 (1977)). Limiting individual relief to only identifiable victims of the employment practices challenged by the United States satisfies this standard. *Id.* at *15-16. In addition, the individual relief provisions in the Decree do not exceed make-whole relief. See *Provisional Entry Memo.*, pp. 22-23. With

respect to back pay, the only candidates eligible for this relief are those who were adversely affected by the practices the United States challenged – namely, African Americans and Hispanics who were never appointed as police sergeants and who (i) took and failed the police sergeant written exam or (ii) passed the exam but ranked too low to be selected for promotion *and* only when a shortfall of their race resulted from the employment practice. In addition, the settlement fund of one million dollars (\$1,000,000.00) does not exceed the back pay amount the United States’ expert calculated would be due to victims. *Id.*, p. 22.

With respect to priority promotions, these promotions will occur “only where there are identifiable effects of the discriminatory practice, in other words, only for those symbol numbers where shortfalls in the expected number of appointments” for African-American and Hispanic candidates exist.¹⁶ *U.S. v. New Jersey*, 1995 WL 1943013, at *16. In addition, the number of priority promotions required by the Decree (68 priority promotions in thirteen jurisdictions) is lower than the estimated promotions that would have been made absent the unlawful impact of the challenged employment practices (105 priority promotions in 43 jurisdictions). *Provisional Entry Memo.*, p. 23. As such, the remedies in the Decree do not exceed make-whole relief, are tailored to provide relief only to identifiable victims of the employment practices challenged by the United States in this case and are squarely within the types of remedies routinely ordered by courts in pattern or practice cases.¹⁷

¹⁶ Each eligible list is identified by a “symbol number,” which represents the year and jurisdiction in which candidates on the list took the police sergeant written exam.

¹⁷ Nor is there any basis for a Due Process Clause challenge. While the objections have not explained in detail why the Decree does not comport with due process, presumably these objections relate to the adequacy of the fairness hearing process, including the adequacy of the notice provisions in the Decree. The United States submits that the process set forth in the Decree for persons whose interests may be affected complies fully with Title VII’s notice

Finally, allegations claiming that priority promotion relief is equivalent to an impermissible quota lack merit and should be overruled. Priority promotions are a component of make-whole relief for victims of discrimination, not “affirmative relief” or in the nature of a quota. *See Local 28 of Sheet Metal Workers’ Intern. Ass’n v. EEOC*, 478 U.S. 421, 448 (1986) (distinguishing between “make-whole relief” and affirmative remedies such as requiring employers “to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force”).

2. Priority promotion relief with retroactive seniority is a lawful remedy.

Several objections challenge the grant of priority promotion relief, including its award of retroactive seniority. These objections should also be overruled because retroactive seniority is a basic component of make-whole relief. In *Franks*, the Supreme Court stated that “rightful place” seniority, which includes both benefits seniority and competitive seniority, “cuts to the very heart of Title VII’s primary objective of eradicating present and future discrimination in a way that backpay, for example, can never do.” *Franks*, 424 U.S. at 767-68 n.28. “[S]eniority, after all, is a right which a worker exercises in each job movement in the future, rather than a simple one-time payment for the past.” *Id.* (internal quotations omitted). Therefore:

[w]ithout an award of seniority dating from the time when he was discriminatorily refused employment, an individual who . . . obtains employment . . . pursuant to the District Court’s order will never obtain his rightful place in the hierarchy of seniority according to which . . . various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors.

process that permits persons to raise objections to the Decree prior to final entry. *See* 42 U.S.C. § 2000e-2(n)(1). *See also U.S. v. New Jersey*, 1995 WL 1943013, at *23 (concluding that a fairness hearing process that was consistent with 42 U.S.C. § 2000e-2(n)(1)(A) protected the procedural due process rights of all individuals potentially affected by the consent decree). The United States addresses separately the adequacy of notice in Section V.F.

Id. at 767-68. Accordingly, the Court must “take as [its] starting point the presumption in favor of rightful-place seniority relief.” *Id.* at 779 n.41.

Retroactive seniority – including competitive seniority – should be awarded even though, as the Supreme Court acknowledged in *Franks*, it may affect incumbent employees. *See id.*, 424 U.S. at 774 - 45 (the “conflicting interests of other employees will, of course, always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy.”) Denial of competitive seniority relief to “identifiable victims of racial discrimination” because such relief would “diminish[] the expectations of other, arguably innocent, employees would if applied generally frustrate the central ‘make whole’ objective of Title VII.” *Id.* at 774.

Thus, even if the Decree’s award of priority promotion relief with retroactive seniority affects incumbent employees, that alone is insufficient to prevent final entry of the Decree. Notably, the impact of priority promotion relief on candidates on existing eligible lists should be minimal and rights of incumbents “are disrupted only to the limited extent necessary to provide relief to identified victims.” *U.S. v. New Jersey*, 1995 WL 1943013, at *16. First, under the Decree, priority promotions will occur in only thirteen jurisdictions, many of whose eligible lists will have expired by the time the State will implement this relief. Second, to balance the interests of victims and candidates on special reemployment lists, priority promotions in jurisdictions with special reemployment lists will be made at a one-to-one ratio. Third, the retroactive seniority available under the Decree is carefully limited to a Claimant’s presumptive appointment date, which is based upon the median appointment date for individuals on the eligible list that would have included the Claimant or from which the Claimant would have been

appointed. *Siskin Decl.*, ¶ 25. Lastly, the retroactive seniority in this case applies only to points for purposes of one's score on future promotional lists. Decree, ¶ 76. The retroactive seniority awarded under the Decree cannot be used to satisfy any time-in-grade requirements or for any other purpose for which local jurisdictions may use seniority (*e.g.*, shift bidding). *Id.*

C. Objections Claiming that the Written Exam Is Not Discriminatory Misunderstand Disparate Impact Violations Under Title VII.

The United States received 247 objections claiming that the police sergeant written exam cannot be discriminatory because the test was fair in form. For example, these objections state that all candidates were given the same exam, all candidates had equal access to test preparation materials, and there is no evidence that the exam was intentionally biased. This category also includes objections claiming that the United States' disparate impact and/or validity analyses are flawed because they did not consider other factors that could correlate to performance on the exam, such as candidates taking a test preparation course or studying for the police sergeant written exam. What these objections essentially claim is that absent evidence that the written exam was discriminatory on its face, or absent evidence that African-American and Hispanic candidates were disadvantaged in their ability to prepare for the exam, the United States cannot prove a Title VII violation. These objections should be overruled because they misunderstand the theory of disparate impact liability.

In *Griggs v. Duke Power Co.*, the Supreme Court held that Title VII proscribes “not only overt discrimination but also practices that are *fair in form*, but discriminatory in operation.” 401 U.S. 424, 431 (1971) (emphasis added); *see also* 42 U.S.C. § 2000e-2(k) (codifying the requirements of the “disparate impact” theory of liability that *Griggs* recognized). The Supreme Court has explicitly recognized written exams as one type of selection procedure subject to

challenge by disparate impact theory. *Griggs*, 401 U.S. at 430 (noting that under Title VII, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they serve as a vehicle for perpetuating discrimination); *see also Teal*, 457 U.S. at 448-49 (stating that Congress, in codifying disparate impact theory, specifically intended for Title VII to protect minorities against written exams that create artificial barriers to job opportunities in state and municipal governments).

Thus, the fact that a written exam may be fair in form, as objectors suggest, is only the starting point of a disparate impact analysis, with the remainder of the inquiry focused on whether the written exam nonetheless prevents groups protected by Title VII from enjoying equal opportunities to obtain employment. In order to demonstrate a nexus between an employment practice and any resulting disparities, plaintiffs need only show through statistical evidence a causal relationship between the challenged employment practice and the disparity. *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160 (2d Cir. 2001); *Newark Branch, NAACP v. Town of Harrison*, 940 F.2d 792, 798 (3d Cir. 1991).

When a disparity is statistically significant, it means that that the disparity is great enough not to be accounted for by chance. *See Stagi v. Nat'l R.R. Passenger Corp.*, Civ. No. 03-cv-5702, 2009 WL 2461892, at *12 (Aug. 12, 2009 E.D. Pa.), *rev'd on other grounds*, 391 Fed. App'x 133 (3d Cir 2010) (stating that “[s]tatistical significance” is a “term of art within the science of statistics which means simply that the disparity was unlikely to have been produced by chance.”). The Third Circuit generally considers a disparity to be “statistically significant” if the probability of the disparity occurring randomly is 5% or less, which is equivalent to a difference of approximately 1.96 units of standard deviation. *See Stagi*, 391 Fed. App'x at 137-38 (stating the general rule that a difference greater than two or three units of standard deviation

is sufficient to rule out the possibility that the disparity occurred at random). And, as the United States has demonstrated in this case, the disparities of the challenged employment practices far exceed this standard. *See Opp. Br.* pp. 23-24. These disparities, taken in conjunction with the State's lack of evidence with respect to validity, demonstrate that African-American and Hispanic candidates did not, in fact, enjoy equality of opportunity in competing for promotion to police sergeant.

Moreover, there is no merit to the contention that a Title VII claim of disparate impact involving the use of a written exam must account for variables such as the amount a candidate studies or prepares. As discussed in the Opposition Brief, courts emphatically have rejected the notion that a defendant can undermine a *prima facie* case of disparate impact discrimination against a protected group merely by setting forth "some other facially non-discriminatory factor that correlates with disparate impact," such as experience, education level, English-proficiency level or training level, to explain why the impact occurs. *See Bouman v. Block*, 940 F.2d 1211, 1227-28 (9th Cir. 1991); *Opp. Br.*, pp. 26-27. Nor can an employer rebut a showing of disparate impact by arguing that if the members of the protected group had only spent more time studying or practicing, for example, the challenged employment practice would not have had a disparate impact. *See, e.g., Bouman*, 940 F.2d at 1227-28.

D. Only Qualified Candidates Will Receive Priority Promotions.

The United States received 68 objections claiming that the Decree will promote unqualified candidates to the position of police sergeant and thereby compromise public safety, including claims that candidates receiving priority promotion will be stigmatized by their peers, superiors and subordinates.

As discussed above, these objections misunderstand the underlying purpose of disparate impact litigation. The United States has demonstrated that the police sergeant written exam previously used by the State was not valid and, therefore, was unable to accurately distinguish between qualified and unqualified candidates. The result was the disproportionate exclusion of otherwise qualified African-American and Hispanic candidates for promotion. Furthermore, under the terms of the Decree, the United States and the State are working cooperatively to develop a new, lawful police sergeant selection procedure that will better identify qualified candidates because it will be job related and consistent with business necessity. As a condition to receiving a priority promotion, all Claimants seeking priority promotions are required under the Decree to take and pass the new selection procedure. Therefore, there is no merit to the assertion that any candidates promoted pursuant to the Decree will be unqualified for the position of police sergeant.

As to the alleged stigma attached to the acceptance of any relief award associated with this Decree, it is important to note that participation in individual relief awards is voluntary and requires that potential Claimants “opt in” to be eligible to receive back pay and/or priority promotions. No individual will be required to seek or to accept any award of individual relief against his or her will. Furthermore, the potential that others may stigmatize those who accept priority promotions is not a legitimate basis for denying final entry of the Decree.¹⁸

¹⁸ The United States has received information that individuals in some jurisdictions have taken actions intended to discourage Claimants from seeking relief under the Decree, such as publicly posting lists of Claimants in police stations. However, individuals who are attempting to chill Claimants’ participation through peer pressure should not benefit from any resulting “stigma” within their police departments by positing this as a reason not to approve the Decree. Furthermore, if the United States receives information indicating that certain individuals are attempting to intimidate potential Claimants from seeking relief, and thereby undermining the purposes of the Decree, it will seek judicial intervention.

E. The Decree Provides Adequate Relief to Actual Victims of Discrimination.

The United States received 67 objections relating to the relief provided by the Decree. This category includes objections to the types of relief offered, including back pay, priority promotions, and retroactive seniority, as well as objections to the amount and distribution of relief.¹⁹ As discussed in Section V.B., the Decree's provisions relating to individual relief are lawful because the individual relief is limited to remedying the employment practices challenged in this case and does not exceed make-whole relief to identifiable victims. Thus, objections to the general provision of back pay, priority promotions, and retroactive seniority should be rejected. In addition, as addressed below, the Decree understandably does not provide the maximum amount of relief that any alleged victim could recover at trial because the Decree is a reasonable compromise between the parties that takes into account the risks and costs of litigation, the uncertainty of determining when any one candidate would have been deemed qualified and promoted, and the desirability of resolving this matter expeditiously.

1. Only African American and Hispanics have been shown to be victims of discrimination based on the State's challenged uses of the police sergeant written exam.

The United States received several objections to the extension of relief to only African-American and Hispanic candidates and not to other protected groups. This lawsuit challenges the impact of the State's uses of the police sergeant written exam only on African-American and Hispanic candidates seeking promotion to police sergeant. Any objections stating that the relief

¹⁹ This category includes objections from candidates challenging the requirement that they must take the exam that the State will develop in order to be eligible for a priority promotion. As discussed in Section V.D., the State and United States are working to develop a new, lawful police sergeant selection procedure that will better distinguish between qualified and unqualified candidates. Claimants seeking priority promotions are required to take and pass the new selection procedure to ensure that only qualified Claimants receive priority promotions.

should extend to other protected groups should be rejected because such individuals have not been shown to be actual victims of the State's challenged uses of the police sergeant written exam.

2. Back pay is appropriately limited to the 43 jurisdictions listed in Attachment A to the Decree, and priority promotions are appropriately limited to the thirteen jurisdictions listed in Attachment K to the Decree.

The United States received a small number of objections stating that individual relief should be awarded to African-American and Hispanic candidates in jurisdictions that are not listed in Attachment A to the Decree. The United States also received a small number of objections stating that priority promotions should be required in jurisdictions not listed in Attachment K to the Decree. For purposes of calculating relief, the United States' expert on disparate impact determined that a shortfall of African Americans or Hispanics who would have been promoted but for the State's uses of the challenged exam occurred in only the 43 jurisdictions identified in Attachment A to the Decree.

Dr. Siskin's Second Amended Declaration sets forth additional facts explaining his shortfall analysis. Namely, the shortfall is based on the following two-step methodology. First, Dr. Siskin determined the number of additional African-American and Hispanic candidates who would have passed the police sergeant written exam if it had no overall disparate impact.²⁰ To calculate this number:

- a. For each year, Dr. Siskin computed the overall passing rate of white candidates on the written exam by dividing the number of white candidates who passed the

²⁰ Though a shortfall calculation can identify the pool of candidates who could have passed the exam and been appointed absent the disparity, it cannot determine which of the candidates from the pool would have, in fact, been appointed. *Second Am. Siskin Decl.*, ¶ 29.

written exam by the number of white candidates who took the written exam. *Second Am. Siskin Decl.*, ¶ 28.²¹

- b. For each jurisdiction and year, Dr. Siskin then multiplied the number of African-American (and Hispanic) candidates who took the written exam by the overall white passing rate for that year computed in (a). *Id.*

This represents the number of African-American (and Hispanic) candidates in each jurisdiction and year who would have passed the written exam if it had no overall disparate impact. *Id.*

Second, Dr. Siskin determined the number of additional African-American and Hispanic candidates who would have been appointed from the police sergeant written exam if it had no overall disparate impact. *Id.* To calculate this number:

- c. For each jurisdiction and year, Dr. Siskin divided the total number of appointments made in a particular jurisdiction by the number of white candidates who passed the written examination, plus the number of African-American and Hispanics passers computed in (b). This represents the jurisdiction hiring rate if there were no disparate impact in the overall passing rate. *Id.*
- d. Dr. Siskin then multiplied the jurisdiction hiring rate computed in (c) by the number of African-American and Hispanic passers computed in (b) and subtracted the actual number of African-American and Hispanic appointments in that jurisdiction to determine how many additional African-American and Hispanic candidates would have been appointed if the written exam did not have a disparate impact. *Id.*

Based on these calculations, an estimated 75 African-American and 30 Hispanic candidates would have been promoted to police sergeant from the symbol numbers and in the 43 jurisdictions identified in Attachment A absent the disparate impact of New Jersey's police sergeant written exam from 2000 to 2009.²² *Id.* Consequently, it is appropriate to limit back pay

²¹ Dr. Siskin used the yearly overall white passing rate, rather than the white passing rate for each jurisdiction, because the State administered the same exam in all jurisdictions and used the same cut-off score across jurisdictions. *Id.*, ¶ 28 n.5.

²² A small number of objectors question whether jurisdiction-specific data was used in determining in which jurisdictions individual relief is appropriate. These objections should be rejected. The use of an overall white passing rate is appropriate because the State administered

to the 43 jurisdictions, and to the symbol numbers and race and/or national origin, listed in Attachment A to the Decree.

The selection of only thirteen jurisdictions where the State will certify Claimants for priority promotions, and the number of priority promotions in those jurisdictions, is limited to include only those jurisdictions where the United States' expert on disparate impact concluded that three or more promotions of African Americans and/or Hispanics would have been made absent the disparate impact resulting from the State's pass/fail and rank-order uses of the police sergeant written exam. *See Siskin Decl.*, ¶ 10. Selecting these thirteen jurisdictions for priority promotions reflects a reasonable compromise between the parties, taking into account the risks and costs of litigation, the uncertainty of determining when any one candidate would have been deemed qualified and hired, and the desirability of resolving this matter sooner as opposed to later. For these reasons, objections stating that individual relief should be extended to other jurisdictions, including Irvington, Hamilton Township, North Brunswick and Cataret, or to other symbol numbers or races, should be rejected.²³

4. Individual relief is appropriately limited to candidates defined as “Claimants” in the Decree.

The United States also received a small number of objections regarding the United States' preliminary determination of which candidates are considered “Claimants” for purpose of the Decree, with five of these objectors requesting to be added to the list of presumptive

the same exam to candidates in all jurisdictions and used the same cut off score across jurisdictions. *See Second Am. Siskin Decl.*, ¶ 28 n.5. Moreover, even if a jurisdiction-specific white passing rate were utilized in allocating individual relief, the net difference would be minimal. *Id.*

²³ Persons who wish to receive greater relief in the form of back pay, priority promotion or any other type of relief have the right to not accept the relief offered under the Decree and to pursue their own Title VII actions.

Claimants. An individual is a “Claimant” and eligible for relief under the Decree if he or she is African American or Hispanic, from one of the 43 jurisdictions identified in Attachment A, has not been promoted to police sergeant and either (1) between 2000 and 2009, failed a police sergeant written exam where appointments from the eligible list resulted in a shortfall of his or her race; or (2) between 2000 and 2008, passed a police sergeant written exam where appointments from the eligible list resulted in a shortfall of his or her race, but ranked below the lowest-ranking candidate appointed from that eligible list. *Id.*, ¶ 3. If a candidate satisfied the definition of “Claimant” for more than one test administration, s/he was considered a Claimant for the earliest test administration in which s/he took the exam. The United States prepared lists of presumptive Claimants based on the information available to it at that time.²⁴ *See* Decree, Attachments B and C.

For the reasons already discussed above, Claimants are appropriately limited to actual victims of discrimination, *i.e.*, candidates who sat for an exam in a jurisdiction and year in which there was a promotions shortfall of his or her race based on the methodology outlined in Section V.E.2. Thus, two African-American objectors from Kearny and one Hispanic objector from Hackensack should not be added as Claimants because a shortfall of their race did not occur in those jurisdictions as a result of the State’s challenged uses of the written exam. *See* Decree, Attachment A; Appendix E, Exhs. 41, 227, 304. Another objector from Atlantic City was promoted and, therefore, does not satisfy the definition of Claimant. *See* Decree, Attachment A;

²⁴ A small number of objectors state that the preliminary lists include candidates who are not African American or Hispanic or question how race and/or national origin will be determined. Each candidate who submits an interest in relief form to the United States will have to certify that s/he is African American or Hispanic. If factual disputes arise as to a candidate’s race, the parties will ask the Court to make a determination at the Fairness Hearing on Individual Relief as to the candidate’s race and whether s/he is entitled to individual relief under the Decree.

Appendix E, Exh. 83. A second objector from Atlantic City appears that she may satisfy the definition of Claimant, and the United States will add her name to the list of presumptive Claimants, ensuring that she will receive further information about filing a claim for individual relief upon final approval of the Decree.²⁵ *See* Decree, Attachment A; Appendix E, Exh. 93. Other individuals whose names do not appear on the list of presumptive Claimants attached to the Decree, but who believe that they satisfy the definition of Claimant, will have the opportunity to submit an objection at the hearing on individual relief or may submit an interest in relief form to the United States for consideration.

5. One million dollars in back pay is an appropriate amount of monetary relief.

The United States received a small number of objections stating that one million dollars in back pay is insufficient monetary relief. As a starting point for negotiations, the United States arrived at its original back pay calculation by taking into consideration (i) the time period within which damages accrued as a result of the alleged violations of Title VII (between May 2006 and April 2011); (ii) the United States' expert's calculation that 105 candidates were not promoted to police sergeant as a result of the challenged practices; and (iii) a comparison of salary data for non-promoted candidates and police sergeants in the same jurisdiction. The back pay calculation also factored in salary increases and interest during the relevant period. Based upon the United

²⁵ The United States received an objection from Jerry Burgos, who is a presumptive Claimant in Hoboken, in which Claimants are eligible for both back pay and priority promotion. Appendix E, Exhs. 40, 41. Officer Burgos is now employed in Hazlet, in which candidates for police sergeant are not eligible for individual relief under the Decree. Because Officer Burgos appears to satisfy the requirements to become a Claimant, he may be eligible for back pay, which is not contingent upon where or whether a candidate is currently employed. Furthermore, if Officer Burgos satisfies the minimum qualifications for taking the police sergeant exam in Hoboken, he may be eligible for priority promotion in Hoboken. However, because a shortfall did not occur in Hazlet, the Court should reject his request to require Hazlet to grant him a priority promotion.

States' original back pay calculation, and factoring in principles favoring voluntary resolution of Title VII claims, one million dollars is a reasonable compromise on the amount of back pay. Furthermore, any individual who is dissatisfied with the monetary relief offered under the Decree has the right not to accept the relief and to pursue his or her own Title VII action. Thus, objections to the overall amount of monetary relief, including objections stating that monetary relief should extend beyond back pay to include compensation for losses to pensions and for expenses incurred for preparing for the exam, should be overruled.

The United States also received some objections stating that the relief is inadequate because individual Claimants will receive less than make-whole relief in the form of back pay. However, as stated in Section V.E.2, though we can estimate the number of candidates who would have passed the exam and been appointed absent the disparity, we cannot determine which additional candidates would have been appointed. Here, an estimated 105 African-American and Hispanic candidates would have been promoted to police sergeant but for the State's challenged uses of the written exam, a much larger group of African-American and Hispanic candidates – approximately 1,350 based on information currently available to the United States – competed for those 105 positions. Thus, the back pay due to Claimants will not equate to the total amount he or she would have received in the absence of discrimination. Rather, the monetary relief to be awarded in this case reflects the uncertainty regarding who would have been promoted absent the discrimination, as well as a reasonable compromise between the parties regarding the total amount of back pay. In addition, the method for distributing the back pay to Claimants is fair and reasonable, based on the year in which the Claimant took the exam but was not promoted. Thus, objections to the amount of individual relief that Claimants will be awarded should be rejected.

F. Adequate Notice Was Provided to Persons Whose Rights May Be Affected.

The United States received two objections claiming that the Decree did not provide adequate notice to individuals whose rights may be affected by the Decree. The two objections, which were filed by different individuals but were identical in content, state that “several police officers who passed the most recent promotional sergeant exam administered by Civil Service will be affected by this Decree and they were not required to be served with notice as per the terms of the Decree[.]” Both objectors appear to be current Jersey City police sergeants.

As described in Section III above, the Decree required that notice of the Decree and the right to file an objection be given to all current police sergeants in all civil service jurisdictions plus all current police officers in the jurisdictions listed in Attachments D and K to the Decree. Jersey City is listed in both Attachment D and Attachment K to the Decree and, therefore, all Jersey City police officers and police sergeants were given notice pursuant to the Decree. Objectors’ assertion to the contrary is incorrect.

Furthermore, the standard for adequate notice of a consent decree is not actual notice but “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *See Nu-Look Design, Inc v. C.I.R.*, 356 F.3d 290, 295 (3d Cir. 2004) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The State hand delivered notice to all police sergeants, and mailed notice to police officers in the specific jurisdictions listed in Attachments D and K to the Decree. In addition, notice of the Decree was posted on the internet and published in the *Trenton Times*. Thus, the notice provided under the Decree more than satisfies a reasonableness standard. A non-specific allegation that a few police officers may not have received the mailing,

but were apparently nonetheless aware of the Decree, does not defeat the reasonableness of the parties' efforts to notify all appropriate individuals.

G. Blank or Unknown

The United States received 22 objections from people who either state that they object to the fairness of the Decree without providing the reasons for that objection, or whose objection is unknown from the wording of the objection. Eleven additional individuals filed only objection cover sheets which, in and of themselves, do not indicate whether the person objects to the Decree or supply any basis for an objection. The United States is unable to comment on these submissions except to state that they do not provide any basis for denying final entry.

H. Untimely

The United States received nine untimely objections, which the Court should overrule on the basis of failure to comply with the terms of the Decree. Nonetheless, all nine untimely objections fall within the categories already addressed above.

VI. CONCLUSION

For the foregoing reasons, as well as those stated in the Provisional Entry Memorandum, the Court should find that the terms of the Decree are lawful, fair, reasonable, adequate, and consistent with the public interest, and that no objection warrants modification or non-entry of the Decree. Accordingly, the Court should finally approve the Decree as a resolution of all claims asserted by the United States against the State.

Date: March 1, 2012

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General
DELORA L. KENNEBREW
Chief

By: s/ Varda Hussain
ESTHER G. LANDER
Deputy Chief
VARDA HUSSAIN
HILARY J. FUNK
ELIZABETH B. BANASZAK
Trial Attorneys
United States Department of Justice
Civil Rights Division
Employment Litigation Section
950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Room 4908
Washington, D.C. 20530
(202) 305-4267

Counsel for Plaintiff United States

APPENDIX

B

THOMAS E. PEREZ
Assistant Attorney General
LORETTA KING
Deputy Assistant Attorney General
DELORA L. KENNEBREW
Chief
ESTHER G. LANDER
Deputy Chief
VARDA HUSSAIN
HILARY J. FUNK
ELIZABETH B. BANASZAK
Trial Attorneys
United States Department of Justice
Civil Rights Division
Employment Litigation Section
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 305-4267

Counsel for Plaintiff United States

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NEW JERSEY AND NEW
JERSEY CIVIL SERVICE
COMMISSION,

Defendants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VICINAGE OF NEWARK

Civil Action No.
2:10-cv-00091-KSH-MAS

Hon. Katharine S. Hayden

FINAL ENTRY ORDER

Upon consideration of Plaintiff United States of America's and defendants State of New Jersey and New Jersey Civil Service Commission's (the "State") Joint Motion for Final Entry of the Consent Decree ("Motion"), the United States' Memorandum of Law in support of the Motion, and all supporting attachments to the foregoing items,

It is hereby **ORDERED** that the Motion is **GRANTED** and the Consent Decree provisionally entered by the Court on November 22, 2011, is finally approved and entered as a Court Order; and it is

FURTHER ORDERED that all the deadlines set forth in the Decree are incorporated herein.

DATED: _____, 2012

KATHARINE S. HAYDEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

APPENDIX

C

CATEGORIES OF OBJECTIONS TO DECREE

Category 1: Objections regarding the sufficiency of the evidence of a disparate impact violation

See Exh. Nos 1, 8, 13, 15,16, 18, 20, 21, 27, 29, 30, 31, 32, 33, 34, 35, 36, 38, 44, 45, 47, 51, 60, 61, 63, 64, 65, 66, 71, 74, 75, 76, 77, 84, 87, 88, 89, 91, 92, 94, 95, 96, 97, 98, 99, 106, 108, 111, 112, 114, 115, 116, 118, 119, 120, 124, 131, 133, 135, 136, 138, 140, 141, 143, 145, 146, 147, 149, 150, 151, 155, 157, 158, 159, 160, 161, 162, 163, 165, 166, 167, 169, 170, 173, 174, 180, 181, 185, 186, 189, 193, 194, 195, 196, 199, 200, 203, 206, 207, 210, 211, 212, 213, 214, 217, 218, 219, 225, 226, 230, 232, 234, 235, 236, 238, 239, 241, 242, 243, 244, 245, 247, 249, 251, 252, 253, 256, 259, 260, 262, 263, 264, 270, 276, 280, 281, 283, 292, 293, 294, 300, 301, 306, 308, 312, 314, 315, 316, 321, 326, 328, 332, 336, 339, 340, 341, 342, 345, 347, 348, 349, 350, 352, 356, 358, 359, 361, 362, 364, 365, 366, 371, 373, 374, 376, 377, 379, 381, 382, 383, 386, 389, 390, 393, 397, 398, 400, 401, 404, 406, 409, 410, 412, 413, 415, 416, 417, 418, 422, 427, 428, 429, 430, 431, 432, 433, 435, 438, 439, 440, 442, 448, 450, 451, 452, 456, 457, 458, 459, 464.

Category 2: Objections regarding the constitutionality of Decree

See Exh. Nos. 1, 3, 4, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 21, 23, 24, 26, 27, 29, 30, 31, 32, 34, 35, 36, 43, 44, 45, 47, 49, 50, 51, 54, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71, 73, 74, 75, 76, 78, 82, 83, 84, 88, 89, 91, 92, 94, 95, 96, 97, 98, 99, 103, 105, 106, 108, 110, 111, 112, 113, 114, 115, 116, 118, 120, 124, 129, 131, 132, 133, 135, 136, 138, 139, 140, 141, 143, 144, 145, 146, 147, 149, 150, 151, 153, 154, 155, 157, 158, 159, 160, 161, 162, 163, 165, 166, 167, 169, 170, 171, 172, 173, 174, 179, 182, 183, 184, 185, 186, 188, 189, 191, 192, 193, 194, 195, 196, 199, 200, 201, 203, 204, 206, 207, 211, 212, 213, 214, 217, 218, 219, 220, 222, 225, 226, 230, 232, 234, 235, 236, 238, 239, 240, 241, 242, 243, 244, 246, 247, 248, 249, 250, 251, 252, 253, 258, 259, 260, 262, 263, 264, 266, 268, 271, 272, 275, 276, 277, 280, 281, 283, 287, 288, 291, 295, 300, 301, 302, 303, 306, 309, 312, 315, 316, 319, 321, 325, 326, 328, 330, 332, 335, 337, 338, 339, 341, 342, 343, 344, 345, 347, 348, 349, 350, 351, 352, 356, 357, 358, 359, 361, 362, 363, 364, 365, 366, 367, 368, 371, 373, 374, 376, 378, 379, 381, 382, 383, 384, 386, 387, 388, 389, 390, 391,392, 393, 396, 397, 398, 399, 400, 401, 402, 403, 404, 408, 409, 410, 411, 412, 413, 415, 416, 417, 418, 419, 427, 428, 429, 430, 432, 433, 434, 435, 437, 438, 441, 442, 443, 445, 446, 448, 450, 451, 452, 453, 456, 457, 458, 459, 460, 461, 463, 467.

Category 3: Objections stating that all candidates had an equal opportunity on the challenged exam

See Exh. Nos 3, 4, 7, 11, 12, 16, 20, 22, 30, 31, 32, 33, 35, 36, 38, 44, 45, 47, 49, 50, 51, 52, 54, 57, 60, 61, 62, 65, 66, 67 ,68, 69, 70, 71, 76, 77, 78, 81, 84, 88, 89, 90, 91, 94, 98, 99, 100, 102, 103, 104, 105, 107, 108, 109, 110, 113, 114, 115, 116, 118, 119, 123, 124,

132, 133, 134, 135, 136, 137, 139, 140, 141, 142, 143, 149, 150, 151, 152, 153, 154, 155, 157, 158, 161, 162, 163, 165, 166, 167, 168, 169, 170, 173, 174, 180, 181, 182, 183, 184, 185, 186, 187, 192, 193, 195, 198, 200, 202, 203, 206, 207, 210, 211, 212, 213, 214, 217, 218, 220, 222, 226, 227, 230, 232, 233, 235, 236, 238, 239, 241, 242, 243, 244, 247, 249, 251, 252, 253, 254, 255, 256, 258, 259, 260, 264, 266, 270, 275, 276, 277, 280, 283, 284, 285, 288, 292, 301, 307, 308, 313, 314, 315, 316, 320, 326, 327, 328, 329, 330, 337, 338, 339, 340, 341, 343, 345, 347, 348, 350, 351, 356, 357, 359, 362, 363, 364, 369, 374, 375, 377, 378, 379, 380, 381, 382, 384, 385, 386, 387, 388, 389, 390, 392, 393, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 411, 414, 415, 416, 417, 418, 419, 422, 427, 429, 430, 431, 433, 434, 437, 438, 441, 445, 446, 448, 450, 451, 452, 456, 458, 459, 460, 461, 462, 464.

Category 4: Objections regarding the qualifications of priority promotion candidates

Exh. Nos. 9, 12, 22, 33, 52, 61, 62, 67, 71, 78, 84, 102, 105, 109, 110, 140, 144, 154, 171, 174, 180, 182, 183, 184, 187, 188, 195, 196, 212, 214, 218, 222, 242, 247, 261, 274, 277, 284, 313, 317, 327, 329, 336, 337, 338, 339, 347, 357, 363, 366, 371, 373, 375, 380, 384, 390, 392, 401, 402, 404, 406, 407, 430, 431, 434, 460, 461, 462, 463, 467.

Category 5: Objections stating that relief provided by Decree is inadequate or improper

Exh. Nos. 5, 23, 24, 25, 37, 39, 40, 41, 53, 54, 71, 72, 79, 80, 83, 85, 86, 93, 101, 110, 121, 122, 125, 126, 127, 128, 130, 134, 139, 177, 178, 179, 180, 191, 196, 204, 205, 208, 209, 215, 222, 223, 224, 227, 228, 229, 270, 277, 285, 287, 289, 296, 297, 299, 304, 310, 329, 331, 335, 336, 346, 364, 367, 368, 372, 373, 380, 396, 420, 421, 423, 424, 425, 426, 434, 447, 449, 454, 465, 466, 467.

Category 6: Objections stating that adequate notice was not provided to persons whose rights may be affected by the Decree

Exh. Nos. 58, 59, 240.

Category 7: Objections that are either blank or provide insufficient information

Exh. Nos. 6, 42, 56, 117, 156, 175, 176, 190, 197, 198, 216, 231, 237, 265, 267, 273, 290, 295, 305, 311, 318, 322, 323, 324, 354, 355, 360, 370, 394, 395, 436, 439, 455.

Category 8: Objections that were submitted after the deadline for submitting objections had passed

Exh. Nos. 5, 153, 219, 303, 324, 379, 448, 457, 467.

APPENDIX

D

NOTE: Appendix D includes list of objectors who requested to appear in court, this information may be accessed on PACER at: <https://ecf.njd.uscourts.gov/cgi-bin/login.pl>.

APPENDIX

E

NOTE: Appendix E – individual objections and the remaining attachments from Appendix E may be accessed on PACER at: <https://ecf.njd.uscourts.gov/cgi-bin/login.pl>.

THOMAS E. PEREZ
Assistant Attorney General
DELORA L. KENNEBREW
Chief
ESTHER G. LANDER
Deputy Chief
VARDA HUSSAIN
HILARY J. FUNK
ELIZABETH B. BANASZAK
Trial Attorneys
United States Department of Justice
Civil Rights Division
Employment Litigation Section
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 305-4267

Counsel for Plaintiff United States

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NEW JERSEY AND NEW
JERSEY CIVIL SERVICE
COMMISSION,

Defendants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VICINAGE OF NEWARK

Civil Action No.
2:10-cv-00091-KSH-MAS

Hon. Katharine S. Hayden

SECOND AMENDED DECLARATION OF BERNARD R. SISKIN, PH.D.

I, BERNARD R. SISKIN, declare the following:

1. I am the Director of BLDS, LLC, based in Philadelphia, Pennsylvania. I received my Ph.D. in Statistics with a minor in Econometrics from the Wharton School of the University of Pennsylvania in 1970. I have authored four books on statistical methodology, three book chapters (including one in a book entitled *Employment Discrimination Litigation: Behavioral*,



Quantitative and Legal Perspectives), four research monographs, and numerous papers, including articles on the role of statistics in the analysis of employment discrimination issues. Since receiving my Ph.D., I have specialized in the application of statistics to the analysis of employment practices. In this capacity, I have been retained by numerous governmental and private organizations, including, but not limited to, the Third Circuit Task Force on Race and Gender, the Equal Employment Opportunity Commission, the United States Department of Justice, the Office of Federal Contract Compliance Programs, the Federal Bureau of Investigation, and various states and municipalities as well as numerous Fortune 500 Companies and other private corporations. I have been retained by Plaintiff United States as an expert witness in the above-captioned action.

2. On a yearly basis, the State of New Jersey and the New Jersey Civil Service Commission (collectively, "New Jersey") administer the same written exam state wide to all police officers applying for promotion to the position of police sergeant in local jurisdictions participating in the promotional process that year. At least 182 counties and municipalities in New Jersey participated in the civil service system during the period of 2000 to 2009. Candidates for police sergeant who meet the minimum qualifications set by New Jersey, and who achieve a passing score on a written exam administered by New Jersey, are placed in descending rank order on eligible lists based on final scores. Final scores are a combination of written exam scores, which are weighted 80 percent, and seniority credits, which are weighted 20 percent. Between 2000 and 2009 inclusive, New Jersey administered the exam on a yearly basis to approximately 6,392 white candidates, 1,343 African-American candidates, and 1,363 Hispanic candidates.

Disparate Impact

3. With respect to disparate impact, I have been asked to provide my expert opinion as to (i) whether the use by New Jersey of a written exam for promotion to police sergeant on a pass/fail basis from 2000 to 2009 had a statistically significant disparate impact upon African-American or Hispanic candidates; (ii) whether New Jersey's determination and use of final scores to certify candidates from eligible lists in descending rank order from 2000 to 2009 for the position of police sergeant in local jurisdictions had a statistically significant disparate impact upon African-American or Hispanic candidates; and (iii) whether any statistically significant disparate impact also resulted in a practical effect upon the promotional opportunities of African-American or Hispanic candidates.

4. On a yearly basis, New Jersey administers the same written exam state wide to all police officers applying for promotion to the position of police sergeant in local jurisdictions participating in the promotional process that year. New Jersey sets the same pass score state wide each year for all of the local jurisdictions participating in the promotional process that year. Accordingly, it is my opinion that it is appropriate to aggregate data from all test takers across jurisdictions, controlling for factors such as year and jurisdiction when appropriate, in analyzing whether New Jersey's uses of the police sergeant written exam result in a statistically significant disparate impact upon African-American and Hispanic candidates.

5. New Jersey's pass/fail use of the written exam from 2000 to 2009 resulted in a statistically significant disparate impact upon African-American candidates for the position of police sergeant. Analysis of test administration data from 2000 to 2009 as a whole indicates that the written exam resulted in a statistically significant disparity between the pass rate of African-American candidates and the pass rate of white candidates, equal to 17.33 units of standard

deviation. Analysis of test administration data for each year separately from 2000 to 2009 indicates that the written exam resulted in a statistically significant disparity between the pass rate of African-American candidates and the pass rate of white candidates in each individual year, ranging from a low (but highly statistically significant) disparity of 4.09 units of standard deviation in 2003 to a high of 9.62 units of standard deviation in 2002.

6. New Jersey's pass/fail use of the written exam from 2000 to 2009 resulted in a statistically significant disparate impact upon Hispanic candidates for the position of police sergeant. Analysis of test administration data from 2000 to 2009 as a whole indicates that the written exam resulted in a statistically significant disparity between the pass rate of Hispanic candidates and the pass rate of white candidates, equal to 12.88 units of standard deviation. Analysis of test administration data for each year separately from 2000 to 2009 indicates that the written exam resulted in a statistically significant disparity between the pass rate of Hispanic candidates and the pass rate of white candidates in each individual year since 2001, ranging from a low (but highly statistically significant) disparity of 3.03 units of standard deviation in 2003 to a high of 9.24 units of standard deviation in 2002.

7. New Jersey's determination and use of final scores to certify candidates from eligible lists in descending rank order from 2000 to 2008 resulted in a statistically significant disparate impact upon African-American candidates. African Americans who passed the police sergeant written exam administered from 2000 to 2008 were ranked statistically significantly lower on eligible lists than whites. Analysis of all eligible lists from 2000 to 2008 as a whole indicates a statistically significant disparity in the likelihood that an African-American candidate would be ranked high enough to be considered for appointment, as compared to a white candidate, equal to 7.77 units of standard deviation. Analysis of appointment data controlled by year also indicates

statistically significant disparities in rank between African Americans and white candidates from 2000 to 2008.¹

8. New Jersey's determination and use of final scores to certify candidates from eligible lists in descending rank order from 2000 to 2008 resulted in a statistically significant disparate impact upon Hispanic candidates. Hispanics who passed the police sergeant written exam administered from 2000 to 2008 were ranked statistically significantly lower on eligible lists than whites. Analysis of all eligible lists from 2000 to 2008 as a whole indicates a statistically significant disparity in the likelihood that a Hispanic candidate would be ranked high enough to be considered for appointment, as compared to a white candidate, equal to 4.66 units of standard deviation. Analysis of appointment data controlled by year also indicates statistically significant disparities in rank between Hispanic and white candidates from 2000 to 2008.

9. The disparate impact resulting from New Jersey's uses of its written exam for promotion to police sergeant from 2000 to 2009 resulted in a significant real-world effect on the promotional opportunities of African-American and Hispanic candidates.

10. Absent the disparate impact of New Jersey's police sergeant written exam from 2000 to 2009, at least one or more African Americans and/or Hispanics would have been promoted to the position of police sergeant in each of the 43 jurisdictions identified in Table 1, with an estimated total of 75 African Americans and 30 Hispanics excluded from promotions state wide due to the disparate impact of the exam. If I limit my analysis to those jurisdictions where at least three or more African Americans and/or Hispanics were excluded from promotions in a particular jurisdiction due to the disparate impact of the exam from 2000 to 2009, a total of 48 African

¹ Controlling the data by year is to account for any differences that may occur when analyzing the data across years; it is not the same as analyzing the data for each year separately.

Americans and 20 Hispanics would have been promoted to the position of police sergeant in those 13 jurisdictions identified in Table 2.

Injunctive Relief

11. I have also been asked to provide my expert opinion on whether continued use of existing eligible lists would create an additional appointment “shortfall” of African Americans or Hispanics. The appointment shortfall is the expected number of African Americans or Hispanics who would have been promoted to police sergeant but for the State’s uses of the challenged examination.

12. For each jurisdiction, I used the average appointment rate per year based on appointment data from 2000 until 2009 to estimate the number of expected new appointments in each jurisdiction that would occur for an additional one year cycle.² Then, considering the race and/or national origin and rank of those remaining on the eligible list, I estimated the additional number of promotions one would expect broken down by race and national origin. I then determined whether these expected appointments would result in an increase in the shortfall of African Americans or Hispanics.

13. Based on the average appointment rates outlined in paragraph 12, I concluded that continuing the use of the existing eligible lists for their current duration or for an additional year of appointments (where the list extends beyond one year) would result in a shortfall that would increase by at least one African-American or Hispanic candidate in those jurisdictions listed in Table 3.

14. I can also look at actual appointments from these unexpired eligible lists, and calculate on an appointment by appointment basis, whether additional appointments will create or increase

² I did not incorporate into my analysis any jurisdictions whose eligible list has expired.

an African-American or Hispanic shortfall. To do so, I would conduct a shortfall calculation for a jurisdiction to determine whether the additional appointment would change the number of promotions, broken down by race and national origin, that one would expect to see in that jurisdiction. For purposes of determining whether an additional appointment would create or increase an African-American or Hispanic shortfall, I would treat each request for certification as an actual appointment.

Individual Relief

15. With respect to individual relief, I have been asked to provide my expert opinion as to the back pay due to the 105 African-American and Hispanic candidates ("Candidates") in the 43 jurisdictions listed in Table 1 to this Declaration who were not promoted to police sergeant in specified years due to the disparate impact of the State's written exam from 2000 through 2009.

16. Using salary information reported by State agencies and publicly available through www.app.com, I estimated back pay due to the Candidates, based on the jurisdiction and year in which the Candidate would have been promoted but for the disparate impact of the exam.

17. In calculating back pay, I assumed that losses began accruing either when the Candidate failed the exam or in May 2006, whichever was later, and stopped accruing in April 2011.

18. In calculating back pay, I compared salary data for individuals who participated in the challenged police sergeant selection process in the 43 jurisdictions listed in Table 1, but who were not promoted, with salary data for police sergeants serving in those jurisdictions.

19. For each of the Candidates, I calculated the salary differential between the salaries earned by individuals who participated in the challenged police sergeant selection process but who were not promoted, and police sergeants in the jurisdiction to which that Candidate was assigned, factoring in an annual salary increase of 5% for 2006, 2007, and 2008 and a 4% increase for both

2010 and 2011 (based on information provided by the State), plus interest.³ Back pay was calculated for each Candidate by year using these salary differentials and then summed to create a total back pay calculation for each Candidate and for each jurisdiction as well as a total back pay calculation for all 105 Candidates.

20. Based on my comparison of the salary differentials between individuals who participated in the challenged police sergeant selection process, but who were not promoted, with police sergeants in the 43 jurisdictions listed in Table 1, I determined that back pay, including interest, due to 105 African-American and Hispanic Candidates in those jurisdictions from May 2006 to April 2011 exceeded \$1,000,000.

21. I have also been asked to provide my expert opinion on how to distribute \$1,000,000 in back pay to any African-American or Hispanic person from those 43 jurisdictions identified in Table 1 who has not been promoted to police sergeant and who has either:

- a. between 2000 and 2009, failed a police sergeant written exam where appointments from the eligible list resulted in a shortfall of his or her race; or
- b. between 2000 and 2008, passed a police sergeant written exam where appointments from the eligible list resulted in a shortfall of his or her race, but ranked below the lowest-ranking candidate appointed from that eligible list.

22. I have also been asked to identify which Candidates who took a police sergeant exam administered by the State from 2000 to the present met the definition of "Claimant" in the Consent Decree. Based on my analysis, the United States prepared Attachments B and C to the Decree, which set forth, respectively, a list of Claimants eligible for back pay and a list of Claimants eligible for both back pay and priority promotion relief. I have since revised

³ If salary data was not available for individuals who participated in the challenged police sergeant selection process but were not promoted and police sergeants for a specific jurisdiction and year, I used the average salaries for all other jurisdictions for that year to calculate the salary differential.

Attachments B and C upon discovering that these attachments included Claimants who did not participate in a test administration that resulted in a shortfall of his or her race. I also revised these attachments to correct other minor errors and to reflect updated appointment data. I understand that these attachments are being submitted to the Court as First Amended Attachment B and First Amended Attachment C.

23. To distribute the \$1,000,000, I divided the total into separate funds for African-American Claimants (Settlement Fund I) and Hispanic Claimants (Settlement Fund II). I assigned \$710,000 to Settlement Fund I for the African-American Claimants and \$290,000 to Settlement Fund II for the Hispanic Claimants, because 71% of the shortfall (75 of 105) is African American and 29% of the shortfall (30 of 105) is Hispanic.

24. To determine the total amount of damages to be paid to each Claimant, I will calculate the amount of damages to be paid to each Claimant for each fund separately and for each year of back pay he or she is eligible to receive. To do so, I will determine the total number of years in back pay that all Claimants are eligible to receive. I will then divide the amount of money in each settlement fund by the total number of years in back pay to determine the monetary value of one year of back pay. I will then multiply that amount by the number of years of back pay each Claimant is eligible to receive in order to determine the total amount of damages to be paid to each Claimant.⁴

25. The back pay awarded to each Claimant will not exceed the pay that the Claimant would have received had he or she been promoted to police sergeant on his or her presumptive appointment date, which is based upon the median appointment date for individuals on the

⁴ I will be able to determine the value of one year of back pay once the Court has approved a Final Relief Awards list, which will set forth the number of Claimants by race who are eligible for back pay.

eligible list that would have included the Claimant or from which the Claimant would have been appointed.

26. The median appointment date for an eligible list is the date by which half of the candidates from the list were appointed. It is appropriate to use the median appointment date because absent discrimination, all of the appointments from an eligible list would have been spread out proportionately among all appointments from each respective list.

27. As stated above in paragraph 10, I determined that, absent the disparate impact of New Jersey's written exam from 2000 to 2009, an estimated additional 75 African Americans and 30 Hispanics would have been promoted to the position of police sergeant in 43 jurisdictions throughout New Jersey. I have reviewed the Consent Decree that the parties have executed in this case, and the 68 priority appointments allocated among 13 jurisdictions provided by the Decree do not exceed the shortfall in any of the 13 jurisdictions.

28. I used the following two-step methodology to calculate the shortfall referenced in paragraphs 10 and 27.

- a. I determined the number of additional African-American and Hispanic candidates who would have passed the police sergeant written exam if it had no overall disparate impact. To calculate this number:
 - i. For each year, I computed the overall passing rate of white candidates on the written exam by dividing the number of white candidates who passed the written exam by the number of white candidates who took the written exam.⁵
 - ii. For each jurisdiction and year, I then multiplied the number of African-American (and Hispanic) candidates who took the written exam by the overall white passing rate for that year computed in (a).

This represents the number of African-American (and Hispanic) candidates in each

⁵ I used the yearly overall white passing rate, rather than the white passing rate for each jurisdiction, because the State administered the same exam in all jurisdictions and used the same cut-off score across jurisdictions. However, the net difference is minimal if a jurisdiction-specific white passing rate is used.

jurisdiction and year who would have passed the written exam if it had no overall disparate impact.

- b. I then determined the number of additional African-American and Hispanic candidates who would have been appointed from the police sergeant written exam if it had no overall disparate impact. To calculate this number:
 - i. For each jurisdiction and year, I divided the total number of appointments made in a particular jurisdiction by the number of white candidates who passed the written examination, plus the number of African-American and Hispanics passers computed in (b). This represents the jurisdiction hiring rate if there were no disparate impact in the overall passing rate.
 - ii. I then multiplied the jurisdiction hiring rate computed in (c) by the number of African-American and Hispanic passers computed in (b) and subtracted the actual number of African-American and Hispanic appointments in that jurisdiction to determine how many additional African-American and Hispanic candidates would have been appointed if the written exam did not have a disparate impact.

Based on these calculations, an estimated 75 African-American and 30 Hispanic candidates would have been promoted to police sergeant from the symbol numbers and in the 43 jurisdictions identified in Table 1, absent the disparate impact of New Jersey's police sergeant written exam from 2000 to 2009.

29. Though a shortfall calculation can identify the pool of candidates who could have passed the exam and been appointed absent the disparity, it cannot determine which of the candidates from the pool would have, in fact, been appointed.

30. I was also asked to provide additional information regarding the percentage of African-American and Hispanic candidates in Paterson for the years between 2000 and 2009 in which a shortfall resulted from the administration of the written exam.

- a. I determined that there was a shortfall of 5 African-American promotions in Paterson due to the 2000, 2003, and 2006 administrations of the police sergeant exam. Across these three test administrations, approximately 16% of candidates in Paterson were African American. Therefore, absent disparate impact, African Americans should have received approximately 16% of the appointments in Paterson during this time period.

- b. I determined that there was a shortfall of 1 Hispanic promotion in Paterson due to the 2006 administration of the police sergeant examination. In 2006, approximately 31% of candidates in Paterson were Hispanic. Therefore, absent disparate impact, Hispanics should have received approximately 31% of the appointments in Paterson during this year.
- c. Furthermore, for the test administrations that resulted in a shortfall, African-American and Hispanic police officers took and failed the written exam at significantly higher rates than white police officers in Paterson. African Americans and Hispanics were overrepresented in the police sergeant candidate pool in Paterson when compared to their representation in the rank of police officer. Therefore, absent disparate impact, one would expect that African American and Hispanic representation among those promoted during the period should exceed the African American and Hispanic representation among the Paterson police force.

Executed this 1st day of March, 2012.



Bernard R. Siskin, Ph.D.

TABLE 1

JURISDICTIONS IN WHICH CLAIMANTS ARE
ELIGIBLE FOR INDIVIDUAL RELIEF

	Jurisdiction	Type of Individual Relief for Which Claimants Are Eligible	
		Back Pay	Priority Promotion
1	Asbury Park	x	
2	Atlantic City	x	x
3	Bayonne	x	
4	Bridgeton	x	x
5	Burlington	x	
6	Camden	x	x
7	Deptford	x	
8	Dover	x	
9	East Orange	x	x
10	Elizabeth	x	x
11	Ewing	x	
12	Garfield	x	
13	Hackensack	x	
14	Hamilton	x	
15	Hillside	x	
16	Hoboken	x	x
17	Irvington	x	
18	Jersey City	x	x
19	Kearny	x	
20	Lawrence	x	
21	Magnolia	x	
22	Morristown	x	
23	New Brunswick	x	x
24	Newark	x	x
25	North Brunswick	x	
26	Orange	x	
27	Passaic	x	x
28	Paterson	x	x
29	Pennsauken	x	
30	Perth Amboy	x	
31	Plainfield	x	
32	Pleasantville	x	
33	Roselle	x	
34	Scotch Plains	x	
35	Somerdale	x	

36	Teaneck	x	x
37	Trenton	x	x
38	Vineland	x	
39	Wallington	x	
40	Weehawken	x	
41	West New York	x	
42	Willingboro	x	
43	Woodridge	x	

TABLE 2

ALLOCATION OF PRIORITY PROMOTION POSITIONS TO JURISDICTIONS

	Jurisdiction	African American	Hispanic
1	Atlantic City	5	2
2	Bridgeton	2	1
3	Camden	3	1
4	East Orange	2	1
5	Elizabeth	3	3
6	Hoboken	0	3
7	Jersey City	6	3
8	New Brunswick	1	2
9	Newark	14	1
10	Passaic	2	1
11	Paterson	5	1
12	Teaneck	2	1
13	Trenton	3	0

TABLE 3

JURISDICTIONS IN WHICH CONTINUED USE OF AN EXISTING ELIGIBLE LIST FOR ITS CURRENT DURATION OR FOR AN ADDITIONAL YEAR (WHERE THE LIST EXTENDS BEYOND ONE YEAR) MAY RESULT IN DISPARATE IMPACT ON AFRICAN-AMERICAN AND/OR HISPANIC CANDIDATES

1	Atlantic City
2	Camden
3	Irvington
4	Jersey City
5	Passaic
6	Paterson
7	Pleasantville
8	Salem City
9	Teaneck
10	Trenton

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NEW JERSEY AND NEW
JERSEY CIVIL SERVICE
COMMISSION,

Defendants.

UNITED STATES COURT FOR THE
DISTRICT OF NEW JERSEY

VICINAGE OF NEWARK

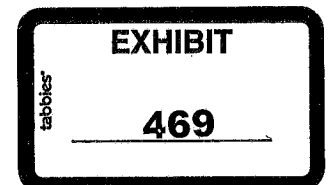
Civil Action No.
2:10-cv-00091-KSH-MAS

Hon. Katharine S. Hayden

DECLARATION OF DANIEL HILL

I, DANIEL HILL, declare the following:

1. I am the Director of the Division of Selection Services of the New Jersey Civil Service Commission ("NJCS"). In this position, I oversee all facets of testing, eligibility determination and list establishment for open competitive and promotional positions that come under the jurisdiction of the NJCS.
2. To comply with the notice provisions set forth in Paragraph 21 in the Decree between the parties in the above-captioned case, the State provided a "Notice of Settlement and Fairness Hearing," the "Instructions for Filing an Objection Prior to the Fairness Hearing," and an "Objection to Entry of the Consent Decree" form (collectively, the "notice forms") to each of the following groups of individuals in December 2011:
 - a. Pursuant to Paragraph 21(a), the State sent the notice forms to each potential Claimant identified in Attachments B and C to the Decree via certified U.S. mail.
 - b. Pursuant to Paragraph 21(b), the State had the notice forms hand-delivered to all current police sergeants in every civil service jurisdiction. Signatures were



collected from the sergeants at the time of delivery to confirm receipt. The distribution of the notice forms and collection of signatures was executed by the police department in each local jurisdiction under the direction of the State.

- c. Pursuant to Paragraph 21(c), the State sent the notice forms to the appointing authority in each civil service jurisdiction via certified U.S. mail.
 - d. Pursuant to Paragraph 21(c), the State sent the notice forms to the State Policeman's Benevolent Association, and the State Fraternal Order of Police via certified U.S. mail. The State requested that each organization forward the notice forms to all local chapters.
 - e. Pursuant to Paragraph 21(c), the State sent the notice forms to the last known addresses of all current police officers in the jurisdictions listed in Attachments D and/or K of the Decree via certified U.S. mail.
3. To comply with the notice provisions set forth in Paragraph 22, the State posted the notice forms on <http://www.state.nj.us/csc/> on December 28, 2011 and is continuing to post this information.
 4. To comply with the notice provisions set forth in Paragraph 23, the State published the information contained in the notice forms, along with website locations that may be accessed to receive additional information, in the *Trenton Times* beginning on December 29, 2011 and continuing for two consecutive weeks. This information was also available on NJ.COM.

Executed this 29th day of February, 2012.



DANIEL HILL