UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, JANET A. CALDERO, *et al.*, Plaintiff-Intervenors, and PEDRO ARROYO, *et al.*, Plaintiff-Intervenors, -against- NEW YORK CITY BOARD OF EDUCATION, *et al.*, Defendants, and JOHN BRENNAN, *et al.*, Objector-Intervenors	Index No.: 96-0374 ORAL ARGUMENT REQUESTED
JOHN BRENNAN, *et al.*, Plaintiff, -against- JOHN ASHCROFT, *et al.*, Defendants.	Index No.: 02-0256

THE CALDERO INTERVENORS' REPLY MEMORANDUM OF LAW IN OPPOSITION TO THE OBJECTOR-INTERVENORS' OBJECTIONS TO APPROVAL OF THE SETTLEMENT AGREEMENT AND IN SUPPORT OF THE CALDERO INTERVENORS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

In 1999, the United States and the New York City Board of Education settled the United States' claims that the Board discriminated on the basis of race in hiring Custodians and Custodian Engineers and discriminated on the basis of race and sex in recruiting for these positions. As the parties acknowledged when they moved for judicial approval of the Settlement Agreement, the Agreement provided race- and gender-conscious relief intended to remedy the effects of the Defendants' past discrimination. (*See* Ex. 50,[1] U.S. Mem. in Support of Entry, at 9 (setting out standard of review "where, as here, a settlement agreement implements race-conscious remedies"); *id.* at 13 (setting out district court's duty to eliminate the discriminatory effects of the past and prevent like discrimination in the future); Ex. 52, Defs. Mem. in Support of Entry, at 7 (setting out standard of review "for the creation of a race-conscious remedy"); *id.* at 9 (agreement consistent with Title VII goal of "ensuring equality of opportunity and the elimination of discriminatory barriers to professional employment").)[2]

Specifically, the Agreement provided permanent employment status and retroactive seniority to 59 women, African-Americans, Hispanics, and Asians who had been hired as provisional Custodians or Custodian Engineers. By ensuring that women and people of color

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1. All references to "Ex. __" are to the Exhibits to the Declaration of Emily Martin, dated Dec. 23, 2004. All references to "Reply Ex. __" are to the Exhibits to the Declaration of Melissa R. Chernofsky, dated April 29, 2005.

2. In the intervening years, of course, the United States has adopted a new view of this case, and brought on new attorneys. It now asserts that the relief awarded in the Settlement Agreement was always intended solely to make whole identified victims of discrimination. (*E.g.*, U.S. Mem. Opp. Summ. J. at 4-5, 7 ("U.S. Mem.").) Nowhere does the United States explain, however, how this view is consistent with its original emphasis on "race-conscious remedies." As the United States elsewhere acknowledges, make-whole relief to identified victims of discrimination is not a form of race- or gender-conscious relief. (U.S. Mem. at 16 n.8 (noting that make-whole relief for victims of discrimination is not subject to heightened constitutional scrutiny).) Its current counsel's claims as to their predecessors' intentions in entering into the Agreement are also undercut by counsel's statement "for the record" that "having not been counsel on the case at the time, none of us here can represent . . . from the United States's point of view, . . . the thinking behind any selection process [for beneficiaries] that might or might not have happened." (Reply Ex. A, Transcript of Feb. 2, 2003 Hearing before Judge Levy, at 32.)

were represented in the Custodian workforce, with seniority that allowed them to compete for larger, higher profile schools, the Agreement partially remedied the effects of the past discrimination that had resulted in disproportionately low numbers of women and people of color on the job. Equally importantly, these provisions helped to prevent future discrimination. They opened the closed system that had perpetuated the overwhelmingly white, male demographics of the workforce and showed by example that women and minorities could successfully hold these jobs, thus enabling more effective recruitment of women and minorities in the future.[3] (*See* Ex. 50, U.S. Mem. in Support of Entry, at 27 ("[T]he conversion of the Offerees to permanent Custodians and Custodian Engineers accomplishes the United States' goal of significantly increasing the representation of blacks, Hispanics, Asians, and women in the positions of permanent Custodians and Custodian engineer while impacting incumbents as minimally as possible."); Ex. 51, Fairness Hearing, at 114 ("We were very careful in selecting the group of individuals we wanted to become offerees. We needed to consider the United States' objective of wanting to rectify the past discrimination in ensuring that there were more Hispanics, blacks, Asians, and women on the work force, and at the same time address the qualifications issues raised.").) While the Settlement beneficiaries included individuals who were victims of the Defendants' discriminatory practices, "[t]he Agreement [did] not seek to identify potential victims of discrimination from among minority and female takers of the challenged examinations or from other sources for the purposes of granting relief." (Ex. 52, Defs. Mem. in Support of Entry, at 17.) *See generally Ass'n Against Discrimination in Employment v. City of Bridgeport*, 647 F.2d 256, 278 (2d Cir. 1981) (explaining that affirmative relief, designed to remedy effects

3. *See generally* Barbara Reskin, *Imagining Work Without Exclusionary Barriers*, 14 Yale J. L . & Feminism 313, 323-24 (2002) (increasing the diversity of the workforce diminishes the likelihood of racial and gender stereotyping and the likelihood that practices such as word-of-mouth recruiting will exclude women and minorities). (*See also* Phillips Ex. 1.)

of past discrimination, and compensatory relief, designed to make victims whole, may overlap to some extent, but have different purposes and functions).

As is the nature of any settlement, the essence of this agreement was compromise. *See E.E.O.C. v. Hiram Walker & Sons*, 768 F.2d 884, 889 (7th Cir. 1985). Each side sought to "gain[] the benefit of immediate resolution of the litigation and some measure of vindication for its position while foregoing the opportunity to achieve an unmitigated victory." *Id.* Thus, for instance, the United States did not obtain awards for every woman and every person of color who had been affected by the Defendants' discriminatory practices, or even for every woman and every person of color whom the Defendants had employed as Custodians or Custodian Engineers. Similarly, the awards made to the beneficiaries were themselves the result of compromise. Thus, the retroactive seniority awards represented a reasonable, though imprecise, reflection of the circumstances of the individual beneficiaries, as each individual received seniority dating either to (1) his or her provisional employment date, thus measuring actual time doing the work of a Custodian or (2) the "median exam date" keyed to a Custodian or Custodian Engineer exam previously taken by the individual, thus roughly corresponding to the individual's interest in and efforts to obtain the job.[4] (*See* Ex. 52, at 13 (retroactive seniority dates are compromise resulting from extensive negotiations).)

Today, both the Objector-Intervenors and the United States object to the very status of the Agreement as settlement and compromise. Both attempt to impose the standards for

4. When there was a choice between the two dates, the compromise embodied in the Settlement Agreement required that the individual receive the earlier date, thus maximizing the remedial effects of the seniority awards.

judicially ordered relief upon an employer's voluntary attempts to cure its own discrimination.[5] For instance, today the United States gives passing acknowledgment to its own previous contention, made less than two years ago, that the Objector-Intervenors bear the burden of proving that the challenged provisions of the Settlement are unlawful. (U.S. Mem. at 7.) Yet, demonstrating once again its lack of scruple in discarding yesterday's legal theory, the United States immediately goes on to argue that for this Court to approve the challenged provisions, it must find that the *United States* has proven its allegations of pattern or practice discrimination and has further proven both that each beneficiary is a victim of the discrimination and the exact scope of each beneficiary's injury. (*E.g.*, *id.* at 13, 14 (describing the United States' "ultimate burden of proof").)

To put it simply, this is not the law. Formal findings of discrimination are not a prerequisite to voluntary affirmative action under either Title VII or the Constitution. *See, e.g.*, *Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616, 630 (1987); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 289-90 (1986) (O'Connor, J., concurring); *United Steelworkers v. Weber*, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring); *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 958 (10th Cir. 2003); *Ensley Branch NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994); *Stuart v. Roache*, 951 F.2d 446, 450 (1st Cir. 1991); *Barhold v. Rodriguez*, 863 F.2d 233, 236 (2d Cir. 1988); *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034, 1041 (7th Cir. 1987). In short, both the Objector-Intervenors and the United States ask this court to ignore well-established precedent that Title VII settlements enjoy a presumption of validity and must be approved unless an objector meets a heavy burden of

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5. As discussed in the Caldero Intervenors' opening memorandum of law, an affirmative action plan adopted through a settlement agreement is held to the same legal standard as any other voluntary employer affirmative action. (Caldero Intervenors' Mem. Opp. to Objector-Intervenors' Objections ("Caldero Mem.") at 37-41.)

demonstrating that a challenged provision is unlawful or unreasonable. *See United States v. N.Y. City Board of Educ.*, Report and Recommendation, 96-CV-374 (RML) at 21, n.24 (E.D.N.Y. July 24, 2002), *adopted* 2002 WL 31663069 (E.D.N.Y. November 26, 2002); *Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001); *Kirkland v. N.Y. State Dept. of Corr. Servs.*, 711 F.2d 1117, 1128-29 (2d Cir. 1983); *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983).[6]

The Objector-Intervenors and the United States claim that the Second Circuit's mandate requires this Court to set aside this overwhelming precedent and enter a judgment as to the precise scope of Defendants' liability for discrimination and the identity of the victims of that discrimination. They apparently believe that the Second Circuit, despite its explicit refusal to reach the merits of the dispute, 260 F.3d at 133, did just that when it held that the Objector-Intervenors "should be accorded discovery and other rights with regard to *their* claim that any impairment by the Agreement of their interests in their positions as provisional Custodian Engineers and in their seniority rights as Custodians and Custodian Engineers would constitute impermissible discrimination rather than a proper restorative remedy based on past discrimination against the Offerees," *id.* at 132 (emphasis added). The Objector-Intervenors and the United States argue that because it accurately paraphrased the Objector-Intervenors' claim, the Second Circuit in fact reached the merits despite its refusal to do so and implicitly held that any award *not* limited to identified individual victims of Defendants' hiring and recruiting discrimination was unlawful. The Second Circuit clearly did not so hold.

As set out below, the Objectors' challenge to the Settlement Agreement fails. This Court should honor Congress's preference for voluntary compliance with Title VII and approve the

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6. The United States' conclusory assertion that the standard set out in *Kirkland* is inapplicable here because the Objector-Intervenors object to entry of the settlement agreement (U.S. Mem. at 10) is especially mysterious, given that the exact question considered in *Kirkland* was the relevance of intervenors' objections to court approval of a settlement agreement.

challenged paragraphs as a lawful voluntary effort to remedy the effects of past discrimination in hiring and recruitment of Custodian Engineers and prevent the recurrence of discrimination in the recruitment of Custodians and Custodian Engineers.

I. THE SETTLEMENT AGREEMENT CAN BE ENTERED AS A CONSENT JUDGMENT.

The Objector-Intervenors chivalrously argue that the Settlement Agreement cannot be entered as a consent judgment because the United States no longer "consents" to the provisions of the contract it signed in 1999. Revealingly, the United States makes no such argument on its own behalf. The United States itself thus apparently recognizes the unremarkable proposition that it consented to the Settlement Agreement in its entirety when its attorneys signed the agreement and that it remains bound by that consent.[7] The United States' alleged failure to consent, which, again, is not asserted by the United States itself, poses no barrier to entry of the Settlement Agreement as a consent decree, given that the United States' consent to these provisions is a matter of record in this case.

The Objector-Intervenors claim, without the benefit of supporting case law, that the United States should not be held to its arms' length bargain because its consent has "expired." This argument is a red herring in respect to paragraphs 13 through 16. First, the United States' position as to paragraph 13, which provided permanent employment status to the beneficiaries employed provisionally at the time the United States and Defendants entered into the Agreement, remains unchanged. (*See* Rosman Ex. 53, United States Response to Defendants' Contention Interrogatories, Response No. 1.) The United States does not argue that any award of permanent

7. On the other hand, The United States *does* extend the same concern for the Objector-Intervenors as the Objector-Intervenors extend to the United States, arguing that the Settlement Agreement's retroactive seniority awards cannot be entered as a consent judgment because the *Objector-Intervenors* do not consent to its provisions. (U.S. Mem. at 9-10.) As set out in detail below, the Objector-Intervenors' consent to the Settlement Agreement is unnecessary, as they do not possess specific, enforceable contract rights that are infringed by the Agreement. *See infra* Parts II, V.

status should be revisited or revoked and there is thus no basis for asserting that it no longer consents to paragraph 13. Any alleged "expiration" of this paragraph is thus irrelevant, and the Objector-Intervenors do not dispute this.

While the United States would today prefer to revisit some of the retroactive seniority awards made under paragraphs 14 through 16,[8] it is not empowered to do so by the "expiration" of its consent. Although paragraph 11 of the Settlement Agreement states that the Agreement shall remain in effect for four years, it is nonsensical to argue that this provision allows the United States to withdraw its consent to paragraphs 14 and 16 and amend or attack them after four years have passed. Whatever the application of paragraph 11 to those provisions of the Settlement Agreement that are by their nature temporary (*e.g.*, Rosman Ex. 39, Settlement Agreement, at ¶¶ 43-46, requiring the Defendants to provide the United States with reports on their recruiting, hiring, and testing processes during the term of the Agreement),[9] it can have no application to paragraphs 14 through 16, for paragraphs 14 through 16 make awards that are by their nature permanent. Indeed, the Objector-Intervenors acknowledge that the retroactive seniority awards were not intended to evaporate four years after the beneficiaries received them. (Brennan Intervenors' Mem. Supp. Summ. J. ("Obj. Mem.") at 35 n.13.) Thus, by entering into the Settlement Agreement and moving for its approval, the United States necessarily consented to *permanent* awards, rather than to four-years'-worth of retroactive seniority awards. Any claim

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8. As set out in the Caldero Intervenors' Memorandum in Support of Defendants' Motion to Enforce ¶ 9 and the Arroyo Intervenors' Memorandum in Support of Defendants' Motion to Enforce ¶ 9, this change of heart is not motivated by any change in law or facts over the past five years, nor is it the result of recently discovered evidence.

9. The Caldero Intervenors adopt and incorporate by reference Defendants' argument on this subject as set out in Defendants' Memorandum of Law in Opposition to the Objections of the Brennan Intervenors ("Defs. Mem."), at 7-15.

that the United States gave temporary consent to the award of a permanent benefit is incoherent, which is perhaps why the United States itself eschews this argument.[10]

Because the United States consented to the permanent awards made in paragraphs 14 through 16, this Court may approve these provisions as a consent decree. *See Janus Films v. Miller*, 801 F.2d 578, 583 (2d Cir. 1986) (a party may not preclude entry of a consent decree agreement by reneging on his agreement); *Stovall v. City of Cocoa*, 117 F.3d 1238, 1242 (11th Cir. 1997) (a court may not reject a consent decree simply because one party does not wish to honor its agreement). The ever-evolving legal theories and political preferences of the United States that have led it to fail to honor its commitments under the Settlement Agreement do not empower it or the Objector-Intervenors to withdraw the United States' consent to these permanent awards.

II. THE OBJECTOR-INTERVENORS HAVE NO RIGHT TO CHALLENGE THE BENEFICIARIES' PERMANENT APPOINTMENTS.

The Objector-Intervenors are not injured by the permanent appointments made pursuant to paragraph 13 and thus have no standing to object to this paragraph or to attempt to veto it.[11] When the Objectors appealed Judge Levy's denial of their motion to intervene, they were provisional Custodian Engineers. The Second Circuit explained that the Settlement Agreement's award of permanent status to the offerees potentially affected their interests as provisional employees, because "[a]ccording permanent status as Custodian Engineer to an Offeree may result in the Offeree's displacing a provisional Custodian Engineer." *Brennan*, 260 F.3d at 127. Unbeknownst to the Second Circuit, however, the two Objector-Intervenors who remain in the

10. In the alternative, any expiration of the Agreement should be equitably tolled, as set out in the Caldero Intervenors' Memorandum in Support of Defendants' Motion to Enforce ¶ 9, at 12-14.

11. Indeed, in a rare moment of unanimity, the United States, the Defendants, the Arroyo Intervenors, and the Caldero Intervenors all agree that the Objector-Intervenors have no standing to challenge the permanent appointment awards.

case today—John Brennan and James Ahearn—had recently become permanent Custodian Engineers, thus mooting the interest described by the court. After remand to this Court, Dennis Mortenson and Scott Spring were permitted to join as Objector-Intervenors; neither is a provisional employee and thus neither has the interest in avoiding displacement by a permanent employee that the Second Circuit hypothesized.

Moreover, Mr. Brennan and Mr. Ahearn became permanent Custodian Engineers with appointment dates of October 2000, the very month in which the Board of Education adopted a broadbanding system allowing permanent Custodians who hold the appropriate license to become Custodian Engineers without taking a civil service examination. (Reply Ex. X, Brennan Intervenors' Response to US First Set of Interrogatories, Response 13; Reply Ex. C, Decl. of Salvatore Calderone, dated January 14, 2005 ("Calderone Decl."), at ¶ 5; Reply Ex. D, Procedures for Promotion of Permanent Level One Custodian.) In other words, Mr. Brennan and Mr. Ahearn obtained permanent Custodian Engineer positions at the very first opportunity under the broadbanding system, and neither has made any showing that he would have obtained a permanent appointment more quickly were it not for the permanent appointments received by the beneficiaries. Mr. Mortenson wrote a letter seeking appointment as a permanent Custodian Engineer on December 19, 2002, nine days after he obtained his stationary engineer license. His application was approved and his appointment implemented the very next day. (Reply Ex. B, Mortensen Dep., at 88-93.) Clearly, the permanent appointments to the beneficiaries in no way delayed Mr. Mortenson's appointment as a permanent Custodian Engineer, and he has not attempted to make any showing to the contrary. Finally, Mr. Spring has been a permanent Custodian since 1997; obviously, the permanent appointments received by beneficiaries three years later did nothing to delay his own appointment. (Martin Ex. 67, Spring Dep., at

58:21-59:8.) Should he eventually obtain his stationary engineer license and seek appointment as a Custodian Engineer, it is likely he would be immediately appointed, as Defendants expect vacancies in that title to continue. (Reply Ex. C, Calderone Decl. at ¶ 4.)[12]

For these reasons the Objector-Intervenors no longer have an interest in the permanent appointments awarded under the Settlement Agreement sufficient to justify intervention. *See Brennan*, 260 F.3d at 132 (suggesting intervention inappropriate when "a concrete effect on an [intervening] employee is impossible")[13]; *Howard v. McLucas*, 871 F.2d 1000, 1005 (11th Cir. 1989) (recognizing that intervenors were required to demonstrate that settlement agreement's promotional remedy would have an adverse impact on their own promotional expectations in order to have standing to challenge the agreement); *Barhold*, 863 F.2d at 234 (finding challengers of an affirmative action reassignment plan lacked standing when they had obtained the reassignments they sought). The Objector-Intervenors attempt to avoid this result by arguing that regardless of whether their own interests are affected, the Court must nevertheless inquire into the propriety of the agreement. While in general a reviewing court must consider whether a proposed settlement agreement is lawful and reasonable, the Objector-Intervenors ignore the review that has already occurred in this case, when Judge Levy initially approved the Settlement Agreement. The Second Circuit reversed and remanded to permit a relatively narrow inquiry, granting the Objector-Intervenors "discovery and other rights with regard to their claim that any

12. Even were this court to conclude that Mr. Brennan and Mr. Ahearn might somehow have received earlier permanent appointments were various beneficiaries not appointed to the Custodian Engineer job, as the Objector-Intervenors assert but do not support, the Objector-Intervenors have made no attempt to show that any of them were in any way harmed by the permanent appointments of Custodians pursuant to the Settlement Agreement. Indeed, there is no possible way in which these appointments threaten the Objector-Intervenors' interests or caused the Objector-Intervenors any injury.

13. This case thus differs from *Kirkland*, where non-minority employees were found to have an interest sufficient to support intervention. There the change in the actual order of appointments, compared to the rank order of the eligibility list, demonstrated that some intervenors had in fact received later appointments under the settlement agreement than they otherwise would have. No such showing of actual or threatened injury has been made here.

impairment by the Agreement of *their interests in their positions as provisional Custodian Engineers* and in their seniority rights as Custodian and Custodian Engineers would constitute impermissible discrimination." 260 F.2d at 133 (emphasis added). [14] The Objector-Intervenors may not now, contrary to this mandate, open a freewheeling discussion of the hypothetical effects of the Settlement Agreement.

The Objector-Intervenors further assert that the permanent appointments might have injured members of the class they wish to represent, even if they themselves are not injured. To establish standing, however, they "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin*, 422 U.S. 490, 502 (1975). Moreover, while the Caldero Intervenors reserve their arguments in opposition to class certification for briefing on that question, for the present purposes it is sufficient to note that no class has been certified, and the Objector-Intervenors have proffered no rationale explaining why a class made up exclusively of individuals who themselves failed to seek to intervene in this action in a timely manner is proper. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 561 (1974) (Blackmun, J., concurring) ("Our decision . . . must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights."); *National Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 715-16 (5th Cir. 1994) (class cannot include individuals whose claims are time-barred); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 246 (3rd Cir. 1975) (same).

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14. For the reasons set out in the opening summary judgment memoranda of the Caldero Intervenors, the Arroyo Intervenors, and the Defendants, the reasons set forth at part IV, *infra*, the permanent status awards are fully lawful and reasonable forms of race-conscious and gender-conscious affirmative action and do not constitute impermissible discrimination under Title VII or the Equal Protection Clause.

Furthermore, even should this Court determine that the Objector-Intervenors have an interest in the permanent appointments sufficient to meet the standard for intervention under Rule 24, and thus have properly gained the right to obtain discovery and put forward their objections to paragraph 13 of the Agreement, it is indisputable that they do not have an interest sufficient to veto the Settlement Agreement's awards of permanent employment status. As the Second Circuit clearly stated in *Kirkland v. New York State Department of Corrections,* "[A]lthough non-minority third parties allowed to intervene in cases which involve consent decrees or settlement agreements implementing race-conscious hiring or promotional remedies do have a sufficient interest to argue that the decree or agreement is unreasonable or unlawful, their interest in the expectation of appointment does not require their consent as a condition to any voluntary compromise of the litigation." 711 F.2d 1117, 1126; *see also Bridgeport Firebird Soc. v. City of Bridgeport*, 686 F. Supp. 53, 58 (D. Conn. 1988). As set out in greater detail in Part V, *infra*, the Second Circuit has sharply limited intervenors' ability to block a Title VII settlement, explaining that "the sum of rights possessed by an intervenor, even if granted unconditional intervention, is not necessarily equivalent to that of a party and depends upon the nature of the intervenor's interest." 711 F.2d at 1126. While the Second Circuit did not consider whether *any* implication of a contractual interest, no matter how minor, permitted an intervenor to veto a proposed settlement agreement, it clearly held that at a minimum, to block an agreement an intervenor must demonstrate that the agreement violates his or her "specific contractual rights." *Id.* at 1127.

The only contractual provision that the Objector-Intervenors have pointed to as the source of rights in this litigation is a portion of the collective bargaining agreement between their union and Defendants, indicating that seniority in a particular position shall be determined according to

permanent appointment date for the position. (Martin Ex. 61, CBA, at 24.) Nothing in this language can be understood to limit the means or methods used by Defendants to appoint individuals to permanent positions. Nor can this provision be understood to limit any beneficiary's right to obtain seniority from the date of permanent appointment.[15] Just as in *Kirkland*, the collective bargaining agreement leaves unimpaired Defendants' discretion to choose and modify the procedures for selecting permanent employees. *Kirkland*, 711 F.2d at 128. Just as in *Kirkland*, then, the Objector-Intervenors have no power to block a Settlement Agreement that modifies defendants' procedures for permanently appointing employees. *Id.*

III. BY DEFINITION, RACE- AND GENDER-CONSCIOUS AFFIRMATIVE ACTION NEED NOT BE LIMITED TO THOSE INDIVIDUALS PROVEN TO BE VICTIMS OF DISCRIMINATION.

A. The Settlement Agreement Meets the Standard for Voluntary Race and Gender Conscious Affirmative Action.

As the Supreme Court has repeatedly affirmed, Title VII permits voluntary race- and gender-conscious affirmative action to address persistent race and gender segregation in the workforce. *Johnson*, 480 U.S. 616; *Local Number 93 v. City of Cleveland*, 478 U.S. 501 (1986); *United Steelworkers v. Weber*, 443 U.S. 193 (1979). As set out in detail previously (Caldero Mem. at 37-50), the award of retroactive seniority and permanent employment status to qualified women and minorities is just such a voluntary effort to undo the race and gender segregation in the custodian workforce. *Cf. Johnson*, 480 U.S. at 637 n.14 (explaining the impact of introducing even a single woman into a previously all-male job title, because her success encourages other women and minorities to consider the possibility of nontraditional jobs for themselves). Even when such efforts could not have been ordered by a court, and even when no proof has been put forward that the employer has violated Title VII, Title VII protects employer

15. The relevance of this provision to the beneficiaries' retroactive seniority awards is discussed at part V, *infra*.

discretion to institute such plans in furtherance of the underlying goals of the statute. *Johnson*, 480 U.S. at 630-33; *Local 93*, 478 U.S. at 520; *Weber*, 443 U.S. at 206-207. Contrary to the arguments of the United States and the Objector-Intervenors, the Supreme Court has also made clear that a party claiming that such a voluntary affirmative action plan unlawfully discriminates in violation of Title VII has the burden of establishing the plan's invalidity. *Johnson*, 480 U.S. at 626-27. The Objector-Intervenors make just such a claim regarding the awards of retroactive seniority to the beneficiaries.[16] They have failed to meet their burden.

Specifically, the Objector-Intervenors (and, apparently, the United States) argue that an employer's award of retroactive seniority pursuant to a race- or gender-conscious affirmative action plan violates Title VII unless the award is limited to individuals proven to be victims of discrimination. Yet Supreme Court precedent clearly establishes that under Title VII, "an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part." *Id.* at 630 (citing *Weber*, 443 U.S. at 212). Given that Title VII does not require an employer to put forward *any* evidence of its own past discrimination before establishing an affirmative action plan, it certainly does not require employers to limit the benefits of that plan to specific identified victims of discrimination. *See Weber*, 443 U.S. at 211 (explaining one reason an employer may wish to adopt an affirmative action plan is to "avoid identifying victims of past discrimination" and the liability that would follow such identification) (Blackmun, J., concurring). As the Supreme Court has explained, "It is . . . clear that the voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination." *Local 93*, 478 U.S. at 516.

16. Again, the Objector-Intervenors nowhere assert that the awards of permanent employment to the beneficiaries violate Title VII.

Indeed, such an effort to compensate identified victims of past discrimination is not affirmative action at all, as the Objector-Intervenors acknowledge in another context (Brennan Intervenors' Reply Mem. Supp. Summ. J. ("Obj. Reply Mem.") at 13 n. 4), given that it is based not on race or gender, but on individual injury. Furthermore, any requirement that employers limit an affirmative action plan's benefits to individual victims of discrimination would drastically undercut employers' voluntary compliance with Title VII, contrary to Congressional intent, by limiting affirmative action to those rare circumstances in which an employer is willing to risk liability by identifying and acknowledging its prior discrimination. *Johnson*, 480 U.S. at 630 n.8; *Weber*, 443 U.S. at 210 (Blackmun, J., concurring). For these reasons, the Supreme Court has repeatedly declined to adopt the rule suggested by the Objector-Intervenors.

B. Affirmative Action Plans Affecting Seniority Are Held to the Same Standard as Any Other Voluntary Plan.

The Objector-Intervenors attempt to distinguish this clear precedent by arguing that affirmative action plans that affect seniority operate under different rules from any other sort of affirmative action plan. They base this contention on *Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976), and *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), neither of which considers a voluntary affirmative action plan and neither of which controls the present case. In *Acha*, the Second Circuit held, as the Supreme Court would shortly thereafter, that retroactive seniority is a permissible form of court-ordered make-whole relief under Title VII. 531 F.2d at 656. Today, this principle is not controversial. Neither is it relevant in the present circumstances, which involve not the appropriate boundaries of court-ordered relief in a fully litigated Title VII case, but the permissibility of voluntary affirmative action efforts to break down prior patterns of employment segregation. In *Chance*, the Second Circuit considered whether awarding benefits according to a facially neutral seniority system itself constituted

discrimination against recently hired minorities and thus justified a remedial judicial order modifying the seniority system's impact. 534 F.2d at 997. The Second Circuit held that the facially-neutral seniority system could not be so challenged, relying on § 703(h) of Title VII, which limits the potential liability of employers by stating that providing terms and conditions of employment pursuant to a *bona fide* seniority system does not constitute an unlawful employment practice. *Id.* at 998. This principle, too, is irrelevant in the present case, which, again, does not test the boundaries of court-ordered relief upon a finding of discrimination, or present the question of when a seniority system itself violates Title VII. Like *Acha*, *Chance* is utterly silent on the legal standard for reviewing a voluntarily adopted affirmative action plan that affects seniority.[17]

As the Supreme Court has emphasized, the distinction is crucial. While Title VII limits the race- and gender-conscious measures that courts may impose on employers, it simultaneously protects employers' prerogative to undertake "temporary, voluntary, affirmative action measures . . . to eliminate manifest racial [and gender] imbalance[s] in traditionally segregated job categories." *Weber*, 443 U.S. at 207 n.7. "[The] suggestion that employers should be able to do no more voluntarily than courts can order as remedies . . . ignores the fundamental difference between volitional private behavior and the exercise of coercion by the State." *Johnson*, 480 U.S. at 630 n.8; *see also Weber*, 443 U.S. at 200 ("Further, since the . . . plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act."); *Ass'n Against Discrim. in Employment*, 647 F.2d at 279

17. Without elaboration, the *Chance* court also stated that the adjustments to the seniority system fashioned by the District Court in that case were "constitutionally forbidden reverse discrimination." 534 F.2d at 998. The Caldero Intervernors respectfully suggest that the intervening thirty years of extensive Supreme Court and lower court jurisprudence on affirmative action and the limits placed on it by the Constitution, considered in the Caldero Intervenors' previous memorandum (Caldero Mem. at 50-76) and at part IV, *infra*, are entitled to greater weight than this dictum.

(contrasting *Weber* standard for implementing voluntary plan with standard for imposing adjudicated remedies). Thus, "whether or not . . . [Title VII] precludes a court from imposing . . . [relief that benefits individuals who were not the actual victims of discrimination], that provision does not apply to relief ordered in a consent decree." *Local 93*, 478 U.S. at 515. Because an affirmative action plan set out in a consent decree is considered a voluntary plan, a federal court thus is not barred from entering a consent decree that provides greater relief than the parties could have obtained at trial. *Id.* at 525-26.

While the Objector-Intervenors are correct that this principle does not empower a court to approve a consent decree that violates the substantive antidiscrimination provisions of Title VII, they provide no support for their assertion that Title VII applies a more restrictive standard to affirmative action plans that affect seniority than other affirmative action plans. Section 703(h) of Title VII does not provide such a rule. It simply defines "what is and what is not an illegal discriminatory practice in instances in which the . . . operation of a seniority system is challenged as perpetuating the effects of discrimination…." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 761 (1976). The provision does not speak to the propriety of remedial actions affecting seniority. *Id.* at 762. Section 703(h) limits employers' potential liability, not their discretion.

Local 93 v. City of Cleveland also demonstrates that Title VII imposes no special restrictions on modifications of seniority pursuant to an affirmative action plan. There, the Supreme Court affirmed approval of a consent decree over intervenors' objections that the decree provided benefits to individuals who had not been shown to be victims of discrimination, and did so without assigning any particular relevance to the fact that the decree affected seniority rights, though dissenters in both the Supreme Court and the Court of Appeals argued that the effects on seniority required that the relief be limited to demonstrated individual victims. *See*

478 U.S. at 534 (White, J., dissenting); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 490 (6th Cir. 1985) (Kennedy, J., dissenting). *Local 93* makes clear that voluntary affirmative action plans, including plans that affect seniority, are reviewed under a different standard from court-ordered relief; that standard, which ensures that voluntary plans do not violate Title VII's antidiscrimination decrees, is set out in *Steelworkers v. Weber* and *Johnson v. Santa Clara Transportation Agency*.

C. The Weber and Johnson Standards Apply to All Voluntary Affirmative Action Programs.

The Objector-Intervenors do not assert that the retroactive seniority provided in the settlement agreement does not meet the *Weber* and *Johnson* standards. Rather, they argue that *Weber* and *Johnson* only apply to "future-hiring affirmative action programs." (Obj. Reply Mem. at 24.) In neither *Weber* nor *Johnson*, however, did the Court so limit its holding. Indeed, *Weber* did not even consider affirmative action hiring. The plan at issue there instead focused on a training program, admission to which was based on seniority except for certain slots set aside for black trainees. 443 U.S. at 198-99. Thus, the very plan approved in *Weber* permitted the modification of seniority interests in order to break down occupational segregation.[18] As *Weber* and *Johnson* make clear, the standards announced in those cases apply to all affirmative action plans voluntarily adopted to eliminate traditional patterns of racial and gender segregation. *See, e.g.*, *Johnson*, 480 U.S. at 627-28 (explaining that *Weber* is the relevant authority for determining whether an employer violated Title VII by adopting a voluntary affirmative action plan for traditionally segregated jobs); *Weber*, 443 U.S. at 197 (framing question presented as whether

18. It strains credulity to argue that while the plan approved in *Weber* was lawful, a plan with exactly the same practical effect would have been unlawful if instead of setting slots aside for black employees, the employer had awarded black employees retroactive seniority for purposes of admission to the training program. The empty formalism distinguishing one plan from the other cannot make the legal difference for purposes of Title VII.

Congress prohibited "race-conscious affirmative action plans"). As the Objector-Intervenors tacitly acknowledge, the awards in paragraphs 14 through 16 meet this standard. They have thus failed to meet their burden of demonstrating the invalidity of paragraphs 14 through 16 under Title VII.

IV. THE CHALLENGED PROVISIONS OF THE SETTLEMENT AGREEMENT COMPORT WITH THE EQUAL PROTECTION CLAUSE.

A. The Objector-Intervenors Have the Burden of Proving a Constitutional Violation.

The Objector-Intervenors assert that they do not bear the burden of proving their claims that the Settlement violates their rights under the Equal Protection Clause, a rather startling contention. This argument flies in the face of overwhelming Supreme Court and Court of Appeals precedent that individuals challenging the constitutionality of an affirmative action plan must prove their case. *Wygant*, 476 U.S. at 277-78 (plurality) ("The ultimate burden remains with the [nonminority] employees to demonstrate the unconstitutionality of an affirmative action program."); *id.* at 293 (O'Connor, J. concurring) ("[I]t is incumbent upon the nonminority teachers to prove their case; they continue to bear the ultimate burden of persuading the court that the . . . evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored.'"); *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950, 959 (10th Cir. 2003) ("This court has repeatedly emphasized that the burden of proof remains at all times with [the challenger of an affirmative action plan] to demonstrate the unconstitutionality of the ordinances."); *Rothe Development Corp. v. U.S. Dep't of Defense*, 262 F.3d 1306, 1317 (Fed. Cir. 2001) (challenger of an affirmative action plan bears the burden of proving unconstitutionality); *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000) (same); *Walker v. City of Mesquite*, 169 F.3d 973, 982 (5th Cir. 1999) (same); *Engineering Contractors*

Ass'n of S. Fla v. Metro. Dade County, 122 F.3d 895, 917 (11th Cir. 1997) (same); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 597 (3d Cir. 1996) (same); *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994) (same); *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 724 (9th Cir. 1992) (same); *Davis v. Halpern*, 768 F. Supp. 968, 974 (E.D.N.Y. 1991) (same).

The Objector-Intervenors attempt to avoid this precedent by arguing that only four justices in *Wygant* concluded that the party challenging the affirmative action measure bears the ultimate burden of persuasion and that in any case intervening Supreme Court precedent has reversed this burden.[19] The Objector-Intervenors' assertions are simply incorrect. In *Wygant*, Justices Powell, Burger, Rehnquist, and O'Connor all explicitly affirmed that those challenging an affirmative action plan bear the burden of proof, 476 U.S. at 277-78, 293, as did Justices Marshall, Brennan, and Blackmun in dissent, *id.* at 300 n.3 ("[I]t is incumbent on petitioners—plaintiffs below—to demonstrate that, at the time they were laid off, . . . continued adherence to affirmative-action goals . . . unjustifiably caused their injuries."); *see also id.* at 310 (concluding that challenged provision was narrowly tailored in part as a result of petitioners' failure to suggest an alternative method that would have achieved the goal in a narrower or more equitable fashion). A majority of the Supreme Court recognized this holding a year later in *Johnson v. Santa Clara*, 480 U.S. 616, 626 (1987) ("Only last Term, in *Wygant* . . . , we held that '[t]he

19. The Objector-Intervenors rely on *United States v. Virginia*, 518 U.S. 515 (1996) and *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), for this argument. *United States v. Virginia* did not consider the constitutionality of an affirmative action plan, but rather addressed the blanket exclusion of women from a public institution. It is of no relevance to the present question. The language in *Adarand* that the Objector-Intervenors rely on is also of no help to them, as it refers only to the initial burden of production borne by an affirmative action plan's defenders to show a strong basis in evidence for adoption of the plan. The fragmentary dictum in *Brewer v. West Irondequoit Central School District*, 212 F.3d 738 (2d Cir. 2000), relied on by the Objector-Intervenors in their opening brief, also appears to reference this burden of production. *Id.* at 744 (referring to defendant's showing of a compelling state interest). The Caldero Intervenors have both acknowledged and met this burden, as set out in their opening brief.

ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program' . . ."). Indeed, less than two years ago the Court again implicitly recognized the burden shouldered by those challenging an affirmative action plan. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (describing deference shown to state actor arguing that affirmative action plan furthered a compelling state interest); *see Johnson v. California*, 125 S.Ct. 1141, 1168 (2005) (Thomas, Scalia, JJ., dissenting) (contrasting that non-affirmative action case where majority placed the burden of justification of race-based policy on the state actor, with the deference shown to the state actor in examining affirmative action program in *Grutter*).

B. The Settlement Agreement's Gender-Conscious Remedies Are At Least Substantially Related to an Important State Interest.

In arguing that strict scrutiny applies to the race-conscious awards made pursuant to the challenged provisions, the Objector-Intervenors ignore the gender-conscious awards made by these paragraphs, which are subject to a less strict constitutional test. Indeed, they appear to have abandoned any claim that the gender-conscious awards violate the Equal Protection Clause, as their reply brief refers solely to the standard of review applicable to racial classifications. (Obj. Reply Mem. at 27-33; *see also* Obj. Mem. at 47-48 (acknowledging that gender-conscious relief is subject to a more lenient standard under the Constitution, and encouraging the Court to focus on Title VII in reviewing the gender-conscious relief).)[20] In any case, the Agreement's gender-conscious awards easily comport with the requirements of the Equal Protection Clause.

Under Supreme Court precedent, while racial classifications must be narrowly tailored to further a compelling state interest, gender classifications must be at least substantially related to an important state interest. *E.g.*, *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728-

20. Thus, the Objector-Intervenors appear to have abandoned *any* claim that the awards of permanent employment to female Custodians and Custodian Engineers discriminated against them, as their Title VII arguments are directed only at the retroactive seniority awards to the beneficiaries.

29 (2003); *Virginia*, 518 U.S. at 534. "In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982). More specifically, gender classifications may be appropriate to compensate women for "particular economic disabilities," to "promote equal employment opportunity," and "to advance full development of the talent and capacities of our Nation's people." *Virginia*, 518 U.S. at 533 (internal citations and quotation marks omitted). Twenty-three of the beneficiaries under the Settlement Agreement were women and received gender-conscious remedies.[21]

Courts have made clear that "a gender-conscious affirmative action program can rest safely on something less than the 'strong basis in evidence' required to bear the weight of a race- or ethnicity-conscious program." *Engineering Contractors Ass'n v. Metro. Dade County*, 122 F.3d 895, 909 (11th Cir. 1997); *see also Contractors Ass'n of Eastern Philadelphia, Inc. v. City of Philadelphia*, 6 F.3d 990, 1010 (3d Cir. 1993). The relevant question is whether "members of the gender benefited by the classification actually suffer a disadvantage related to the classification." *Hogan*, 458 U.S. at 718. Probative evidence of some past discrimination against women must support a gender-conscious affirmative action program, but this evidence need not suggest *any* discrimination, whether active or passive, by the government actor itself.[22] *Engineering Contractors Ass'n.*, 122 F.3d at 910; *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1580 (11th Cir. 1994); *Coral Constr. Co. v. Kings County*, 941 F.2d 910, 932 (9th Cir. 1991); *cf. Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 362 (1978) (Brennan,

21. Six of these beneficiaries were women of color, and thus presumably benefited from both race- and gender-conscious remedies, while 17 were white women and thus benefited exclusively from gender-conscious remedies.

22. As a result, arguments such as the Objector-Intervenors' claims that discriminatory word-of-mouth recruiting cannot be considered *Defendants'* discriminatory practice have no relevance in determining the propriety of the gender-conscious relief.

White, Marshall, Blackmun, JJ., concurring in part and dissenting in part) (finding that remedying the effects of past societal discrimination an important state interest under intermediate scrutiny); *Califano v. Webster*, 430 U.S. 313, 318 (1977) (finding gender classification that compensated women for past economic disadvantage served an important governmental objective, whether disadvantage was caused by "overt discrimination or from the socialization process of a male-dominated culture"). In addition, the scrutiny of the evidence "is not to be directed toward mandating that gender-conscious affirmative action is used only as a last resort, but instead to ensuring that the affirmative action program is a product of analysis rather than a stereotyped reaction based on habit." *Engineering Contractors Ass'n.*, 122 F.3d at 910 (internal citations and quotation marks omitted). The question a court must ask is whether the preference rests "on evidence-informed analysis rather than on stereotypical generalizations." *Id.*; *see also Hogan*, 458 U.S. at 725.

The Settlement Agreement's gender-conscious awards rest on constitutionally ample evidence of discrimination against women in the relevant economic sector. This evidence includes both the statistical evidence of women's severe underrepresentation in the Custodian and Custodian Engineer positions (*See generally* Rosman Ex. 49, Ashenfelter Decl.; Jacobsen Decl., Ex. 1) and extensive anecdotal evidence of sex discrimination in the field. Examples of such anecdotal evidence in this case include women being told directly and indirectly by men working in the field that women don't get jobs as Custodians (Reply Ex. F, D'Alessio Dep. at 26:8-17, 96:17-18; Reply Ex. G, Daniele Dep. at 76:17-18; Ex. 24, McMahon Dep. at 13:20 - 24); a female custodial employee being groped and sexually harassed by her Custodian supervisor (Reply Ex. G, Daniele Dep. at 69:11-21); a female custodial employee being denied overtime, when all the men on the staff got overtime (Reply Ex. H, Ortega DeGreen Dep. at

54:13-55:18); male custodial employees refusing to take direction from female Custodians (Reply Ex. I, DiDonato Dep. at 37:17-19; Reply Ex. J, Caldero Dep. at 71:20-72:2; Reply Ex. K, Jarrett Dep at 55:10-23); School Construction Authority contractors refusing to deal with female Custodians (Reply Ex. M, Luebkert Dep. at 80:10 – 81:8; Reply Ex. L, Morton Dep. at 96:3 - 20); female applicants for the Custodian job being harassed by male applicants at a Custodian test preparation class (Reply Ex. I, DiDonato Dep. at 41:24 – 42:3); a potential female applicant being given incorrect information by a male Custodian about the requirements for the job in an effort to talk her out of applying (Reply Ex. G, Daniele Dep. 72:19 – 73:7); a female custodial employee being told by co-workers that the Custodian didn't want her around (Reply Ex. J, Caldero Dep. 45:9 – 14); a school principal telling a female Custodian she should be a cleaner instead of a supervisor (Reply Ex. N, Tatum Dep. at 71:19 – 72:6); a school principal asking if it was a joke that a woman was the new Custodian (Reply Ex. O, Wolkiewicz Dep. at 81:6 – 11); a school principal telling a female Custodian to dress in jeans instead of the business attire other Custodians wore (Reply Ex. K, Jarrett Dep. at 53:14 – 20); female custodial employees being denied the fireman position or the opportunity to learn the skills necessary for the fireman position because it was a man's job[23] (Reply Ex. N, Tatum Dep. at 40:21 – 41:17, 43:5 – 14, 53:2 - 18; Reply Ex. H, Ortega DeGreen Dep. at 85:17-22); a plant manager refusing to call in an emergency in a female Custodian's building unless it was verified by a male Custodian (Reply Ex. L, Morton Dep. at 88:18 – 89:10); a female custodial employee being told that she should not object to being assigned to work for an alcoholic Custodian because he was "a good old boy" (Reply Ex. P, Quinn Dep. at 62:3 – 23); male Custodians refusing to assist a female Custodian when equipment malfunctioned (*id.* at 82:3 – 16); and a female Custodian being told by a male

23. In New York City schools, a "fireman" is a custodial employee who operates the school's boilers. Custodians and Custodian Engineers often rise from the firemen ranks.

Custodian she should be home "barefoot, pregnant and taking care of her two kids" (Reply Ex. L, Morton Dep. at 96:23 – 97:4).

Further, the Objector-Intervenors do not allege, much less try to prove, that the relief in the challenged paragraphs rests on traditional, stereotypical generalizations about the capacities and abilities of women. The Settlement Agreement's gender-conscious awards thus address an important state interest, as demonstrated by sufficient probative evidence of discrimination against women in the relevant economic sector. *Cf. Ensley Branch, NAACP*, 31 F.3d at 1580-81 (finding evidence of women's gross under-representation in a number of city positions, in combination with anecdotal evidence of discrimination, a sufficient evidentiary basis for gender-conscious remedy in city hiring); *Coral Constr. Co.*, 941 F.2d at 932.

In addition, the awards made under the Settlement Agreement are substantially related to advancing this interest in remedying gender discrimination. (*See* Caldero Mem. at 44-50; 67-76.) "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Hogan*, 458 U.S. at 725-26. Justice Brennan's concurring and dissenting opinion in *Bakke*, joined by three other Justices, represents the road not taken in reviewing race-conscious affirmative action, in that it argues intermediate scrutiny should apply to such efforts. However, the analysis there provides helpful guidance in applying the intermediate scrutiny standard to gender-conscious affirmative action programs today. *See* 438 U.S. at 358-62 (arguing that appropriate standard of review is level of scrutiny used to address gender classifications). As Justice Brennan's opinion explains, "Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough

that each recipient is within a general class of persons likely to have been the victims of discrimination." *Id.* at 363; *see also id.* at 366. A court instead determines whether a gender classification is substantially related to remedying discrimination by considering factors such as whether the program stigmatizes any group and whether the individuals benefiting from the program are qualified for the positions they attain. *Id.* at 373-74; *see also Fullilove v. Klutznick*, 448 U.S. 448, 520-21 (1980) (Marshall, Brennan, Blackmun, JJ., concurring). The Objector-Intervenors have not attempted to show that the awards stigmatize either men in the workplace or the female recipients of relief. Further, it is undisputed that the beneficiaries were qualified for the Custodian and Custodian Engineer positions at the time they received the Settlement Agreement's awards, and indeed had been performing the relevant jobs for years. As a result, the gender-conscious awards fully comport with the Constitution.

C. The Race-Conscious Remedies Meet the Strict Scrutiny Standard.

1. A Strong Basis in Evidence Supports the Existence of a Compelling State Interest in Remedying Past Discrimination.

Not only do the gender-conscious awards rest on sufficient probative evidence of past discrimination against women, a strong basis in evidence supports the Settlement Agreement's race-conscious awards. The Objector-Intervenors' attempts to avoid this evidence must fail.

a. The relevance of a *prima facie* case

The Objector-Intervenors first suggest that evidence sufficient to support a *prima facie* case of race discrimination is an insufficient basis for race-conscious remedies, because *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) only strongly *implies* that evidence approaching a *prima facie* case provides the necessary basis. (Obj. Reply Mem. at 28.) Their argument flies in the face of consistent pre-*Croson* and post-*Croson* precedent affirming that a *prima facie* case of discrimination provides a compelling basis for race-conscious remedial

measures; this consistent precedent supplies the context for *Croson*'s reference to evidence approaching a *prima facie* case. *See, e.g., Wygant*, 476 U.S. at 292 ("[D]emonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority . . . to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination.") (O'Connor, J., concurring)[24]; *Peightal v. Metro. Dade County*, 26 F.3d 1545, 1555-56 (11th Cir. 1994); *Boston Police Superior Officers Federation v. City of Boston*, 147 F.3d 13, 20 (1st Cir. 1998); *Brunet v. City of Columbus*, 1 F.3d 390, 406 (6th Cir. 1993); *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999, 1011 (6th Cir. 1992); *Stuart v. Roache*, 951 F.2d 446, 450 (1st Cir. 1991); *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1442-44, 1446-47 (9th Cir. 1989); *Kirkland*, 711 F.2d at 1130-31; *Paganucci v. City of New York*, 785 F. Supp. 467, 477 (S.D.N.Y. 1992), *aff'd* 993 F.2d 310 (2d Cir. 1993).

b. The *prima facie* intentional pattern or practice recruitment discrimination case

The Objector-Intervenors next argue that, regardless of whether evidence of a *prima facie* case of intentional discrimination provides the requisite strong basis in evidence for race-conscious measures, a *prima facie* case of disparate impact discrimination does not. Again, as set forth at length in the Caldero Intervenors' previous memorandum, even were this the case (it is not[25]), the argument is largely academic, given that the statistical disparities between expected

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24. The four dissenting judges in *Wygant* believed that a *lesser* evidentiary basis was necessary. *See* 476 U.S. at 305-06 (Marshall, Brennan, Blackmun, JJ., dissenting); *id.* at 313 (Stevens, J., dissenting).

25. *See* Arroyo Intervenors' Mem. Supp. Entry of the Challenged Provisions ("Arroyo Mem.") at 54-58; Defs. Mem. at 29-37; Caldero Mem. at 54. The Objector-Intervenors attempt to muster a parade of horribles to march

and actual female and minority applicants here present a *prima facie* case of intentional pattern or practice recruitment discrimination—not coincidentally, one of the very types of discrimination pleaded in the United States' complaint against Defendants. (*See* Caldero Mem. at 52-67.) "There is no doubt that where gross statistical disparities can be shown, they alone in a proper case may constitute *prima facie* proof of a pattern or practice of discrimination under Title VII." *Croson*, 488 U.S. at 725-26 (internal quotation marks and citation omitted); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 158 (2d Cir. 2001) ("Statistics alone can make out a *prima facie* case of discrimination if the statistics reveal a gross disparity in the treatment of workers based on race.") (internal quotation marks and citation omitted); *see also Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977).[26] This *prima facie* case is further strengthened by anecdotal evidence of discrimination, as set out in the Caldero Intervenors' previous brief. (Caldero Mem. at 57-59.) *See, e.g.*, *Catlett v. Missouri Highway & Transp. Comm'n*, 828 F.2d 1260, 1265 (8th Cir. 1987) (either anecdotal or statistical evidence alone may establish a pattern or practice of intentional discrimination).

The Objector-Intervenors protest that consideration of anecdotal evidence demonstrating intentional discrimination is "unfair." (Obj. Reply Mem. at 61.) This alleged "unfairness" stems

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against the conclusion that a *prima facie* case of disparate impact discrimination constitutes a strong basis in evidence, arguing that if this were the case, racial quotas would be the norm. For instance, they argue, if a job required Spanish language skills, and this requirement disproportionately excluded non-Hispanics, a quota for non-Hispanics could be implemented. (Obj. Reply Mem. at 29.) The Objector-Intervenors seem to have forgotten their strenuous insistence elsewhere that a *prima facie* disparate impact case can only be made by reference to the pool of *qualified* potential employees. In their hypothetical, the inquiry would not be the impact of the Spanish language requirement on non-Hispanics, but rather, the impact of the Spanish language requirement on that subset of the non-Hispanic population with the necessary Spanish language skills. Presumably, this impact would be minimal. The failure of their example demonstrates the failure of their argument.

26. This is because, even absent anecdotal evidence of discrimination, gross statistical disparities support an inference of intentional discrimination. *Hazelwood*, 433 U.S. at 307-08. The Objector-Intervenors' argument that statistical disparities are generally insufficient for a *prima facie* case of intentional pattern or practice discrimination is thus manifestly incorrect.

from their passionate belief that this case is inherently, exclusively, and irrevocably a disparate impact case.[27] The Objector-Intervenors believe this to be inherently, exclusively, and irrevocably a disparate impact case despite the claim of intentional pattern and practice recruitment discrimination clearly set out in the United States' complaint—namely, its allegation that the Defendants had a policy and practice of "failing and/or *refusing*" to recruit women and people of color on the same basis as white men. (Ex. 1, Complaint, at 5 (emphasis added); *see also* Ex. 50, U.S. Mem. in Support of Entry, at 2.)[28] They believe this despite the fact that the case settled prior to trial or any other affirmative presentation of the United States' case. They believe this although the case settled even before discovery was completed on the United States' recruitment discrimination claims. They believe this although the United States relied not only on disparate impact arguments, but also on disparate treatment cases and the inference of intentional discrimination arising from gross statistical disparities when it moved for court approval of the Settlement Agreement. (Ex. 50, U.S. Mem. in Support of Entry, at 16-18 ("Statistical analyses of adverse impact may alone suffice to establish a *prima facie* showing because racial or gender imbalance in a work force is often a telltale sign of purposeful

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27. The Objector-Intervenors argue that it was incumbent on the Caldero Intervenors to give notice of any "claims" of intentional discrimination to the other parties as a condition of their intervention and base this assertion primarily on the self-serving attempts of the Defendants' attorney to limit her own discovery obligations. (Obj. Reply Mem. at 61-62.) First, the Caldero Intervenors do not raise "claims" in the instant proceeding, other than a claim for declaratory relief that the Settlement Agreement is lawful and appropriate; no one is threatened with unanticipated liability as a result of the evidence put forward here. Second, the parties stipulated that the scope of the Caldero Intervenors' intervention would be limited to the "recruitment and testing claims pled by the United States in *United States v. New York City Board of Education*, Civ. No. 96-0374," which, of course, include the exact pattern and practice recruitment discrimination claim argued here. (Reply Ex. Q, Stipulation and Order.) Third, the Caldero Intervenors explicitly did not limit the scope of their intervention to any particular theory of the case beyond the above stipulation. (Reply Ex. A, Transcript of Feb 2, 2003 Hearing before Magistrate Judge Levy at 10-11, ("Mr. Rosman: Your Honor, I felt we were limited to the theories that the United States had previously identified in this case. . . . The Court: I think what makes more sense is to limit the intervention to the claims, because I think the parties may change their theories . . . .").) In no way do the current allegations constitute "unfair" surprise.

28. As this allegation makes clear, the United States is not being truthful when today it states that it has not alleged intentional discrimination in this case. (*See* U.S. Mem. at 25.)

discrimination.").) In short, the Objector-Intervenors ask this Court to ignore competent and relevant anecdotal evidence of discrimination that indisputably goes to the lawfulness of the Settlement Agreement's remedies because they believe that they have deduced through their scrutiny of the discovery requests made by the United States between 1996 and 1999 that the United States was likely not thinking much about intentional discrimination during that period. Obviously, this Court is not so barred.

c. The *prima facie* disparate impact recruitment discrimination case

Again, the evidence of Defendants' recruitment discrimination supports not only a *prima facie* disparate impact claim, but also a *prima facie* disparate treatment claim. Thus, the Objector-Intervenors' attempts to impose the standard for a disparate impact discrimination claim on the evidence, and their arguments that the evidence does not meet the particular requirements of a disparate impact case, are largely beside the point. Regardless, their arguments are unpersuasive.

Specifically, they assert that the statistical evidence does not show that Defendants' recruiting practices *caused* the shortfall in female and minority applicants and that such a showing is necessary for a *prima facie* disparate impact case. In arguing that causation has not been established by the statistical evidence provided, the Objector-Intervenors repeatedly invoke the mantra that the "statistical showing must meet *certain* standards" to state a *prima facie* case. (Obj. Reply Mem. at 57, 59.) Yet they never identify exactly what that certain standard might be, apart from their belief that it hasn't been met. It is hornbook Title VII law that a statistical analysis must meet a *certain* standard of relevance and completeness in order to be evidence on which a court could base a finding of a *prima facie* case of disparate impact. However, courts have shown a great deal of flexibility and practicality in evaluating statistical evidence based on the facts before them. The case law is clear that perfection is not the standard, as perfect data

almost never exist. *E.g.*, *Vulcan Soc. v. Civil Serv. Comm'n*, 490 F.2d 387, 393 (2d Cir. 1973) ("It may well be that the [evidence] did not prove a racially disproportionate impact with complete mathematical certainty. But there is no requirement that [it] should."). As discussed in the Caldero Intervenors' opening brief, the party challenging a statistical analysis as insufficient must present evidence that the claimed imprecision would affect the result. (*See* Caldero Mem. at 62-63.)

Despite the Objector-Intervenors' misplaced glee that neither the Caldero Intervenors nor Defendants addressed *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) that case sheds no light here. In *Wards Cove*, the question before the Court was not whether particular factors should have been taken into account in the statistical analysis, but rather what was the correct labor pool for comparison in the first place. The lower courts in *Wards Cove* had found a disparate impact based on the racial make-up of an employer's unskilled cannery workforce compared to the racial make-up of the same employer's skilled non-cannery workforce. The Court held that "'the proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified population in the relevant labor market.'" 490 U.S. at 650 (internal quotation omitted). The unskilled cannery workers were not the relevant labor market for the skilled noncannery positions, both because they would be unqualified (i.e., factory workers applying for jobs as accountants), and because the cannery workers were too narrow of a pool – there were "obviously many qualified persons in the labor market for noncannery jobs who are not cannery workers." *Id.* at 654.

Contrary to the Objector-Intervenors' assertions, it is obvious on its face that the statistics in *Wards Cove* bear no resemblance to the statistical analysis performed by Dr. Ashenfelter, and certainly could not be described as "at least as good." (Obj. Reply Mem. at 57.) As discussed in

depth in the Caldero Intervenors' opening brief, Dr. Ashenfelter used a sophisticated set of occupational proxies to control for qualifications in the labor pool, as well as a model to determine the depth of the potential applicant pool in each of those occupational proxies. (Caldero Mem. at 60-62.) Dr. Ashenfelter's analysis does exactly what *Wards Cove* requires – it compares the racial and gender composition of the at-issue jobs with the racial and gender composition of the qualified population in the relevant labor pool.

Defendants relied on word of mouth advertising in a disproportionately white, male workforce, and did not advertise the exams for these positions beyond including them in the general information about civil service exams distributed to those organizations that had affirmatively sought to receive such general information.[29] (Caldero 56.1 Stat. ¶¶ 9-15.) Given these recruiting methods, which could be expected to duplicate the demographics of the existing workforce, Dr. Ashenfelter's analysis of the disparity between the demographics of the actual applicant pool and the qualified population establishes an inference that Defendants' recruiting practices caused this disparity. *See E.E.O.C. v. Steamship Clerks Union*, 48 F.3d 594, 605 (1st Cir. 1995) (finding causation could be inferred when a recruitment practice that could obviously be expected to lead to the perpetuation of demographics of the union coincided with an absence of new minority members). The conclusion is further strengthened by the testimony of various beneficiaries that they did not seek out Custodian or Custodian Engineer jobs because they did not know about the exams (Caldero 56.1 Statement ¶¶ 26, 27), *cf. E.E.O.C. v. Joe's Stone Crab*, 220 F.3d 1263 (11th Cir. 2000) (finding no causation between recruiting practice and disparate impact because of the absence of such testimony), and by evidence tending to show that when

29. The exams were also automatically included in the listings of upcoming civil service exams in the local civil service newspaper. This listing included only the relevant job title, salary range, and exam date, and provided no description of the position or the job requirements.

Defendants broadened their recruitment methods, the pool of actual applicants for Custodian and Custodian Engineer positions became more diverse. (Caldero Mem. at 56 fn. 35, 66-67.)[30] Moreover, the Second Circuit has found that once a plaintiff identifies the challenged employment practice, statistical evidence can in itself raise an inference of causation. *Waisome v. Port Authority of New York and New Jersey*, 948 F.2d 1370, 1375 (1991). This is particularly true in a case such as this one, where the statistical evidence shows that there is close to zero likelihood that the disparity between the race and gender make-up of the actual workforce and the race and gender makeup of the qualified labor pool could be caused by chance. (*See* Caldero Mem. at 56-57.)

The Objector-Intervenors' second attack on the sufficiency of the *prima facie* disparate impact recruitment case—their claim that no specific recruiting practice has been identified as the cause of the disparate impact—also fails. In this case, Defendants' recruiting as a whole—their reliance on word-of-mouth advertising in combination with their failure to broadly publicize the Custodian and Custodian Engineer job opportunities—caused the disparate impact identified by Dr. Ashenfelter.[31] The Caldero Intevenors' recruitment expert, Dr. Phillips, is informative on this point. Dr. Phillips describes methods that may be used to track the impact of certain recruiting practices on the applicant pool, such as applicant flow and selection ratio

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30. Reply Ex. R, Cappoli Dep. at 47:16 – 48:7 (surprised at number of women who applied after broader advertising).

31. The Objector-Intervenors argue that it is somehow illogical or inappropriate for this Court to consider what the Defendants failed to do as well as what they did in recruiting for candidates. But what the Defendants failed to do provides the crucial context for understanding the effects of what they actually did. Word-of-mouth advertising, for instance, is of little concern if undertaken as part of a larger effort that effectively publicizes information about job opportunities to a wide and diverse applicant pool. When undertaken by a mostly white, almost all male workforce in the absence of other efforts to broadly publicize job opportunities, its impact is far more significant. *See, e.g.*, *United States v. City of Warren*, 138 F.3d 1083,1092 (finding disparate impact caused by advertising exclusively in white suburban county while failing to advertise in nearby Detroit); *United States v. Georgia Power Co.*, 474 F.2d 906, 925-26 (5th Cir. 1973) (finding that word-of-mouth advertising and internal posting in predominately white workforce had disparate impact in absence of supplemental efforts, such as newspaper advertising).

analyses. (*See* Phillips Ex. 1 at 12.) But the Defendants never collected the data necessary to perform these analyses, so it is impossible to untangle the effects of various recruiting practices from each other. (*See* Phillips Ex. 1 at 14; Ex. 8, Excerpts from Boswell Dep., at 51-52.) When multiple, concurrent recruitment practices converge to discourage potential female and minority applicants, this convergence does not insulate a defendant from a disparate impact claim. *United States v. City of Warren*, 138 F.3d 1083, 1094 (6th Cir. 1998) ("*Wards Cove* does not preclude the United States' claim for failing to isolate and quantify the effects of Warren's discriminatory employment practices simply because two practices . . . converged to discourage black applicants."); *Thomas v. Washington County Sch. Bd.*, 915 F.2d 922, 924-25 (4th Cir. 1990) (finding that an employer's failure to advertise, limited posting, and word-of-mouth recruitment constituted policy with unlawful disparate impact). Defendants may not escape liability by simultaneously maintaining multiple discriminatory practices, in order to prevent precise measurement of the separate effect of each. *Warren*, 138 F.3d at 1094.

The Objector-Intervenors also attempt to import Seventh Circuit law on this point, arguing that passive reliance on word-of-mouth recruiting is not an employment practice subject to disparate impact analysis.[32] *See E.E.O.C. v. Chicago Miniature Lamp Works*, 947 F.2d 292 (7th Cir. 1991). Neither the Second Circuit, nor any other Circuit, has adopted this holding.[33]

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32. The case the Objector-Intervenors rely on, however, does make clear that the inference of intentional discrimination arising from the statistical impact of word of mouth recruiting *can* form the basis of a disparate treatment claim. 947 F.2d at 298-299, 305 ("[T]he reliance [on] word-of-mouth to obtain applicants for jobs does not insulate an employer from a finding of disparate treatment of minorities"). Once again, given the *prima facie* case of intentional recruitment discrimination made here, the Objector-Intervenors' focus on disparate impact standards and requirements is largely beside the point.

33. *But see Thomas v. Washington County Sch. Bd.*, 915 F.2d 922 (4th Cir. 1990) (word-of-mouth recruiting had unlawful disparate impact); *E.E.O.C. v. Metal Serv. Co.*, 892 F.2d 341, 350 (3d Cir. 1990) (word-of-mouth recruiting evidence of employment discrimination); *Lams v. Gen. Waterworks Corp.*, 766 F.2d 386, 392 (8th Cir. 1985) (same); *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975) (same); *Catlett v. Missouri Highway & Transp. Comm'n*, 589 F. Supp. 929, 946-47 (W.D. Mo. 1983) (word of mouth recruiting had unlawful disparate impact), *aff'd* 828 F.2d 1260 (8th Cir. 1987).

Even were the holding of *Chicago Miniature* the rule, however, it is not applicable in the present case. The Seventh Circuit explicitly distinguished Chicago Miniature's practice of "passively wait[ing] for applicants who typically learned of opportunities from current Miniature employees" from an active reliance on word-of-mouth advertising in which an employer "encouraged its employees to refer applicants for . . . jobs." 947 F.2d at 305. Here, the evidence shows that the Board of Education did so encourage its employees (*see* Caldero 56.1 Stat. ¶ 11), and thus engaged in the sort of word-of-mouth recruiting that even under Seventh Circuit precedent is subject to disparate impact analysis under Title VII.

Finally, the Objector-Intervenors suggest that the evidence does not support a *prima facie* case of recruitment discrimination because the Defendants' recruitment methods were motivated by the business necessity of keeping costs law. (Obj. Reply Mem. at 60.) Once again, the Objectors (and the United States) thereby try to convert this review of the propriety of a settlement into a litigated determination of liability. The Second Circuit has explicitly rejected the notion that an employer must demonstrate an inability to rebut a *prima facie* case of discrimination before it may undertake voluntary affirmative action. *Bushey v. New York State Civil Serv. Comm'n*, 733 F.2d 220, 226 (2d Cir. 1984); *Kirkland*, 711 F.2d at 1129-30. The presence or absence of business necessity motivating the challenged practice is thus irrelevant. Moreover, at no point have the Defendants *ever* suggested that their recruitment methods were motivated by the business necessity that the Objectors now invent for them. Indeed, given that the Defendants voluntarily agreed to broaden their recruitment for Custodian and Custodian Engineers significantly in those portions of the Settlement Agreement that the Objector-Intervenors do not challenge, any assertion that business necessity motivated their former stunted efforts must fail.

2. The Race-Conscious Awards Are Narrowly Tailored.

In their reply memorandum, the Objector-Intervenors first acknowledge that if the relief provided under the Settlement Agreement were limited to restorative remedies for identified victims of proven discrimination, the Equal Protection Clause and the scrutiny it requires of race- and gender-conscious state action would not be implicated. (Obj. Reply Mem. at 13 n.4.) Yet eighteen pages later, they suggest that race-conscious relief is only narrowly tailored and thus permissible under the Equal Protection Clause when it makes whole individuals who were themselves the victims of discrimination. (*Id*. at 31.) Were their theory correct, the Equal Protection Clause would ban race-conscious relief in all circumstances, for the only form of relief that the Objector-Intervenors are willing to acknowledge as constitutionally permissible is not race-conscious. A remedy that benefits only demonstrated individual victims does not consider race; it considers victimhood. *See Croson*, 488 U.S. at 526 (Scalia, J., concurring); *Acha*, 531 F.2d at 654-56; *Davis v. N.Y. City Housing Auth.*, 60 F. Supp. 2d 200, 236 (S.D.N.Y. 1999). Thus, the Objector-Intervenors argue for scrutiny of race-conscious relief that is "strict in theory, fatal in fact," in contravention of Supreme Court precedent. *See Grutter*, 539 U.S. at 327; *Adarand*, 515 U.S. at 237. As Justice O'Connor noted in *Wygant*, the otherwise fractured Court in that case unanimously agreed that "a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored' . . . to the correction of prior discrimination by the state actor." 476 U.S. at 287.[34]

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34. The Objector-Intervenors complain that no attempt has been made to distinguish the cases cited in their opening brief that allegedly require race-conscious relief be limited to individual victims of discrimination. The cases are distinguishable as follows. The *Croson* plurality identified relief to individual victims as only *one* of multiple forms of relief, including race-conscious relief, that can be constitutionally undertaken given sufficient evidence of past discrimination. 488 U.S. at 509-10. *Missouri v. Jenkins* addressed judicially-ordered school desegregation remedies, a far different question, and nowhere suggested that such remedies must be limited to those students who themselves had experienced *de jure* segregation, nor has any desegregation case so held. 515 U.S. 70 (1995). *Coral Construction Co. v. King County* found that a county's minority enterprise set-aside

Moreover, when an affirmative action plan seeks to remedy prior recruitment discrimination, the conclusion that its benefits need not be limited to individual victims is especially compelling. Many, if not most, "victims" of recruitment discrimination will be unaware of the injury they have suffered, for in many instances the nature of their injury will be that discriminatory recruitment left them unaware of relevant employment opportunities. If an affirmative action plan to remedy the effects of this sort of discrimination were required to limit its beneficiaries to proven victims, this would radically stunt remedial efforts given the particular difficulties of identifying such victims. Employers would thus in practice be forced to perpetuate the effects of their prior race discrimination.[35] The Constitution does not require this.

As set out in the Caldero Intervenors' previous brief, the race-conscious relief provided under the Settlement Agreement is necessary, flexible, appropriately related to the relevant labor market, and minimally impacts third parties. (Caldero Mem. at 69-76.) It is thus narrowly tailored, as required by the Equal Protection Clause.

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program was sufficiently narrowly tailored when it allowed for waiver when a minority enterprise's bid was unreasonably high and the cost was not attributable to discrimination; it did *not* require an individualized showing of victimhood as a condition of participation in the program. *See* 941 F.2d 910, 925 (9th Cir. 1991) ("[T]he rule does *not* require a finding of specific instances of discriminatory exclusion for each MBE.") (emphasis added). Finally, *Cunico v. Pueblo School District* struck down a racially conscious lay-off pursuant to an affirmative action plan when there was no evidence of *any* past discrimination by the defendant, including, but not limited to, past discrimination against the particular individual benefited. 917 F.2d 431, 438-39 (10th Cir. 1990); *see also id.* at 437 ("The purpose of race-conscious affirmative action must be to remedy the effect of past discrimination against a *disadvantaged group* that *itself* has been the victim of discrimination.") (emphasis added).

35. It is worth noting in this context that the Objector-Intervenors also argue that recruitment methods with a disparate impact cannot be challenged under Title VII. They thus argue both that no lawsuit can be brought to remedy such discrimination and that a public employer cannot voluntarily remedy the effects of this discrimination. In other words, they seek to completely insulate recruitment discrimination from any remedy, even wholly voluntary remedial efforts.

V. THE OBJECTOR-INTERVENORS HAVE FAILED TO DEMONSTRATE ANY INTEREST SUFFICIENT TO BLOCK APPROVAL OF THE SETTLEMENT AGREEMENT'S RETROACTIVE SENIORITY AWARDS.

The Second Circuit has sharply limited third-party intervenors' ability to block judicial approval of settlement agreements. Specifically, it has made clear that at minimum, an intervenor must show that the agreement impinges on a specific, legally enforceable contract right in order to exercise such a veto. *But see generally Bridgeport Guardians v. Delmonte*, 248 F.3d 66, 74 (2d Cir. 2001) ("[A] collective bargaining agreement may be displaced, in some circumstances and to some extent, in order to remedy discrimination."). Contrary to the contentions of the Objector-Intervenors and the United States, no such impingement has been shown.

The Objector-Intervenors argue that the collective bargaining agreement (CBA) between their union and the Defendants grants them rights that are diminished by the Settlement Agreement's awards of retroactive seniority. In asserting that they are vested with certain rights by the CBA's statement that seniority will be calculated from the date of permanent appointment, the Objector-Intervenors dismiss the relevance of what are necessarily equal "contractual" rights that the beneficiaries themselves enjoy to their own retroactive seniority dates. Contrary to the Objector-Intervenors' claim (*see* Obj. Reply Mem. at 15 n.5), these contractual rights do not flow only from the Settlement Agreement itself, but also from the separate contractual agreements entered into between Defendants and each beneficiary, wherein each beneficiary released any and all claims of discrimination in consideration for the particular retroactive seniority award described in the Settlement Agreement. (*See* Rosman Ex. 39, Settlement Agreement, App. G; Reply Ex. T, Caldero Release of Claims.) Thus, it is not the case that the very instrument at issue—the Settlement Agreement—is the sole source of the

beneficiaries' contract rights; rather, the beneficiaries each individually gave valuable consideration in exchange for their retroactive seniority awards. The situation is thus materially different from *United States v. City of Hialeah*, where the challenged provisions of the settlement agreement had not been implemented and so the identified beneficiaries had given no consideration for their awards. 140 F.3d 968, 975 (11th Cir. 1998). The Objector-Intervenors have failed to offer any rationale for privileging their own claims over the beneficiaries' contract claims to their retroactive seniority awards.[36] Any valid contract claim by the Objector-Intervenors is thus offset by the equal or greater contract rights of the beneficiaries.

Moreover, and crucially, the Objector-Intervenors have failed to demonstrate the invasion of a clear contract right that *Kirkland* requires as a prerequisite to blocking court approval of a Settlement Agreement. The Objector-Intervenors first argue that the Settlement Agreement violates their contractually protected rights to transfer to other schools. As an initial matter, it is important to recognize that the retroactive seniority awards made to many of the beneficiaries have no effect on the Objectors' ability to transfer. The collective bargaining agreement indicates that for purposes of transfer, seniority will be measured from the date of permanent appointment in the job title of Custodian or Custodian Engineer. (*See* Ex. 61, CBA.) Under the CBA, Custodian Engineers generally compete with other Custodian Engineers for transfer, while Custodians generally compete with other Custodians. (*See id*.) As set out above, Objectors Ahearn and Brennan became permanent Custodian Engineers in October 2000, while Objector Mortenson became a Permanent Custodian Engineer in December 2002. The Custodian Engineer beneficiaries all either became permanent in the spring of 2000, pursuant to the

36. For the reasons set out *supra*, the voluntary awards to the beneficiaries do not violate Title VII or the Equal Protection Clause, and thus their contractual rights cannot be ignored on the grounds that these contracts are discriminatory.

Settlement Agreement or (in one instance) had become permanent prior to entry of the Settlement Agreement. In other words, *even absent any retroactive seniority awards, all of the Custodian Engineer beneficiaries would still have more seniority than the Custodian Engineer Objector-Intervenors.*[37] In addition, *even absent the retroactive seniority awards, at least five of the Custodian beneficiaries would still have more seniority than Custodian Objector Spring*.[38] Given the Objector-Intervenors fell behind these individuals on the seniority ladder *regardless* of the retroactive seniority awards, it is difficult to understand how the awards to these beneficiaries violated the Objector-Intervenors' rights, or even affected their ability to transfer.

Further, the Objector-Intervenors have failed to show any specific, vested contractual right, as opposed to a mere expectation, in obtaining transfers. As set out in the Caldero Intervenors' opening memorandum (Caldero Mem. at 23-24, 33-34), seniority alone does not guarantee any Custodian or Custodian Engineer any particular transfer. Rather, Custodians and Custodian Engineers will only become eligible for transfer upon receiving a satisfactory evaluation. Custodians and Custodian Engineers who fall within the same broad seniority bracket compete with each other on the basis of performance ratings. Only in the event of a tie between qualified bidders seeking a particular school is seniority relevant.[39] The ability to

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37. The sixteen relevant beneficiaries are Pedro Arroyo, Lloyd Bailey, Salih Chioke, Kristen D'Alessio, Ciro Dellaporte, Kevin LaFaye, Joseph Lin, Steven Lopez, Joseph Marcelin, Vernon Marshall, Wilbert McGraw, Margaret McMahon, Percival Punter, Fidel Seara, Luis Torres, and Frank Valdez.

38. These five are Janet Caldero, Andrew Clement, Kathleen (Falzarano) Luebkert, Felix Torres, and Irene Wolkiewicz. (Reply Ex. U, permanent appointment letters.) Kathleen (Falzarano) Luebkert had the same permanent appointment date as Scott Spring—September 22, 1997—but her list number was 153, while Mr. Spring's was 191, which means that she was considered to have more seniority. (Reply Ex. V, civil service list.)

39. The Objector-Intervenors suggest there is some discrepancy between various beneficiaries' acknowledgment in the context of their motion for intervention that seniority is relevant to the transfer process and the contention that the collective bargaining agreement provides no vested contract right to transfer based on seniority. Again, the Objector-Intervenors attempt to confuse the interest necessary to meet the standard for intervention under Rule 24(a)(2) and the much higher showing necessary to block approval of a Settlement Agreement. *See*

transfer to a particular school is further limited by whether the school requires a refrigeration license or a stationary engineer's license and whether the candidate has the requisite license. Further, Custodian Engineers have preference over Custodians, even if the Custodian has more seniority than the Custodian Engineer. Finally, before any transfer is recommended, the union and the Community Board must be given the opportunity to review the candidates for transfer and their ratings and to submit any objections. (*See* Reply Ex. E, CBA, at 23-30.)

Thus, an individual Custodian does not obtain a right to transfer protected by the collective bargaining agreement upon obtaining a certain level of seniority. A host of other factors will affect his or her ability to obtain a desired transfer. Because seniority alone is not determinative, rather than gaining a vested right to obtain transfers based on seniority, he or she can at most assert a "hope" of transfer. *Cf. Cassidy v. Municipal Civil Serv. Comm'n*, 37 N.Y.2d 526, 529, 337 N.E.2d 752, 754, 375 N.Y.S.2d 300, 303 (1975) (finding receipt of highest examination score on a civil service test did not vest any right to appointment or legally protectible interest in candidate, when examination scores were not the sole determinant of fitness for the position). In *Kirkland*, the Second Circuit found that such an interest, based merely on hope and expectation, rather than clear entitlement, was insufficient to block approval of a consent decree. 711 F.2d at 1128 ("The only interest, therefore, that intervenors possess is their mere expectation of promotion pursuant to possibly discriminatory procedures."); *see also E.E.O.C. v. Am. Tele. & Tele. Co.*, 556 F.2d 167, 172-73 (3d Cir. 1977) (approving consent decree that allowed for affirmative action override of seniority in promotions, when collective bargaining agreement provided that seniority was only the deciding factor when two employees were determined to be equally qualified by management).

Kirkland, 711 F.2d at 1126. At this stage, the Objector-Intervenors must show more than an *interest* in their seniority. They must show a clear contractual right that is violated by the Settlement Agreement.

The contingency of the Objector-Intervenors' seniority interest in the current rating and transfer plan is further made clear by Article XVI of the collective bargaining agreement, which indicates that when conditions change, representatives of the Board and the union will discuss policy matters, including "rating and transfer plan revisions," but that nothing in this provision "shall prevent or delay unduly the taking of action by the Board necessary for the proper conduct of the Board." (Reply Ex. E, CBA, at 44.) This Article further states, "Nothing herein shall be construed to . . . preclude the Board from adopting any other system [of custodian operations]." (*Id.* at 45.) Again, *Kirkland* stands for the proposition that the employer's retention of such discretion is inconsistent with employees' possession of the specific contractual rights necessary to block approval of a settlement agreement. 711 F.2d at 1128. Given the discretion retained by Defendants in the rating and transfer process and the uncertainty of any individual's expectation or claim to a particular transfer, the Settlement Agreement's retroactive seniority awards do not violate any right the Objector-Intervenors possess under the collective bargaining agreement. *See, e.g.*, *County of Nassau v. N.Y. State Pub. Employees Relations Bd.*, 151 A.D.2d 168, 172-84, 547 N.Y.S.2d 339, 341-48 (1st Dep't 1989), *aff'd*, 76 N.Y.2d 579, 563 N.E.2d 266, 561 N.Y.S.2d 895 (1990) (where a collective bargaining agreement provided that adjunct faculty appointments each semester would be made on the basis of seniority, but where college retained discretion to consider qualifications in making assignments, college's refusal to base appointments on seniority did not violate collective bargaining agreement).

The Objector-Intervenors also assert that they possess rights to temporary care assignments that have been violated by the Settlement Agreement's retroactive seniority awards to the beneficiaries. Again, they fail to meet the *Kirkland* standard, and indeed fail to demonstrate that seniority is even relevant to temporary care assignments. As the Objector-

Intervenors acknowledge, the collective bargaining agreement does not address the method by which temporary care shall be assigned. They assert that these procedures are set forth in a side letter between the Board and the Custodians' union (Obj. Reply Mem. at 14), but fail to produce this letter and offer no support for their assertion that the retroactive seniority awards impinge specific, enforceable, contract rights created by this letter. The only possible effect the Settlement Agreement's retroactive seniority awards may have had on the Objector-Intervenors' temporary care assignments was a one-time, nonrecurring delay of a few weeks in receiving an assignment. (Reply Ex. C, Calderone Decl. at ¶ 9.) The Objector-Intervenors have made no showing of a specific right to receive temporary care assignment that this possible brief, nonrecurring delay may have violated. Clearly, their mere expectation that temporary care assignments will be assigned pursuant to a particular methodology is an insufficient basis for blocking approval of the Agreement. *See, e.g., Presidents' Council of Trade Waste Ass'ns, Inc. v. City of New York*, 142 Misc. 2d 135, 140, 536 N.Y.S.2d 656, 660 (Sup. Ct. N.Y. County 1988), *aff'd*, 159 A.D.2d 428, 553 N.Y.S.2d 665 (1st Dep't 1990) (noting that defendants' use of a particular methodology in calculating operating expenses in previous years does not create a property right in petitioners in continued use of that methodology and that petitioners' interest was a unilateral expectation).

Finally, the Objector-Intervenors speculate that someday lay-offs may occur in the custodian workforce and that in such a circumstance, the Agreement's retroactive seniority awards would violate their interest in certain lay-off procedures under civil service law. They introduce no evidence suggesting that lay-offs are actually anticipated or threatened, and no lay-offs have occurred in the custodian workforce in memory. When there is no basis for assuming that a hypothetical scenario on which an objection rests will come to pass, it is appropriate for a

court to decline to reach this objection in considering the propriety of approval of a settlement agreement. *See Kirkland*, 711 F.2d at 1135.[40]

Moreover, this claim is directly analogous to the claims found wanting in *Kirkland*. There, intervenors argued that the settlement agreement, which adjusted appointment procedures from a civil service eligibility list, violated their rights under civil service law and the New York Constitution, which require merit and fitness to be determined by competitive examinations. *Kirkland v. N. Y. State Dept. of Corr. Servs.*, 552 F. Supp. 667, 675-76 (S.D.N.Y. 1982). The Second Circuit held, however, that in the absence of an enforceable contract guaranteeing that these procedures would remain in place, intervenors did not have a clear right sufficient to support the veto of a settlement agreement. 711 F.2d 1127-28. It contrasted the collective bargaining agreement at issue in *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981), which specifically indicated that job benefits provided by ordinance would remain in effect through the term of the contract, with the agreement before it, which did not protect intervenors' rights in procedures existing at the time of the execution of the contract. The court found that in the latter case, the intervenors had no legal right to the continuation of those procedures and thus no right to block the Settlement Agreement. *Kirkland*, 711 F.2d at 1127-28. Moreover, the Second Circuit pointed out, even if the collective bargaining agreement at issue *did* prohibit any changes in civil service procedures during the term of the agreement, "such a right would not allow intervenors to veto the settlement unless it also was shown that New York law permitted

40. The Objector-Intervenors cite *Firefighters v. Stotts*, 467 U.S. 561 (1984), as a case recognizing the relevance of seniority interests in regard to lay-offs, even when no lay-offs are immediately planned. The situation presented in *Stotts* is distinguishable from this case in many ways, most importantly in that that case did not involve a voluntary affirmative action plan. *See Local 93*, 478 U.S. at 515. An additional important distinction, however, is that lay-offs were not purely hypothetical in *Stotts*, but had actually occurred. Indeed, these actual lay-offs were at the center of the dispute over modifications to the consent decree. 467 U.S. at 567.

the authority of the [Civil Service Commission] to be circumscribed by private agreement." *Id.* at 1128 n.12.

The Objector-Intervenors have utterly failed to meet this standard. They have not pointed to any term of the collective bargaining agreement that gives them an enforceable right in certain lay-off procedures and they have made no showing that New York law would permit such a private agreement to curb the discretion of the Civil Service Commission over these procedures.[41] They thus have only an unenforceable expectation, and no right to block the settlement agreement. *See Eagan v. Livoti*, 287 N.Y. 464, 468, 40 N.E.2d 635, 637 (1942) ("[N]o person has a vested interest in any rule of law or legislative policy which entitles him to have it remain unaltered for his benefit[.]").

The Objector-Intervenors' interest in this case was sufficient to support their intervention to set forth their objections to paragraphs 14 through 16. They have been granted the opportunity to develop and present these objections. This is all the process that they are due, and the minor effects paragraphs 14 through 16 of the Settlement Agreement have on their interests is insufficient to permit their veto of this Agreement.

VI. THE PROCEDURAL POINTS RAISED BY THE OBJECTOR-INTERVENORS AND THE UNITED STATES LACK MERIT.

In spite of the Court's stated interest in reaching the merits of the issues before it, the Objector-Intervenors, and to a lesser degree the United States, have liberally sprinkled their Reply Memorandum with meritless procedural arguments, seemingly designed to distract the Court from that very task. To avoid further distraction, we briefly address these arguments.

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41. The Objector-Intervenors compare their seniority interests in regard to lay-offs to the rights created by an insurance policy. The crucial difference, of course, is that an insurance policy is a contract, enforceable by the individual holder against the insurance company. The Objector-Intervenors have no individually enforceable contract rights here.

A. The Caldero and Arroyo Intervenors' Motions for Partial Summary Judgment Are Properly Before the Court.

The Objector-Intervenors raise the frivolous argument that the Caldero and Arroyo Intervenors' Motions for Partial Summary Judgment should be denied because they did not request a pre-motion conference. (Obj. Reply Mem. at 80.) The Court expressly permitted these motions, and stated that the pre-motion conference already held was sufficient. (*See* Chernofsky Declaration, ¶ 3 and Ex. Y thereto.)

B. Defendants' Failure to Serve a Rule 56.1 Statement Is Irrelevant.

As the Objector-Intervenors point out (Obj. Reply Mem. at 35), the Defendants did not serve a Rule 56.1 Statement in response to the Objector-Intervenors' 56.1 Statement. If the Objector-Intervenors and the Defendants were the only parties to the case, then this might have some relevance. However, to the extent the facts in the Objector-Intervenors' 56.1 statement are disputed by any of the three other parties to this litigation, the Defendants' failure to respond has no relevance, and those facts are not deemed admitted.

C. The Objector-Intervenors Misapply Fed. R. Evid. 703.

At page 40 of their Reply, the Objector-Intervenors claim that "the other parties" use their expert statements to support underlying facts, and allege this to be improper under Fed. R. Evid. 703. But Rule 703 deals with the admissibility of otherwise inadmissible facts underlying an expert's opinion, and sets out a balancing test for when admission of those facts might be useful to a jury. The Objector-Intervenors confuse the admissibility of hearsay on which an expert may rely in forming his or her opinion, and the admissibility of the expert's own conclusions. The cases cited by the Objector-Intervenors on this point all deal with the former, as does Fed. R. Evid. 703. The experts' conclusions themselves are clearly admissible.

D. The Caldero Intervenors Are Entitled to Individual Hearings if Necessary.

Should the Court accept the Objector-Intervenors' and United States' argument that only individual victims of discrimination are entitled to relief under the Settlement Agreement, the Caldero Intervenors would be entitled to individual hearings to determine the appropriateness of the remedy each received given the individual circumstances of each. Contrary to the Objector-Intervenors' assertions, evidence regarding each Caldero Intervenor's status as a victim of discrimination does not qualify as "all the facts in their possession needed to oppose the motion." (Obj. Reply Mem. at 41.) The facts required to oppose the motion consist of the strong basis in evidence of discrimination, satisfied by the statistical analysis of Dr. Ashenfelter and the anecdotal evidence in this case.

The Court clearly did not contemplate evaluating each Caldero Intervenor's individual case on this summary judgment motion. Additionally, as noted in the Court's July 20, 2004 Order (Reply Ex. W), "the parties acknowledge that if the evidence before the Court is insufficient to resolve this question [question 4], an evidentiary hearing may be necessary." If the Court is to reach the question of whether each Caldero Intervenor is a victim of discrimination, many material facts would be in dispute as to each individual Caldero Intervenor, and "the evidence before the Court is insufficient" to make a determination on those facts without a hearing.

In essence, the Objector-Intervenors contend that in order to preserve their claims that they are individual victims should this Court determine that such proof is required, the Caldero Intervenors were required to submit in excess of twenty summary judgment briefs, in addition to the voluminous paper already filed in this case, setting out their individual situations and claims

and rebutting any defenses to these claims.[42] The Objector-Intervenors make this claim although the only individualized showing they have made that the Caldero Intervenors were *not* victims of discrimination is an unsworn demonstrative exhibit created by attorneys for the United States that the Objector-Intervenors themselves fault in many particulars.[43] (*See* Rosman Ex. 54; Obj. Mem. at 70-75; Obj. Reply Mem, at 72-74.) The persuasiveness of this document is further undermined by the fact that its creators do not believe that it conclusively demonstrates who is and is not a victim of discrimination; instead, the United States argues that material facts are in dispute and, like the Caldero Intervenors, seeks hearings on the question of who is a victim, if the Court finds this question to be relevant to approval of the disputed paragraphs. (*See* U.S. Mem. at 23-25, 28.) If, contrary to precedent, the Court finds a showing of individual victim status is necessary, the Caldero Intervenors have introduced evidence demonstrating examples of the types of factual disputes that will be at issue. (*See* Ex. 26, Manousakis Decl.; Ex. 73, Quinn Decl.) They should not be prejudiced because of the practical impossibility of fully setting out each client's individual situation in this briefing schedule.

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42. In addition to the ample reasons set out above, a further rationale for not requiring proof of victim specificity as a condition of approval of settlement agreements such as this one is the burdensomeness such a requirement imposes both on the settling parties and on the reviewing court. As a court confronted with a similar question remarked,

> Intervenors essentially ask this court to require in excess of 100 mini-trials on issues dealing with the adequacy of each [individual's] complaint and the availability of defenses. It seems to us beyond serious dispute that no reasonable parties are going to settle any case if an intervenor can force them to litigate separately the merits of each claim.

Airline Stewards v. Am. Airlines, 573 F.2d 960, 963 (7th Cir. 1978).

43. The Objector-Intervenors also broadly assert that women (by which they presumably mean white women) and Asians who took an exam to become a Custodian or a Custodian Engineer could not have been victims of discrimination. (Obj. Reply Mem. at 69.) This is on its face untrue. A white woman or Asian could be a victim of recruitment discrimination, for instance, if she was unable to take an earlier examination because the Defendants' recruitment methods left her unaware of it, but learned of and took a later exam. She could be a victim of recruitment discrimination if the Defendants' recruitment methods led her to believe that taking the exam would be futile for her as a woman or minority and thus to devote little effort to preparing for the exam. She could be a victim of recruitment discrimination if because of the Defendants' recruitment methods, she was unaware of available or necessary test preparation, and performed poorly on the exam as a result.

E. Conflicting Expert Reports Do Not Preclude Summary Judgment.

Contrary to the assertions of the Objector-Intervenors and the United States, submission of conflicting expert testimony does not in itself preclude summary judgment. *See Detwiler v. Offenbecher*, 728 F. Supp. 103, 139-40 (S.D.N.Y. 1989) (finding that one expert's opinion that the analysis at issue was not based on a reasonable method of preparation was insufficient to defeat summary judgment); s*ee also United States v. Various Slot Machines on Guam*, 658 F.2d 697, 700 (9th Cir. 1981) (stating "we have difficulty with the notion that to state an opinion is to set forth specific facts" as would be necessary to defeat summary judgment).

F. The United States Is Incorrect That Material Facts Are In Dispute Regarding Whether Evidence of Discrimination Supported the Awards Under the Settlement Agreements.

As set out above, the United States is correct that should this Court rule that proof of each beneficiary's status as an individual victim of discrimination is necessary, material facts as to the beneficiaries' individual circumstances are in dispute, and an evidentiary hearing is necessary. However, the United States is incorrect in its contentions that material facts are in dispute regarding (1) whether the Board's recruiting practices caused the disparities identified by the United States; (2) whether the Board's recruiting practices were job-related under the governing legal standards; and (3) whether the recruiting practices used to solicit provisional applicants and hiring applicants provisionally constituted an alternative practice resulting in less disparate impact. First, the factual inquiries suggested by these factors are not the appropriate inquiries for judging the legality of the Settlement Agreement's challenged provisions, as set out above. Second, while the United States identifies relevant disputes in the parties' contentions and their interpretations of the relevant facts, it fails to identify actual disputed facts preventing summary judgment on whether sufficient evidence of discrimination supported the Settlement Agreement's awards.

CONCLUSION

For the reasons set out above, the Caldero Intervenors' Motion for Summary Judgment should be granted.

Dated: New York, New York
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By: /s

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