September 14, 2007

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The Honorable Frederic Block
United States District Court Judge
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *United States v. New York City Board of Education*, No. 96-0374 (FB)(RLM)

Dear Judge Block:

We write on behalf of the Caldero Intervenors in the above-captioned case, pursuant to Your Honor's invitation to submit post-hearing briefing addressing (1) whether the City Defendants and the United States intended in entering into the settlement agreement to categorize each African-American and Hispanic beneficiary as either a "recruiting claim beneficiary" or a "testing claim beneficiary"; (2) if the City Defendants and the United States did not so intend, whether the relief provided in the settlement agreement to African-American and Hispanic beneficiaries is "narrowly tailored" to the compelling interest in remedying the effects of past testing discrimination and thus consistent with the Equal Protection Clause; and (3) if the City Defendants and the United States did so intend, which beneficiary falls within each category. We address each of these topics in turn below.

I. THE SETTLEMENT AGREEMENT WAS NOT INTENDED TO CATEGORIZE AFRICAN-AMERICANS AND HISPANICS AS "RECRUITING CLAIM BENEFICIARIES" OR "TESTING CLAIM BENEFICIARIES."

First, as set out in the Caldero Intervenors' submissions of June 21, 2007, and July 12, 2007, and as reiterated in our standing objection at the August 20, 2007, hearing, Transcript of August 20, 2007 Hearing ("Tr.") at 23,[1] the language of the settlement agreement is not ambiguous and thus the parol evidence rule requires exclusion of any evidence of the parties' intent beyond this unambiguous language. *See, e.g.*, *Teitelbaum Holdings, Ltd. v. Gold*, 396 N.E.2d 1029, 1032 (N.Y 1979); *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 426 (2d Cir. 1992); *Flightsafety Int'l Inc. v. Flight Options, LLC*, 418 F. Supp. 2d 103, 107 (E.D.N.Y. 2005), *rev'd in part on other grounds*, 194 Fed. Appx. 53 (2nd Cir. 2006). The settlement agreement itself makes no distinction between or allusion to "testing claim beneficiaries" or "recruiting claim beneficiaries." Rather, it sets out a single system for determining offerees (the agreement's term for beneficiaries) and calculating their

[1] Cited transcript excerpts are attached as Exhibit A.

awards, without reference to the underlying claims. (Settlement Agreement at ¶¶ 4-5, ¶¶ 12-17 (Doc. 67, Feb. 11, 1999).) No ambiguity as to the parties' intent is created by this language, which sets out a unitary system for identifying offerees and calculating their awards.[2]

Second, even assuming that the settlement agreement is ambiguous on this point, the evidence introduced at the August 20, 2007, hearing clearly shows that Defendants did not intend the agreement to distinguish between recruitment claim and testing claim beneficiaries. The evidence further demonstrates that the United States at no time during negotiation of the agreement communicated any contrary intention to Defendants. Indeed, no competent evidence as to the United States' intentions in entering into the agreement was put forward at all. As a matter of law, the evidence thus offers no support to the assertion that, contrary to the actual language of the settlement agreement, the agreement was in fact intended to categorize each African-American and Hispanic beneficiary as either a "testing claim beneficiary" or a "recruitment claim beneficiary."

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As Your Honor has previously held, "When contract language is ambiguous, extrinsic evidence is relevant to the extent it bears on 'the parties' *objective* manifestations of intent.'" *RJE Corp v. Northville Indus., Corp*, 198 F. Supp. 2d 249, 263 (E.D.N.Y. 2002) (Block, J.) (emphasis added). As a matter of law and logic, only intent that was objectively manifested—that is, actually communicated by one party to the other in crafting the agreement—may be considered in determining whether the settlement agreement should be read to categorize African-American and Hispanic beneficiaries as either recruitment claim beneficiaries or testing claim beneficiaries. *E.g.*, *Wells v. Shearson Lehman/Am. Express, Inc.*, 526 N.E.2d 8, 24 (N.Y. 1988) (finding plaintiff's subjective intent to be irrelevant when no manifestation of this intent was made at the time the parties entered into the contract); *Hudson-Port Ewen Assocs. v. Chien Kuo*, 566 N.Y.S.2d 774, (N.Y. App. Div. 1991), *aff'd*, 578 N.E.2d 435 (N.Y. 1991) ("In the absence of any evidence that the . . . views . . . advanced [in litigation] were either discussed or considered by the parties during the process leading up to the execution of the agreement, the words in the contract must be given the meaning which those to whom they are addressed would reasonably be expected to perceive."); *Faulkner v. Nat'l Geographic Soc.*, 452 F. Supp. 2d 369 (S.D.N.Y. 2006) ("[S]tatements of subjective intention uncommunicated to the other contracting party are immaterial in construing the terms of the contract."); *Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 301-02 (S.D.N.Y. 1997) ("[W]hen resolving disputes concerning the meaning of ambiguous contract language, unexpressed subjective views have no proper bearing."), *aff'd*, 166 F.3d 1201 (2d Cir. 1998). Any intention not so communicated cannot be assumed to have been shared by both adversaries as they negotiated and drafted the agreement. As

[2] Moreover, "[t]he language of a contract is not made ambiguous simply because the parties [later] urge different interpretations." *Seiden Assocs.*, 959 F.2d at 428; *see also, e.g.*, *Photopaint Technologies, LLC v. Smartlens Corp.*, 335 F.3d 152, 160 (2d Cir. 2003) ("Unambiguous contract language is not rendered ambiguous by competing interpretations of it urged in litigation."); *Hugo Boss Fashions, Inc. v. Federal Ins. Co.*, 252 F.3d 608, 616 (2d Cir. 2001) (same). Nor does a contract's silence as to a particular point introduce ambiguity under New York law. *E.g.*, *Nissho Iwai Europe PLC v. Korea First Bank*, 782 N.E.2d 55, 60 (N.Y. 2002); *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 171 (N.Y. 2002).

your Honor stated at the August 20 hearing, "You can ask what they communicated, what they said, but if you ask for a conclusion as to somebody's intent, that's really something that has to be drawn from facts." Tr. at 28: 22-25.

Norma Cote, prior counsel for Defendants and the only actual negotiator of the settlement agreement to provide testimony, stated unequivocally that neither party to the agreement ever communicated any intention to classify beneficiaries as testing claim or recruiting claim beneficiaries in negotiating and finalizing the agreement. Tr. at 14: 23-25 ("The Federal Government never made any distinction between who—between which legal theory applied to any individual beneficiary. If any."); *id.* at 27: 9-12 (Q: "Did the defendants ever communicate any intention to the United States to classify each offeree as either a testing claim beneficiary or recruitment claim beneficiary?" A: "Never.").[3] Nor did the parties ever discuss calibrating relief to a particular beneficiary's injury pursuant to a particular claim of discrimination. *Id.* at 30: 19-22; 31: 7-11.

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Katherine Baldwin, formerly a second-level attorney supervisor representing the United States in this case, freely admitted that she had no participation in or personal knowledge of the negotiations in this case or the process by which the beneficiaries were selected. *Id.* at 81: 23-24 ("I was not involved in the construction of the list because I was two layers removed."); *id.* at 82: 17-20 (Q: "Well, do you know then how that list was composed and who on that list from these two categories—" A: "No, I do not have direct knowledge of that.").[4] Her hypothesis that the settlement agreement must have been intended to classify individuals as recruiting claim beneficiaries or testing claim beneficiaries, because of an unwritten Department of Justice policy on make-whole relief for individual victims of discrimination, is therefore irrelevant. The irrelevance of her testimony is underscored by Ms. Baldwin's lack of direct knowledge of a single instance in which representatives of the United States directly communicated to Defendants any intention regarding the categorization of beneficiaries during negotiation and finalizing of the agreement. Nor could she offer any specific recollection of communications with those line attorneys who actually negotiated the settlement agreement as to either the categorization of the beneficiaries or the Justice Department policy she described. *Id.* at 99: 23 – 100: 4 (Q: "Do you personally recall conveying the policy you mentioned earlier regarding make-whole relief to the line attorneys in this matter?" A: "I don't specifically recall whether I did or I didn't."); *see also id.* at 99: 23-100.

The deposition testimony of Marybeth Martin, another former supervising attorney in this case, is similarly flawed. *See* Martin Dep. at 34: 2-5 ("[T]he list [of beneficiaries] was something that was developed by the Trial Team, and probably the City of New York, and our paralegal staff with dates and things that I wouldn't have had any independent knowledge of."); *id.* at 78: ll.1-3. Nor could Ms. Martin testify to direct knowledge of a single instance in which representatives of the United States directly communicated to Defendants any intention regarding the categorization of beneficiaries in the process of negotiating and finalizing the agreement.[5] *See id.* at 27: 14 – 28: 1.

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[3] *See also* Tr. at 15: 15-19; 16: 16-21.
[4] *See also, e.g.*, *id.*at 89: 13-15; 93: 13-21; 94: 9-13; 98: 16-18.
[5] Ms. Baldwin and Ms. Martin did offer their interpretation of the United States' Memorandum in

For these reasons, neither Ms. Baldwin nor Ms. Martin is competent to testify as to the parties' objectively manifested intentions in entering into the settlement agreement. *See, e.g.*, *Nycal Corp.*, 988 F. Supp. at 303 n.42 (holding that testimony of person who concededly has no personal knowledge of relevant contract negotiations cannot raise a genuine issue of material fact regarding the parties' intent), *aff'd* 1998 WL 870192, at *3 (holding that witness who had not personally participated in settlement negotiations and had not specifically discussed relevant question with negotiators of contract could not give relevant, competent, or admissible evidence as to meaning of contract).

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The categories "recruiting claim beneficiary" and "testing claim beneficiary" only make sense if one is seeking to categorize each beneficiary as either a probable victim of testing discrimination or a probable victim of recruiting discrimination. However, no witness has testified that *any* inquiry was made as to whether an individual who did not take a challenged exam was in fact a victim of recruitment claim discrimination before that individual was included in the universe of offerees. Tr. at 25: 20-23 (Q: "Did you undertake any individualized inquiry to determine whether [individuals added to the beneficiary list had] been victims of recruiting discrimination or testing discrimination?" Cote: "No."); *id.* at 28:3-9 (Q: "Did the defendants [and the] United States in this process ever jointly pursue any individualized inquiry to determine whether each offeree was, in fact, a victim?" Cote: "No." Q: "Did the United States ever communicate to you that it had independently undertaken such individualized inquiries?" Cote: "No.").[6]

Rather, the evidence is clear that the United States and Defendants asked three questions to determine whether an individual would be an offeree: (1) does the individual currently work as a custodian or custodian engineer; (2) is the individual African-American, Hispanic, Asian, or female; and (3) has the individual worked provisionally as a custodian or custodian engineer during the stipulated time frame.

Support of Entry of the Settlement Agreement, filed in May 1999, which they read as reflecting an intent to limit beneficiaries to identified victims of recruiting and testing discrimination. First, this brief was filed and served after the United States and Defendants negotiated and signed the agreement and thus sheds limited light on the intentions objectively manifested by the parties during the relevant negotiation. Second, and more importantly, while the brief references make-whole relief to individual victims, nowhere does it state that each award received by a beneficiary constitutes such relief. To the contrary, it notes that the settlement agreement implements "race-conscious remedies," (U.S. Mem. in Supp. of Entry at 9 (Doc. 108, filed May 25, 1999)), and explains that the agreement is consistent with Title VII's purposes both to provide make-whole relief *and* to remove barriers that in the past favored one identifiable group of employees over another (*id.* at 13). No one contests that *some* of the beneficiaries are appropriately identified as victims of discrimination and that the agreement advances Title VII's make whole interests in regard to these individuals. This does not demonstrate, however, that the awards to the beneficiary class were not also intended to advance equal opportunity for African-Americans and Hispanics as a group—the other goal of Title VII. Indeed, the brief itself states that the awards also further this interest. (*See id.* at 26-27 ("Additionally, the 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 Custodian and Custodian Engineer while impacting incumbents as minimally as possible.").)

[6] *See also, e.g.*, Tr. at 112: 1-7 (Ms. Baldwin testifying that she does not know if beneficiaries were individually interviewed); Martin Dep. at 43: 5-9 (same).

(*See* Settlement Agreement at ¶ 4.).[7] If all three questions were answered in the affirmative, the individual was made a beneficiary. These criteria are not designed to determine which individuals were harmed by a particular form of discrimination. That one is a black provisional custodian does not alone prove that one was personally harmed by either testing discrimination or recruitment discrimination in the past. That an individual is Hispanic and previously worked as a provisional custodian engineer does not *per se* demonstrate that he is the victim of any sort of discrimination at all. Yet no further inquiry was required before an individual was included as a beneficiary under the settlement agreement.

Indeed, after the initial list of beneficiaries was created, the United States completely deferred to Defendants' determinations as to whether any additional individuals met these criteria and thus were appropriately included as beneficiaries. *See* Tr. at 24: 20 – 25: 13. As Ms. Cote testified, in making that determination, Defendants considered only whether an individual met the requirements set out in the agreement—were they employed by the Board, were they in a protected class and had they worked provisionally in the relevant time period. *Id.* at 25: 14-19; 33: 11-15. There is no evidence that at any time the United States communicated to Defendants that any other inquiry was desirable or necessary in determining the universe of beneficiaries.

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Once an individual was included in the universe of offerees, under the terms of the settlement agreement, the calculation of his or her particular seniority award depended in part on whether he or she took a challenged exam. (*See* Settlement Agreement at ¶ 15.) But this method of calculating retroactive seniority could ***not*** have been intended to distinguish testing claim beneficiaries from recruiting claim beneficiaries. This case only alleged testing discrimination against blacks and Hispanics. Yet, as the settlement agreement makes clear, any white women and Asians who failed a challenged exam *also* would receive retroactive seniority based on the median hire date for that exam. (*See id.* at ¶ 4, ¶ 15.)[8] In actual fact, several white female test-takers and one Asian test-taker received retroactive seniority on the basis of this calculation. (*See id.* at ¶ 5, App. A.) These white female and Asian beneficiaries could never have been considered victims of testing discrimination or "testing claim beneficiaries," because no one ever alleged that the exams had a disparate impact on white women or Asians. Assuming that the attorneys negotiating the settlement agreement had even a minimal understanding of the claims in this case and the terms of the agreement, calculating retroactive seniority based on whether or not an individual took a challenged exam could not have been intended to distinguish between testing claim and recruiting claim beneficiaries; indeed, Ms. Baldwin admitted as much in her testimony. Tr. at 106: 13-20 ("It's possible that relief was calculated in a way that took into account they took the test or not. But they were not testing claim victims."). Moreover, no party ever raised any concern during the negotiation and finalizing of the agreement that calculating awards for white females and Asians in this way was a mistake or otherwise inappropriate. *Id.* at 32: 3-7; 33: 2-7; Martin Dep. at 48: 7-22.

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[7] *See also* Tr. at 13: 22 – 14: 12; 24: 22 – 25: 19; 33: 11-15; 101: 4 – 102: 14; Martin Dep. at 30: 21 – 31: 12; Tr. of Disc. Hr'g at 32, 34 (Doc. 304, Feb. 3, 2003) (Ms. Cote summarizing the method by which beneficiaries were identified).

[8] *See also* Tr. at 73: 13-16.

The United States' relief chart, created more than four years after the execution of this agreement, cannot change these facts. As Ms. Baldwin testified, that chart was prepared by Jodi Danis and Chuck Leggott, Tr. at 88: 5-6, neither of whom represented the United States in this matter at the time of the negotiation of the agreement and neither of whom had personal knowledge of these settlement negotiations. While the United States refused to respond formally to the Caldero Intervenors' interrogatory seeking the identity of the individuals with whom Ms. Danis and Mr. Leggott consulted in crafting the interrogatory responses that included this chart,[9] John Gadzichowski, counsel for the United States, informed counsel for the Caldero Intervenors that Ms. Baldwin and Ms. Martin, two individuals without personal knowledge of the settlement agreement negotiations, were in fact the only persons consulted. The 2003 relief chart represents a *post hoc* interpretation and proposed amendment of the settlement agreement by the United States, rather than a guide to the parties' intentions in entering into the agreement.[10]

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II. THE RELIEF PROVIDED TO AFRICAN-AMERICAN AND HISPANIC BENEFICIARIES IS NARROWLY TAILORED TO REMEDY THE EFFECTS OF DEFENDANTS' PAST TESTING DISCRIMINATION

As this Court has held, determining whether race-conscious relief is narrowly tailored requires consideration of "the necessity of the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." (9/11/06 Mem. & Order, at 73.) *See also Jana Rock Constr., Inc. v. New York State Dep't of Econ. Dev.*, 438 F.3d 195, 205-06 (2d Cir. 2006). In the April 20 Memorandum & Order, this Court noted that if the settlement agreement does not distinguish between testing claim and recruitment claim beneficiaries, and thus the legality of all relief received by African-American and Hispanic beneficiaries is appropriately tested by reference to the testing claim, then it is possible that some of the above factors may be affected by the increased number of relevant beneficiaries. (4/20/07 Mem. & Order, at 23.) Each of the relevant narrow tailoring factors is briefly addressed below.

A. Necessity for the relief and efficacy of alternative remedies

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[9] The United States referred the Caldero Intervenors to Ms. Baldwin's testimony on this point. Ms. Baldwin, of course, testified that she had no personal knowledge as to the crafting of this chart. Tr. at 87: 23-25.

[10] Indeed, that this relief chart does not accurately reflect the intentions of the parties to the settlement agreement is apparent on its face; for example, while the settlement agreement is clear that the seniority awarded each beneficiary shall be calculated according to the individual's provisional hire date or (if the individual took a challenged exam) the earlier of the provisional hire date or the median exam date, the United States' 2003 relief chart entirely discards the provisional hire date as an appropriate measure of seniority for *any* offeree and asserts that any retroactive seniority award not calculated by reference to a median exam date is inappropriate. This rejection of a central provision of the settlement agreement alone demonstrates that the 2003 chart represents a wholesale revision of the agreement, rather than an explication of the original intent underlying the agreement.

Understanding the testing claim as the basis for the relief provided to all the African-American and Hispanic beneficiaries does not change the analysis of this factor. As has been exhaustively set out in prior briefing and accepted by this Court, the evidence of the challenged exams' racially disparate impact is overwhelming. (*See* 9/11/06 Mem. & Order at 47-49, 65-72; 4/20/07 Mem. & Order at 20.) Race-conscious measures were necessary and appropriate to avoid the perpetuation of the discriminatory impact of these exams, which were shown to have the effect of excluding large numbers of African-Americans and Hispanics from the custodian workforce.

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The settlement agreement's relief for African-Americans and Hispanics was undertaken in conjunction with race-neutral remedies and only after alternative remedies had been attempted and had failed to remedy the effects of Defendants' testing discrimination on the racial make-up of the custodian and custodian engineer workforce. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (stating that narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives" that would achieve the objectives sought, though it "does not require exhaustion of every conceivable race-neutral alternative"). As set out in the Caldero Intervenors' summary judgment briefing, in recruiting applicants for Exam 7004 in 1997, Defendants made race-neutral efforts to bring more African-Americans and Hispanics into the workforce. For instance, they sponsored a training class for Exam 7004, which they advertised in newspapers with a predominately minority readership and which they encouraged custodians to publicize to their qualified minority staff. (*See* Caldero Ints.' Mem. in Supp. of S.J. at 70 (Doc. No. 528, filed April 29, 2005) and exhibits cited therein.) They also reached out to groups with a minority constituency in an attempt to find participants for an additional training. (*Id.*) Despite these efforts, the number of actual African-American and Hispanic applicants for Exam 7004 was still smaller than that predicted based on these groups' representation in qualified labor force. (*Id.*) Even if those African-Americans and Hispanics who did apply had passed Exam 7004 at the same rate as white test-takers, their entrance onto the job would have been insufficient to fully remedy the exclusionary effect of Defendants' past discrimination, given the overwhelmingly white make-up of the existing workforce. The persistence of these disparities in the face of Defendants' race-neutral methods to increase the diversity of the workforce demonstrates the necessity of extending race-conscious relief to African-Americans and Hispanics. *See Barhold v. Rodriguez*, 863 F.2d 233 (2d Cir. 1988) (finding affirmative action plan that took gender and race into account in addition to seniority in approving transfers to certain localities to be narrowly tailored when recruitment efforts alone had proved insufficient in increasing minority and female representation in those localities).

In addition, the settlement agreement adopted this race-conscious relief in conjunction with race-neutral efforts to prevent discriminatory testing. (*See* Settlement Agreement at ¶¶ 25-33.) This utilization of race-neutral remedies in conjunction with race-conscious methods is a further indicator that the race-conscious relief was narrowly tailored to remedy past discrimination and prevent its continuation. *See Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994); *Coral Constr. Co. v. King County*, 941 F.2d 910, 922 (9th Cir. 1991).

B. The flexibility and duration of relief

Measuring the relief of all African-American and Hispanic beneficiaries against the testing claim also does not change the analysis of this factor. It remains the case that the agreement provided for a one-time adjustment of employment status and seniority for the beneficiaries, rather than (for instance) setting hiring goals that reach far into the future. Such one-time measures do not implicate the significant constitutional concerns that indefinite attempts to preserve a particular racial balance in a workforce raise. *See, e.g.*, *Cotter v. City of Boston*, 323 F.3d 160, 172 (1st Cir. 2003). (*See also* Caldero Ints.' Mem. in Supp. of S.J. at 71-72.)

C. The relationship of the numerical goals of the relief to the relevant labor market

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Even when all African-American and Hispanic beneficiaries are considered, the relief set out in the settlement agreement does not lead to their overrepresentation in the workforce in comparison to the relevant labor market. African-Americans were estimated to make up 20.1 percent of qualified individuals in the external custodian and custodian engineer labor market in 1997, shortly before the settlement agreement was executed. (*See* Decl. of Joyce Jacobsen, Ex. 1 at Table 2. (Doc. No. 530, filed April 29, 2005).) .) Even when the analysis is limited to those who actually applied for the position, blacks made up 7.6 percent of qualified applicants. (*Id.*) A total of sixteen African-Americans received permanent status under the Agreement, bringing their representation in the permanent custodian and custodian engineer workforce to approximately 5 percent. (*See* Caldero Ints.' Rule 56.1 Statement at ¶ 109 (Doc. 529, filed April 29, 2005.) Similarly, Hispanics were estimated to make up 18.9 percent of qualified individuals in the external labor market in 1997. (*See* Decl. of Joyce Jacobsen, Ex. 1 at Table 2.) Even when the analysis is limited to those who actually applied for the position, Hispanics made up 16 percent of qualified applicants. (*Id.)* A total of sixteen Hispanics received permanent status under the agreement, which also brought their representation in the permanent custodian and custodian engineer workforce to approximately 5 percent. (*See* Caldero Ints.' Rule 56.1 Statement at ¶ 109.) Thus, even when all African-American and Hispanic beneficiaries receiving permanent appointments are taken into consideration, the relief provided in the settlement agreement clearly is not broader than that suggested by the representation of African-Americans and Hispanics in the relevant labor market. Indeed, it is narrower, but "a local government need not choose between a program that aims at parity and no program at all." *Engineering Contractors Ass'n v. Metro. Dade County*, 122 F.3d 895, 927 n. 6 (11th Cir. 1997); *see also Stuart v. Roache*, 951 F.2d 446, 454 (1st Cir. 1991) (finding promotional goals to be narrowly tailored when they fell short of minority population eligible for promotions).

D. The impact of the relief on the rights of third parties

When all African-American and Hispanic beneficiaries are considered, the relief awarded under the settlement agreement still minimally impacts the rights of third parties. First, the permanent appointments of 32 African-American and Hispanic

beneficiaries had little impact on the rights of third parties. No new permanent positions were created for the beneficiaries. (*See* Caldero Ints.' Rule 56.1 Statement at ¶¶ 115-16.) Thus the incumbent custodian and custodian engineer workforce would have been competing with the same number of permanent custodians and custodian engineers for transfers or temporary care assignments whether or not these particular individuals were appointed for these slots. While the permanent appointments to the beneficiaries may have meant that some individuals did not ultimately receive permanent appointments who otherwise would have, these individuals remained free to seek such permanent employment in the future, and "as the Supreme Court has observed in the context of access to employment . . . the denial of a new application is much less burdensome than the loss of an existing good." *United States v. Sec'y of Housing & Urban Dev.*, 239 F.3d 211, 220 (2d Cir. 2001) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282 (1986)); *see also, e.g.*, *Petit v. City of Chicago*, 352 F.3d 1111, 1117 (7th Cir. 2003) (concluding that affirmative action program resulted in minimal harm to white plaintiffs when 50 of 82 plaintiffs were never promoted); *Reynolds v. City of Chicago*, 296 F.3d 524, 528 (7th Cir. 2002) (finding delayed promotion for a few white employees a modest burden); *Stuart v. Roache*, 951 F.2d 446, 454 (1st Cir. 1991) (finding promotion goals to impose a minor burden on innocent third parties when goal only slightly limited white officers' opportunities to become sergeants and white officers passed over for one promotion could reapply).

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Similarly, the retroactive seniority awarded to African-American and Hispanic beneficiaries had only a slight impact on the ability of white custodians and custodian engineers to obtain desired transfers or temporary care assignments. At the time of approval of the settlement agreement, there were 41 African-American and Hispanic beneficiaries in a custodian workforce employed in more than 1000 public schools. (*See* Caldero Ints.' Rule 56.1 Statement at ¶ 117.). Seven years later, there are even fewer, as some beneficiaries have retired or otherwise left the custodian workforce. As this Court held in the April 20, 2007 opinion, in examining whether the addition of the eleven African-Americans and Hispanics previously considered "recruiting claim beneficiaries" would alter the Title VII analysis in this case, "While the addition of a large number of beneficiaries might eventually compel the conclusion that an affirmative-action plan unnecessarily trammels the rights of others, the relatively modest addition of 11 beneficiaries here does not change the fact that employees have no absolute entitlement to a particular transfer or [temporary care assignment], that there are no quotas or other absolute bars to obtaining these benefits, or that the Agreement provides for a one-time adjustment of seniority." (4/20/07 Mem. & Order at 23.) As this Court has also noted, the Title VII test that asks whether a plan unnecessarily trammels the rights of third parties is "closely related to" and "cut from the same cloth as" Fourteenth Amendment narrow tailoring analysis. (9/11/06 Mem. & Order, at 74.) This Court's conclusion that the settlement agreement's provision of relief to all African-American and Hispanic beneficiaries to remedy the effects of testing discrimination does not unnecessarily trammel the rights of third parties under Title VII compels the conclusion that the same relief has a minimal impact under Equal Protection Clause analysis.

In other words, given the small number of beneficiaries and the large number of public schools, "there [is] still a considerable number of reassignment possibilities

for White males." *Barhold*, 863 F.2d at 238. For this reason, the retroactive seniority awards in no way impose an "absolute bar" to the advancement of other custodians and custodian engineers. *United States v. City and County of San Francisco*, 696 F. Supp. 1287 (N.D. Cal. 1988), *aff'd* 890 F.2d 1438 (9th Cir. 1989). Should an individual lose a particular transfer opportunity, he is free to seek a different transfer opportunity in the future. Indeed he can request transfers to several different schools, by order of preference, at the same time. Custodians and custodian engineers have no "legitimate, firmly rooted expectations" that they will receive a particular school when they bid for a transfer, as there is always the strong possibility they will be in competition with others for this benefit. *Cotter*, 323 F.3d at 171. Moreover, all custodians and custodian engineers are free to reapply in the future if they are denied a particular transfer. Thus, just as in the context of initial hiring, the loss of this opportunity is far less burdensome than the loss of an existing good. *HUD*, 239 F.3d at 220; *Reynolds*, 296 F.3d at 528; *Stuart*, 951 F.2d at 454. The awards thus do not impermissibly impact the rights of third parties.

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That all the African-American and Hispanic beneficiaries were qualified for the custodian and custodian engineer positions further counsels in favor of a finding that these awards had a minimal impact on third parties. While remedies that permit or require the hiring of unqualified minorities are unlikely to be narrowly tailored and may impose a significant burden on qualified third parties, *see Dean v. City of Shreveport*, 438 F.3d 448, 462 (5th Cir. 2006), the African-American and Hispanic beneficiaries in this case all had been performing the job and performing it well for years before the execution of the settlement agreement. Indeed, the evidence adduced demonstrates that they were selected precisely because their provisional appointments and time on the job demonstrated that they were well qualified. Tr. at 29: 13-21.

E. The irrelevance of individual victim status in determining whether a race-conscious remedy is narrowly tailored

As they have before, the Brennan Intervenors and the United States will likely argue that in order for race-conscious relief to be narrowly tailored, it must consist solely of make-whole relief to individual victims of discrimination. This position is both legally and logically unsupportable. In its September 11, 2006 opinion, this Court found, based on substantial precedent, that the award of retroactive seniority to non-victims for purposes of transfers and temporary care assignments was narrowly tailored to meet a compelling governmental interest in remedying Defendants' past testing discrimination. (9/11/06 Mem. & Order, at 72-73, 58-59). The Court also noted the inherent difference between make-whole relief to individual victims of discrimination, and race-conscious relief, as that term is used in Equal Protection jurisprudence. (*See id.* at 73, n. 50 ("No one disputes that, as in Title VII, relief that makes whole actual victims of discrimination is warranted. *See Croson*, 488 U.S. at 526 (Scalia, J., concurring)."). In *Croson*, Justice Scalia goes on to explain that make-whole relief to identified victims of discrimination is not, in fact, race-conscious, but rather is race-neutral remediation. This is because while the beneficiaries may be members of a particular racial group, they are not being identified on the basis of their race, but on the basis of being a victim. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 526-527 (1989); s*ee also Coalition for Economic Equality v. Wilson*, 122 F.3d 692, 700 n.7 (9th Cir. 1997) ("When, for

example, a state gives the identified victims of state discrimination jobs or contracts that were wrongly denied them, the beneficiaries are not granted a preference 'on the basis of their race' but on the basis that they have been individually wronged."); *Green v. Veneman*, 159 F. Supp. 2d 360, 371 (S.D. Miss. 2001) (noting that when substantive relief is only available to class members who prove race discrimination against them, it does not work any race-based injury); *Davis v. N.Y.C. Housing Auth.,* 60 F. Supp. 2d 220, 236 (S.D.N.Y 1999) (contrasting race-conscious relief, which is subject to strict scrutiny, with relief to individual victims, which is not); *Associated Gen. Contractors of Ca., Inc. v. City and County of San Francisco*, 748 F. Supp. 1443, 1455 (N.D. Cal. 1990), *aff'd* 950 F.2d 1401, 1403 (9th Cir. 1991) ("[A] remedy that goes to the actual victim is not race conscious at all, it is victim conscious.").[11]

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Were make-whole relief to individual victims the only permissible relief under the Equal Protection Clause, there would never be a need for a strict scrutiny analysis, because race-conscious relief would be per se impermissible. A similarly absurd result would occur if the Court were to accept the position that make-whole relief is one type of race-conscious relief, as the Court would find itself in the untenable position of applying strict scrutiny any time an award of benefits to an actual victim of race discrimination in a Title VII case against a public employer. Given that race-conscious relief need not be limited to proven victims of discrimination, there is no constitutional rationale for concluding that narrowly tailored relief must be limited to individuals who were "almost" such victims of discrimination—*i.e.*, those African-Americans and Hispanics who actually took a challenged examination. Rather, the Court must find, as it has previously, that the award of retroactive seniority to non-victim African-American and Hispanic beneficiaries is race-conscious affirmative relief that is narrowly tailored to meet a compelling governmental interest in remedying the effects of Defendants' testing discrimination.

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[11] The cases most recently cited by the Brennan Intervenors in support of their argument to the contrary shed little light on the issue at hand. In *Paganucci v. City of New York*, 758 F. Supp. 467 (S.D.N.Y. 1992), the court found that a consent decree which only gave benefits to minority officers who had been affected by an exam's disparate impact, was narrowly tailored. This is hardly revelatory, and does not stand for the converse conclusion the Brennan Intervenors would have the Court draw, that in order for a consent decree to be narrowly tailored, it can *only* provide benefits to those directly harmed by an exam's disparate impact. *Rothe Development Corp. v. United States Department of Defense*, 262 F.3d 1306 (Fed. Cir. 2001) is no more instructive. In *Rothe*, the court found that in order for a federal government program that provided preferences in the award of defense contracts to socially and economically disadvantaged bidders not to be overinclusive, the government first needed to make findings that each minority group included in the program suffered from the lingering effects of discrimination so as to justify inclusion in a preference program extending to the defense industry. *Rothe Devel. Corp. v. United States Department of Defense*, 262 F.3d at 1332. The court inquired into whether particular racial groups had experienced discrimination, not the individual contractor, *id.*; of course, this Court has already held that substantial evidence supports the conclusion that as groups, African-Americans and Hispanics were discriminated against by the challenged exams. The court in *Kornhass Construction Co., Inc. v. State of Oklahoma*, 140 F. Supp. 2d 1232, 1247-48 (W. D. Okla. 2001) similarly found an issue of overinclusiveness when a bid preference program failed to make particular findings with respect to the inclusion of each minority group, though even more critical in *Kornhass* was the state's failure to provide a compelling governmental interest at all for the creation of the bid preference program. The issue of overinclusiveness in *Concrete General, Inc. v. Washington Suburban Sanitary Commission*, 779 F. Supp. 370, 381 (D. Md. 1991) also was based on the inclusion of minority groups for whom the state had presented no evidence of prior discrimination. Such cases are of no relevance here, where the contrary is true.

III. IF THE SETTLEMENT AGREEMENT IS FOUND TO DISTINGUISH "TESTING CLAIM BENEFICIARIES" FROM "RECRUITING CLAIM BENEFICIARIES," ANDREW CLEMENT IS A "TESTING CLAIM BENEFICIARY."

Should the Court conclude despite the weight of the evidence that the parties intended to classify each African-American or Hispanic offeree as either a recruiting claim beneficiary or a testing claim beneficiary, the Caldero Intervenors submit that testing beneficiaries appropriately include those African-Americans and Hispanics who took one or more of the challenged examinations. This category includes Caldero Intervenor Andrew Clement (who is African-American and who took Exam 1074, but who nevertheless is listed as a "recruiting claim beneficiary" in the United States' relief chart). The United States and the Brennan Intervenors argue that Andrew Clement is not properly considered a testing claim beneficiary because he scored well on this exam and thus cannot be a victim of testing discrimination. This argument fails for two reasons.

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First, as this Court held in the September 11, 2006 opinion, quibbles about whether particular African-American and Hispanic test-takers are appropriately considered actual victims of testing discrimination are only relevant in determining whether the retroactive seniority awarded to these individuals is appropriately relied on in the event of lay-offs. (9/11/06 Mem. & Order, at 58-64; 72-78.) Otherwise, the actual victim status of these test-takers is immaterial to the legality of the relief they received. For this reason, the Court held that African-American and Hispanic individuals who, like Mr. Clement, took a challenged exam, passed it, and were appointed through the civil service process, nevertheless appropriately received retroactive seniority for transfer and temporary case assignment purposes as "testing claim beneficiaries." (*Id.* at 35, 58-59, 72-75.) Mr. Clement is similarly appropriately considered a "testing claim beneficiary" regardless of his victim status, simply by virtue of having taken a challenged exam.

Second, as set out in greater detail in the Caldero Intervenors' section of the parties' joint submission of August 31, 2007, Mr. Clement is also appropriately considered a victim of testing discrimination, given that Exam 1074's discriminatory impact not only caused fewer African-Americans to pass, but also caused those African-Americans passing the exam to on average receive lower scores than white test-takers passing the exam. (*See* Siskin & Cupgood, Adverse Impact on Minorities of Written Examinations for Custodian and Custodian Engineer Positions in New York City, 1985-1993, at 13-14 (Arroyo Int. Mot. for S.J. Ex. 85).) Mr. Clement received a lower list number than several white takers of Exam 1074 and thus ranked behind these individuals for purposes of transfer and layoff. (*See* Ex. B (excerpt of appointment list for Exam1074).) He is thus properly considered an individual victim of race discrimination in testing.

For the reasons stated above, the Court should find that (1) in entering into the settlement agreement, Defendants and the United States did not intend to categorize African-American and Hispanic beneficiaries as either "recruiting claim

beneficiaries" or "testing claim beneficiaries" and (2) the relief provided to all the African-American and Hispanic beneficiaries is narrowly tailored.

Sincerely,

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