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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MICHAEL BRIONEZ, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, et al., Defendants.	Case No. C-01-3969 CW **REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR ENFORCEMENT OF COURT-APPROVED SETTLEMENT** Date: January 12, 2007 Time: 10:00 a.m. [Hon. Claudia Wilken]

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INTRODUCTION

Defendants argue that they have held up their end of the bargain because, in the months since this Court's March 2006 Order, they have finally begun to take meaningful steps to comply with their obligations under the Hispanic Settlement Agreement (HSA). Plaintiffs agree that, since the Court specifically found that the HSA's goals are fully enforceable, Defendants have "accelerated" their implementation of and compliance with the HSA. Defendants' Opposition to Plaintiffs' Second Motion for Enforcement ("Def. Opp.") at 1. But Plaintiffs did not enter into this settlement with the expectation or for the promise of a few months' "accelerated compliance." To the contrary, the parties agreed that Defendants would, in good faith, implement the HSA's provisions for a period *of three years*, with the express goal of bringing the Region's Hispanic representation to parity with the applicable civilian labor force. Defendants have not yet fulfilled their duties under the HSA, and Plaintiffs have not yet received the benefit of their bargain.

After Plaintiffs filed the instant motion, Defendants produced applicant and selection data, purporting to correct "conceptual" and "computational errors," to which they attribute their prior poor performance in those areas. Substituting this re-worked data, Defendants now assert that their selection rate has more than doubled. Erath Dec. at ¶¶ 7, 46-50. In addition, a new defense expert modifies the CLF goals beyond what this Court authorized to reach the implausible conclusion that Even though Hispanics comprise nearly a third of California's civilian labor force, only 9.8% are actually potentially able to work in Region 5. Erath Dec. ¶ 59.

Nonetheless, even assuming that Defendants have finally produced accurate selection data at the final hour, they continue to fall short of the goals of Section IV.A.1 of the HSA and of substantial compliance with other essential components. Defendants' recitation of provisions with which they have managed to comply (for the most part, only over the last several months) should not

obscure their failure to timely implement some of the HSA's most significant provisions, designed to work in tandem to alleviate severe and persistent under-representation in Region 5. It is both proper and necessary for this Court to provide Plaintiffs with the benefit of their bargain by extending the HSA for an additional two years. Given the recency of the gains that Defendants assert they have made, there can be no doubt that the Court's Order and supervision have propelled the Region forward. Continued enforcement by this Court is crucial to sustained progress and to the achievement of the HSA's ultimate goals, as originally contemplated by the parties.

ARGUMENT

I. The Monitor's Report is Properly Before the Court

Defendants argue that "[t]he newly-filed monitor's report is entitled to no weight because the Monitor is not an expert and is not competent as a lay witness." Def. Opp. at 4. This argument lacks merit and runs counter to Defendants' own substantial reliance upon the Monitor's report in their opposition to this motion.

As an initial matter, the Court ordered the Monitor in May 2006 to "provide to the Court, Defendants and Plaintiffs, her report on the Region's progress in compliance with the HSA and the additional remedial measures required by the Court's order." Order Regarding Reporting and Enforcement Procedures at 2. Because the Monitor was ordered to submit her report to the Court, the Court may certainly consider it. Moreover, it is well established that a court-ordered report by a monitor, special master, ombudsman, *etc*.,[1] may constitute admissible evidence.[2] *See Bonito v. Guardian Life Ins. Co. of Am.*, No. 93-55765, 1997 U.S. App. LEXIS 27068, at *9-10 (9th Cir.

[1] *See Ruiz v. Estelle*, 679 F.2d 1115, 1160 (5th Cir. 1982) (noting that court-appointed agents have the same function even though they may be identified by many titles, including "Monitor," "Special Master," and "Ombudsman.").

[2] Although Defendants allude to "hearsay information" contained in the Monitor's October 9, 2006 report, they have failed to cite to a single case where a Monitor's report has been excluded as

1997) (finding "wholly without merit" claim that Special Master's report was inadmissible); *Ex Parte Peterson*, 253, U.S. 300, 312 (1920) (finding an Auditor's report to be admissible evidence).

The parties clearly contemplated that the Monitor's reports could be presented to the Court when they negotiated and agreed upon the Monitor's Statement of Work. Under Section II, "Monitor's Duties and Responsibilities," the Statement provides that "[t]he Monitor may meet with and report to the Court if directed by the Court." *See* Second Declaration of Denise M. Hulett ("Hulett Dec.") at ¶ 3, Ex. 1. As noted above, the Court has so ordered.

II. Defendants Remain Out of Compliance with Significant Provisions of the HSA.

A. Defendants' Latest Method of Adjusting the Applicable CLF is Both Flawed and Contrary to the Parties' Agreement.

The HSA provides that for the purposes of the Agreement, "the parties agree that the best available statistics for identifying the relevant civilian labor force are EEOC Civilian Labor Force Data." HSA § II.A.1. In addition, the relevant geographic area for all clerical, technical, blue collar positions as well as administrative positions at GS-12 and below, is defined as the state of California. HSA § II.A.15. Defendants had ample opportunity to negotiate for different definitions or for specific adjustments to the EEOC civilian labor force data, had they believed such adjustments were necessary to properly reflect the appropriate labor pool. Yet the parties' agreed-upon definitions contained no such modifications. In this Circuit, a settlement agreement's scope "must be discerned within its four corners, and not by reference to what might satisfy the purpose of one of the parties." *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 896 F.2d 412, 413 (9th Cir. 1990) (alteration in original) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971)).

In its March 2006 Order ("Order"), the Court found it appropriate to permit adjustment of

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hearsay. *See* Def. Opp. at 4. Regardless, the Monitor's Report certainly bears all of the indicia of trustworthiness required by FRE 807's residual hearsay exception.

the civilian labor force data for two factors, citizenship and English proficiency, based on Defendants' representation that these two factors are required for employment in Region 5. Now, Defendants' new expert, Dr. Christopher Erath, seeks to further modify the labor pool definitions for a multitude of additional, selectively chosen factors, to justify Defendants' remarkable contention that Hispanics are actually *overrepresented* in Region 5's 462 job series.

The "refinements" that Dr. Erath proposes for series 462 Forestry Technician positions now include not just citizenship and language ability, but also education, geography, and grade level. Hulett Dec. at ¶ 3, Ex. 5, 12/8/06 Declaration of Dr. Christopher Erath ("Erath Dec.") at ¶¶ 13, 32, 40. These adjustments and conclusions are founded upon flawed and erroneous assumptions that are discussed in detail below, and demonstrated in the report of Plaintiffs' expert, Dr. Marc Bendick. Moreover, they are also vastly and indefensibly removed from the definitions upon which the parties agreed as the result of lengthy negotiations. Defendants have provided no evidence to show that job descriptions or requirements for positions covered by HSA have changed since June 2002, when they signed the Agreement. *See Keith v. Volpe*, 784 F.2d 1457, 1460 (9th Cir. 1986) (citing *Armour*, 402 U.S. at 680-683) (noting that a party could have "bargained for and included an absent provision if they had so desired."). In other words, there has been no change in circumstances that would warrant modification of the definitions that the parties bargained for and agreed upon, as set forth in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). Modification of the parties' bargained-for definitions is, then, neither justified nor appropriate.

In the discussion below, Plaintiffs address the deficiencies in Dr. Erath's analysis. As Dr. Bendick notes in his report, each of Dr. Erath's new adjustments is based upon questionable and/or incomplete information and assumptions. Hulett Dec. at ¶ 3, Ex. 2, 12/21/06 Report of Dr. Marc Bendick ("Bendick Rep.") at ¶ 8-11. Further, as Dr. Bendick also points out, applying Dr. Erath's chosen adjustments simply invites further "refinement" for a potentially endless assortment of

assertedly "relevant" characteristics such as age, gender, or out-of-state status. Id. at ¶ 10. Though the Defendants treat it as such, the Court's decision to permit adjustments for citizenship and English proficiency was hardly an invitation to selectively or open-endedly change the parties' agreed-upon definitions.

1. English Proficiency Adjustment

Defendants urged, and the Court ordered a language adjustment to the CLF. Although Plaintiffs believe that the language adjustment has minimal impact, the methodology employed by Defendants' expert demonstrates the arbitrariness of his approach to CLF determination**.** Although Defendants have cited federal regulations as evidence that citizenship is a requirement for employment in Region 5, they have provided no evidence that English proficiency is also a required qualification for employment, in series 462 or otherwise. Rather, Defendants have conclusorily stated -- with no evidentiary support and while supplying no specific information -- that "English is essential to many Region 5 positions (which affects Hispanic representation in the EEOC-CLF)." Defendants' Opposition to Plaintiffs' First Motion for Enforcement at 17. Plaintiffs' electronic search of Region 5 vacancies in series 462 returned dozens of announcements that do *not* specify an English proficiency requirement.[3]

Plaintiffs also note that Defendants' reliance on Census figures relating to English language proficiency is, at best, highly misplaced. Various commentators have observed that not only are the choices available to Census respondents ambiguous as to their meaning, but also that the self-reported nature of the responses renders them intrinsically subjective and open to inconsistency. *See, e.g.,* Dennis Baron, "English Spoken Here? What the 2000 Census Tells Us about Language in the USA," *available at* http://www.english.uiuc.edu/-people-/faculty/debaron/essays/espoken.htm

[3] The Second Declaration of Denise M. Hulett attaches just a few of these announcements. Hulett Dec. at ¶ 3, Ex. 4.

("the Census fluency data is particularly unreliable, because respondents have no objective standard for deciding whether they speak English "well" or "very well," and they may also disagree about what constitutes speaking English "not well" or even "not at all." Census takers are not competent to make these distinctions either."); James W. Crawford, "10 Caveats about Language Data from Census 2000," *available at* http://ourworld.compuserve.com/homepages/JWCRAWFORD/census01.htm ("Follow-up studies in this area have shown that self-reports tend to be unreliable. . . . Census questions about language are abbreviated, ambiguous, and – for many people – confusing . . . . No explanatory notes or objective criteria are provided to help respondents in answering them."); Robert Kominski, Population Division, U.S. Bureau of the Census, "How Good is 'How Well"? An Examination of the Census English-Speaking Ability Question," *available at* http://www.census.gov/population/socdemo/language/ASApaper1989.pdf ("questions remain about the general utility and validity of the speaking ability question. . . . The data do not detail a firm discrimination between the four different categories of the 'how well' question").

The Census categories on which Dr. Erath relied and which Census respondents use to self-report their language abilities are, therefore, subjective, ambiguous, and undefined. Moreover, Plaintiffs dispute Dr. Erath's arbitrary decision to draw the line for employment in series 462 between "well" and "not well" – not only because the categories are undefined, but also because he does so without any factual basis. As Plaintiffs have noted, Defendants have produced no evidence that English proficiency is a requirement for employment in that or any other series. Under these circumstances, Defendants' method of language adjustment should be rejected.

2. Defendants' Proposed Education/Work Experience Adjustment

In addition to citizenship and language, Defendants also purport to adjust the civilian labor force data based on education and work experience. Dr. Erath states in his report that most of the

hiring in series 462 occurs at grades 4, 5, and 6, and so he reviews education and work requirements for those grades in making his modifications to the data. Erath Dec. at ¶ 32. As a preliminary matter, Dr. Erath mistakenly states that grade 4 positions require either six months of specialized and six months of general experience or "a two-year college degree." In fact, vacancy announcements for these positions specify that two years of college *coursework*, not necessarily a degree, meet the educational requirement. Id.; Hulett Dec. at ¶ 3, Ex. 4, Vacancy Announcement ADS06-R4HT-SIERRA-058DP. Grade 5 positions require either the two years of college or a year of specialized experience; and grade 6 positions require a year of service at the grade 5 level. Erath Dec. at ¶ 32.

Dr. Erath's report goes on to observe lower levels of educational attainment for Hispanics in California, and to correspondingly "adjust" the civilian labor pool based on education.[4] However, Dr. Erath's analysis and adjustment for this factor essentially ignores Region 5's alternative hiring qualification, the route by which many prospective employees can be and are hired into series 462: general and specialized work experience. In fact, as Dr. Bendick's report points out, it is work experience that is the primary requirement, for which education may be substituted. Bendick Rep. fn. 7.

[4] Moreover, the post-agreement education adjustment is particularly unfair when applied in California, where a long history of official discrimination in the area of education has been well documented. School segregation of Mexican American students "was common in California during the 1920s and 1930s." *Menchaca, Martha, The Mexican Outsiders: A Community History of Marginalization and Discrimination in California 77 (1995).* By 1931, "85 percent of California schools surveyed by the state government reported segregating Mexican students either in separate classroom or in separate schools." *Ruben Donato, Martha Menchaca, and Richard R. Valencia, Segregation, Desegregation, and Integration of Chicano Students: Problems and Prospects, in Chicano School Failure and Success: Research and Policy Agendas for the 1900s 35 (1991).* See also, *Mendez v. Westminster School District*, 64 F. Supp. 544 (S.D. Cal. 1946)(*de jure* segregation found); James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 Howard L.J. 548, 573-524 (1979); Richard *R. Valencia, The Plight of Chicano Students: An Overview of Schooling conditions and Outcomes, in Chicano School Failure and Success: Research and Policy Agendas for the 1990s 10 (1991).*

Dr. Erath's report simplistically and erroneously applies civilian firefighting experience as a "proxy" for relevant experience to work in series 462, notes (without citing actual data) that Hispanics in California are less likely than non-Hispanics to be firefighters, and concludes that "it is again unlikely that Hispanics are to possess such a qualification." Erath Report at ¶ 33. Dr. Erath's use of civilian firefighting experience as a "proxy" for relevant experience for series 462 is, however, unjustifiably narrow. In fact, vacancy announcements for GS-462-04 positions, for example, provide broadly that

> Qualifying experience for the GS-04 level includes six months general experience that demonstrates the applicant's ability to perform the work of the position or that provided familiarity with the subject matter or processes of the occupation AND six months specialized experience at the GS-03 level that is directly related to the line of work of the position to be filled and which has equipped the applicant with the particular knowledge, skills, and abilities to successfully perform the duties of the position.

Experience-based requirements for these 462 job series positions are, therefore, much more readily satisfied than Dr. Erath's declaration suggests. Moreover, Dr. Erath's analysis does not reflect the fact that participation in the Student Career Experience Program (the "SCEP Program"), which if successfully completed can result in qualification for permanent positions, has no entry-level educational degree or experience requirements. A SCEP participant need only be a student at a high school, college, or technical school. 5 C.F.R. § 213.3202. A student who had not completed high school or who did not have any applicable experience could, upon completing the SCEP Program, nevertheless automatically become eligible for consideration for positions in the 462 job series. While SCEP participants are not counted as permanent employees, the program provides a widely used avenue by which participants can gain the necessary experience to qualify for a permanent position, a reality that Dr. Erath's modification of labor force availability completely ignores.

3. Defendants' Proposed Geographical Adjustment

The HSA is quite clear that the relevant geographic area for all clerical, technical, blue collar positions as well as administrative positions at GS-12 and below, is defined as the state of California; this represents all of the jobs in the 462 job series. Despite this unambiguous definition, Dr. Erath includes a geographical adjustment based on the unsupported assumption that Region 5's hiring for these positions is predominantly "local." Erath Dec. at ¶ 40. As Dr. Bendick notes, Dr. Erath concludes that hiring in the 462 job series is local simply because he perceives a correlation between the number of forestry technicians in a forest and the number of Hispanics in the County in which the forest is located. Bendick Rep. n.8. The fallacy in this supposition is obvious. Suppose, for example, that there is a law firm in which 30 percent of the attorneys are Asian, located in a city in which 30 percent of the general workforce is Asian. Such a superficial match could occur even if not one of the attorneys were hired locally. Id.

Other than their expert's suspect conclusion, Defendants offer no evidence that hiring in series 462 is in fact "local," confined to the counties in which the forests are located, or that prospective employees will not relocate for the jobs in question. This is despite the fact that, presumably, applicant locality information is within Defendants' possession. Indeed, Defendants' own reports of recruitment and consortium activities demonstrate that recruitment is conducted statewide, *see* Defendants' Eighth Monitoring Report at 4-11. The parties agreed to a statewide geographic area for the application of CLF goals to this series. Defendants have provided no basis for modifying the HSA at this late date to alter the agreed-upon geographic area.

4. Defendants' Proposed Grade Adjustment

For purposes of measuring compliance with the goals of the Agreement, Plaintiffs and Defendants agreed that "Applicable Labor Pool" was to be measured by series-based civilian labor force data. Section II A.1. Defendants now wish to modify the agreed-upon labor pool designation

by dividing the 462 series into two separate goals – one for grade 6 and below, and one for grade 7 and above.

Dr. Erath provides no rationale for choosing this particular dividing line, and no evidence that there is more similarity among positions above and below the line than among all 462 series jobs as taken together. To determine whether such a split would be appropriate, and if so, where it should be made, would require investigation of the specific occupations at each grade level and the career path to which they belong, a course of inquiry that might have been appropriate during settlement negotiations, but is not appropriate now to modify agreed-upon goal parameters.

Dr. Erath mischaracterizes Dr. Bendick's previous report when he states that Dr. Bendick endorsed splitting the 462 job series into grades 2-6, to be matched with Census category 612, and grades 7 and up, to be matched with category 196. Dr. Bendick's methodology, approved by this Court, did not split the 462 series by grade. Bendick Rep. n.10. Rather, Dr. Bendick determined a goal for the 462 series by using a Census Bureau "crosswalk" between the 1990 Census and the three 2000 Census occupations that need to be weighted together to correspond to that 1990 occupation.[5] The series-specific goals are what the parties agreed to, what this Court approved, and they should not now be modified.

B. Despite Defendants' Selective Adjustments, They Continue to Fall Short of the Section IV.A.1 Goals

Plaintiffs continue to believe that the agreed-upon goal setting definitions should not be

[5] Relying on data provided by Region 5 for the purposes of this litigation (and turned over to Plaintiffs just days ago), Dr. Erath concluded that 66.1 percent of Forestry Technicians were in grade 7 and above. Erath Dec. at ¶ 20. As Dr. Bendick noted in his first report, however, government-wide statistics for Forestry Technicians indicate that nearly seventy percent of Forestry Technicians are in grades 6 and below. Defendants have provided no explanation for why two thirds of the Region 5 workforce would be in grade 7 (captain-level) and higher, when the distribution is so vastly different elsewhere in the government. All Defendants have provided is a new set of data – data they have never before provided to the Monitor or the Court, and that turned over to Plaintiffs several days prior to this filing. Hulett Dec. at ¶ 3, Ex. 6, December 20, 2006 letter from Susan Ullman.

modified. However, in light of the Court's adoption of citizenship and language modifications to the CLF goals, Dr. Bendick has revisited the 2000 Census data to derive a correct, consistent estimate of Hispanic representation in Series 462 that incorporates these two adjustments.

Rather than making *ad hoc* adjustments, as Dr. Erath does, Dr. Bendick demonstrates that Census data permits us to determine Hispanic availability in a population with the following six characteristics: California residency, labor force participants, occupation in one of the three 2000 Census occupations the Census Bureau crosswalk identifies as corresponding to the 1990 Census occupation representing Series 462 in the Settlement, no work-limiting disability, and U.S. citizenship, and English language proficiency, as defined as Census respondents who self-reported that they speak English "very well" or "well."[6] Bendick Rep. n.4. Applying this method, Dr. Bendick finds that the applicable civilian labor pool for the 462 series, taking citizenship and language into account as the court directed, is 18.4 percent Hispanic. Id. at 7. As Plaintiffs' expert, Dr. Louis Lanier, demonstrates, there remains a significant shortfall of 118 between Hispanic representation in series 462, and in the civilian labor pool. Hulett Dec. at ¶ 3, Ex. 3, Third Supplemental Report of Dr. Louis Lanier ("Lanier Rep.") at ¶ 7. In order to reach parity, even with the modifications to the data because of citizenship and language, Hispanic employment in the 462 series would have to grow from 299 to 417, a 39.5 percent increase. Id.

New and corrected applicant and selection data was provided to Plaintiffs after the instant motion was filed – on December 6, 2006. See Hulett Dec. at ¶ 3, Ex. 6. Based upon the new selection data, Dr. Lanier re-calculated his projections for the GS-462 series, assuming that

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[6] Plaintiffs include the language adjustment because the Court found it appropriate in the March 2006 ruling For the reasons set forth above, however, Plaintiffs believe Defendants' adjustment methodology is flawed, but that in any case, once citizenship adjustments are applied, the impact of a language adjustment is minimal.

Defendants' best rate – 22.2 percent Hispanic selection share in 2006 – will continue indefinitely.[7] Dr. Lanier concludes that under those circumstances, the GS-462 series could attain parity by 2015. Lanier Rep. at ¶¶ 9, 12.

C. Defendants Have Not Fully Complied With Other Important HSA Components.

In addition to falling short of the Agreement's enforceable goals, Defendants have failed to timely and substantially comply with various provisions contained in Section V of the HSA. Throughout their opposition brief, Defendants contend – based on newly revealed data, newly created processes, or a combination of the two – that they are now in substantial compliance with all measures required by the Agreement. Defendants point to accelerated gains in the last several months, including a Hispanic selection rate of 25.8 percent in the most recent six months of available applicant flow data. Def. Opp. at 13. If Defendants' new data is to be credited, the Region has indeed improved upon the stagnation that characterized the first three years of the HSA. But as this Court noted in its March 2006 Order, "last-minute compliance is not substantial compliance," Order at 23, and Defendants' recent improvement serves to highlight Defendants' less attentive approach to their obligations prior to the Court's Order. Moreover, Defendants last-minute revelation of new data – and new approaches to presenting data – have both left Plaintiffs little ability to review and verify the information, and have renewed doubts surrounding the reliability of the reporting.

Defendants argue that new computations and or steps taken in previous months have brought them into compliance with HSA §§ V.A.1., V.A.2, V.A.3, and V.B.2, and the Court-ordered remedy regarding a Mentoring Program for Fire Apprentices. Plaintiffs discuss these provisions below.

1. HSA § V.A.1.

HSA § V.A.1. requires Defendants to take action to "disseminate effectively information relating to employment opportunities" and to "increase the diversity of the applicant pool by

[7] Plaintiffs do not share that assumption unless court supervision continues.

engaging in recruitment activities, both government-wide and externally, consistent with the obligations set forth in Section IV." Noting the persistently small Hispanic proportion of the Region 5 applicant pool, the Court's March 2006 ruling found that Defendants had failed to comply with this provision. Order at 20. In their opposition brief, Defendants argue that Plaintiffs have relied on outdated and flawed data (the data Defendants provided in their September 2006 report to this Court) in demonstrating a decline in the Hispanic share of the applicant pool. Def. Opp. at 16. Subsequent to the filing of this motion for enforcement, Defendants filed new data and an expert analysis addressing "conceptual" and "computational" errors in the applicant flow information they have reported to Plaintiffs, the Monitor, and this Court for last four years. Erath Dec. at ¶ 7.

In her most recent report, and as Plaintiffs discussed in detail in their initial Memorandum in support of this motion, the Monitor also pointed to significant and continued problems and gaps in Defendants' applicant flow data. Indeed, throughout the term of the HSA, both the Monitor and Plaintiffs have pointed to Defendants' incomplete and inaccurate data on applicant flow, and so Defendants' acknowledgement of significant errors is not wholly surprising. Plaintiffs do take issue, however, with Defendants' expectation that Plaintiffs, the Monitor, and this Court simply accept their eleventh-hour reconstruction of four years of applicant flow data.

Even assuming that Defendants' new selection and applicant data are accurate and that there have been recent genuine improvements in the Hispanic applicant pool, Court supervision for an additional two years is nonetheless warranted. Last-minute compliance with the HSA's provisions is not substantial compliance – and the fact that Defendants have made recent progress in the Hispanic applicant rate does not eradicate earlier deficiencies. The efficacy of the recruitment program is barely recent enough to be measurable, particularly when the core goals have not been achieved. Court supervision is required to ensure that last-minute compliance becomes full compliance.

2. HSA § V.B.2.

Defendants maintain that since the Court's Order in March 2006, they have complied with HSA § V.B.2, requiring them to provide the Regional Recruitment Coordinator with applicant flow and other data. Defendants do not, however, provide any explanation for how they could have provided meaningful applicant flow data to the Regional Recruitment Coordinator, when even they concede that they have not maintained such data. Defendants' new data reports and expert analyses – prepared just recently to correct for "conceptual" and "computational" errors – paint a far different picture than the Region's previous reporting on applicant flow and selection rates. Defendants have not reconciled their admittedly problematic reporting with their claimed compliance with HSA § V.B.2.

3. HSA § § V.A.2 and V.A.3.

Defendants argue that they are now in compliance with HSA § V.A.2, which requires them to monitor all recruitment and promotion actions of Forest Supervisors and Regional Office Directors and all recruitment and promotion actions taken under their supervision," and HSA § V.A.3, requiring them to use the agreed-upon Form C in the selection process. Def. Opp. at 19-21. The Court's March 2006 Order included a finding that Defendants were not in compliance with these provisions, and the Monitor's October 2006 report observed continuing and serious problems in both the monitoring and the use of Form C. Order at 21-23; Monitor's 10/9/06 Report at 23-31.

The Declaration of Associate Forester Vicki Jackson provides new information on monitoring of selections and use of Form C, and Defendants now contend that they have addressed backlogs and deficiencies in these processes. Specifically, Defendants state that they have improved compliance with this provision since July 2006. Def. Opp. at 21. Assuming Defendants' data and assertions are valid, their argument is essentially that, because they have correctly monitored selections and utilized Form C for approximately six months of the four years of the HSA, they are

in compliance with §§ V.A.2 and V.A.3. Plaintiffs do not view such eleventh-hour action as either substantial compliance or as fulfillment of the benefit of their bargain. Defendants' recent claimed improvements do not diminish the fact that, for more than three years, Defendants failed to properly monitor selections or employ agreed-upon outreach and recruitment procedures.

4. Mentoring Program for Fire Apprentices

Defendants dismiss Plaintiffs' concerns about their compliance with the Court's Order, regarding it as a complaint about being "tardy." Def. Opp. at 25. It is true that Plaintiffs' and the Monitor's concerns stemmed from Defendants' delayed implementation of the Program (despite their representation to the Court that they already had a program in place), as well as interruptions in the program. But Defendants again miss the point: delayed compliance, particularly when time is so limited and the stakes so high, does not constitute substantial compliance.

III. The Court Has the Authority to Provide the Relief Plaintiffs Seek, Including Through Use of its Modification Power.

In the initial Memorandum in support of this motion for enforcement, Plaintiffs argued at length that the Court has the authority under the language of the HSA, through its inherent power to enforce the Agreement and through its modification power, to extend the HSA. Defendants devote the bulk of their opposition to their contention that sweeping changes in their Human Resources structure and processes are neither relevant to nor significant enough to warrant modification of the Agreement. Plaintiffs' initial brief sets out dramatic shifts in the Region's recruitment and hiring processes, and so they will not be repeated here. Plaintiffs note only that Defendants are mistaken when they claim that changes in these processes have not "burdened" implementation of the Agreement. As the Monitor's last report observed, the foot-dragging, delays, false starts, and repeated revisions associated with these changes have cumulatively hindered the implementation process.

Defendants also argue that the remedy Plaintiffs seek is unjustified by and unrelated to the extensive changes the Region's hiring and recruitment processes. To the contrary, a two-year extension is a uniquely appropriate remedy for this situation – a situation in which Defendants failed to measurably progress for three years, and then, spurred by the Court's intervention, "accelerated" their compliance in recent months. A two-year extension serves to provide Plaintiffs with no more and no less than the benefit of their bargain, and merely imposes upon Defendants the obligation they undertook when they entered into the Agreement – three years of good-faith compliance. The extension is also suitably tailored because it will provide an opportunity to assess the full impact of the recent, untested changes on barriers to Hispanic representation.

CONCLUSION

Although they characterize Plaintiffs' requested extension as a "drastic" solution, Defendants also state in Section III of their Opposition that they will continue the HSA programs and Court-ordered remedies that they consider effective.[8] Def. Opp. at 39. Yet Plaintiffs have little confidence that once the Agreement expires, Defendants will keep in place measures to improve Hispanic representation – many of which have been in operation only a few months, rather than the three years the parties agreed upon. Indeed, if the months since the Court's Order have made anything clear, it is that judicial vigilance and supervision have been highly motivating for Defendants. A year ago, Defendants were still dragging their feet, committed to the notion that the HSA's goals were merely aspirational. There is no doubt that the Court's intervention was a critical step toward implementation of the HSA.

And the Court's continued involvement remains critical. In reality, Plaintiffs seek no "drastic" measures – only to hold Defendants to the deal the parties struck four years ago.

[8] Interestingly, Defendants do not include centralized hiring on this list of measures that they plan to continue, even though they attribute many of gains in Hispanic hiring to centralization. Def. Opp. at 39.

Defendants ask the Court to accept their few months of "accelerated" compliance as a substitute for the three years for which Plaintiffs bargained. It is both permissible and appropriate for this Court, however, to insist that Defendants *fully* meet their obligations, by ordering an additional two-year extension of the Agreement.

Respectfully submitted,

Dated: December 22, 2006

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