UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA, Plaintiff, v. **STATE OF RHODE ISLAND, RHODE ISLAND DEPARTMENT OF CORRECTIONS,** Defendants.	Civil Action No.: 1:14-cv-78(S)

MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION TO PROVISIONALLY ENTER THE SETTLEMENT AGREEMENT AND SCHEDULE FAIRNESS HEARING

TABLE OF CONTENTS

I. INTRODUCTION **1**
II. PROCEDURAL BACKGROUND **1**
III. FACTUAL BACKGROUND **2**
A. The Written Examination 3
B. The Video Examination 5
IV. OVERVIEW OF THE SETTLEMENT AGREEMENT **6**
A. Injunctive Relief 6
1. Interim Selection Process 6
2. Development and Use of New Selection Devices 6
B. Individual Relief 7
1. Monetary Relief 7
2. Priority Hiring with Noncompetitive Retroactive Seniority 8
C. Procedure Following the Provisional Entry of the Settlement Agreement 9
1. Notice of Settlement 9
2. Fairness Hearing on the Terms of the Settlement Agreement 9
3. Notice of Entry of the Settlement Agreement and Individual Relief Claims Process 10
4. Fairness Hearing on Individual Relief 10
D. Continuing Jurisdiction and Duration of the Settlement Agreement 11
V. DISCUSSION **11**
A. Standard of Review 11
B. The Settlement Agreement is Fair, Reasonable, and Adequate 13
1. The Settlement Agreement Avoids Costly Protracted Litigation 13
a. The United States Has Established the First Prong of a Disparate Impact Case 14
b. The United States Contends There is Insufficient Evidence to Support the Job-Relatedness and Business Necessity of the Challenged Selection Practices 15
c. The United States Has Proposed Viable Alternatives to the Current Selection Process 19
2. The Settlement Agreement Provides Relief That Is Appropriate Under Title VII 19
a. Injunctive Relief Should Be Awarded 20

b. Individual Remedial Relief Should Be Awarded..... 21

3. The Settlement Agreement Provides for Hearings to Ensure the Fairness of the Settlement Agreement, Protects Third Parties' Rights, and Protects the Settlement Agreement from Collateral Attack..... 23

VI. CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 16, 20, 21

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 11

Boston Chapter, N.A.A.C.P., Inc., v. Beecher, 504 F.2d 1017 (1st Cir. 1974) 16

Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13 (1st Cir. 1998) 23

Bradley v. City of Lynn, 443 F. Supp. 2d 145 (D. Mass. 2006) 15, 16

Burney v. City of Pawtucket, 559 F. Supp. 1089 (D.R.I. 1983) 16

Bussie v. Allmerica Fin. Corp., 50 F. Supp. 2d 59 (D. Mass. 1999) 13

Carson v. Am. Brands, Inc., 450 U.S. 79 (1981) 11, 12, 14

Conservation Law Found. of New England, Inc., v. Franklin, 989 F.2d 54 (1st Cir. 1993) 12, 13, 21

Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980) 13

Donnelly v. Rhode Island Bd. of Governors for Higher Educ., 929 F. Supp. 583 (D.R.I. 1996), *aff'd*, 110 F.3d 2 (1st Cir. 1997) 16

Durrett v. Hous. Auth. of the City of Providence, 896 F.2d 600 (1st Cir. 1990) 12, 13, 20, 21

Edwards v. City of Houston, 78 F.3d 983 (5th Cir. 1996) 24

EEOC v. Hiram Walker & Sons, Inc., 768 F.2d 884 (7th Cir. 1985) 11

EEOC. v. Astra U.S.A., Inc., 94 F.3d 738 (1st Cir. 1996) 11

Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) 21, 23

Fudge v. City of Providence Fire Dep't, 766 F.2d 650 (1st Cir. 1985) 15

Giusti-Bravo v. U.S. Veterans Admin., 853 F. Supp. 34 (D.P.R. 1993) 14

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 15

Hutchinson v. Patrick, 636 F.3d 1 (1st Cir. 2011) 12

In re Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24 (1st Cir. 2009) 12

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 14, 20, 21

Johnson v. Allyn & Bacon, Inc., 731 F.2d 64 (1st Cir. 1984) 21

Jones v. City of Boston, 752 F.3d 38 (1st Cir. 2014) 4, 15

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) 11

Ricci v. DeStefano, 557 U.S. 557 (2009) 4, 7, 14, 16

United States v. Brennan, 650 F.3d 65 (2d Cir. 2011) 17

United States v. Cannons Eng'g Corp., 899 F.2d 79 (1st Cir. 1990) 12, 14
United States v. Massachusetts, 781 F. Supp. 2d 1 (D. Mass. 2011) 16
United States v. Massachusetts, 869 F. Supp. 2d 189 (D. Mass. 2012) 12, 22
United States v. New Jersey, 1995 WL 1943013 (D.N.J. March 14, 1995) 24
Voss v. Rolland, 592 F.3d 242 (1st Cir. 2010) 12
Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 15
Wrenn v. Sec'y, Dep't of Veterans Affairs, 918 F.2d 1073 (2d Cir. 1990) 21

Statutes

42 U.S.C. § 2000e, *et seq.* 1
42 U.S.C. § 2000e-2(k) 2
42 U.S.C. § 2000e-2(k)(1)(A)(i) 15
42 U.S.C. § 2000e-2(k)(1)(A)(ii) 19
42 U.S.C. § 2000e-2(n)(1) 23
42 U.S.C. § 2000e-5(g) 21
42 U.S.C. § 2000e-6 1

Regulations

29 C.F.R. § 1607 16

I. INTRODUCTION

Plaintiff United States of America ("United States") and Defendants State of Rhode Island ("Rhode Island") and the Rhode Island Department of Corrections ("RIDOC") (collectively, "Parties") submit the following Memorandum of Law in Support of the Joint Motion to Provisionally Enter the Settlement Agreement and Schedule Fairness Hearing ("Joint Motion"). The Parties request that the Court provisionally enter the proposed Settlement Agreement filed with this Joint Motion, and schedule a Fairness Hearing on the Settlement Agreement.[1] *See* Exhibit A.

As set forth below, the Court should provisionally enter the Settlement Agreement because its terms are lawful, reasonable, and equitable. If entered, the Agreement will fulfill the goals of: (1) resolving all legal and factual disputes between the Parties; (2) establishing a new selection procedure for entry-level correctional officers ("COs") positions that complies with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"); and (3) providing appropriate individual remedial relief in the form of monetary and priority hiring relief (with retroactive noncompetitive seniority) to qualified African American and Hispanic applicants who were affected by the employment practices challenged by the United States in this case.

II. PROCEDURAL BACKGROUND

The United States commenced this action against Rhode Island on February 10, 2014, pursuant to Section 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-6. *See* Dkt. No. 1 at ¶ 1. In this case, the United States alleges that Defendants violated Title VII by engaging in a pattern or practice of employment discrimination in hiring entry-level

[1] This Memorandum incorporates by reference the definitions set forth in the Settlement Agreement, attached as Exh. A, at ¶ II.

correctional officers at the RIDOC. *Id.* Specifically, the United States alleges that from 2000 to 2013, Defendants used a written examination and a video examination for selecting entry-level correctional officers that had a disparate impact on African American and Hispanic candidates, and is not job-related and consistent with business necessity. *Id.* ¶¶ 31-36. Furthermore, the United States claims that Defendants' use of these examinations is unlawful because alternative selective devices with less impact are available that would meet Rhode Island's legitimate business needs. *See* 42 U.S.C. § 2000e-2(k). In their answer to the United States' complaint, Defendants denied that the challenged employment practices violated Title VII. *See* Dkt No. 23. The United States has never alleged intentional discrimination in this case, whether in its Complaint or in any subsequent filing. The State does not admit to liability under Title VII.

After more than two years of extensive fact and expert discovery, the Parties engaged in productive settlement discussions in December 2016, and narrowed the issues that remained in dispute. These efforts culminated in a successful mediation on April 20, 2017, facilitated by Magistrate Judge Lincoln D. Almond. The Parties acknowledge their shared objective of selecting a qualified, diverse workforce in a manner that does not disproportionately exclude African American or Hispanic candidates from employment at the RIDOC. The Parties consent to the terms of the proposed Settlement Agreement, filed with this Joint Motion, and agree to waive hearings and findings of fact and conclusions of law on all remaining issues in the case, subject to the fairness hearings outlined below.

III. FACTUAL BACKGROUND

For purposes of seeking provisional—and, ultimately, final—entry of the Settlement Agreement, the United States contends, and Rhode Island does not dispute, the following: Since at least 2000, the multiple-hurdle selection process for entry-level COs at the RIDOC has included

a written examination and video examination. Both exams are administered on the same day; the video exam is administered first, followed by the written exam. Applicants who pass both exams are placed on an eligibility list in descending rank order based solely on their video exam score, and are processed for further consideration based on this rank. While CO candidates must pass additional screening hurdles, including a physical fitness test (since 2007), a background check, and a psychological evaluation, only the written and video examinations are at issue in this case.

A. The Written Examination

From 2000-2004, Rhode Island used a written examination ("initial written exam") developed by Jeanneret & Associates ("Jeanneret") to select applicants for the entry-level CO position. *See* Declaration of Bernard R. Siskin, Ph.D. ("Siskin Decl."), attached as Exhibit B, at ¶ 2; Declaration of David P. Jones, Ph.D. ("Jones Decl."), attached as Exhibit C, at ¶ 17. This initial written exam consisted of 91 questions that tested the basic cognitive abilities of reading comprehension, math, attention to detail, writing, problem solving ability and situational judgment. Siskin Decl., ¶ 2; Jones Decl., ¶¶ 17, 25. In 2005, the State revised the 91-item written exam. The revised written exam contains 82 questions and has been administered from 2006 to the present. Siskin Decl., ¶ 2; Jones Decl., ¶ 18. For nearly all years in which the State administered either the initial or the revised written exams, a passing score of 70% was used on a pass/fail basis. Siskin Decl., ¶ 2; Jones Decl., ¶ 18. An applicant who failed the written examination was disqualified from proceeding to the next step in RIDOC's selection process. Siskin Decl., ¶ 3; Jones Decl., ¶ 20.

Between January 2000 and June 2004, RIDOC administered the initial written exam three times. Jones Decl., ¶ 16. The disparity between the overall pass rate for applicants who identified as African American and the overall pass rate for applicants who identified as white is statistically

significant at 13.94 units of standard deviation.[2] Siskin Decl., ¶ 5. Similarly, the disparity between the overall pass rate for applicants who identified as Hispanic and the overall pass rate for applicants who identified as white is statistically significant at 14.43 units of standard deviation. *Id*., ¶ 5.

Between June 2006 and September 2013, RIDOC administered the revised written exam six times. Jones Decl., ¶ 16. The disparity between the overall pass rate for applicants who identified as African American and the overall pass rate for applicants who identified as white was statistically significant at 17.87 units of standard deviation. Siskin Decl., ¶ 6. Similarly, the disparity between the overall pass rate for applicants who identified as Hispanic and the overall pass rate for applicants who identified as white was statistically significant at 18 units of standard deviation. *Id*., ¶ 6.

According to the statistical analyses performed by Dr. Bernard R. Siskin, Ph.D., the United States' statistical expert, an additional 133 African American applicants and 125 Hispanic applicants would have been eligible to continue in the RIDOC's selection process for the entry-level CO position if the initial written exam did not have disparate impact on these groups. *Id*., ¶ 5. Similarly, according to Dr. Siskin's statistical analyses, for the revised written exam, an additional 248 African American applicants and 265 Hispanic applicants would have been eligible to continue in the RIDOC's selection process absent the disparate impact of the exam. *Id*., ¶ 6.

[2] In Title VII disparate impact cases such as this, disparities between white and minority selection rates often are expressed as a number of standard deviations. *See Jones v. City of Boston*, 752 F.3d 38, 43-44 (1st Cir. 2016). The number of standard deviations corresponds to the statistical likelihood that a disparity as large as the one observed would occur by chance. *Id.* at 43-44. The likelihood that a disparity that is equivalent to two or more standard deviations would occur by chance is approximately 5 percent—that is, "statistically significant." *Id.* at 43. As the First Circuit has explained, in cases such as this, a "*prima facie* showing of disparate impact [is] 'essentially a threshold showing of a significant statistical disparity . . . and nothing more.'" *Id*. at 46 (quoting *Ricci v. DeStefano*, 557 U.S. 557, 587 (2009)).

B. The Video Examination

The 83-item video exam used by RIDOC was developed by Ergometrics and Applied Personnel Research Inc. ("Ergometrics") and has been administered to applicants from 2000 to the present. Siskin Decl., ¶ 2; Jones Decl., ¶ 19. The video exam depicts situations that a CO may encounter on the job through a series of vignettes. Jones Decl., ¶ 19. Each vignette is followed by a multiple-choice question that requires an applicant to select the most appropriate answer for each scenario. *Id.*, ¶ 19. Each answer is awarded between one to five points, with 415 points possible overall. Siskin Decl., ¶ 2; Jones Decl. ¶ 19. RIDOC used a passing score of 79.5% on the video exam, which represents 330 out of 415 possible points. Siskin Decl., ¶ 2; Jones Decl., ¶ 19. An applicant who fails to achieve this score is disqualified from continuing in the selection process. Siskin Decl., ¶ 3; Jones Decl., ¶ 20. If a candidate passes both the written and video exam, they are placed on a rank-order eligibility list based on their video exam score. Siskin Decl., ¶ 3; Jones Decl., ¶ 20.

From 2000-2013, the video exam was administered nine times by RIDOC. Jones Decl., ¶ 16. The video exam had a statistically significant disparate impact on African American and Hispanic test takers. Siskin Decl., ¶ 7. The overall pass rate between African American and white test takers is statistically significant at 12.53 units of standard deviation. *Id.*, ¶ 7. Similarly, the disparity in the overall pass rate between Hispanic and white test takers is statistically significant at 18.17 units of standard deviation. *Id.*, ¶ 7.

According to Dr. Siskin's statistical analyses, an additional 308 African American applicants and 469 Hispanic applicants would have been eligible to continue in the RIDOC's selection process for the entry-level CO position if the video exam did not have disparate impact on these groups. *Id.*, ¶ 7. And, if the written and video exams had not had a disparate impact on

African Americans and Hispanics, an estimated 52 additional African American applicants and 55 additional Hispanic applicants would have proceeded through all stages of the selection process and been hired as COs between 2000 and the present. *Id.*, ¶ 8.

IV. OVERVIEW OF THE SETTLEMENT AGREEMENT

A. Injunctive Relief

As set forth in the Settlement Agreement, the Parties have agreed that the RIDOC will not use the initial written, revised written, or video exam at issue in this action, except as identified in the interim selection process, to select entry-level correctional officers. Exh. A, ¶¶ 28, 33. The State will designate an individual who will be primarily responsible for facilitating the implementation of the provisions of this Agreement. *Id.*, ¶ 31.

1. Interim Selection Process

Proper development of a new selection process will take time. To accommodate the State's immediate operational needs, the Parties have agreed that the State may use an interim selection process. *Id.*, ¶¶ 32-33. For the purpose of hiring one class of correctional officers for the RIDOC training academy, the State is authorized to use the revised written exam with a passing score of 70% (57 out of 82 questions), and the video exam with a passing score of 70% (290 out of 415 possible points). Candidates' tests will be scored and rank ordered based on the video exam. *Id.*, ¶ 33.

2. Development and Use of New Selection Devices

Under the terms of the Settlement Agreement, the State, in consultation with the United States, will develop and administer a new procedure for selecting qualified candidates for the correctional officer position. *Id.*, ¶¶ 34-39. The new selection device(s) will not have a statistically significant disparate impact on the basis of national origin or race or will be job related for the

correctional officer position and consistent with business necessity in accordance with Title VII. *Id.*, ¶ 35.

B. Individual Relief

The State agrees to provide individual relief to eligible Claimants in the form of (1) monetary relief and/or (2) priority hiring relief with noncompetitive retroactive seniority. *Id.*, ¶ 40. Remedial relief will only be awarded to individuals who would otherwise have been eligible for consideration to be hired as entry-level correctional officers but for the unintentional disparate impact of the employment practices challenged by the United States.[3]

1. Monetary Relief

Following entry of the Settlement Agreement, the State will contribute $450,000 in monetary relief to be distributed to eligible Claimants. *Id.*, ¶ 41. An individual may be eligible for relief if he or she is African American or Hispanic; failed the initial or revised written exam or the video exam between January 2000 and 2013; and met the minimum qualifications for employment at the time they failed one or more of the challenged selection devices. *Id.*, ¶ 48. Nevertheless, a Claimant need not express an interest in, or be eligible for, priority hiring relief, or accept an offer of employment in the correctional officer position in the Rhode Island Department of Corrections to qualify for monetary relief. *Id.*, ¶ 50.

[3] In *Ricci v. DeStefano*, 557 U.S. 557 (2009), the Supreme Court found that a public employer had violated Title VII's disparate treatment provision when, for fear of disparate impact liability, the employer discarded the results of a previously administered promotional examination for individuals who were already employed. *Id.* at 574. The Court held that an employer must have a "strong basis in evidence" for any race-based employment action taken to avoid disparate impact liability. *Id.* at 584. The Parties maintain that *Ricci* is not applicable to the instant matter. Unlike in *Ricci*, the State is not attempting to set aside the results of an already-administered selection process. Instead, the Settlement Agreement is intended to ensure that *future* hiring cycles comply with Title VII.

2. Priority Hiring with Noncompetitive Retroactive Seniority

The State shall award priority hiring relief to eighteen (18) African American Claimants and nineteen (19) Hispanic Claimants. *Id.*, ¶ 90. After thirty-seven (37) eligible Claimants are hired, the State's obligation under this Agreement is satisfied. *Id.*, ¶ 93. The number of priority hires negotiated by the Parties does not exceed what would constitute make-whole relief to individuals who would otherwise have been hired as entry-level correctional officers but for the disparate impact of the practices challenged by the United States, because there are fewer priority hires than the estimated number of additional Hispanic and African-American hires absent the disparate impact of the challenged exams. Ex. B, Siskin Decl. at ¶ 8. Importantly, the Agreement does not require the RIDOC to hire any individual who is not currently qualified to be a correctional officer. African American and Hispanic Claimants are eligible for priority hiring relief only if they failed the initial or revised written exam or video exam between January 2000 and 2013; or failed the revised written exam administered as part of the interim selection process while also passing the video exam; met the minimum qualifications for employment at the time they failed one or more of the selection devices; and, meet the current minimum qualifications for hire as a correctional officer. Ex. A, Settlement Agreement at ¶ 49. In limited circumstances, current RIDOC correctional officers who meet these criteria are also eligible for priority hiring relief. *Id.*, ¶ 91.b. Priority hires will be credited with noncompetitive retroactive seniority that corresponds with their presumptive hire date—the date of the first academy class they would have entered had they not been disqualified by the initial written, revised written, or video exams. *Id.*, ¶ 90.

C. Procedure Following the Provisional Entry of the Settlement Agreement

The Parties respectfully request that the Court provisionally enter the proposed Settlement Agreement and schedule an Initial Fairness Hearing on the terms of the Agreement no less than 100 days from the date of the Court's order on this Joint Motion. The Agreement, if provisionally approved, sets forth the schedule for notice and the fairness hearings.

1. Notice of Settlement

Following provisional approval of the Settlement Agreement, notice will be sent to all applicants who identified as African American or Hispanic when they applied to the State for an entry-level correctional officer position and failed the initial written exam, revised written exam or video exam between 2000 and 2013; or failed the revised written exam or video exam administered as part of the interim selection process. *Id.*, ¶¶ 19-20 (Appx. A). Notice will also be provided to all interested parties including currently employed correctional officers at the RIDOC, the Rhode Island Brotherhood of Correctional Officers, and any other union or association authorized to represent correctional officers with instructions on how to file objections with the Court prior to the Initial Fairness Hearing. *Id.*, ¶¶ 22-23 (Appx. A).

2. Fairness Hearing on the Terms of the Settlement Agreement

At the Initial Fairness Hearing, the Court will determine whether the terms of the Settlement Agreement are fair, reasonable, and adequate; and not illegal, a product of collusion, or against the public interest. *Id.*, ¶ 15. The Court will consider and resolve any objections to the terms of the Settlement Agreement at the hearing. If the Court concludes that terms of the Agreement are fair, reasonable, and adequate, the Court shall enter the Settlement Agreement at or following the fairness hearing. *Id.*, ¶ 27.

3. Notice of Entry of the Settlement Agreement and Individual Relief Claims Process

Following the entry of the Settlement Agreement, applicants who identified as African American or Hispanic when applying for any of the State's selection processes for entry-level correctional officers, and who failed the initial written exam, the revised written exam, or the video exam between 2000 and 2013; or who failed the written exam administered as part of the interim selection process while also passing the video exam, will receive a copy of the notice of entry of the Settlement Agreement. *Id.*, ¶ 42 (Appx. B). The notice, where applicable, will also include instructions on how to file a claim for a monetary award or priority hiring consideration and the Interest-in-Relief Form Documents. *Id*.

The United States, in consultation with the State, will finalize a list of Claimants eligible for individual relief. *Id.*, ¶¶ 47-52. The United States will file the Proposed Individual Relief Awards Lists with the Court containing its eligibility determinations and simultaneously move the Court to hold a Fairness Hearing on Individual Relief to determine which Claimants are entitled to a monetary or a priority hire award. *Id.*, ¶¶ 55-57.

4. Fairness Hearing on Individual Relief

At the Fairness Hearing on Individual Relief, the Court will consider and resolve any objections filed by affected individuals to the Proposed Monetary Awards List or the Proposed Priority Hire Claimant List. *Id.*, ¶ 65-66. If the Court determines that the monetary and priority hire awards are fair, reasonable, and adequate, the Court will approve the Final Individual Relief Awards Lists at or following the Fairness Hearing on Individual Relief. *Id.*, ¶ 67. Following the Court's approval, notice will be sent to Claimants eligible for Individual Relief Awards. *Id.*, ¶¶ 68-69 (Appx. D).

D. Continuing Jurisdiction and Duration of the Settlement Agreement

The Settlement Agreement provides that the Court will retain jurisdiction over this matter for the purpose of resolving any disputes or entering any orders that may be appropriate to implement the Agreement. *Id.*, ¶ 116. Provided there are no outstanding disputes before the Court, the Settlement Agreement shall be dissolved upon the completion of the following: (i) fulfillment of the Parties' obligations with regard to injunctive relief; (ii) completion of the issuance of monetary award checks; and (iii) 45 days after the State provides the final reports and statements regarding priority hiring relief as required by the Settlement Agreement. *Id.*, ¶ 111. Once the Settlement Agreement is dissolved, the Parties will promptly move for this action to be dismissed. *Id.*, ¶ 112.

V. DISCUSSION

A. Standard of Review

"In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see also EEOC. v. Astra U.S.A., Inc.*, 94 F.3d 738, 744 (1st Cir. 1996) ("[P]ublic policy strongly favors encouraging voluntary settlement of employment discrimination claims."); *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985) (noting Congress' "express preference for settlement" in Title VII cases). Accordingly, it has long been recognized that cooperation and voluntary compliance are the preferred means of achieving Title VII's goals of ensuring equal employment opportunities and eliminating unlawful employment practices. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515-16 (1986) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)).

To resolve a pattern or practice suit brought under Title VII, such as this one, the proposed agreement must be lawful, fair, reasonable, adequate, and consistent with the public interest. *See Hutchinson v. Patrick*, 636 F.3d 1, 10 (1st Cir. 2011); *Voss v. Rolland*, 592 F.3d 242, 251 (1st Cir. 2010). In determining the fairness of a proposed agreement, courts should "weigh[] the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." *Carson*, 450 U.S. at 88 n.14. Additionally, the First Circuit has held that a court approving a consent decree or settlement agreement should ensure it is "not illegal, a product of collusion, or against the public interest." *United States v. Massachusetts*, 869 F. Supp. 2d 189, 193 (D. Mass. 2012); *see also Conservation Law Found. of New England, Inc., v. Franklin*, 989 F.2d 54, 58-59 (1st Cir. 1993) (reiterating that any agreement must not violate the Constitution or relevant statutes and must be consistent with Congress' objectives, although the parties possess significant leeway to negotiate the terms of settlement); *Durrett v. Hous. Auth. of the City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (approval of a proposed settlement agreement requires, among other factors, reasonable notice to possible objectors and third parties who may not be unreasonably harmed).

Notably, a negotiated settlement agreement proposed by a government actor is generally afforded deference by the district courts. *Conservation Law Found. of New England, Inc.*, 989 F.2d at 58-59; *Durrett*, 896 F.2d at 604; *see also United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) (encouraging settlement where "a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement"). As well, there is a general presumption in favor of settlement where "the parties negotiated at arm's length and conducted sufficient discovery." *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009).

B. The Settlement Agreement is Fair, Reasonable, and Adequate

The Settlement Agreement here resulted from "arm's length negotiations" between two governmental agencies after more than two years of extensive, complex fact and expert discovery, and mediated by a Magistrate Judge of this District Court. *See Bussie v. Allmerica Fin. Corp*., 50 F. Supp. 2d 59, 77 (D. Mass. 1999); *Conservation Law Found. of New England, Inc*., 989 F.2d at 58. The Settlement Agreement is fair, reasonable, and adequate because the parties have consented to the terms, notice will be provided to third parties, and the agreement meets the objectives Congress intended under Title VII. *See Durrett*, 896 F.2d at 604; *Culbreath v. Dukakis*, 630 F.2d 15, 23 (1st Cir. 1980). The Settlement Agreement affords no more relief than is appropriate under Title VII and that the United States could have obtained were it to prevail at trial. *See Durrett*, 896 F.2d at 604. Additionally, the rights of third parties are not unreasonably or impermissibly affected as set forth below. *Id.* Ultimately, the relief provided ensures that Defendants will use a selection process that complies with Title VII, does not exclude qualified applicants for CO positions, and provides individual remedial relief to those African American and Hispanic applicants who otherwise would have been eligible for consideration to be hired as entry-level correctional officers except for the unintentional disparate impact from the challenged employment practices.

1. The Settlement Agreement Avoids Costly Protracted Litigation

Reasonableness is presumed after sufficient discovery has taken place between experienced counsel, and settlement would avoid further lengthy, costly litigation. *Bussie v. Allmerica Fin. Corp*., 50 F. Supp. 2d at 76-77. As a general matter, Title VII disparate impact cases are complex, costly, and time-consuming. Cases challenging just one selection device span years, and the proceedings are often bifurcated for separate trials on liability and damages. *See*

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 360-61 (1977). The situation here is even more complicated because the United States must establish, and Rhode Island must defend against, liability for two selection devices involving two distinct groups of persons affected by the challenged selection devices in order to prevail on the claims in this case. To date, the Parties have engaged in robust motions practice, as well as substantial fact and expert discovery. The Parties have propounded multiple sets of interrogatories, document requests, and requests for admissions; taken numerous fact and expert depositions; and exchanged several sets of expert reports. The Parties forecast further costly expert reports and depositions in addition to the filing of dispositive motions if this case continues to be litigated. Ultimately, the Parties' voluntary settlement avoids these costs and risks, ensures timely relief to affected individuals, allows Rhode Island's hiring to proceed in the interim, and guarantees a Title-VII compliant selection process in the future. *See Cannons*, 899 F.2d at 90 (evaluating the reasonableness of the proposed settlement by considering the expense of protracted litigation and the strength of the parties' claims).

a. *The United States Has Established the First Prong of a Disparate Impact Case*

In determining the fairness of a settlement agreement, courts consider the Plaintiffs' likelihood of success on the merits in weighing whether or not the relief secured to the victims is adequate.[4] *Carson,* 450 U.S. at 88, n.14; *Giusti-Bravo v. U.S. Veterans Admin*., 853 F. Supp. 34, 36 (D.P.R. 1993). If this case proceeded to trial, the United States would have to establish a *prima facie* case of discrimination under a disparate impact theory by showing that the written

[4] The First Circuit has not addressed whether the "strong basis in evidence" standard established in *Ricci v. DeStefano* applies to Title VII consent decrees or settlement agreements, and the Parties maintain that it does not. 557 U.S. at 584. Nevertheless, the United States sets forth its evidence, gathered through extensive discovery, of disparate impact, the job-relatedness and business necessity of the challenged practices, and alternative employment practices.

examination and video examination had a statistically significant disparate impact on African American and Hispanic applicants. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i). Generally, Plaintiffs rely heavily on statistical evidence to establish disparate impact, especially when "statistical tests sufficiently diminish chance as a likely explanation." *Fudge v. City of Providence Fire Dep't*, 766 F.2d 650, 658 n.8 (1st Cir. 1985); *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). As discussed above, the United States has demonstrated that the disparity between the pass rates for African American and Hispanic applicants compared to white applicants for the CO position was statistically significant—that is, not due to chance—as required by courts in the First Circuit for establishing a *prima facie* case of disparate impact under Title VII. *Jones v. City of Boston*, 752 F.3d 38, 43-44 (1st Cir. 2014); *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 161 (D. Mass. 2006); *Fudge*, 766 F.2d at 658 n.8. Moreover, Defendants did not refute during expert discovery Dr. Siskin's conclusion that the written and video examinations have a statistically significant disparate impact on African American and Hispanic applicants. Accordingly, the accumulated evidence and expert testimony would support a finding that the United States has established the first prong of a disparate impact claim.

b. *The United States Contends There is Insufficient Evidence to Support the Job-Relatedness and Business Necessity of the Challenged Selection Practices*

Once the United States has established the first prong of the disparate claim, the Defendants must prove that their use of the written examinations and video examination is "job-related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i); *Bradley*, 443 F. Supp. 2d at 156. In other words, if the written examinations and video examination "cannot be shown to be related to job performance, the practice is prohibited." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971). As explained by the Supreme Court, "discriminatory

tests are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (citation and internal quotation marks omitted). To make this showing, the First Circuit and its trial courts require a demonstration by the employer that the employment test has been validated through a professionally acceptable methodology, that is, a validity study. *See* 29 C.F.R. § 1607; *Boston Chapter, N.A.A.C.P., Inc., v. Beecher*, 504 F.2d 1017, 1023-25 (1st Cir. 1974); *Bradley*, 443 F. Supp. 2d at 171; *Burney v. City of Pawtucket*, 559 F. Supp. 1089, 1101 (D.R.I. 1983).

Courts in the First Circuit have made clear that "[t]o pass muster under Title VII," Defendants' use of the selection devices "must be *both* 'job related' [for the CO position] and consistent with 'business necessity.'" *Bradley*, 443 F. Supp. 2d at 170-71; *United States v. Massachusetts*, 781 F. Supp. 2d 1, 16 (D. Mass. 2011); *Donnelly v. Rhode Island Bd. of Governors for Higher Educ*., 929 F. Supp. 583, 589 (D.R.I. 1996), *aff'd*, 110 F.3d 2 (1st Cir. 1997). Specifically, Defendants need to show that the manner in which they *used* the written examination and video examination is job-related and consistent with business necessity. Thus, it is Rhode Island's burden to prove the validity of each selection device.

According to the United States' testing expert, Dr. David P. Jones, the Defendants cannot establish that the written exam or video exam is valid for selecting entry-level correctional officers under either a content validity or criterion-validity approach. Ex. C, Jones Decl. at ¶¶ 22, 33.[5]

[5] As discussed previously, the State does not admit to liability under Title VII, and the parties disagree as to whether the United States' evidence as to the issues of job-relatedness and business necessity and alternative employment practices is sufficient to establish liability under Title VII. Nonetheless, the parties agree that this summary of the United States' evidence (and the accompanying declarations of the United States' experts, submitted herewith) is sufficient to satisfy the "strong basis in evidence" standard set forth in *Ricci*. 557 U.S. at 584. *See United*

Content validity refers to the extent to which the content of a selection device is adequately matched to the content of the job for which employment decisions are being made. An example of a content-valid selection device is a computer-based word processing test to assess applicants for which computer-based word processing is a key part of the job to be performed. *Id.*, ¶ 8. Criterion-related validity is established when an employer demonstrates statistically (on a sufficiently-sized research sample) that performance on a selection device relates in a meaningful way with a criterion, such as on-the-job performance. To establish criterion-related validity, job performance information (e.g., measures of productivity, quality of work, absenteeism, overall job performance evaluations, or other measures that capture aspects of employees' success in performing the job) must be gathered and demonstrate that an individual's performance on the test predicts, at a statistically significant level, an individual's performance on the job. *Id.*, ¶ 9.

With respect to the **written exam**, Dr. Jones first contends that a content validity strategy is not appropriate, since the written exam tests basic mental abilities such as reading comprehension, math, attention to detail, and writing. *Id.*, ¶ 25. The State's content validity strategy is further undermined in that there is no indication that the number of test questions for each ability accurately reflect the requirements of the job, such that the abilities are measured in the correct proportion as required on the job or at the level required on the job. *Id.*

In terms of criterion-related validity, performance on the written exam does not predict performance on the job. *Id.*, ¶ 23. While performance on the written exam does correlate with

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States v. Brennan, 650 F.3d 65, 109–10 (2d Cir. 2011) ("[W]e hold that, under *Ricci*, a "strong basis in evidence" of non-job-relatedness or of a less discriminatory alternative requires more than speculation, more than a few scattered statements in the record, and more than a mere fear of litigation, but less than the preponderance of the evidence that would be necessary for actual liability. This is what it means when courts say that the employer must have an objectively reasonable fear of disparate-impact liability.").

higher performance on RIDOC paper-and-pencil training academy tests, performance in the RIDOC training academy does not predict performance on the job. *Id.*, ¶ 24. *Passing* the RIDOC training academy, not performing well on paper-and-pencil academy tests, is the appropriate criterion, and the State's experts have presented no evidence that show whether (or what) scores on the written exam predict RIDOC training academy passage. *Id.* Finally, the United States maintains there is insufficient evidence to support the passing score of 70% used on both the initial and revised written exams, because the score does not distinguish those who can and cannot perform the correctional officer job. *Id.*, ¶ 26.

With respect to the **video exam**, the United States rejects the validity transportability arguments advanced by the State's experts—that is, arguments that validity evidence assembled elsewhere may be "transported" to support the use of the video exam in Rhode Island. While the State's experts rely on studies performed in other jurisdictions by the test developer purporting to show that performance on the video exam predicts performance on the job, the test developer's claims of content and criterion-related validity in other jurisdictions cannot be confirmed because the underlying test development data and criterion-related validity study data no longer exist. *Id.*, ¶ 28. Moreover, according to Dr. Jones, the video exam appears to function differently in Rhode Island than in other jurisdictions, such that Rhode Island-specific evidence is required to support the use of the video exam in Rhode Island. *Id.* While the State's experts performed a Rhode Island-specific study, it suffers from multiple problems: the State's experts reported inconsistent and unreliable results, used only sixty percent of the job performance data they collected, and drew largely upon chance in their statistical findings. *Id.*, ¶ 29. Lastly, the passing score of 79.5% for the video exam is too high and does not distinguish between those who can and cannot perform the correctional officer job. *Id.*, ¶ 30.

c. *The United States Has Proposed Viable Alternatives to the Current Selection Process*

Even if Defendants could establish that the written examination and video examination are job related and consistent with business necessity, the United States could still prevail by showing the availability of viable alternatives with less disparate impact that meet the State's needs. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii). Dr. Jones proposed alternatives that would reduce the statistically significant disparate impact on African American and Hispanic applicants and serve Rhode Island's legitimate business needs. First, Rhode Island could have used lower passing scores on the written and video exams. *Id.*, ¶ 31. Specifically, the revised written test could be used with a passing score of 52% (which would predict with 95% certainty whether an applicant would pass the RIDOC training academy) or 65% (which Rhode Island already used in 2007); and the video exam could be used with a passing score of 70% (which Rhode Island attempted to use in 2000 and will be used in the interim process). *Id.*, ¶ 31. Second, Dr. Jones produced a modified 52-item version of the video exam using Rhode Island-specific performance data gathered by the State's experts. *Id.*, ¶ 32. The modified video test eliminated items having a disparate impact on African American and Hispanic applicants and items where the correct answer correlated with poorer performance on the job. *Id.*, ¶ 32. Both of these alternatives would have had less of a disparate impact on African American and Hispanic candidates and would have met RIDOC's legitimate business needs. For these reasons, there is a "strong basis in evidence" that the United States may prevail at trial and secure the type of relief afforded in this Settlement Agreement. *See supra* notes 4-5.

2. <u>The Settlement Agreement Provides Relief That Is Appropriate Under Title VII</u>

Courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the

future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (citation omitted). Here, the relief provided in the Settlement Agreement is lawful, fair, reasonable, adequate, and otherwise consistent with the public interest because the proposed Settlement Agreement provides (1) the relief necessary to ensure that Defendants have a Title-VII compliant selection process in the future; (2) individual relief to those individuals who otherwise would have been eligible for consideration to be hired as correctional officers except for the use of the written and video examinations; and (3) notice and an opportunity to be heard to third parties who may be affected by the implementation of relief. Furthermore, the relief awarded in the Settlement Agreement is no more than the United States could obtain were it to prevail at trial. *See Durrett*, 896 F.2d at 604.

a. *Injunctive Relief Should Be Awarded*

When an employer has engaged in a pattern or practice of discrimination in violation of Title VII, an award of injunctive relief is justified without any further showing. *See Teamsters*, 431 U.S. at 361. Appropriate injunctive relief may include: an order prohibiting an existing discriminatory practice; an order for the adoption of a new, lawful selection procedures; an order to retain records or compliance reports; an injunction against future discrimination; or "any other order necessary to ensure the full enjoyment of the rights protected by Title VII." *Id.* (internal quotations omitted). Consistent with these parameters, the injunctive relief set forth in the Settlement Agreement provides for the cessation of the practices alleged by the United States to constitute a pattern or practice of discrimination. Specifically, the Settlement Agreement enjoins the Defendants from using their current written and video examination to select entry-level COs,[6]

[6] Due to the State's immediate operational needs, the Parties have agreed to an interim selection process for *one class of correctional officers* using the revised written exam at a passing score of

and requires the development of a new, valid selection process. Thus, this relief, and the objectives it serves, is lawful, fair, reasonable, adequate and consistent with the public interest. *See Durrett*, 896 F.2d at 604; *Conservation Law Found. of New England, Inc*., 989 F.2d at 58.

b. *Individual Remedial Relief Should Be Awarded*

One of the central purposes of Title VII is to make whole persons who have been harmed by employment practices that violate the statute. *See Albemarle*, 422 U.S. at 418. In enacting Title VII, "Congress took care to arm the courts with full equitable powers" so that the courts may fashion relief for identifiable victims of unlawful employment practices. *Id*. In exercising these equitable powers, a court may fashion relief "as may be appropriate, which may include, but is not limited to, . . . hiring of employees," with monetary and other equitable relief as the court deems appropriate. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (quoting Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g)). In Title VII pattern or practice cases, the goal is to place affected individuals at, or as near as possible to, the situation they would have been in if not for the challenged practices. *Albemarle*, 422 U.S. at 418-19 (citation omitted). That is, each unsuccessful applicant is presumptively entitled to individual remedial relief, as required by Title VII. *Franks*, 424 U.S. at 773 n.32; *Teamsters*, 431 U.S. at 362; *Johnson v. Allyn & Bacon, Inc*., 731 F.2d 64, 69 (1st Cir. 1984).

Guided by these principles, courts have routinely approved settlements which include "the three basic components of 'make whole' relief in hiring discrimination cases: a job offer, backpay, and retroactive seniority." *See Wrenn v. Sec'y, Dep't of Veterans Affairs*, 918 F.2d 1073, 1076 (2d Cir. 1990); *see, e.g., United States v. Massachusetts*, 869 F. Supp. 2d 189, 191-92, 196 (D. Mass.

70% and the video exam at a lower passing score of 70%. Exh. A, Settlement Agreement, at ¶¶ 32-33.

2012). Individual relief will be limited to those individuals who were adversely impacted by the State's hiring practices—namely, African American and Hispanic applicants who failed the initial or revised written exam or the video exam between January 2000 and 2013 or failed the revised written exam administered as part of the interim selection process and met the minimum job qualifications. Exh. A, Settlement Agreement, at ¶¶ 48-49. These individuals will have an opportunity to qualify for make whole relief, which includes monetary and/or priority hiring relief with retroactive noncompetitive seniority benefits.

Under the terms of the Settlement Agreement, Rhode Island will provide a total of $450,000 in monetary relief. *Id.*, ¶ 41. The relief afforded is less than what could have been recovered had the United States prevailed at trial. The monetary award will be distributed to eligible claimants pursuant to the Settlement Agreement. *Id.*, ¶ 72.

The Settlement Agreement also provides for priority hire relief to qualified African American and Hispanic claimants. *Id.*, ¶¶ 90-91. The Parties have agreed that Rhode Island will offer priority hiring relief to 37 eligible African American and Hispanic claimants. *Id.*, ¶¶ 90-91. The number of priority hires required by the Settlement Agreement is not higher than the estimated hiring shortfall caused by the challenged employment practices.[7] Additionally, priority hire relief does not require incumbent employees to be removed from their jobs, and does not act as an absolute bar to the employment of other persons. Therefore, priority hiring relief is narrowly tailored to those persons who actually would have been hired absent the disparate impact of the written or video exams and currently meet the job qualifications.

[7] Dr. Siskin determined the hiring shortfall for the initial written exam, revised written exam and video exam. *See supra*, Section III A-B. Absent the disparate impact of the revised written exam and video exam, Dr. Siskin estimates that 52 additional African Americans and 55 additional Hispanics would have been hired.

Finally, the Settlement Agreement provides retroactive noncompetitive seniority for individuals who qualify for priority hire relief. This award shall correspond with the graduation date of the first academy class the claimant would have entered and is necessary to achieve the "make whole" purpose of Title VII. *Franks*, 424 U.S. at 763-66; Exh. A, Settlement Agreement, at ¶¶ 12, 90. Priority hires who failed the initial written, revised written, or video exams administered from 2000-2013 (but not failers of the revised written exam administered in 2017 as part of the interim selection process) also qualify for retroactive pension benefits. Exh. A, Settlement Agreement, at ¶ 90, 102-105. The amount of retroactive noncompetitive seniority awarded to recipients of priority hire relief is no more than the amount of seniority that these individuals would have received absent the effect of the challenged practices because it is based on the presumptive hire date—the graduation date of the first academy class they would have entered had they not failed the written or video exams. *Id.*, ¶¶ 12, 90.

3. The Settlement Agreement Provides for Hearings to Ensure the Fairness of the Settlement Agreement, Protects Third Parties' Rights, and Protects the Settlement Agreement from Collateral Attack

To safeguard against later challenges, the Settlement Agreement provides for both a Fairness Hearing on the Settlement Agreement prior to final approval of the Settlement Agreement by the Court, and a Fairness Hearing on Individual Relief prior to the implementation of that relief. *Id.*, ¶¶ 15, 57. The Fairness Hearing on the Settlement Agreement gives this Court the opportunity to satisfy itself that the terms of the Settlement Agreement are lawful, fair, reasonable, adequate, and otherwise consistent with the public interest. The Fairness Hearing on Individual Relief gives this Court the chance to ensure that the awards of individual remedial relief are fair and equitable given the total amount of relief available under the Settlement Agreement. Both fairness hearings comport with the provisions of Title VII that protect a Title VII settlement agreement or consent

decree from collateral attack, while addressing due process concerns. *See* 42 U.S.C. § 2000e-2(n)(1)*; Boston Police Superior Officers Fed'n v. City of Boston*, 147 F.3d 13, 19 (1st Cir. 1998); *see generally Edwards v. City of Houston*, 78 F.3d 983, 991 n.8 (5th Cir. 1996) ("Section 2000e-2(n) protects consent judgments from certain subsequent collateral challenges by persons who, although not parties to the litigation that produced it, may have interests adversely affected by the judgment."); *United States v. New Jersey*, 1995 WL 1943013, at *23 (D.N.J. March 14, 1995) (concluding that fairness hearing process consistent with 42 U.S.C. § 2000e-2(n)(1)(A) protects the procedural due process rights of all individuals potentially affected by the consent decree).

Before the Initial Fairness Hearing, written notice of the Parties' execution of the Settlement Agreement, the date of the Initial Fairness Hearing, as well as instructions for submitting objections will be provided to persons whose interests may be affected. Exh. A, Settlement Agreement, at ¶¶ 19-23 (Appx. A). At the Initial Fairness Hearing, the Court will determine, after considering timely-filed objections, whether the terms of the Settlement Agreement are lawful, fair, reasonable, adequate, and otherwise consistent with the public interest.

Assuming the Settlement Agreement is approved by the Court, a claims process will follow, after which claimants will be given a second opportunity to object, this time to their awards of individual relief. The purpose of the Fairness Hearing on Individual Relief is to allow the Court to evaluate whether the awards of individual remedial relief are fair and equitable and whether to approve or modify individual determinations regarding eligibility for monetary and priority hire relief. Each individual potentially eligible for relief pursuant to the Settlement Agreement will receive notice of the Fairness Hearing on Individual Relief, notice of what individual remedial relief, if any, may be awarded, and instructions for filing objections to the proposed award of individual remedial relief. *Id.*, ¶ 58. The Settlement Agreement contemplates that the Court, after

considering timely-filed objections, will enter an order approving or modifying the proposed individual remedial relief following the Fairness Hearing on Individual Relief.

VI. CONCLUSION

For the foregoing reasons, the Court should provisionally enter the accompanying Settlement Agreement and set a date for a Fairness Hearing on the Terms of the Settlement Agreement.

Date: September 18, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2017, I filed the foregoing Memorandum of Law In Support of the Joint Motion to Provisionally Enter the Settlement Agreement and Schedule Fairness Hearing using the CM/ECF system where it is available for viewing and downloading. The CM/ECF system will automatically send a notice to all counsel of record.

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